SLAVERY DISCLOSURE LAWS: FOR FINANCIAL REPARATIONS OR FOR "TELLING THE TRUTH?"

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I. INTRODUCTION

In November 2003, Lehman Brothers, at the time a huge banking subsidiary of a leading financial services firm, made a startling disclosure. Mayer, Henry, and Emanuel Lehman—the original Lehman Brothers—had purchased a female slave named Martha in 1850 in Montgomery, Alabama, four years after founding the firm's predecessor.[1] The company stated that the brothers "may have personally owned other slaves,"[2] but emphasized that "[t]here is no evidence that these slaves were purchased or used by any predecessor entity of Lehman Brothers."[3]

The admission that the founders of Lehman Brothers were slave owners came as a direct result of a Chicago city ordinance passed in 2002. Under the Business, Corporate and Slavery Era Insurance Ordinance ("Chicago Slavery Disclosure Ordinance"), any contractor with whom the city of Chicago enters into a contract must research and disclose

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[1] Fran Spielman, *Company Admits Its Ties to Slavery*, CHI. SUN-TIMES, Nov. 24, 2003, at 9.

[2] A collection of family and business memorabilia includes an unpublished history that details "the Lehman brothers' $900 purchase of a male slave and their ownership of other slaves as early as 1850." *Id.*

[3] *Id.*

records showing ties the company or any predecessor company had to "investments or profits from slavery or slaveholder insurance policies during the slavery era."[4] Under the ordinance, if a contractor fails to comply with these requirements, the city may void its contracts with the contractor.[5]

Lehman Brothers was the first Chicago contractor to admit its past ties to slavery. Less than two years later, it became the first firm to be penalized for an inaccurate disclosure.[6] This penalty for the firm's false disclosure was considerable. The firm was removed as an underwriter of a $1.5 billion O'Hare Airport bond, costing the firm $500,000, because the Chicago City Council uncovered records that called into question the extent of the corporation's ties to slavery.[7]

The loss of a city contract—in this case, a lucrative contract—is the only penalty prescribed by the Chicago

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[4] Business, Corporate and Slavery Era Insurance Ordinance, CHI., ILL., MUN. CODE § 2-92-585 (2002).

[5] *Id.*

[6] *See* Spielman, *supra* note 1. At the time of Lehman's disclosure, more than 2000 slavery affidavits had been filed with the city; none of these affidavits admitting past ties with the city. *Id.* However, since this disclosure, a number of high-profile corporations have admitted that their predecessors or subsidiaries had ties to slavery. *See infra* Part III.B, V.B.

[7] Fran Speilman, *Lehman Takes a Hit Over Ties to Slavery*, CHI. SUN-TIMES, Oct. 2, 2005, at 12.

The O'Hare Airport bond contract was initially approved by the City Council subject to an unprecedented promise—the Chairman of the Chicago City Council's Finance Committee would not sign off on the final deal unless Lehman Brothers came before his committee and fully disclosed all of the firm's slavery ties. *Id.* Before the committee, Lehman's general counsel stated, "[n]either we nor our consultant have been able to locate any records that would enable us to determine the extent to which the original partnership profited from its ties to slavery or to account for the partnership's profits from its transactions involving the cotton industry." *Id.*

This testimony was sharply disputed by outside research, which detailed Lehman Brothers' involvement in the sale, purchase, and trading of cotton. *Id.* In the eyes of the Chairman of the Finance Committee and other members of the city council, this evidence was "proof-positive" that Lehman Brothers had profited greatly from slavery. *Id.*

Slavery Disclosure Ordinance for failure to accurately disclose ties to slavery. Reflecting on this outcome, Dorothy Tillman, the sponsor of the Chicago Slavery Disclosure Ordinance, summarized the message of the legislation: "It says to other companies: If you tell the truth, there is no penalty. If you lie, there is."[8]

This statement implies that the only purpose of slavery disclosure laws is to encourage corporations to research and then truthfully disclose any ties that these companies or their predecessors had to slavery.[9] Yet, slavery disclosure laws also serve another purpose—to identify corporations that had ties to slavery in order to bring civil suits against them, as a means of securing financial reparations for slavery. While both of these two purposes seek to promote a broad goal of the modern African-American reparations movement—to bring past injustices to light and to correct present injustice—which of these two purposes predominates inevitably shapes the assessment of slavery disclosure laws.[10]

This Note evaluates slavery disclosure laws by focusing on whether the promotion of truthful disclosures or the facilitation of reparations lawsuits can reduce racial

[8] *Id.* Characterizing Lehman Brothers' initial disclosure as a "lie" is not necessarily fair to the company. There was no indication that Lehman Brothers covered-up or even knew of their involvement in the cotton trade; rather, by all indications, they made a good-faith effort to research their ties to slavery but failed to uncover the true extent of their involvement.

[9] After signing the ordinance into law, Chicago's Mayor, Richard Daly, similarly observed that companies that tell the truth about their ties to slavery will not be punished: "This ordinance . . . will not prohibit a company from doing business with the city or state, even if it had once profited from slavery, but it would shine a light on a disgraceful part of our nation's history." Oliver Burkeman, *Chicago Compels Contractors to Come Clean on Slave Profits*, GUARDIAN, Oct. 4, 2002, at 14.

[10] It is somewhat controversial to consider acknowledgments of historical ties to slavery as a mode of "reparations"—compared to securing financial payments, requiring companies to research and disclose ties to slavery appears to do less to correct present injustice. *But see infra* Part III.B (discussing how reparations activists cite historical disclosures as having the potential to benefit groups harmed by the legacy of slavery, albeit in a less tangible manner).

inequality stemming from slavery.[11] Through this evaluation and an analysis of the structure of recent slavery disclosure laws, this Note seeks to provide guidance to a city or state government considering such legislation.

Part II discusses prior attempts to secure African-American reparations through truthful disclosures or financial payments. Part III observes that the drafters of the recent slavery disclosure laws sought to advance both of these methods of reparations. Part IV argues that legislatures should not pass slavery disclosure laws if their sole purpose is to support slavery reparations litigation. However, such legislation may be attractive to legislatures seeking to promote truthful acknowledgement of slavery ties and to encourage voluntary payments by disclosing corporations. Historical admissions stemming from compliance with slavery disclosure laws support the goal of reducing racial inequality, insofar as companies which discover and disclose ties to slavery may feel compelled to provide payments to the poorest African-American communities. Despite the potential for truth-telling aspects of disclosure laws to reduce racial inequality, imprecise language in existing slavery disclosure laws unnecessarily imposes costs on businesses without encouraging any additional disclosures. Accordingly, Part V concludes by proposing slavery disclosure legislation that would promote historical acknowledgment reparations at the lowest possible cost to businesses.

II. BACKGROUND

The movement to pass slavery disclosure laws is recent, with the first law passed in 2000. As of this writing, eight major cities (Berkeley, Chicago, Detroit, Los Angeles, Milwaukee, Oakland, Philadelphia, and San Francisco), and three states (Iowa, Illinois, and California) have slavery disclosure laws of some sort. At their core, all of these laws

[11] This Note takes no stand on whether society *should* take steps to reduce racial inequality stemming from slavery.

seek to have companies research and then disclose links these companies or their predecessors had to slavery.

In many ways, these disclosure laws are a product of a long history of attempts to secure reparations for slavery. Much of the slavery reparations movement has been focused upon securing these financial reparations payments either through litigation or legislation. Efforts to secure what this Note terms "historical acknowledgment reparations" are much more recent. This Note characterizes such reparations as disclosures of ties to slavery and any subsequent apologies or voluntary payments in recognition of these ties.[12] While apologies and voluntary payments do not inevitably follow from truthful disclosures of slavery ties, in recent years, these are common actions taken by a disclosing entity.[13] In order to help discern legislative intent behind these laws, this Part provides background into the history of the slavery reparations movement and focuses on the state of the movement when these laws were being drafted.

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[12] Some commentators refer broadly to five modes of reparations: truth commissions, apologies, civil rights legislation, cash or in-kind payments to groups/communities, and cash or in-kind payments to individuals. *See, e.g.*, Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 836 (2006). *But see* Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003) (arguing that most commonly, reparations are understood to mean payment in cash or in kind to either African Americans individually or to groups or communities).

Within the context of slavery disclosure laws, the civil rights mode of reparations takes on less importance, as the text of these laws are narrowly tailored to affect corporate actions. Moreover, although not commonly cited as a separate mode of reparations by commentators, voluntary financial payments take on added importance in this context, given perceived public pressure to take remedial action after corporate disclosure of ties to slavery. For the purpose of this Note, these modes of reparations can be collapsed into two overarching categories—historical acknowledgment reparations which correspond to actions taken directly in response to slavery disclosure laws and financial reparations which refer to financial payments secured through legislation or litigation.

[13] *See infra* Part III.B (discussing corporate disclosures of ties to slavery and corresponding apologies and establishment of funds to benefit African Americans).

A. Prior Attempts to Secure Financial Reparations through Litigation or Legislation

The idea of providing compensation for harms caused by slavery actually precedes the Civil War and even the abolitionist movement. Beginning in 1781, certain free blacks used ordinary tort remedies to receive (modest) compensation for having been wrongfully enslaved by the standards of the time. For example, in the earliest known case, Quock Walker, a Massachusetts slave, sued his owner who had promised to free him at age twenty-five.[14] Walker won a jury trial which compensated him for assault and battery that occurred after he should have been freed.[15] Similarly, in 1801, a black man received a judgment freeing him from slavery and compensating him for the time he was wrongfully enslaved after he was captured behind British lines during the Revolutionary War and wrongfully taken to Pennsylvania as a slave.[16] While none of this handful of cases compensated slaves who were, by the standards of the day, legally enslaved, these cases show an early use of the courts to secure financial payments for harms related to slavery in at least a tiny number of cases.

At the end of the Civil War, reparations payments were prominently discussed on the eve of and soon after emancipation. In January 1865, General Sherman issued Field Order No. 15, which granted former slaves up to forty acres of land in the islands off the coast of South Carolina and Florida.[17] Little over a year later, though, Andrew Johnson rescinded the order and the freed slaves received nothing.[18] Sherman's field order was most likely not motivated by compensating ex-slaves for past harm, but

[14] ALFRED L. BROPHY, REPARATIONS: PRO AND CON 20 (2006).

[15] *Id.*

[16] *Id.*

[17] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 70-71 (1988). Commonly, this promise is known as "Forty Acres and a Mule;" however, former slaves were offered just land and only a vague promise of assistance to buy a mule. *Id.*

[18] *Id.* at 461.

rather was a temporary strategic calculation aimed at relieving pressure caused by thousands of former slaves following his army.[19] This order is often cited by today's reparations movement as a promise for compensation that was not kept.[20]

After the end of Reconstruction, there were a few scattered attempts to secure reparations through litigation or national legislation. For example, in 1891, Walter R. Vaughan, a white businessman from Alabama, proposed legislation that would provide economic compensation to former slaves.[21] In 1915, Cornelius J. Jones, a Washington, D.C. attorney, filed a federal suit seeking to recover taxes from cotton produced with slave labor.[22] None of these efforts secured any meaningful payments to former slaves or their descendants.[23]

After a flurry of discussion following the introduction of James Forman's "Black Manifesto" in the late 1960s, discussed below, in the 1970s and for most of the 1980s, the reparations movement received scant mainstream attention.[24] However, the black reparations movement was reenergized by the Civil Liberties Act of 1988, which provided an apology for "fundamental violations of the basic civil liberties and constitutional rights" and $20,000 in financial reparations to Japanese Americans who were placed in internment camps during World War II.[25]

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[19] *Id.* at 71.

[20] Adjoa A. Aiyetoro, *Formulating Reparations Litigation Through the Eyes of the Movement*, 58 N.Y.U. ANN. SURV. AM. L. 457, 458-61 (2003).

[21] *See* BROPHY, *supra* note 14, at 34.

[22] *Id.*

[23] *Id.* Lee Harris argues that this effort to secure reparations through legislation failed not only because of racism, but also because "the African-American community was too disorganized, poor, and disjointed to be persuasive." Lee A. Harris, *Political Autonomy as a Form of Reparations to African-Americans*, 29 S.U. L. REV. 25, 31-32 (2001).

[24] *See* Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 287 (2003).

[25] 50 U.S.C. app. §§ 1989a-1989b (2008).

This successful effort to achieve reparations for Japanese American internment came after an unsuccessful effort to achieve these results through many years of litigation.[26] A class action suit on behalf of internees filed in the early 1980s was ultimately dismissed on statute of limitations grounds.[27] While this litigation was ongoing, documents were uncovered showing that the U.S. Government greatly exaggerated the threat posed by Japanese Americans during World War II.[28] In response to political pressure, a bi-partisan commission was formed and ultimately found that the U.S. internment policy "was not justified by military necessity."[29] This finding later helped provide the impetus to drive Congress to act.

Given recent failures to secure African-American reparations through litigation, activists may be heartened that reparations for Japanese internment were achieved after many attempts and despite the failure of efforts in the court system. Yet, for a number of reasons, internment reparations may be distinguished from slavery reparations. For example, with internment, there was a relatively small, distinct, and identifiable group of victims who would be entitled to receive payment. With slavery, however, a number of generations separate victims from their descendants, thereby making the identification of precise recipients of reparations payments a challenging proposition.

Nevertheless, the Civil Liberties Act and the resulting payments energized a movement by African-Americans to gain financial reparations though legislation. One year later, Representative John Conyers introduced H.R. 40, the Commission to Study Reparation Proposals for African

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[26] *See* Hohri v. United States, 586 F. Supp. 769 (D.D.C. 1984), *aff'd in part, rev'd in part*, 782 F.2d 227 (D.C. Cir. 1986), *vacated*, 482 U.S. 64 (1987), *on remand*, 847 F.2d 779 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 925 (1988).

[27] *Id.*

[28] *See* BROPHY, *supra* note 14, at 43.

[29] Eric L. Muller, *Fixing a Hole: How the Criminal Law Can Bolster Reparations Theory*, 47 B.C. L. REV. 659, 670-71 (2006).

Americans Act, which mirrored the Civil Liberties Act.[30] While this legislation does not directly demand immediate payments, it would "1) establish a commission to study the racial and economic impact of slavery on freed slaves and living African-Americans and 2) *make a recommendation to Congress on the appropriate remedies for these harms, whether in the form of an apology or financial compensation*."[31] By explicitly contemplating financial compensation and because of its relationship with the Civil Liberties Act, H.R. 40 leaves an implication that if this bill is passed, financial reparations would likely follow. Although this bill has been reintroduced each year since 1989, it has not garnered remotely enough support to become law.[32]

Reparations advocates also turned to the courts in order to achieve reparations. In a 1995 case, *Cato v. United States*, the Ninth Circuit rejected a suit by descendants of slaves against the United States Government for $100 million in damages caused by slavery and racial discrimination, largely on statute of limitations and sovereign immunity grounds.[33] *Cato* is the only slavery reparations suit against the government to be decided by an appellate court and, accordingly, is seen as the leading case on this issue.[34]

By the beginning of this decade, litigation strategy shifted to suits against corporations. At the same time cities and states were passing slavery disclosure laws, litigation was being filed against companies or successors to companies that provided transportation, finance, and insurance services

[30] *See* Ogletree, *supra* note 24, at 290 ("H.R. 40 was inspired by, and mirrors, the Civil Liberties Act of 1988."); *see also* Commission to Study Reparation Proposals for African-Americans Act, H.R. 40, 109th Cong. (2005).

[31] H.R. 40, 109th Cong. (2005) (emphasis added).

[32] *See* Ogletree, *supra* note 24, at 290. Given the bill's unsuccessful reintroduction each year, H.R. 40 has become a symbolic gesture. *Id.*

[33] 70 F.3d 1103 (9th Cir. 1995).

[34] *See, e.g.*, BROPHY, *supra* note 14, at 121; Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191, 256 (2003).

to slave owners.[35] Such litigation has thus far also failed to secure any judgments against corporate defendants.

To proponents of reparations, the advantages of seeking financial reparations through legislation or litigation are fairly obvious. Depending on the form of payments, individual descendants of slaves may receive cash payments, groups and organizations that serve African-Americans may receive financial infusions, and through the pocketbooks of the government or corporations, there will be further recognition of the evils stemming from slavery.

However, the weaknesses of this approach are readily apparent. There is very little support for reparations legislation amongst whites. According to a 1997 poll, 88% of whites opposed reparations payments compensating for slavery.[36] A 2003 poll found only 4% of whites willing to support such payments.[37] Although such polls may be inexact, these numbers illustrate the lack of political support amongst white Americans for reparations payments. Common arguments against this form of reparations include a recognition that legislative reparations payments will, in fact, be funded by U.S. taxpayers at large, unfairly penalizing those who had nothing to do with slavery. Similarly, targeting corporations for litigation may be criticized given that pre-Civil War state and federal governments relatively were much more culpable for the evils of slavery than individual corporations, most of which are long dissolved. Given this opposition and the failure to pass H.R. 40, it is unlikely that reparations legislation will be passed in the foreseeable future. Moreover, while corporations are attractive defendants because of their deep pockets and their inability to rely on the sovereign immunity

[35] *See In re* African-American Slave Descendants Litig., 375 F. Supp. 2d 721 (N.D. Ill., 2005).

[36] Terry Smith, *Race and Money in Politics*, 79 N.C. L. REV. 1469, 1495 n.127 (2001).

[37] *See* BROPHY, *supra* note 14, at 5 (citing Harbour Fraser Hodder, *The Price of Slavery*, HARV. MAG. (2003)). In contrast, two out of three blacks support compensation. *Id.*

argument successfully employed in *Cato*, such reparations litigation faces significant legal challenges.[38]

B. Prior Attempts to Secure Historical Acknowledgment Reparations

Unlike the above examples of attempts to secure slavery reparations through litigation or legislation, "historical acknowledgment reparations" have only been employed in recent years. As this Note has defined it, "historical acknowledgment reparations" refer to disclosures of links to slavery and any subsequent apologies or voluntary payments to African-Americans. Over the past forty years, there have been notable attempts to secure voluntary payments or apologies for slavery. Relative to slavery disclosure laws, some of these attempts less clearly focus on uncovering new ties to slavery. Nevertheless, such attempts are predicated on the target having at least some ties to slavery, thereby fitting within this Note's definition of historical acknowledgment reparations.

In May 1969, in what many scholars cite as the beginning of the modern slavery reparations movement, noted activist James Forman introduced his "Black Manifesto" at a Sunday service at Riverside Church in New York City.[39] Forman interrupted the service to demand that churches and synagogues pay $500 million as a "beginning of the reparations due us as people who have been exploited and

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[38] The legal hurdles at the time slavery disclosure laws were being passed were not insignificant. *See infra* Part III.A. However, after *In re African-American Slave Descendants Litigation*, such hurdles have become virtually insurmountable. *See infra* Part IV.A.

On the other hand, non-legal considerations may compel a corporation implicated in reparations litigation to settle. For example, a business operating in a particularly competitive industry may settle to avoid the embarrassment of and potential loss of business related to having their ties to slavery publicized in litigation, notwithstanding their superior legal claims.

[39] *See, e.g.*, BROPHY, *supra* note 14, at 37; Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 603-04 (1993); BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS 3-7 (1973).

degraded, brutalized, killed, and persecuted."[40] This demand was unique for two reasons. First, unlike previous demands for reparations against individual slaveholders or the U.S. Government at large, Forman sought payments from churches and synagogues "for their role in supporting the 'exploitation' of the American Negro."[41] These institutions were hardly major players in slavery, especially synagogues, of which there were only a handful as late as 1865, but were likely targeted because it was thought that they would be more susceptible to moral persuasion. Second, unlike past financial reparations proposals, payments would not be made to individual former slaves or their descendants, but rather be targeted to correcting racial inequality with group-based payments. These payments would be used to establish several institutions to support African-Americans, including a Southern land bank, a research skills center, a training center for teaching skills in community organization and communications, a black labor strike and defense fund, and a black university.[42] Not surprisingly, this demand was widely rejected by the white community; while some individual churches initiated assistance programs to black organizations, the goals expressed by Forman were not realized.[43]

Other later examples of historical admission reparations focus on apologies. In 1998 and in 2003, during trips to Africa, both Bill Clinton and George W. Bush expressed regret for the harm caused by slavery but stopped short of issuing a full apology.[44] Implicit in both presidents' statements of regret was an acknowledgment of the U.S. government's historical involvement in slavery. Yet disclosures of this involvement were far from the focus of these speeches. For example, President Bush's 2003 speech never directly mentions the U.S. government's sanction of

[40] BITTKER, *supra* note 39, at 4.

[41] *A Black Manifesto*, TIME, May 16, 1969, *available at* http://www.time.com/time/magazine/article/0,9171,902585,00.html.

[42] BITTKER, *supra* note 39, at 4-5.

[43] *Id.*

[44] *See* BROPHY, *supra* note 14, at 13.

slavery.[45] The closest he comes is the statement: "There was a time in my country's history when one in every seven human beings was the property of another."[46]

In the foreign context, attempts to secure historical acknowledgment reparations have similarly emphasized truthful disclosures of past conduct. Most notably, the South Africa Truth and Reconciliation Commission was created to prepare a record of human rights violations stemming from the long apartheid era.[47] The commission was charged with investigating human rights abuses dating back to 1960, "restoring the human and civil dignity" of victims of such abuses, and deciding whether to grant amnesty to perpetrators of crimes.[48] In order to be granted amnesty, the applicant must show that his or her actions were politically motivated, and he or she must provide full disclosure of what occurred.[49] The applicant would then receive permanent immunity from criminal or civil liability.[50] A five-volume report was created in 1998 and the final commission report was issued in 2003—all told, these reports helped document gross human rights violations suffered by approximately 20,000 people in apartheid South Africa.[51]

There are intrinsic strengths to the disclosure of one's role in past wrongdoing. For example, Brophy describes the corrective features of such disclosures:

> [I]t will give a new sense of power to those whose version of history is vindicated. The

[45] President George W. Bush, President Bush Speaks in Goree in Senegal (2003), *in* REPARATIONS: PRO AND CON 203 (2006).

[46] *Id.*

[47] AMNESTY INTERNATIONAL/HUMAN RIGHTS WATCH, TRUTH AND JUSTICE: UNFINISHED BUSINESS IN SOUTH AFRICA 4 (2003) [hereinafter UNFINISHED BUSINESS].

[48] *Id.* at 4-5.

[49] *Id.* at 4.

[50] *Id.*

[51] *Id.* at 8; *see also* TRUTH AND RECONCILIATION COMMISSION, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 2 (2003), *available at* http://www.info.gov.za/otherdocs/2003/trc.

> power of historical stories is strong—they give listeners a sense of place and importance—and stories about the community will lead to a renewed sense of power and pride. The value of new and accurate accounts of past racial crimes appears to be great.[52]

Yet, some factors that led to the large number of Truth and Reconciliation Commission disclosures are not present in slavery disclosure laws. Brophy notes: "Most frequently, truth commissions are effective when they are linked with credible criminal punishment (or the offer of release from the threat of punishment)."[53] Certainly, most, if not all, perpetrators of violence in apartheid South Africa were motivated to disclose their crimes because honest disclosures would yield immunity from civil and criminal prosecution. By contrast, slavery disclosure laws provide almost the opposite motivations to corporations. Corporations do not receive formal immunity from civil liability for truthful disclosures, and these same disclosures could well provide the basis for potentially large court settlements. Nevertheless, at the time slavery disclosure laws were being discussed, slavery reparations lawsuits based on corporate disclosures faced sizable legal challenges.[54] Moreover, from the perspective of public relations, few corporations could likely afford to be seen as evading compliance with slavery disclosure laws. Thus, by the time legislatures began considering these laws, there were no systematic barriers that would prevent slavery disclosure laws from yielding truthful disclosures of historical wrongs.

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[52] *See* BROPHY, *supra* note 14, at 12.

[53] *Id.* at 70.

[54] *See infra* Part III.A (describing the legal hurdles posed by a reparations lawsuit).

III. MODES OF REPARATIONS APPLIED TO SLAVERY DISCLOSURE LAWS

When the slavery disclosure laws were drafted from 2000–2005, legislators could look to what appeared to be a successful truth commission model in South Africa that focused on encouraging disclosures of wrongs committed during the more recent years of the apartheid period. Additionally, although it was becoming increasingly clear that financial reparations legislation would not be passed, achieving financial payments through litigation seemed somewhat promising from the perspective of reparations advocates (despite the serious legal hurdles to a successful suit), as a number of high-profile reparations lawsuits were filed against corporations during this time. And so, it is not surprising that the drafters of slavery disclosure laws sought to achieve two, potentially competing, purposes—financial reparations through litigation and historical acknowledgment reparations.

A. Slavery Disclosure Laws as Promoting Financial Reparations Lawsuits

During the time period when slavery disclosure laws were being passed, activists were filing litigation against corporations with alleged ties to slavery.[55] While no commentator claimed that slavery disclosure laws would guarantee the success of litigation against corporations, these laws could address some of the hurdles to a viable reparations lawsuit.

Writing in 1998, two years before the passage of the first slavery disclosure law, Professor Eric Yamamoto recognized that reparations lawsuits must overcome:

> (1) the statute of limitations . . . ;

[55] The first of the suits in the *In re African-American Slave Litigation* case were filed in 2002, the same year the Chicago Slavery Disclosure Ordinance was passed. This litigation was not resolved until 2006—after most existing slavery disclosure laws had been passed.

> (2) the absence of directly harmed individuals ("all ex-slaves have been dead for at least a generation");
>
> (3) the absence of individual perpetrators ("white Americans living today have not injured African Americans and should not be required to pay for the sins of their slave master forbearers");
>
> (4) the lack of direct causation . . . ;
>
> (5) the indeterminacy of compensation amounts ("it is impossible to determine who should get what and how much").[56]

Although these concerns may not be a precise list of all the problems facing slavery litigation,[57] they help illustrate the legal challenges posed by such litigation. While such concerns may have played a varying role from city to city and state to state, slavery disclosure laws were seen by at least some legislators as a piece of the larger financial reparations litigation strategy. For example, Dorothy Tillman, the sponsor of the Chicago Disclosure Ordinance, also sponsored a city resolution in 2000 calling for national slavery

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[56] Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 491 (1998) (quoting Verdun, *supra* note 39, at 607). These concerns remained salient after slavery reparations complaints against corporations were first filed. *See, e.g.*, Ogletree, *supra* note 24, at 293-94 (quoting Yamamoto's concerns in 2003).

Slavery disclosure laws may be used to address and possibly overcome the third and fourth concerns of this list. However, as recognized in *In re African-American Slave Descendants Litigation*, challenges posed by statutes of limitations, standing, and establishing injury have to date proved fatal to a complaint. These issues will be addressed, *infra*, in Part IV.A.

[57] Most ex-slaves were dead by the beginning of the twentieth century, and thus most ex-slaves have been dead for at least *three* generations. This gap in time poses difficulty for identifying descendants of individual slaves. Moreover, the difficulty in finding individual perpetrators is further challenged by the fact that not all white Americans living today have "slave master forbearers." Specifically, white Americans whose ancestors arrived after 1865 have no connection to slave owners.

reparations, and Charles Ogletree, a leading scholar involved in reparations litigation, helped craft the Chicago legislation.[58] It is possible that despite these personal ties to the financial reparations movement, these Chicago drafters sought only to advance the historical acknowledgment mode of reparations. Yet, this scenario is unlikely given Professor Ogletree's advocacy of reparations litigation following the passage of this law and given that at least prior to the conclusion of the *Slave Descendants Litigation* case, reparations lawsuits appeared to be at least as viable a means (although still unlikely) of gaining the financial reparations sought by Tillman in 2000 as national legislation.

Beyond these personal ties, commentators have cited the potential for these laws to be used to strengthen legal claims in reparations litigation against corporations. Specifically, at the time these laws were passed, they were seen as a way systematically to identify corporate defendants and to establish a nexus between plaintiffs and defendants.

In the lawsuits later consolidated in *Slave Descendants Litigation*, the plaintiffs principally relied upon the research of an attorney, Deadria Farmer-Paellman, to identify defendants.[59] After five years of research, Farmer-Paellman declared that she had uncovered sixty corporations who had profited from slavery.[60] While acknowledging that Farmer-Paellman's efforts were laudable, Professor Eric Miller criticized the "more or less random manner in which [*Slave Descendants Litigation's*] defendants are selected."[61] He observed: "[T]he defendants in the current lawsuits happen to be those turned up by Ms. Farmer-Paellman during the course of her research . . . . [I]t is not clear [that this research was] particularly systematic."[62]

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[58] Darryl Fears, *Seeking More than Apologies for Slavery*, WASH. POST, June 20, 2005, at A01.

[59] Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L.J. 45, 57-58 (2004).

[60] *Id.* at 59 n.57.

[61] *Id.* at 59.

[62] *Id.*

Under Miller's view, slavery disclosure laws will address this problem of discovering a more representative and complete range of defendants for reparations litigation. He argues, "Such statutes promise to impose a measure of uniformity upon the information gathered and, in so doing, increase the equity of those lawsuits that sue various corporations or industries for profiting from slavery."[63] By relying on corporate disclosures in compliance with slave disclosure laws, plaintiffs could secure a methodical means of identifying defendants that have acknowledged ties to slavery.

Drafters of slavery disclosure laws may also have sought to help address the problem of identifying a nexus of causation between plaintiff and defendant. Establishing this nexus may be easiest whenever a disclosure names a particular slave. As Ogletree observes, "Having identified the defendant and the insurance contracts, it is potentially a simple matter of historical research to determine the slaves covered by those contracts and trace their descendants."[64] The California and Illinois Slavery Insurance Disclosure laws require insurance companies operating in the state to disclose the names of slaveholders and slaves identified in slave insurance policies, thus mandating that the defendant insurance company itself conduct Ogletree's suggested historical research of identifying slaves. Similarly, identification of a particular slave who had ties to a company would be considered a responsive record under all other slavery disclosure laws.[65]

Ogletree's approach would almost certainly be underinclusive because genealogical research is not as "simple" as he asserts. Although genealogical records are

[63] *Id.*

[64] Ogletree, *supra* note 24, at 309.

[65] There are several examples of disclosures from companies operating in other industries that include identification of a particular slave. *See, e.g.*, *supra* Part I and *infra* Part V.B (describing, respectively, disclosures by Lehman Brothers and Bank One that presidents of the predecessor companies owned particular slaves).

becoming more commonly available,[66] given the passage of at least three generations, it is highly unlikely that even most descendants of an ex-slave can be positively identified. Moreover, this approach to finding plaintiffs in slavery reparations litigation would privilege descendants of slaves towards the end of the slavery era (such as a slave in 1850), as opposed to the descendants of earlier slaves (from say 1650) because it is far easier to identify the former. Nevertheless, all other things being equal, a lawsuit needs only to identify one plaintiff with standing, and genealogical research has the potential to establish links between some descendants of victims and corporate defendants. Thus, a potentially viable lawsuit could identify a descendant of a slave named in a corporate disclosure and use that descendant as a plaintiff against the defendant company.

Moreover, a corporation sued after identifying slaves in compliance with a slavery disclosure law potentially could raise a Fifth Amendment defense that compliance with this legislation compelled them to self-incriminate. This argument will fail. Under current precedent, a corporation is not protected under the Fifth Amendment's self-incrimination clause.[67] Accordingly, at the time slavery disclosure laws were passed, the disclosures themselves had the direct potential to support litigation against these corporations. In other words, compliance with the law brought the risk of civil lawsuit.

B. Slavery Disclosure Laws as Promoting Historical Acknowledgement Reparations

Almost every disclosure law states that its primary purpose is to promote the truthful accounting of the past. The plain text of slavery disclosure laws supports the

[66] For example, Ancestry.com has an African-American ancestry database, which it says contains fifty-five million historical documents. Fernanda Santos, *Sharpton Learns His Forebears Were Thurmonds' Slaves*, N.Y. TIMES, Feb. 26, 2007, at B3. Records from this database famously uncovered that Al Sharpton's ancestors were slaves of Strom Thurmond's family. *Id.*

[67] *See* Doe v. United States, 487 U.S. 201, 206 (1988).

premise that the purpose of these laws is to encourage corporate acknowledgement of ties to slavery. The Chicago Disclosure Ordinance makes the goal explicit: "The purpose of this section is to promote full and accurate disclosure to the public about any slavery policies sold by any companies, or profits from slavery by other industries (or their predecessors) who are doing business with the city."[68] Similarly, the California Insurance Disclosure Law states that the purpose of these laws is to provide information to the descendants of slavery: "Descendants of slaves, whose ancestors were defined as private property, dehumanized, divided from their families, forced to perform labor without appropriate compensation or benefits, and whose ancestors' owners were compensated for damages by insurers, are entitled to full disclosure."[69]

The text and legislative intent of slavery disclosure laws also promote apologies and voluntary reparations payments following truthful disclosures of ties to slavery.[70] For example, the San Francisco and Oakland disclosure laws explicitly seek voluntary reparations payments. Although businesses that disclose ties to slavery will not face mandatory punishment, these cities created a fund to accept voluntary donations from such businesses to be used, in the words of the San Francisco ordinance, to "promote healing and assist in remedying depressed economic conditions, poverty, unequal educational opportunity and other legacies of [the] slavery era among the population of the city."[71]

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[68] Business, Corporate and Slavery Era Insurance Ordinance, CHI., ILL., MUN. CODE § 2-92-585 (2002).

[69] CAL. INS. CODE §§ 13810-13813 (West 2008).

[70] Such apologies and voluntary payments fit within this Note's definition of "historical acknowledgment reparations." *See supra* Part II (defining "historical acknowledgment reparations" as the disclosure of a corporation's full involvement in slavery and the two most common actions taken by a disclosing conclusion—apologies and voluntary payments to members or groups of the African-American community).

[71] Slavery Disclosure Ordinance, S.F., CAL., ADMIN. CODE § 12Y.1(q) (2006). As of this writing, there have been no publicly disclosed contributions to this particular fund. *See also* Part V.B (discussing Oakland's fund).

Similarly, Nate Holden, the sponsor of the Los Angeles Slavery Disclosure Ordinance, made clear his intent that companies with ties to slavery take steps beyond just disclosure. Holden "hoped that companies with slavery in their past would 'make a good-faith effort' to provide some restitution, perhaps by supporting scholarships or youth programs."[72]

Slavery disclosure laws have achieved notable success in achieving these goals of uncovering historical corporate ties to slavery and encouraging such corporations to apologize or provide voluntary reparations. Three major corporations—J.P. Morgan, Lehman Brothers, and Wachovia—have disclosed past ties to slavery in compliance with the Chicago Slavery Disclosure Ordinance.[73] Following its disclosure, Lehman Brothers apologized for its role in slavery. J.P. Morgan and Wachovia went further by apologizing and pledging $5 million and $10 million, respectively, to benefit African-Americans.[74] Such disclosures and follow-up actions effectively demonstrate how slavery disclosure laws may be used to achieve the purpose of historical acknowledgment reparations. As noted by Brophy: "The disclosure ordinance led to additional information, which then led to reparative action. But for the disclosure ordinance, there would never have been reparative action."[75]

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[72] Jessica Garrison, *Council OKs Slave Clause*, L.A. TIMES, May 17, 2003, at B3.

[73] Wachovia's disclosure was the most extensive. The company hired a group of professional historians to research and compile a 111-page report which detailed how one of its predecessors came to own 162 slaves after clients defaulted on loans and another "put 529 slaves to work on railroads." Darryl Fears, *Seeking More Than Apologies for Slavery*, WASH. POST, June 20, 2005, at A01.

[74] *See* BROPHY, *supra* note 14, at 144; OFFICE OF THE CITY ADM'R, SLAVERY ERA DISCLOSURE ORDINANCE REPORT TO THE MAYOR AND BOARD OF SUPERVISORS 8 (2007), http://www.sfgov.org/site/uploadedfiles/oca/SE_Report.pdf.

[75] *See Brophy*, *supra* note 12, at 839.

IV. SLAVERY DISCLOSURE LAWS PROMOTE HISTORICAL ACKNOWLEDGENT REPARATIONS, BUT FAIL TO SUPPORT LITIGATION EFFECTIVELY TO ACHIEVE FINANCIAL REPARATIONS

As shown in the previous Part, slavery disclosure laws have two potentially competing purposes—to enact historical acknowledgment reparations or to support a strategy leading to financial reparations through litigation. Accordingly, slavery disclosure laws should first be evaluated in the light of whether they successfully advance one or both of these purposes.

A. The *Slave Descendants Litigation* Decision Will Hamper Financial Reparations through Litigation but May Provide the Potential to Challenge Corporate Disclosures through Consumer Protection Claims

Following the passage of slavery disclosure laws, the *Slave Descendants Litigation* decision—a case growing out of tort rather than disclosure acts—significantly changed the legal landscape regarding how corporations may be sued for ties to slavery. The Seventh Circuit dismissed tort-like claims against corporations for their historical involvement in slavery, but held that claims brought under state fraud or consumer protection laws would be cognizable.[76]

Although courts from other circuits are free to distinguish this decision, *Slave Descendants Litigation* is a well-reasoned case that enjoys great respect.[77] This case is the only corporate reparations lawsuit decided by an appellate court, and this decision's weight is enhanced by the fact that the

[76] *In re* African-American Slave Descendants Litig., 471 F.3d 754 (7th Cir. 2006), *cert. denied*, 128 S. Ct. 92 (2007).

[77] As of this writing, there have been no publicized complaints against corporations for financial slavery reparations and no published decisions on this issue following the *In re African-American Slave Descendants Litigation* decision.

decision rules on ten consolidated complaints within multi-district litigation.[78]

1. Tort-like Slavery Reparations Litigation

Assuming that the Seventh Circuit's decision controls the question, then tort-like litigation against corporate defendants who disclosed ties to slavery will almost certainly not be successful, and thus, activists will not be able to use slavery disclosure laws as a vehicle for obtaining tort-based reparations.[79] *Slave Descendants Litigation* consolidated ten suits against corporate defendants with alleged ties to slavery; in its final form, the complaint contained essentially five counts: conspiracy, intentional infliction of emotional distress, conversion, unjust enrichment, and 42 U.S.C. § 1982.[80] The plaintiffs sought accounting of profits earned from slave labor, a constructive trust imposed on such profits, restitution, equitable disgorgement, and punitive damages.[81] The District Court dismissed this case with prejudice because the plaintiffs lacked standing, the suit involved a political question, the statute of limitations had lapsed and barred the claim, and the complaint failed to state a cause of action.[82] The Seventh Circuit largely affirmed this dismissal.[83]

In dismissing the complaint's tort-like claims, the Seventh Circuit observed that there would be a cognizable complaint only in an extremely narrow factual and legal circumstance:

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[78] *In re* African-American Slave Descendants Litig., 375 F. Supp. 2d 721 (N.D. Ill. 2005).

[79] *But cf. supra* note 38 (arguing that fear of negative publicity from such litigation may compel a corporation to settle claims even if they have little chance of legal success).

[80] *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 721.

[81] *Id.* at 721.

[82] *Id.*

[83] *In re* African-American Slave Descendants Litig., 471 F.3d 754 (7th Cir. 2006).

> If one or more of the defendants violated a state law by transporting slaves in 1850, and the plaintiffs can establish standing to sue, prove the violation despite its antiquity, establish that the law was intended to provide a remedy (either directly or by providing the basis for a common law action for conspiracy, conversion, or restitution) to lawfully enslaved persons or their descendants, identify their ancestors, quantify damages incurred, and persuade the court to toll the statute of limitations, there would be no further obstacle to the grant of relief.[84]

This scenario is practicably impossible to satisfy. Putting issues of proof aside, no court has ever agreed to toll the statute of limitations for a reparations lawsuit,[85] and the Seventh Circuit in this case forcefully reasoned that statutes of limitations would be "toothless" if third generation descendants of slaves could recover for the harms suffered by their forbearers.[86] Consequently, according to the Seventh Circuit, litigation against corporations seeking financial reparations will not be successful regardless of the amount and quality of disclosures yielded by slavery disclosure laws.

2. Consumer Protection Claims

The consumer protection portion of the *Slave Descendants Litigation* decision, on the other hand, strengthens historical acknowledgment aspects of slavery disclosure laws by providing activists with the legal tools to act as private attorneys general in enforcing slavery disclosure laws. The Seventh Circuit held that claims brought under state fraud or consumer protection laws would be cognizable, as long as the plaintiff class alleged that they "bought products or

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[84] *Id.* at 759.

[85] *See* Cato v. United States, 70 F.3d 1103 (9th Cir. 1995); Hohri v. United States, 847 F.2d 779 (D.C. Cir. 1998).

[86] *In re African-American Slave Descendants Litig.*, 471 F.3d at 759 ("When a person is wronged he can seek redress, and if he wins, his descendants may benefit, but the wrong to the ancestor is not a wrong to the descendants. If it were, then . . . statutes of limitations would be toothless.").

services from some of the defendants that they would not have bought had the defendants not concealed their involvement with slavery."[87] The result is that if potential plaintiffs can find any evidence that contradicts corporate statements regarding slavery ties, they can bring a consumer protection suit.

The Seventh Circuit seeks to minimize the practical consequences of this holding with the following argument: "It is true that under no consumer protection law known to us, whether a special statute or a doctrine of the common law of contracts or torts, has a seller a general duty to disclose every discreditable fact about himself that might if disclosed deflect a buyer."[88] However, slavery disclosure laws create this very duty with respect to slavery. A business operating in a city or state with such a disclosure law would be required to research and disclose the company's ties to slavery. If the business makes a knowingly or intentionally false disclosure to conceal these ties, then under the Seventh Circuit's reasoning, a class of plaintiffs could bring suit under state consumer protection laws.[89]

In this manner, the Court's consumer protection holding provides a private cause of action, unavailable under most city and state disclosure laws, that allows individuals to act as private attorneys general to challenge the veracity of corporate statements.[90] This legal right notwithstanding, a

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[87] *Id.* at 762.

[88] *Id.* at 762-63.

[89] For examples of state consumer protection laws see LA. REV. STAT. ANN. § 51:1409(a) (2006); N.Y. GEN. BUS. LAW §349(h) (Consol. 2007); TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 2006).

[90] Berkeley is the only city that explicitly grants such a private right of action. Disclosure of Historical Commerce in Slavery by Certain City Contractors, BERKELEY, CA MUN. CODE, Ch. 13.96.030(B) (providing that "any Berkely resident . . . may bring an action against a person or entity" to enforce the ordinance's provisions).

Otherwise, prior to this decision, reparations activists were at the mercy of city and state governments to enforce slavery disclosure laws. *See generally* Ogletree, *supra* note 24, at 308 (criticizing the California Slavery Insurance Disclosure Law for failing to provide a cause of action for private enforcement). This enforcement mechanism potentially leaves

plaintiff can likely recover only a small sum of money for consumer protection claims,[91] and in order to allege enough facts to state a consumer protection cause of action, the plaintiff must bear the cost of researching a corporation's historical ties to slavery.[92] Yet, assuming the plaintiff is not motivated by large damage awards and is not dissuaded by potentially high costs of research,[93] a plaintiff who finds information contradicting a corporate disclosure may file suit and require corporations to publicly defend disclosures relating to their ties to slavery. Accordingly, this private right of action will support historical acknowledgment reparations by providing additional incentive for both activists (who now have a legal right to challenge corporate disclosures in court) and businesses (who may fear that this additional enforcement mechanism may increase the likelihood of losing contracts for inaccurate disclosures) to research extensively and accurately disclose corporate ties to slavery.[94]

B. Although the *Slave Descendants Litigation* Decision is Often Seen as a Blow to the Reparations Movement, the Court's Consumer Protection

these governments vulnerable to the charge that they are overlooking inaccurate disclosures in order to protect valuable business deals between the government and the disclosing company or because those charged with enforcing the law view the law as trivial. The former argument loses some weight given that most slavery disclosure laws provide significant discretion to the government as to whether statutory penalties will be enforced. For example, the Chicago Slavery Disclosure Ordinance makes contracts voidable at the election of the city. *See* Business, Corporate and Slavery Era Insurance Ordinance, CHI., ILL., MUN. CODE § 2-92-585 (2002).

[91] *See infra* note 112 (discussing the small damages available for such suits).

[92] Compare the cost burdens in a tort-like suit. Under tort law, the defendant corporation would likely bear the cost of disclosing past ties to slavery through discovery.

[93] Presumably a nonprofit or an activist group would fall within this assumption.

[94] As of this writing, there have been no publicized consumer fraud complaints against companies that have complied with slavery disclosure laws.

Holding Potentially Supports the Goal of Reducing Racial Inequality

As illustrated above, following the *Slave Descendants Litigation* decision, reparations activists are far less likely to be able to successfully use slavery disclosure laws to support financial reparations litigation, whereas activists are more likely to be able to bring consumer protection claims to challenge the veracity of corporate disclosures.

An important question remains—given this legal environment, are slavery disclosure laws effective? This Part addresses this question from the perspective of whether these laws can further the goal of addressing current racial inequalities that have stemmed from slavery.

Lingering effects of slavery on the African-American community have been well documented, and examples of racial inequality are numerous. In 2006, 22% of African-Americans lived below the poverty line, compared to only 8% of whites.[95] In 2002, median household income for whites was approximately $47,000 and for blacks only $29,000.[96] African-American men earn only 76.8% of what white men make, and African-American women earn only 66% of the earnings of white men.[97] In 2007, the unemployment rate amongst blacks was 6.2% compared to 3.3% for whites,[98] and as of January 2008, unemployment among blacks rose at

[95] U.S. Census Bureau, Statistical Abstract of the United States 456, tbl.694 (2009), http://www.census.gov/compendia/statab/tables/09s0693.pdf (last visited Apr. 26, 2009).

[96] Kyle D. Logue, *Reparations as Redistribution*, 84 B.U. L. REV. 1319, 1349 (2004).

[97] Zanita E. Fenton, *The Paradox of Hierarchy—Or Why We Always Choose the Tools of the Master's House*, 31 N.Y.U. REV. L. & SOC. CHANGE 627, 637 n.57 (2007) (citing BRUCE H. WEBSTER, JR. & ALEMAYEHU BISHAW, U.S. CENSUS BUREAU, INCOME, EARNINGS, AND POVERTY DATA FROM THE 2005 AMERICAN COMMUNITY SURVEY 10-11 & tbl.5 (2006), *available at* http://www.census.gov/prod/2006pubs/acs-02.pdf).

[98] U.S. Census Bureau, Statistical Abstract of the United States 395, tbl.607 (2009), http://www.census.gov/compendia/statab/tables/09s0607.pdf (last visited Apr. 26, 2009).

triple the rate of whites.[99] These disparities are also present in education. Seventeen percent of blacks drop out of high school compared to 11% of whites, and 14% of blacks complete four years of college compared to 33% of whites.[100] Moreover, African-Americans are arrested and incarcerated at rates far disproportionate to their size in the general population.[101] With respect to health care, black infant mortality is more than double that of white babies[102] and African-Americans can be expected to live on average five fewer years that whites.[103] Although such statistics as these are by no means the only indicators of racial inequality, they help show that under numerous indicators of well-being, blacks lag behind whites. While there is no consensus regarding the *extent* to which slavery may have caused these disparities, clearly the legacy of slavery has played *some* role in creating gross inequalities between white and black Americans.

Although there is certainly no broad agreement as to whether society is obligated to or should take any steps to remedy these disparities,[104] the ideal of reducing racial

[99] Peter S. Goodman & Louis Uchitelle, *Critiques of Spending Plan Retrace Old Debate*, N.Y. TIMES, Jan. 25, 2008, *available at* http://www.nytimes.com/2008/01/25/business/25stimulus.html.

[100] Logue, *supra* note 96, at 1350-51.

[101] *See* HUMAN RIGHTS WATCH, TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES (2008), *available at* http://www.hrw.org/sites/default/files/reports/us0508_1.pdf ("Blacks were 10.1 times more likely than whites to enter prison for drug offenses."); HUMAN RIGHTS WATCH, PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS (2000), *available at* http://www.hrw.org/legacy/reports/2000/usa/Rcedrg00-01.htm ("Blacks comprise 13 percent of the national population, but 30 percent of people arrested, 41 percent of people in jail, and 49 percent of those in prison.").

[102] Logue, *supra* note 96, at 1351.

[103] David Hall, *The Spirit of Reparation*, 24 B.C. THIRD WORLD L.J. 1, 12 n.23 (2004) (citing ELIZABETH ARIAS & BETTY L. SMITH, DIV. OF VITAL STATISTICS, DEATHS: PRELIMINARY DATA FOR 2001 28 (2003)).

[104] The question of whether society is obligated to or should take steps to reduce racial inequality is an appropriate question for the legislature, which may consider passing more aggressive social programs to address

inequality serves as a useful barometer to evaluate the historical acknowledgment reparations and financial reparations aspects of disclosure laws. Indeed, Oakland's slavery disclosure ordinance makes this goal explicit, stating that a purpose for their law is to provide compensation that can lead to "a level playing field" and "equal opportunity."[105] Judged against this standard, only the historical acknowledgment reparations aspects of these laws have the potential to systematically address racial inequities, insofar as companies which discover and disclose ties to slavery may feel compelled to provide payments to the poorest African-American communities. Using slavery disclosure laws to support financial reparations through litigation, on the other hand, has the potential to provide descendants of slaves with large sums of money; yet, these funds will only reach a small subset of African-Americans and nothing guarantees that this subset will include the poorest blacks.

In order to remedy racial inequality through reparations, a program must target a broad number of relatively disadvantaged African-Americans. At the very least, any reparations program must include disadvantaged African-Americans. Although descendants of slaves who are economically well-off may have an equivalent moral claim that just like poor African-Americans their descendants were wronged and they deserve redress, assistance provided only to relatively rich blacks would not address the goal of reducing racial inequality.

The legal system is not well suited to target such disadvantaged African-Americans.[106] Plaintiffs in *Slave Descendants Litigation*, while describing themselves as a class of all descendants of slavery, were not actually

these problems. The wisdom of passing such legislation is outside the scope of this Note and will not be discussed in detail.

[105] Slavery Era Disclosure Ordinance, OAKLAND, CA MUN. CODE, Tit. IX, Ch. 9.60(E) (2005). "Compensation" referred to in this provision likely relates to proceeds from donations to the city's voluntary compensation fund by disclosing corporations. *See also supra* Part III.B (describing the voluntary funds set up by Oakland and San Francisco).

[106] *See* Logue, *supra* note 96, at 1359.

certified.[107] It would be highly unlikely that such a class would be certified by any judge given its size and difficulty in proving membership. As observed by Ryan Forston:

> Class action suits normally require that notice be given to potential class members, usually for the purpose of allowing them to opt out if they choose. However, this becomes problematic when it is nearly impossible to identify harmed plaintiffs to whom notice should be given. Most slaves cannot be specifically identified. Similarly unidentifiable are those who have legal control over slaves' estates. Every slave who has descendants will in most instances have a large number of descendants. The vast majority of persons alive today who have at least some slave ancestry have probably descended from more than one former slave. This creates a web of legal relationships impossible to untangle.[108]

Given this unlikelihood of achieving class certification, as well as the difficulty of establishing standing in reparations lawsuits and the underinclusive nature of using genealogical research to identify descendants of individual slaves harmed by a particular corporation,[109] any successful suit for reparations against a corporation involved in slavery would distribute damages to only a small subset of African-American plaintiffs (and descendants of slaves with a mixed-race ancestry). Even assuming, *arguendo*, that these plaintiffs can secure a large damage award, money would

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[107] The plaintiffs refer to themselves as a class that consists of all "formerly enslaved Africans and their descendants;" however, they never sought class certification. *In re* African-American Slave Descendants Litig., 375 F. Supp. 2d 721, 737 n.16 (N.D. Ill. 2005).

[108] *See* Ryan Forston, *Collective Liability, the Limited Prospects of Success for a Class Action Suit for Slavery Reparations, and the Reconceptualizaion of White Racial Identity*, 6 AFR.-AM. L. & POL'Y REP. 71, 87 (2004).

[109] *See supra* Part III.A (discussing the difficulty of establishing standing in reparations lawsuits against corporations and observing the underinclusive nature of using genealogical research to identify descendants of individual slaves harmed by a particular corporation).

only be distributed to a relatively small number of blacks, resulting in no systematic reduction in racial inequality.

Moreover, the legal system provides no guarantees that this small group of plaintiffs will include the poorest African-Americans. Standing in a tort-like lawsuit must rest in their individual ability to show a genealogical link to a slave identified by a corporate disclosure.[110] The plaintiff's relative well-being would not be taken into account. Accordingly, a group of plaintiffs could easily consist of mostly rich African-Americans and, for the most part, exclude poor African-Americans. For these reasons, reparations lawsuits have never been an effective means to reduce racial inequality. Because of these deficiencies in reparations litigation, portions of the *Slave Descendants Litigation* decision constraining plaintiffs' ability to file such lawsuits have not further constrained the overall effectiveness of slavery disclosure laws.

Historical admission reparations, on the other hand, have the potential to further the goal of reducing racial inequality, insofar as companies which discover and disclose ties to slavery may feel compelled to provide payments to the poorest African-American communities.[111] Unlike damages paid in slavery litigation, voluntary financial payments can be targeted to the poorest African-Americans.[112] J.P.

[110] *See supra* Part III.A.

[111] Potentially an argument can be made that corporations sued for reparations payments may settle by similarly paying large groups of poor African Americans. Such a scenario is unlikely. During the wave of litigation that led to the consolidated *In re African-American Slave Descendants Litigation* decision, no corporation settled. Following this decision, plaintiffs are even more unlikely to prevail on tort-like claims. Notwithstanding the tenuous legal grounds for such suits, defendant corporations could potentially settle as a means of avoiding the possibility of years of bad press or boycotts. Yet, such pressures would more likely result in voluntary payments outside of litigation, as settlements may encourage potential plaintiffs not involved in the original suit to begin new litigation.

[112] Both apologies and consumer protection claims are unlikely to address racial inequality in a tangible manner. Obviously, apologies, in and of themselves, do not provide any financial benefit to their recipients, and monetary awards for a consumer protection claim will likely be very

Morgan's $5 million scholarship fund for black students from Louisiana and Wachovia's $10 million donation to a number of organizations, such as the United Negro College Fund and the Thurgood Marshall Scholarship fund, that serve poor blacks, provide the best examples of how historical acknowledgment reparations aspects of slavery disclosure laws may help reduce racial inequality.[113] After researching and disclosing ties to slavery as mandated by Chicago Slavery Disclosure Law, both companies voluntarily took action to improve the educational opportunities of a relatively large number of disadvantaged African-Americans.[114] Of course, these payments were entirely voluntary, and individually, they are unlikely to be of a magnitude that can significantly reduce racial inequality. Yet the same public relations considerations that compelled these disclosures will likely be present whenever a large corporation operating in a competitive market discloses ties to slavery. Accordingly, it would not be unreasonable to expect that other companies disclosing ties to slavery in compliance with slavery disclosure laws will take steps similar to those taken by J.P. Morgan and Wachovia.

small, as statutes typically only provide for compensation of damages or treble damages when intent to defraud can be shown. *See* Tara Kolar Ramchandani, Note, *Judicial Recognition of the Harms of Slavery: Consumer Fraud as an Alternative to Reparations Litigation*, 42 HARV. C.R.-C.L. L. REV. 541, 553 (2007).

[113] *See Brophy*, *supra* note 12, at 144; OFFICE OF THE CITY ADM'R, SLAVERY ERA DISCLOSURE ORDINANCE REPORT TO THE MAYOR AND BOARD OF SUPERVISORS (2007), http://www.sfgov.org/site/uploadedfiles/oca/SE_Report.pdf.

[114] *See Brophy*, *supra* note 12 at 144; OFFICE OF THE CITY ADM'R, SLAVERY ERA DISCLOSURE ORDINANCE REPORT TO THE MAYOR AND BOARD OF SUPERVISORS (2007), http://www.sfgov.org/site/uploadedfiles/oca/SE_Report.pdf.

V. LEGISLATURES CONSIDERING SLAVERY DISCLOSURE LAWS SHOULD CHOOSE A FRAMEWORK THAT REFLECTS THEIR DESIRED BALANCE BETWEEN DISCLOSURES AND COSTS TO BUSINESSES

Legislatures should not pass slavery disclosure laws if their sole purpose is to support slavery reparations litigation. For the reasons set forth above, such litigation is unlikely to reduce racial inequality, and in any event, following the *Slave Descendants Litigation* decision, tort-like reparations suits have little chance of success. On the other hand, slavery disclosure laws may be attractive to legislatures seeking to promote truthful acknowledgment of slavery ties and to encourage apologies and voluntary payments by disclosing corporations. Legislatures which decide to enact slavery disclosure laws should first consider which form of slavery disclosures fits their needs and then adopt legislation proposed at the end of this Part that would promote historical acknowledgment reparations at the lowest possible cost to businesses.

A. Four Main Ways to Frame Slavery Disclosure Laws

Slavery disclosure legislation may be framed in four ways. From legislation that will yield the most potential disclosures at the highest cost to businesses to the least disclosures at the lowest cost to businesses, legislatures may choose: (1) legislation that makes compliance mandatory and applies broadly to all businesses ("mandatory-broadly applicable"); (2) legislation that is mandatory but applies only to specific categories of businesses or industries ("mandatory-targeted"); (3) legislation that is voluntary and applies to all businesses ("voluntary-broadly applicable"); or (4) legislation that is voluntary and applies to specific industries ("voluntary-targeted"). The following chart classifies existing slavery disclosure laws within these categories:

	Mandatory	Voluntary
Broadly-Applicable	Chicago, Detroit, Los Angeles, Milwaukee, and Wayne County (MI)	None as of this writing
Targeted	California, Illinois, Berkeley, Oakland, Philadelphia, and San Francisco	Iowa

Mandatory-broadly applicable statutes are a common form of slavery disclosure laws, with Chicago, Detroit, Los Angeles, Milwaukee, and Wayne County passing such legislation.[115] These laws apply to "each contractor with whom the city enters into a contract" and require these

[115] Passed in 2002, the Chicago Slavery Disclosure Ordinance was the first city disclosure ordinance in the United States. Oliver Burkeman, *Chicago Compels Contractors to Come Clean on Slave Profits*, THE GUARDIAN, Oct. 4, 2002, *available at* www.guardian.co.uk/world/2002/oct/04/usa.oliverburkeman. Detroit, Los Angeles, Philadelphia, and Wayne County have each passed disclosure ordinances modeled after the Chicago legislation. Makebra M. Anderson, *More Companies Affected by Slavery Disclosure Laws*, NEW AMERICA MEDIA, June 29, 2005, *available at* http://news.ncmonline.com/news/view_article.html?article_id=3ba8643897 1b8db462e41805fb90435a. *Cf.* S.F. SLAVERY DISCLOSURE ORDINANCE REPORT TO THE MAYOR AND BOARD OF SUPERVISORS 9 (2007), *available at* http://www.sfgov.org/site/uploadedfiles/oca/SE_Report.pdf (describing the Philadelphia disclosure law as targeted to insurance or financial institutions, despite otherwise being modeled after Chicago ordinance); *see also* John M. Broder, *The Business of Slavery and Penitence*, N.Y. TIMES, May 25, 2003, at 4.4 (detailing the Los Angeles slavery disclosure law's ties to the Chicago Slavery Disclosure ordinance). Finally, see Slavery Era Disclosures, WAYNE COUNTY, MI CODE OF ORDINANCES art. XI, § 120-192(f) (2008), which requires disclosures only from companies with city contracts worth more than $20,000, but otherwise tracks the language of the Chicago legislation.

Given these similarities to the Chicago ordinance, Detroit, Los Angeles, and Wayne County slavery disclosure laws will not be discussed separately.

entities to disclose "records of investments or profits from slavery or slaveholder insurance policies during the slavery era . . . ."[116] In theory, mandatory-broadly applicable statutes could ask for both disclosure and remedial action, but to date, all such legislation is modeled after Chicago's, which penalizes only noncompliance.[117] Truthful disclosures are not penalized, and companies that disclose ties to slavery are not explicitly asked to take any further action. Three major corporations—J.P. Morgan, Lehman Brothers, and Wachovia—have reported ties to slavery after searching their records in compliance with the Chicago Slavery Disclosure Ordinance.[118]

The second type of disclosure laws, mandatory-targeted disclosure laws, comes in two forms. In one version, these laws specify particular industries that have to comply. In the other, they broadly define who must disclose but exempt categories of businesses from compliance. California and Illinois take the former approach and target only insurance companies operating within the state.[119] These laws require

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[116] Business, Corporate and Slavery Era Insurance Ordinance, CHI., ILL., MUN. CODE § 2-92-585 (2002).

[117] Business, Corporate and Slavery Era Insurance Ordinance, CHI., ILL., MUN. CODE § 2-92-585 (2002). ("Failure to comply with this section shall deem the contract voidable on behalf of the city.").

[118] *See* BROPHY, *supra* note 14, at 14. ABN AMRO (LaSalle Bank's Dutch parent company) and UBS have additionally discussed involvement in the slave trade in response to this ordinance. *See* S.F. SLAVERY DISCLOSURE ORDINANCE REPORT, *supra* note 115, at 9. Such connections, however, involve minor involvement in African slavery by remote predecessor companies." *See* Fran Spielman, *UBS Acknowledges Slavery Ties*, CHI. SUN-TIMES, Nov. 3, 2006, at 56 (discussing an employee of UBS's Swiss predecessor company who owned slaves while living in Brazil); Yvette Shields, *LaSalle Bank Discloses Connections to Slavery of Dutch Parent's Predecessors*, BOND BUYER, May 2, 2006, at 6 (describing how an ABN AMRO predecessor accepted slaves as collateral for loans, as well as vague connections, such as predecessors "hav[ing] business associates in slaveholding countries . . . and trad[ing] in goods produced by slaveholding territories.").

[119] California and Illinois have virtually identical statutes requiring disclosure by insurance companies of their involvement with slavery era insurance policies. CAL. INS. CODE §§ 13810-13813 (West 2008)

insurance companies to report "any records within the insurer's possession or knowledge relating to insurance policies issued to slaveholders that provided coverage for damage to or death of their slaves."[120] A number of insurance companies have disclosed that their predecessors issued policies for slaves in compliance with the California law; these companies include Aetna, American International Group ("AIG"), and New York Life.[121]

(California's Insurance Disclosure Law); 215 ILL. COMP. STAT. 5/155-41 (2008), (Illinois' Insurance Disclosure Law).

Passed in 2000, the California Slavery Era Insurance Policies legislation ("California Slavery Insurance Law") provides:

> The commissioner shall request and obtain information from insurers licensed and doing business in this state regarding any records of slaveholder insurance policies issued by any predecessor corporation during the slavery era. . . .
>
> . . . .
>
> The commissioner shall obtain the names of any slaveholders or slaves described in those insurance records, and shall make the information available to the public and the Legislature. . . .
>
> . . . .
>
> Each insurer licensed and doing business in this state shall research and report to the commissioner with respect to any records within the insurer's possession or knowledge relating to insurance policies issued to slaveholders that provided coverage for damage to or death of their slaves. . . .
>
> . . . .
>
> Descendants of slaves, whose ancestors were defined as private property, dehumanized, divided from their families, forced to perform labor without appropriate compensation or benefits, and whose ancestors' owners were compensated for damages by insurers, are entitled to full disclosure.

CAL. INS. CODE §§ 13810-13813 (West 2008).

[120] CAL. INS. CODE § 13812. Illinois' law uses virtually identical language. *See* 215 ILL. COMP. STAT. 5/155-41(b).

[121] CAL. DEP'T OF INS., CONSUMERS: SLAVERY ERA INSURANCE REGISTRY REPORT 4-9 (2002), *available at* http://www.insurance.ca.gov/0100-consumers/0300-public-programs/0200-slavery-era-insur/upload/Slavery-Report.pdf.

Berkeley and Oakland target additional industries. Berkeley requires disclosure from "[a]ny contractor providing insurance or financial services to the City."[122] Oakland goes further. In addition to requiring disclosures from businesses providing insurance and financial services, Oakland targets textile, tobacco, railroad, shipping, rice and sugar companies doing business with the city.[123]

San Francisco illustrates the other form of mandatory-targeted disclosure laws. It too provides a specific list of industries subject to the law—textile, insurance, and financial services companies doing business in the city, but then lists a broad number of exemptions describing companies that do not have to comply with this law.[124] Exemptions provide that financial and insurance companies who manage city employee retirement funds, healthcare trusts, medical and dental insurance, and who issue bonds and notes to the city do not have to comply with the disclosure law; additionally, emergency contracts, sole-source contracts, and contracts for less than $5000 per year are exempt from disclosure.[125] Any company operating in a targeted industry that does not satisfy an exemption must research and disclose ties to slavery. In response to the San Francisco Disclosure Ordinance, U.S. Bank disclosed that presidents of their predecessor banks owned slaves and at least one slave was used as collateral for a predecessor bank loan.[126]

Of these mandatory-targeted laws, some merely ask for disclosure, while others ask for disclosure and remedial

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[122] Disclosure of Historical Commerce in Slavery by Certain City Contractors, BERKELEY, CA MUN. CODE, Ch. 13.96.020.

[123] Slavery Era Disclosure Ordinance, OAKLAND, CA MUN. CODE, Tit. IX, Ch. 9.60 (2005).

[124] Slavery Disclosure Ordinance, S.F., CAL., ADMIN. CODE § 12Y.3, 4(a) (2006); Slavery Era Disclosure Ordinance, OAKLAND, CA MUN. CODE, Tit. IX, Ch. 9.60(J) (2005).

[125] *Id.*

[126] Letter from U.S. Bank to David Augustine, Policy and Legislative Manager, *available at* http://www.sfgov.org/site/uploadedfiles/oca/SE_Us bank.pdf.

action. Similar to the Chicago Slavery Disclosure Ordinance, the California, Illinois, and Berkeley disclosure laws, neither punish nor explicitly ask a company that truthfully discloses ties to slavery to take any action. However, the San Francisco Slavery Disclosure Ordinance ("S.F. Slavery Disclosure Ordinance") specifies its hope that corporations who disclose ties to slavery take remedial action to benefit the African-American community. The ordinance creates a fund to collect voluntary contributions from companies who disclose ties to slavery to be used to "promote healing and assist in remedying depressed economic conditions . . . and other legacies of [the] slavery era."[127] As of November 2007, there have been no publicly disclosed contributions to this fund.[128]

Voluntary-targeted and voluntary-broadly applicable disclosure laws are the least common form of disclosure laws. To date, only Iowa employs a voluntary-targeted law. Iowa's House Resolution 29 was passed after the California and Illinois Insurance Disclosure laws. It recognizes that many of the insurance companies operating in Iowa also operate in Illinois and have already complied with the Illinois law.[129] For that reason, this law seeks voluntary compliance of insurers operating in Iowa, but not Illinois.[130] Thus, Iowa's decision to make compliance voluntary did not rest on the notion that such a regime would yield more or higher-quality disclosures. Rather, the legislation appears to recognize that

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[127] Slavery Disclosure Ordinance, S.F., CAL., ADMIN. CODE § 12Y.1(q) (2006); *see also* Slavery Disclosure Ordinance, S.F., CAL., ADMIN. CODE § 12Y.5 (2006). Oakland's Slavery Disclosure Law also established a similar fund that accepts voluntary contributions that will go towards "promot[ing] healing and assist in remedying the depressed economic conditions, poverty, unequal educational opportunity and other legacies of slavery, which will serve to promote the public health, welfare and safety." *See* Slavery Era Disclosure Ordinance, OAKLAND, CA MUN. CODE, Tit. IX, Ch. 9.60(J) (2005). As of this writing, there have been no publicly disclosed contributions to this fund.

[128] *See* S.F. SLAVERY DISCLOSURE ORDINANCE REPORT, *supra* note 115.

[129] IOWA CONSUMER AFFAIRS BUREAU, REPORT ON SLAVERY ERA INSURANCE (2004), http://www.iid.state.ia.us/docs/slaveryreport.pdf.

[130] *Id.*

many insurance companies who had to comply with the California and Illinois Slavery Insurance Laws also operated in Iowa, making a mandatory regime unnecessary.

Similar to the California and Illinois laws, the Iowa law seeks the disclosure of any slavery insurance policies.[131] However, no penalties attach if an insurance company either refuses to research and disclose or inaccurately discloses slavery records. Empirically, no evidence exists that Iowa's voluntary disclosure law has yielded fewer disclosures than mandatory disclosure laws. Of the 112 insurance companies covered by the Iowa law, all complied with the request to research and disclose any slavery insurance polices.[132] This response rate does not foreclose the possibility that because there were no penalties for inaccurate disclosures, these responses were of a lesser quality than responses in a mandatory regime. That said, as of this writing, none of the Iowa disclosures have been challenged and no evidence exists that these disclosures were inaccurate.

Finally, to date, no cities or states have enacted voluntary-broadly applicable disclosure laws. This type of law would apply either to every company contracting with the city or state or at its most broad, to every business operating in the state.

Structurally, nothing would prevent voluntary-broadly applicable legislation from achieving the same high response rate as the Iowa law. For example, while Iowa's perfect response rate may be partially credited to the effort of the Iowa insurance commissioner giving actual notice to all insurance companies targeted under the act, notice of a request to research and disclose slavery ties may be provided on standard forms required for all companies bidding on a

[131] The Iowa law requests: "[1)] [A] description of the research methodology used to identify and compile the records requested, including a description of the record, whether the insurer found responsive data and a summary of the responsive data; and [2)] names of slaves, slaveholders, beneficiaries, policyholders, a copy of the responsive policy and other identifying information." *Id.*

[132] *Id.* Most commonly, insurance companies responded that they were incorporated after the end of the Civil War. *Id.*

city or a state contract.[133] Similarly, if this response rate resulted from corporate fear that the public would react negatively if these businesses refused to comply with Iowa's legislation, then the same public relations concerns would be present under a voluntary-broadly applicable law.[134]

B. Drafting Errors in Existing Slavery Disclosure Laws

The previous section helps illustrate the tradeoffs between the quality of slavery disclosures and the costs to businesses presented by each of the four main ways to frame disclosure laws. While city and state legislation may be useful in illustrating the strengths and weaknesses of a particular approach, each existing statute contains drafting errors that pose unnecessary costs on businesses and therefore should not be repeated.

1. Imprecision in Definitions of Which Companies are Subject to the Law

Mandatory-broadly applicable disclosure laws and mandatory-targeted disclosure laws that exempt categories of businesses from compliance leave ambiguity in determining which businesses are subject to the law. This uncertainty exposes businesses which in good faith may think that they are not subject to the law to liability; such

[133] This statement assumes that a voluntary-broadly applicable law would apply only to businesses that contract with the city or state. If the law applies to every business operating in the state, then the issue of notice will become salient. Under this assumption, contractors will encounter the request for slavery era records when filling out paperwork related to bidding on the contract or will encounter the request when finalizing their contract with the city or state.

Notice is achieved in this manner for all current mandatory-broadly applicable laws. *See, e.g.*, City of Chicago Economic Disclosure Statement and Affidavit, *available at* http://egov.cityofchicago.org/webportal/COCWebPortal/COC_ATTACH/EDS1105.pdf.

[134] However, as in all voluntary disclosure regimes, a lack of penalties potentially harms the quality of these responses.

exposure does not necessarily improve the quantity or quality of slavery disclosures.

The Chicago Slavery Disclosure Ordinance's[135] mandatory-broadly applicable law that "[e]ach contractor with whom the city enters into a contract, whether subject to competitive bid or not" has generated some confusion.[136] Shortly before the Chicago Disclosure Ordinance took effect, a high profile dispute erupted between Chicago's Mayor and Dorothy Tillman, the sponsor of the disclosure legislation. The city's Procurement Department had been distributing disclosure forms only to companies with new contracts in the pipeline.[137] Tillman argued that the law did not just apply to businesses signing new contracts with the city. She sought to apply the law as broadly as possible to include companies with contracts that predated the disclosure ordinance, stating: "Everyone using taxpayers' money who started their business on the backs of slaves should [come clean]. If you're going to ask new companies, the old companies should do it, too."[138] While the City Law Department interprets this law not to apply retroactively and apply only to new contracts, this issue has not been definitely resolved.[139] In order to avoid this ambiguity, model legislation that seeks to maximize the number of entities covered by the disclosure law should specify whether the law requires disclosures from companies that have existing contracts with the city.

The mandatory-targeted approach used by San Francisco presents more ambiguity regarding which businesses must comply with the law and should not be followed as a model

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[135] Detroit, Los Angeles, and Wayne County slavery disclosure laws are modeled after the Chicago ordinance and will not be discussed separately. *See supra* note 115.

[136] Business, Corporate and Slavery Era Insurance Ordinance, CHI., ILL., MUN. CODE § 2-92-585 (2002).

[137] Fran Spielman, *Alderman Seeks More Slavery Disclosure*, CHI. SUN-TIMES, Jan. 30, 2003, at 7.

[138] *Id.*

[139] *Id.* After a sufficient period of time, this ambiguity will no longer be an issue, as eventually there will be no governing contracts that were signed prior to the passage of the Chicago Slavery Disclosure Ordinance.

for legislation. The San Francisco Disclosure Law provides a specific list of entities subject to the law—textile, insurance, and financial services companies doing business in the city—thereby exempting broad categories of these businesses from disclosure.[140] As a result of these exemptions, the San Francisco Disclosure Law provides less clarity than do other slavery disclosure laws regarding which businesses are subject to the law. At the time this law was passed, the President of the Los Angeles-based Center for Governmental Studies was quoted: "It seems like this will only cause major headaches for the city as contractors get confused over whether the law applies to them, . . . [a]nd this is bound to help attorneys in town as people file lawsuits against city contractors alleging non-disclosure."[141]

By contrast, cities and states that seek to employ mandatory-targeted regimes should look to the California Slavery Insurance Law[142] as a model for identifying which businesses will be subject to compliance. By specifying that these laws affect insurers "licensed and doing business in [the] state," the California Slavery Insurance Disclosure Law provides clarity as to exactly which businesses must be in compliance.[143] Beyond this specific definition, California's insurance department provided notice to businesses which fell within the ambit of these laws. Following the law's passage, the California Department of Insurance contacted

[140] Slavery Disclosure Ordinance, S.F., CAL., ADMIN. CODE § 12Y.3, 4(a) (2006). Exemptions include: financial and insurance companies that manage city employee retirement funds, healthcare trusts, medical and dental insurance, and that issue bonds and notes to the city do not have to comply with the disclosure law; additionally, emergency contracts, sole-source contracts, and contracts for less than $5000 per year. § 12Y.4(a).

[141] *S.F. Slave Trade Disclosure Law Approved*, ABC7NEWS, Nov. 1, 2006. Despite this concern, as of this writing, there have been no published accounts of lawsuits against companies who thought they were not subject to the S.F. Slavery Disclosure Ordinance.

[142] The Illinois Slavery Insurance Disclosure law is virtually identical to the California Slavery Insurance Disclosure Law and will not be discussed separately. *See supra* note 119.

[143] CAL. INS. CODE § 13810 (West 2001).

1357 carriers who were subject to the legislation.[144] Thus, by providing an unambiguous definition of which businesses are subject to the law and providing them with actual notice, no unforeseen penalties will attach to a business which reasonably believes that it is not subject to disclosure laws.

2. Imprecision in Definition of When Liability Attaches Under the Law

Mandatory disclosure regimes, whether broadly applicable or targeted, utilize wide-ranging language to define when liability would attach under slavery disclosure laws. Vague language used to define compliance will result in unnecessary costs to businesses. Such imprecise language is found in Chicago's slavery disclosure law.

The Chicago Disclosure Ordinance seeks "records of investments or profits from slavery or slaveholder insurance policies during the slavery era."[145] As one commentator has observed, this language is unclear and makes it difficult for businesses to be in compliance without "casting a wide net": "Are corporate archives complete enough to conduct a search dating back 200 years or more? What defines profits from slavery-money made directly from the slave trade or from goods, such as cotton, produced by slave labor? What about the textiles produced in Northern mills?"[146] Accordingly, if a company is to ensure that it is not penalized under these laws, then it must expend maximum effort to find responsive documents, which may be few, at a potentially high cost. In order to fully research potentially incomplete records of predecessors, many companies may find the need to hire professional historical research firms to conduct this research, incurring a significant cost.[147] Uncertainty over

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[144] IOWA CONSUMER AFFAIRS BUREAU, REPORT ON SLAVERY ERA INSURANCE (2004), http://www.iid.state.ia.us/docs/slaveryreport.pdf.

[145] Business, Corporate and Slavery Era Insurance Ordinance, CHI., ILL., MUN. CODE § 2-92-585 (2002).

[146] Bob Tita, *Obstacles to Slavery Law Ahead*, CRAIN'S CHI. BUS., Oct. 14, 2002.

[147] Larger corporations, such as Wachovia and Lehman Brothers, have hired such consultants to conduct this research. *See supra* notes 7 and 73.

whether "profits from slavery" include indirect profits, such as those derived from northern textile plants processing cotton picked by slaves, potentially expands the set of records to be researched, increasing the cost of compliance.[148]

The California Slavery Insurance Law has a limited definition of responsive records; thus, while it avoids the ambiguity problem of the Chicago Slavery Disclosure Ordinance, it fails to fully advance the purposes of slavery disclosure laws. The law requires disclosures of records "within the insurer's possession or knowledge relating to *insurance policies issued to slaveholders that provided coverage for damage to or death of their slaves*."[149] Ogletree criticizes this language: "[I]t narrowly defines the manner in which insurance corporations may have been implicated in slavery, permitting some prevarication and evasion."[150] Accordingly, the historical admission purpose may be frustrated, in that an insurance company may legally withhold any evidence of involvement in slavery other than insurance coverage for death or damage to slaves.[151]

In contrast, San Francisco is a strong model for defining compliance, offering maximum opportunities to advance the historical acknowledgment purpose of slavery disclosure laws without imposing any undue risk that companies will misconstrue their obligations under the law. The San Francisco Disclosure Law provides meticulous detail regarding the actions a business must take to be in compliance with the law. The law requires disclosure of the steps the business took to find responsive records and defines the level of effort a business must make when searching for these records:

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[148] Such concerns may be tempered if a company employs a retention policy that automatically destroys documents after a certain date.

[149] CAL. INS. CODE § 13812 (West 2001) (emphasis added).

[150] Ogletree, *supra* note 24, at 308.

[151] Correspondingly, the financial reparations through litigation purpose may be frustrated if a company withholds such evidence of involvement in slavery, thereby depriving plaintiffs of a potential defendant in a reparations lawsuit.

> Each contractor . . . shall complete an affidavit verifying that the Contractor has searched through any and all records in the Contractor's possession or control, including records of any parent or subsidiary entity or Predecessor Company, and *has made a good faith effort* to search any relevant records that are within the Contractor's knowledge but not within its possession or control, for evidence that the Contractor, its parent or subsidiary entity, or its Predecessor Company Participated in the Slave Trade or received Profits from the Slave Trade.[152]

The law further specifies what records are relevant and must be disclosed:

> (1) the names of each Person Subjected to Slavery, each Slaveholder, and each person or entity who Participated in the Slave Trade or derived Profits from the Slave Trade, mentioned in the records, (2) a description of the type of transactions, services, or other acts evidenced by the records; and (3) the extent and nature of any Profits from the Slave Trade evidenced by the records.[153]

By providing detail explaining what records are responsive and the level of effort that a business must expend when searching its records, the San Francisco Disclosure Law ensures that a covered company that follows the steps outlined above will be in compliance with the law. At the same time, § 12Y.4(b) requires disclosure of all types of records that may be considered relevant for the historical acknowledgment purpose of uncovering the extent to which a company was involved with slavery.

C. Recommended Legislation

A city or state that intends to pass a slavery disclosure law should first choose one of the four main ways to frame

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[152] Slavery Disclosure Ordinance, S.F., CAL., ADMIN. CODE § 12Y.4(a) (2006) (emphasis added).

[153] Slavery Disclosure Ordinance, S.F., CAL., ADMIN. CODE § 12Y.4(b) (2006).

these laws. In making this decision, the legislature should consider the tradeoffs between quality of disclosures and costs to businesses as outlined above. To help guide this decision, cities or states may consider their geographical and historical position. For example, a broadly applicable disclosure law may make most sense in a city like Atlanta, where, historically, there were many slaves and many industries potentially had slavery ties. In contrast, a targeted disclosure law may make more sense in a city like Portland, Oregon, where few, if any, slaves ever resided and certain industries are thought to account for most slavery ties. Interestingly, to date, broadly-applicable laws have been employed only in cities that were not part of the Confederacy. This development potentially may be a result of a recognition that many businesses targeted under these acts operate on a national level or have predecessors that operated in the South.

A legislature considering a voluntary regime should be particularly cautious. Voluntary disclosure laws present a potentially attractive option to legislatures that may be concerned that such disclosure laws will discourage businesses from operating within the city or state. As of this writing, these laws have been employed in only limited circumstances. While no empirical evidence is available to discredit the quality or quantity of disclosures yielded from these laws, a lack of penalty for noncompliance potentially removes incentives for businesses subject to the law to fully research and disclose slavery ties.

After choosing a framework, the legislature should avoid imprecision in language found in existing slavery disclosure laws. If the legislature seeks a narrow target or targets a particular industry, model legislation should follow the California Slavery Disclosure Law and clearly define which entities are covered by the law. If the legislature wants this law to apply broadly, drafters should look to the Chicago Slavery Disclosure Ordinance as a guide, but also specify whether the law applies to businesses with existing contracts to the city.

Finally, drafters should follow the San Francisco Slavery Disclosure Ordinance when defining the steps the businesses must take to find responsive records and defining the level of effort a business must make when searching for these records. The San Francisco Disclosure Ordinance's clear definition of compliance and what constitutes due diligence presents an optimal mix that maximizes the potential for disclosures of slavery ties at the lowest possible cost.

VI. CONCLUSION

From 2000–2006, when most slavery disclosure laws were enacted, ten high-profile slavery reparations lawsuits were filed against corporations in districts throughout the country. As shown by personal ties between reparations activists and legislators, as well as commentary discussing how these laws could be used to identify plaintiffs and defendants in such suits, a purpose of slavery disclosure laws was to support litigation seeking financial reparations. Yet, the *Slave Descendants Litigation* decision severely curtailed the viability of future tort-like reparations suits.

This legal development, alone, should not dissuade legislatures considering passing new slavery disclosure laws. From the perspective of advancing the goal of reducing racial inequality, such reparations lawsuits were never particularly effective (and with it, the utility of generating evidence to support such suits). While it is unclear whether a court would ever grant reparations plaintiffs standing to sue, at a minimum, such plaintiffs would have to demonstrate that they are genealogically related to a named slave. Relatively few African-Americans will be able to show such a connection, and those that do may be economically well-off. Even large amounts of money paid to plaintiffs in such suits would do little to address racial inequality, given the relatively small number of African-Americans who would benefit and the lack of guarantees that they will be disadvantaged.

Historical admissions offered in compliance with slavery disclosure laws, on the other hand, have the potential to indirectly help reduce racial inequality. Public relations

concerns have driven at least two large corporations, J.P. Morgan and Wachovia, to make voluntary payments to organizations that serve disadvantaged African-Americans after disclosing ties to slavery. Similar public relations concerns will likely be in play whenever a large corporation, operating in a competitive industry, discloses ties to slavery. If a significant number of corporations that disclose ties to slavery follow J.P. Morgan and Wachovia's lead and voluntarily provide sizable payments to groups of poor African-Americans, then slavery disclosure laws, by playing an essential role in encouraging corporations to make voluntary payments, will help reduce racial inequality.

Of course, a legislature may reasonably decide that the benefits from such disclosures are not worth the sometimes significant costs imposed on companies in order to research ties to slavery. Legislatures that nonetheless decide to move forward with such laws should choose the method of framing slavery disclosure laws that best reflects their preferred balance between quality of disclosures and costs to businesses. Legislatures should then enact model legislation described in Part IV.3, in order to avoid imposing any additional costs on businesses through imprecision in statutory language. In this manner, legislatures may find an optimal combination of historical admission reparations at the lowest cost to businesses.