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Introduction Symposium: The Jurisprudence of Slavery Reparations: Introduction

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SYMPOSIUM: THE JURISPRUDENCE OF SLAVERY REPARATIONS

2.

INTRODUCTION

HANOCH DAGAN, KEITH N. HYLTON, AND ANTHONY J. SEBOK

On April 9th and 10th, 2004, Boston University School of Law sponsored a symposium titled *The Jurisprudence of Slavery Reparations*. As the principal conference organizers, we are pleased and a bit awestruck to see the symposium contributions published in this issue of the *Boston University Law Review*. The papers published here – in the first symposium of its kind in a major law review – should serve as an immensely valuable reference on the jurisprudence of reparations.

The papers gathered in this symposium focus on the legal, moral, and political dimensions of using private law remedies to redress historic wrongs arising from the enslavement of various groups of persons in Western nations. The inspiration for this topic is the lawsuits that have been filed in connection with slave labor in the context of the Holocaust in Europe and chattel slavery in the Americas from the Fifteenth to Nineteenth Centuries. We have been struck by the complexities that lay beneath the surface of these suits.

History has given its verdict on slavery: the institution is wholly rejected and abjured by all civilized nations today. But the question of whether and how to redress the wrongs of slavery is still open. It is a peculiar, and yet perhaps fitting, that in the United States the means of redress have been predominantly framed in terms of tort law and the law of unjust enrichment.

Some of the themes addressed in this symposium are:

– The role of private law in framing a legal claim for slavery. Are private law theories “inapt,” even if they might be effective in establishing a legal beachhead for claimants? Should the legal system facilitate suits framed in terms of unjust *enrichment* that seem directed towards redress for injuries to the person, or human dignity, or should it insist that such wrongs be addressed only with public law tools such as redistribution of income and affirmative action? Should rights and duties with respect to dignitary wrongs, such as enslavement, be descendible?

– The role of doctrine in framing a legal claim for redress for slavery. Are some legal requirements in private law so trivial or quotidian that they ought to be ignored or suspended in the pursuit of historic justice? How should the legal system view doctrines such as statute of limitations, or proof of

causation?

– The role of history in framing a legal claim for redress for slavery. Are some wrongs so far in the past that they cannot, or ought not, be the subject of legal analysis? Can a just approach to legal transitions accommodate redress for slavery?

The symposium contributions can be divided, roughly, into four categories. One is the topic of unjust enrichment and reparations for slavery. The papers in this category examine whether the theory of unjust enrichment, or the doctrine of restitution, provide an appropriate doctrinal home for slavery reparations. We can subdivide these papers further into three sets. One subset looks at whether reparations based on unjust enrichment theory devalue or misrepresent the harms of slavery, treating them as if they were equivalent to claims for “backpay”. Hanoch Dagan argues that because restitution of ill-gotten gains can serve as a means for vindicating the plaintiffs’ autonomy interests, there is nothing inappropriate in addressing human rights violations via restitution. Anthony Sebok questions the fit between the structure of restitution and the interests that slavery litigation hopes to vindicate. He argues that lawyers who choose to address the wrongs of slavery under the rubric of “unjust enrichment” seem to be using a legal fiction. Dennis Klimchuk, on the other hand, argues that framing the slavery suits in terms of unjust enrichment gets the “moral-expressive content” of the claims exactly right. He argues that granting restitution to slaves or their heirs for unpaid wages because the retention of the value of their labor by slaveholders is unjust makes concrete our rejection of the conception of slaves as chattels, things from which value can be derived without consent.

Another subset is represented by Emily Sherwin’s paper, which argues that resentment is a constitutive and inevitable feature of restitution. She worries that, because unjust enrichment invites parties to think of legal redress as a form of retaliation, it is an inappropriate theory for issues of enormous public controversy, such as the history of race in the United States. Finally, a third subset, consisting of Andrew Kull’s contribution, examines the actual use of restitution doctrine in claims brought by former slaves against former masters on the theory that the former master had held the slave during a period in which he was entitled to freedom. Kull finds that the courts of slave states created a special exemption that effectively granted legal immunity to slaveholders who had acted in good faith.

A second category focuses on doctrinal arguments against reparations (especially the requirement of causation and the defense of limitations). Richard Epstein’s title, “The Case Against Black Reparations,” reveals his thesis immediately. Epstein provides a careful analysis of Judge Norgle’s arguments in the *African Slave Descendants Litigation* opinion, which dismissed several class action suits for slavery reparations. Epstein’s paper, which could be titled “how to avoid making bad arguments against reparations,” demolishes some of Norgle’s arguments and takes the surviving ones – notably the one based on the statute of limitations – and shows how

they should be stated. James Hackney argues that causation issues are so difficult to untangle that courts are ill-prepared to find acceptable solutions to the problem of repairing the injustices of American slavery. Legislative solutions appear to be the only viable option.

A third topic category begins at this point and focuses on the significance of the passage of time and the implications of the fact that slavery was in fact legally-sanctioned (the retroactivity problem). Keith Hylton claims that applying today's law to slavery should be viewed as bringing law to a regime from which it had been entirely displaced, not as a retroactive application of a different set of rules. The more troubling problem for plaintiffs, in his view, is the passage of time: after enough time has passed, private law shuts the door on claims based on old and distant injuries. Hanoch Dagan suggests that the restitutionary defense of bona fides purchaser for value is a plausible tool (superior to that of limitations) for addressing the intergenerational justice difficulties raised by historic wrongs, and that law is justified to retroactively impose some of the burden of our moral progress on beneficiaries of our past immorality. Anthony Sebok argues that because Dagan's restitution-oriented solution requires courts to hold that dignitary interests can survive past the death of those who suffered their injury, lawyers should direct their efforts towards solving the tort problems raised by Hylton.

A fourth topic category covers alternative solutions to private lawsuits for reparations. Saul Levmore examines possible reparations schemes in which the government, through the tax system, permits individuals to make contingent promises that could be directed toward slavery reparations. Such "privatized reparations" schemes are attractive, argues Levmore, when citizens hold disparate and intense views on the wisdom and morality of compensation. Kyle Logue argues that on both moral and administrative grounds, redistribution based on race has a surprising appeal. While the moral arguments are well known, the administrative arguments, familiar largely to tax scholars, point to the interesting feature that race is an immutable trait that is strongly correlated with characteristics that would justify taxation or subsidization. Hence a redistributive program based on race would not risk creating the large efficiency costs typically associated with income or wealth redistribution projects. David Lyons argues that the injuries of slavery were all of a piece with the federal government's treatment of African Americans throughout this country's history, which provides the moral basis for funding government programs designed to reduce the gap between the life prospects of blacks and whites.

As this summary indicates, the range of problems that are raised by the demand for a legal response for the wrongs of slavery are broad, and the answers – if there are any – are complex. We are mindful of the strong political and emotional feelings that the questions of slavery reparations evoke in many people, feelings which are proportionate to the terrible injuries caused by slavery itself and the subsequent refusal of American society to deal with slavery's aftermath. We hope that the papers in this symposium, while

relatively narrow in their scope, will help frame fruitful discussion in the future about both the potential and limits of law to deal not only with American slavery, but widespread historical injustice, whatever its context.

In addition to symposium contributors, there are others who have helped enormously in putting this project together. We must thank seminar participants who chose not to submit a paper to this issue: Adrienne Davis of the University of North Carolina School of Law, Mayo Moran of the Faculty of Law at the University of Toronto, and Wendy Gordon of the Boston University School of Law. Their insightful comments and criticisms greatly improved the quality of the papers submitted. We must also thank Ken Simons for moderating the first two panels of the meeting and providing several helpful suggestions to presenters. Andrew Heinz, Adrienne Smith and the editors of the Boston University Law Review have been extremely patient with contributors and deserve much of the credit for the final outcome. Finally, we are grateful to Boston University School of Law, and especially former Dean Ronald Cass, for institutional support.