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# The Seduction of Power: An Analogy of Incest and Antebellum Slavery

*Lisa Haberman*\*

## I. INTRODUCTION

To be free is to be unconstrained by the power of another.<sup>1</sup> No one is completely free because freedom is relatively limited. Freedom brings the responsibility of making choices regarding the exercise of individual freedom within the parameters of an organized association. This is not a land of unlimited freedom.

The citizens of the United States sacrifice God-given collective freedom in exchange for the security of individual liberty. Liberty is the promise of freedom to oneself within our association. The right to choose the destiny of our circumstance is limited only by respect and recognition of others to the same right. It is the acknowledgement that no person or association has a superior claim in a human being than that human being.

Slavery is a robber of liberty, fraudulently taking away a person's ability to make choices in regard to her physical, emotional and spiritual interests. Antebellum slavery was the coercion of services and the ability of one to hold the lawful title of another person.<sup>2</sup> Natural law demands one man cannot own another;<sup>3</sup> therefore, the issue of slavery becomes one of trespass and fraud. Masters fraudulently trespassed on the slaves' right to self-determination. Under common law, any unauthorized entry presumes damage. This trespass interferes with the legitimate expectancy of liberty guaranteed by the federal government in the United States Constitution. The dynamic of a powerful master under whom the slave was compelled to defer was justified by a false sense of superiority or entitlement<sup>4</sup> and

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1. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 763 (1996).

2. See *Dred Scott v. Sanford*, 60 U.S. 393, 404 (1856).

3. See BLACK'S LAW DICTIONARY 1049 (7th ed. 1999) (defining natural law).

4. See Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207 (1992). "This article demonstrates that some battered women are held in involuntary servitude and suggests that a

aggrandized the master at the expense of the slave.<sup>5</sup> From these observations, I formulated five elements of slavery: (1) apparent authority; (2) representing fraudulent power; (3) with the intent to overcome the will of another; (4) for personal aggrandizement; and (5) with damages presumed.

A contemporary heir apparent to antebellum slavery is child abuse, specifically incest in the father-daughter relationship. Just as the slaves were oppressed, children are exploited.

[Friedrich] Engels regarded the presence or absence of slavery as an indicator of the relative degree of the emancipation of women; a society where the institution of slavery was present would be more likely to subject its "free woman" to a subordinate status analogous to that of slaves. A society where there was no slavery, and thus no model for the subjection of one human being to the power of another, would be likely to accord women substantially more rights and freedoms.<sup>6</sup>

Similarly, incest has a disproportionate impact on females.<sup>7</sup> "Among the reported victims of incest, girls outnumber boys ten to one."<sup>8</sup> According to a representative study by Diana E. H. Russell, a notable researcher: "Thirty-eight percent of the female population have experienced sexual molestation by the age of eighteen years."<sup>9</sup> Clearly the problem of incest is much more prevalent than most people realize or care to admit.

In the United States, the statute of limitations to initiate a law suit in civil court against an abusive perpetrator is generally between two to three years after attaining the age of majority.<sup>10</sup> A victim may experience limited relief if memory was repressed and personal injury was only recently discovered.<sup>11</sup> If the victim has not forgotten the abuse, special discovery rules should arguably apply.<sup>12</sup> Although the victim is cognizant of the abuse, a failure to connect emotional injuries with the abuse until years later justifies an extension of the filing time for the claim.<sup>13</sup> However,

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civil constitutional claim . . . could be brought against the batterer." *Id.* at 210.

5. See U.S. CONST. amend. XIII, §§ 1, 2.

6. Dorothy C. Wertz, *Women and Slavery: A Cross-Cultural Perspective*, 7 INT'L J. WOMAN'S STUD. 372, 377 (1984).

7. See generally SUSAN FORWARD & CRAIG BUCK, *BETRAYAL OF INNOCENCE, INCEST AND ITS DEVASTATION* (1988).

8. See *id.* at 2.

9. Camille W. Cook & Pamela Kirkwood Millsaps, *Redressing Wrongs of the Blamelessly Ignorant Survivor of Incest*, 26 U. RICH. L. REV. 1 (1991).

10. See generally James Wilson Harshaw, Comment, *Not Enough Time? The Constitutionality of Short Statutes of Limitations for Child Sexual Abuse Litigation*, 50 OHIO ST. L. J. 753 (1989).

11. See *id.*

12. See *id.*

13. See *id.*

these theories have all met limited success.<sup>14</sup> Because the courts lack uniformity, citizens are deprived of their interest in fairness and consistency in the administration of justice.<sup>15</sup>

Furthermore, the collective denial of childhood assault cases violates due process because it interferes with the legitimate expectancy for justice following a trespass by one person on another.<sup>16</sup> Cutting off the statutory filing period does not aid in establishing justice or securing liberty. The offenders are addicted to their behavior and unless stopped, continue to commit the same crimes. Ultimately, offenders perpetuate their legacy throughout past and future generations.<sup>17</sup> The government cannot control covert assaults on personal liberty,<sup>18</sup> but must encourage and empower individuals to recover by providing a safe forum for the declaration of the parties' rights. The federal legislature should recognize child sexual abuse, specifically father-daughter incest,<sup>19</sup> as slavery actionable in civil court by authority of the Thirteenth Amendment for the ultimate purpose of injunction.

The Supreme Court, in *Jones v. Alfred H. Mayer Company*, stated that the Thirteenth Amendment empowers Congress to legislate against private acts of discrimination that perpetuate slavery's "badges and incidents".<sup>20</sup> The Thirteenth Amendment provides:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.<sup>21</sup>

In *Jones*, an African-American couple sued pursuant to 42 U.S.C. section

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14. *See id.* at 753 n.4 (for a list of applicable cases).

15. *See generally id.*

16. "No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property without due process of law." *See* U.S. CONST. amend. XIV, § 1.

17. *See* JAN FRANK, A DOOR OF HOPE: RECOGNIZING AND RESOLVING THE PAINS OF YOUR PAST 111 (1987).

18. The laws and the social underpinnings of our modern nation-state system have created and maintained divisions between the personal and public lives of each citizen. The family has traditionally been regarded as a private institution with more protections and less legal scrutiny.

19. *See* FORWARD & BUCK, *supra* note 7, at 3. The authors define incest as:

any overtly sexual contact between people who are either closely related or perceive themselves to be closely related . . . includ[ing] stepparents, stepsiblings, half-siblings, and even live-in lovers if they have assumed a parental role. If that special trust that exists between a child and a parent figure or relative is violated by any type of sexually exploitive act, that is incest. It makes no difference, for example, whether the aggressor is a natural father or a stepfather.

*Id.*

20. 392 U.S. 409, 440-44 (1968).

21. U.S. CONST. amend. XIII, §§ 1, 2.

1982 when a private real estate developer refused to sell housing or land to African-Americans.<sup>22</sup> Section 1982 provides that all citizens have “the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.”<sup>23</sup> The Court held that the Thirteenth Amendment empowered Congress to enact section 1982 and that it prohibits private discrimination.<sup>24</sup> In finding that the Thirteenth Amendment gives Congress broad legislative power, the Court stated: “Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation.”<sup>25</sup>

Although significant, the Court's holding in *Jones* does not adequately address nor encompass the essence of slavery. The “badges and incidents” of slavery, as articulated in *Jones*, and slavery in general, are more profound than merely discrimination in obtaining or holding an interest in property. This test measures damage after it has occurred. Slavery is an intentional and systematic denial of a person's right to self or liberty. Such fraudulent assertions of power are dynamic and will not be eradicated until cycles are broken and future abuse anticipated before it occurs.

Let us assume for argument that the Constitution is a living trust.<sup>26</sup> A trust is a legal arrangement where one party holds property for the benefit of another.<sup>27</sup> The government promises to establish justice and to secure the blessings of liberty in exchange for our commitment to its authority. Liberty is therefore held in trust by the government.

In the case of children, the government shares its responsibility as a trustee with parents. Each has the fiduciary duty to maintain the trust in the best interest of the true owner. Although the trustee holds the legal interest, or an ability to control, the settlor is both the true owner and beneficiary who holds the equitable interest. A true owner's right to possession supercedes the right of any other to custody. In addition to the duty to manage and protect, trustees have the duty to make the trust productive and work in the best interests of the beneficiary. A breach of trust occurs when the trustee invades the trust for an improper purpose. Self-aggrandizement is such an improper purpose. Moreover, when the trustee fraudulently trespasses on the liberty of the beneficiary, a breach of trust occurs. It is an

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22. 392 U.S. 409, 440-44 (1968).

23. 42 U.S.C. § 1982 (2000).

24. See *Jones*, 392 U.S. at 440-44.

25. *Id.* at 440. See also ERWIN CHERMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 213 (1997) (discussing *Jones*).

26. Although there is no historical context or academic precedent for this assumption one may compare the Constitution to a living trust to contrast a common legal instrument that promises to regulate the custody and management of tangible property for the benefit of another with the Union's promise to regulate and manage the custody of freedom held for the benefit of its citizens.

27. See BLACK'S LAW DICTIONARY, *supra* note 3, at 1513 (defining trusts).

improper invasion of trust res or liberty. Under this analogy, the Thirteenth Amendment is an enforceable provision of the trust.

## II. DISCUSSION

### A. APPARENT AUTHORITY

The first outstanding feature of slavery is its display of apparent authority over the person of another. Apparent authority refers to the legally and socially recognized ability of one person to exercise powers of custody and control over another, along with an expectation that that person will submit and defer to such authority. During antebellum slavery, the apparent authority holder took the form of a master. In incest, the apparent authority holder is the father.

#### 1. Antebellum Slavery

In antebellum slavery, the apparent authority took the form of a legal owner or master to which the slave was legally and socially expected to defer and submit. The slaveholder had the power and the legal right to attempt to break the will of a slave and supplant it with his own.<sup>28</sup> The master had absolute power over a slave's necessities. Masters rationed the supply of food and water and there were severe punishments for stealing.<sup>29</sup> The master also had the ability to separate families,<sup>30</sup> remove children and control medical care, formal education, religion,<sup>31</sup> and familial affiliation.<sup>32</sup> Masters regulated leisure time and recreation as well.<sup>33</sup> "Paternalism" has long been associated with slavery, the relationship between master and slave likened to that of parent and child.<sup>34</sup> Literature of that time, frequently presents the slave as the equivalent of a child whose oversight is

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28. See McConnell, *supra* note 4, at 219.

29. See STANLEY FELDSTEIN, *ONCE A SLAVE: THE SLAVES' VIEW OF SLAVERY* 43 (1971).

30. See Wertz, *supra* note 6, at 375. "Even though most slave 'marriages' may have remained undisturbed by owners, and most slave children may have remained with their parents, the *threat* of separation remained very real to the slaves, however rarely carried out." *Id.*

31. See FELDSTEIN, *supra* note 29, at 68.

The narratives also indicate that the master exercised control over various degrees of the religion of the slaves with three identifiable patterns (a) no religion at all; (b) formal or organized instruction, more or less along the lines of the established gospel, either with or without the permission of the slaveholders; or (c) makeshift or fraudulent instruction . . . .

*Id.*

32. See McConnell, *supra* note 4, at 220.

33. See D.J. ROMAGNOLO, *PATERNALISM AND RULING CLASS IDEOLOGY IN THE ANTEBELLUM SOUTH: A CRITIQUE OF THE SOCIAL FUNCTION OF PATERNALISM AS PRESENTED IN THE ANALYSIS OF EUGENE D. GENOVESE* 1 (1976) (Occasional Paper, No. 2, by the Program in Comparative Culture, Univ. of Cal., Irvine). Romagnolo presents the paternalistic nature of the master-slave relationship as a dichotomy of kindness and cruelty. "The master emerges as a father figure who is stern but understanding and feels himself dutiful to provide the 'friendly guidance' necessary to protect the negro." *Id.*

34. *Id.*

the master's responsibility.<sup>35</sup> Slaves were "treated as children expected never to grow up."<sup>36</sup> Defenders of slavery analogized the relationship of master and slave to that of parent and child, comparing slavery to a property interest and reasoning that children may fall under the same class of persons bound to service.<sup>37</sup>

## 2. Incest

"Patriarchal power and ideology create a social and legal climate hospitable to incest. . . . [I]ts prevalence indicates incest is 'endemic to the patriarchal family.'"<sup>38</sup> According to associate professor of law at the City University of New York at Queens College, Joyce E. McConnell, feminist theories of power and subordination explain the phenomenon of incest and account for "why the victims are generally female, and why their suffering has received little legal attention."<sup>39</sup> Feminist theories generally

place incest in the context of the subordinate role of females and the ideology of male supremacy. . . . First, sexual injuries to females historically have not been taken seriously unless they interfered with the property-like interest that a father, husband or brother had in the female. Second, because of women's historically subordinate status, females and their suffering have largely been invisible.<sup>40</sup>

These theories offer an explanation as to why victim's injury resulting from incestuous acts has been ignored. Due to the large change in the status of women and children, the law has evolved from treating private sphere crimes, such as battery and rape, differently from those committed in the public sphere.<sup>41</sup> Consequently, incest most often occurs in

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35. *Id.*

36. WILLIAM ROSE LEE, *SLAVERY AND FREEDOM* 25 (1982). Lee's book includes essays on the American experience of antebellum slavery which attempts to take the study of slavery beyond sociology to consider the dynamic characteristics of the institution along with the effect of such change. *See id.* at vii-xi.

37. *See* Akhil Reed Amar & Daniel Widawsky, Comment, *Child Abuse As Slavery: A Thirteenth Amendment Response to Deshaney*, 105 HARV. L. REV. 1359, 1367 (1992) (citing *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1873)). "The domestic institution of slavery is one of these [social and domestic] relations, and was recognized in the States of this Confederation as a species of property interest. The Constitution describes slaves, and I suppose children and apprentices might come under the same class of persons bound to service." *Id.* (citing CONG. GLOBE, 38th Cong., 1st Sess. 2941 (1864) (statement of Rep. Fernando Wood)).

38. Joyce E. McConnell, *Incest as Conundrum: Judicial Discourse on Private Wrong and Public Harm*, 1 TEX. J. WOMEN & L. 143, 148-49 (1992) (quoting Judith Herman, "a leading expert on incest"). "The patriarchal organization of social systems through which male dominance and female submission are legitimized helps to explain why the victims of incest are overwhelmingly female, as well as why their harm has been disbelieved or discounted." *Id.* at 148.

39. *Id.*

40. *Id.* at 148-49.

41. *See generally id.*

patriarchal families where the father exercises absolute dominion and control over his minor daughter and his financially dependent family members.<sup>42</sup>

## B. REPRESENTATION OF FRAUDULENT POWER

The second feature of slavery is the assertion of fraudulent power. Fraud is an intentional misrepresentation of a material fact that is intended to and in fact does cause reasonable reliance by another to her own detriment.<sup>43</sup> The misrepresentation is the apparent authority holder's assertion of the right to break the will of the other and supplant it with his own. Although socially sanctioned, assertions of power that attempt to supersede the true owner's interest in her body and self-integrity are false.

### 1. Antebellum Slavery

Chief Justice Taney wrote for the Supreme Court in *Dred Scott v. Sanford*, holding that "there was no distinction between 'property in a slave and other property,' and that under the Constitution a citizen of the United States could not be forbidden from taking his property with him when he moved from one area to another."<sup>44</sup> Supporters of slavery analogized the right to the services of slaves to that of children and wives, all resting upon common property principles.<sup>45</sup> The master-slave relationship was premised on the master's absolute power and uncontrolled authority over the body of the slave,<sup>46</sup> including the power to exploit sexuality.<sup>47</sup>

42. Cook & Millsaps, *supra* note 9, at 8. "[T]he application of the discovery doctrine is logical, just, and equitable. It provides the blamelessly ignorant survivor of incest with the threshold determination to commence her tort action." *Id.* at 40.

43. See BLACK'S LAW DICTIONARY, *supra* note 3, at 670 (defining fraud).

44. *Dred Scott v. Sanford*, 60 U.S. 393, 404 (1856). See also Tomas P. Govan, *Introduction to FELDSTEIN*, *supra* note 29, at 20.

45. Amar & Widawsky, *supra* note 37, at 1367.

The parent has the right to the service of his child; he has a property in the service of that child. A husband has a right of property in the service of his wife; he has the right to the management of his household affairs. The master has the right of property in the service of his apprentice. All these rights rest upon the same basis as a man's right of property in the service of slaves.

*Id.* at 1367 (citing CONG. GLOBE, 38th Cong., 2d Sess. 215 (1865) (statement of Rep. Chilton White)).

46. *Id.* at 1370.

In 1842, Judge Turley of the Tennessee Supreme Court confirmed this interpretation of slavery in *Jacob v. State*: "[T]he right to obedience and submission, in all lawful things . . . , is perfect in the master . . ." Judge Ruffin of the North Carolina Supreme Court described the master/slave relationship in even blunter terms: "Such obedience [of a slave to a master] is the consequence only of uncontrolled authority over the body . . . . The power of the master must be absolute, to render the submission of the slave perfect."

*Id.* (citing *Jacob v. State*, 22 Tenn. (3 Hum.) 493, 520 (1842); *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829)).

47. See Neal Kumar Katyal, Note, *Men Who Own Women: A Thirteenth Amendment*



This legal right to ownership, combined with the slaveholder's belief in his moral right of ownership and natural superiority to African-Americans, "provided the justification for daily degradation and subjugation."<sup>48</sup> Antebellum masters had free sexual access to their female slaves and generated large numbers of mulatto children who, while in truth the biological children of the master, were treated as slaves.<sup>49</sup> It was not uncommon that slave owners would have incestuous relationships with their daughter-slaves.<sup>50</sup>

Mulatto, quadroon and octoroon faces were the consequence of sexual liberties masters took with their slaves.<sup>51</sup> Every year brought with it multitudes of these slaves: a new group of people springing up in the slave states, held in slavery and looking vastly different from those originally brought to America from Africa. The mixed race in the slave states increased and there were thousands of slaves who did not differ in complexion from the whitest slaveholders.<sup>52</sup>

Slavery was bad enough for the black person but it was worse for the mulatto or quadroon. These slaves, while being subjected to the degradation and misery of slavery, suffered the additional hardship of being all too aware that their own fathers were treating them as property. This was particularly difficult when they contrasted their condition with that of the pampered luxury of their father's lawful children, many of whom were not "whiter" than they.<sup>53</sup>

## 2. Incest

Today, the family is the major sphere offering the potential exercise of almost unlimited personal power and where parents and guardians can exact considerable violence without risking legal sanctions. In an incestuous family, fathers convince their daughters that the "incestuous relationship is normal, necessary and healthy, though subject to misunderstanding by others. Further, he often persuades the daughter that she . . . is to blame for the abuse, and that if she reveals the special secret, dire consequences will befall the entire family."<sup>54</sup> Typically, the perpetrator threatens abandonment, harm<sup>55</sup> and even death<sup>56</sup> to the victim or

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*Critique of Forced Prostitution*, 103 YALE L.J. 791, 799-800 (1993).

48. McConnell, *supra* note 4, at 219.

49. Amar & Widawsky, *supra* note 37, at 1367.

50. See Katyal, *supra* note 47, at 800 (citing ELIZABETH FOX-GENEVESE, WITHIN THE PLANTATION HOUSEHOLD 315 (1988)). "[A]nd masters, who embodied the ultimate authority, might have sexual relations with the women they disciplined and who indeed might be their daughters." *Id.* at 800 n.57 (quoting FOX-GENEVESE, at 315 n.38).

51. See FELDSTEIN, *supra* note 29, at 218. "Thus, wrote Austin Steward, as time passed, the African was not the only slave in America. Eventually, he said, there was as much European blood in the veins of the enslaved as there was African." *Id.* at 223.

52. *Id.* at 219.

53. See *id.* at 218.

54. Cook & Millsaps, *supra* note 9, at 8.

55. See Joselyn B. Lamm, Note, *Easing Access to the Courts for Incest Victims: Toward*

another family member if she refuses to submit or reveals the truth. The abuser “uses the atmosphere of silence and denial . . . to gain and maintain sexual access to his” daughter.<sup>57</sup> Secrecy is essential to the relationship, with a majority of incest victims not telling anyone while living in the home.<sup>58</sup> This secrecy is similar to antebellum slavery because fear of reprisal and consequences worked as a mechanism to silence the victim and perpetuate the oppression. “This conspiracy of silence becomes overwhelming and daughters are unable to speak out against their fathers, even after the abuse has ceased.”<sup>59</sup> Victims who admit to incest or who are discovered are often discredited or defamed.<sup>60</sup> Sadly, they come to believe these denunciations.<sup>61</sup>

### C. INTENT TO OVERCOME

The third characteristic of slavery is the intent to overcome the will of another. The most efficient way to do this is to inculcate the slave to wanting to supply the labor or goods that the master desires.

The exercise of power over a slave depends upon the master’s relationship to the slave, whose services he must compel, coerce or secure by compliant cooperation. Of course, the master can effect compliance by killing or maiming representative slaves, or by so limiting the means of survival that the slave has no option but to submit. However, internal constraints on the master’s exercise of power are set by his own interests. The dead, the maimed, the starved are of little use, except as examples.<sup>62</sup> The master can most effectively satisfy his desires by assuring the cooperation of the slaves. In addition to physical force, masters assured compliance of slaves through limiting options and thereby effecting cooperation without coercion.

#### 1. Antebellum Slavery

Control of the slaves was essential for the master’s business. He achieved this control by various means, ranging from subtle psychology to fear of punishment, and from separation to brute force.<sup>63</sup> Masters did the utmost to provide the slaves with distorted images of the outside world. “Any concept that deviated ever so slightly from the established slave structure was stamped out, and fear was substituted in its place to insure the

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*an Equitable Application of the Delayed Discovery Rule*, 100 YALE L.J. 2189, 2193 (1991).

56. See Kimberly A. Crnich, *Redressing the Undressing: A Primer on the Representation of Adult Survivors of Childhood Sexual Abuse*, 14 WOMEN’S RTS. L. REP. 65, 68 (1992).

57. Lamm, *supra* note 55, at 2192.

58. See Carol W. Napier, Note, *Civil Incest Suits: Getting Beyond the Statute of Limitations*, 68 WASH. U. L.Q. 995, 1002 (1990).

59. Cook & Millsaps, *supra* note 9, at 7.

60. See FORWARD & BUCK, *supra* note 7, at 29.

61. *Id.*

62. See generally Amelie Oksenberg Rorty, *Imagination and Power*, 22 RATIONALITY & SOC’Y 801 (1983).

63. See FELDSTEIN, *supra* note 29, at 109-10.

tranquillity of the plantation."<sup>64</sup> The coercive attempts were both explicit and implicit transactions.

[U]sually the unequal power relationship was sufficient to make a woman submit, particularly if sexual overtones were repeated over time . . . . [I]n the United States slave women usually had nothing to gain, either for themselves or their children, by being the owner's mistress, and did not initiate such relationships. The fact that many encounters took place without recorded resistance by the women does not mean that these women were willing participants. Physical violence was not always necessary to convince a woman that it was in her best interest to submit; usually the implicit threat of violence, based on the owner's unlimited power, was sufficient.<sup>65</sup>

A manifestation of control was the master's sexual dominance over female slaves.

## 2. Incest

In an incestuous relationship, "the father's goal is to control his daughter and to maintain secrecy, cooperation and compliance."<sup>66</sup> The incestuous father manipulates his daughter into thinking that she is a willing partner.<sup>67</sup> Like slavery, types of manipulation include psychological abuse, physical coercion, intimidation, discouragement and threats of isolation,<sup>68</sup> physical harm or even death.<sup>69</sup> He may warn his daughter that if she betrays him to the authorities, he will be put in jail and the family will be without food, clothing and shelter. "Further, he may warn his daughter that if she tells her mother, her mother will suffer a nervous breakdown that the parents will divorce, or that she . . . will be . . . sent to a foster home."<sup>70</sup>

"[V]iolence in intimate relationships can and often does result in more than physical and emotional injury; it is violence with a purpose, and that purpose is to end another's free will."<sup>71</sup>

64. *Id.* at 29.

65. Wertz, *supra* note 6, at 380.

66. Cook & Millsaps, *supra* note 9, at 9. "Unfortunately, in these patriarchal families the mother may be incapable of recognizing the abuse or of rescuing her daughter." *Id.* at 8.

67. *See* Lamm, *supra* note 55, at 2193.

68. *See id.*

69. *See* Crnich, *supra* note 56, at 68.

70. Cook & Millsaps, *supra* note 9, at 8.

71. McConnell, *supra* note 4, at 252.

Battery merely describes being struck as in a beating. It fails to capture the kind of abuse of power central to the battered woman's cases examined in this article. In contrast, involuntary servitude describes the unwilling "subjection to a master" as a much more accurate description . . . . In addition, by renaming these cases of battering, we begin the important task of understanding that violence in intimate relationships can and often does result in more than physical and emotional injury.

When the father makes incestuous advances toward his daughter, he rarely resorts to force or violence – he has no need. There is tremendous psychological coercion built into the father-daughter relationship. Not only has the daughter been taught to obey her father, but she looks to him for moral guidance . . . . So the victim almost always participates in the incest “voluntarily”, not recognizing the subtle coercion that has taken place.<sup>72</sup>

Many incest victims hurt or mutilate themselves to provide relief.<sup>73</sup> Such acts are “an attempt at control, a type of punishment, a means of expressing anger and a way to have feelings.”<sup>74</sup> The need for self-punishment often leads to self-abusive behaviors like alcoholism, drug abuse or prostitution.<sup>75</sup> Adolescent victims frequently become runaways and are often treated as criminals and returned to their parents.<sup>76</sup>

#### D. FOR PERSONAL AGGRANDIZEMENT

The fourth characteristic of slavery is the master’s self-aggrandizement. Whether this master is a slave owner or an incestuous father is of no consequence. The master is gratified by his oppression of another. The essence of slavery is the usurpation of another’s personal power, the master’s increased power is at the expense of the slave. The seduction of power is addictive to the master.

##### 1. Antebellum Slavery

Although slavery was frequently profitable for some owners, this was not always the case. “Slavery has existed in societies with widely differing types of economic organizations, including some where instead of generating a surplus the slaves consumed it.”<sup>77</sup> In essence, slaves became expensive possessions demonstrating the owner’s wealth and social status. “[S]lavery as an institution appear[ed] to be symbolic: slavery exist[ed] for the aggrandizement of the owner through personal domination over another.”<sup>78</sup>

##### 2. Incest

“Aggressors rarely commit incest to satisfy purely sexual needs.”<sup>79</sup> Instead, they use sex with their young daughters as a vain attempt to satisfy a variety of emotional needs and as a method of coping with their feelings

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*Id.*

72. See FORWARD & BUCK, *supra* note 7, at 21.

73. ELLEN BASS & LAURA DAVIS, *THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE* 219 (1988).

74. *Id.*

75. See FORWARD & BUCK, *supra* note 7, at 25.

76. *Id.* at 26.

77. Wertz, *supra* note 6, at 372.

78. *Id.*

79. FORWARD & BUCK, *supra* note 7, at 33.

of inadequacy.<sup>80</sup> “As long as incest remains a secret and other family members or authorities are not alerted to the assaults, the father is assured that he will not be held accountable and that his daughter will remain continually available to him.”<sup>81</sup> Many factors, such as the perpetrator’s threats of psychological and physical harm to the victim or other family members, shame and guilt, “combine to silence the victim . . . thus keeping the incestuous relationship intact.”<sup>82</sup> The Father in the incestuous relationship is aggrandized when his authority is imposed and increases his sense of control. Consequently, he somehow feels more adequate, competent, or sufficient as a result. Thus, the Father’s desire to have this increased perception of himself compels him to maintain and habitualize his coercive actions toward his daughter.

#### F. PRESUMPTION OF DAMAGES

The law presumes damage when there has been a trespass of another’s land. Is it not logical that trespasses upon the person of another are entitled to similar consideration? While damage may be nominal or profound, recognition of such unauthorized intrusions should be entitled to some consideration. This consideration may be a simple declaration of the rights of the parties. In a country that prides itself on individual liberty, it is ironic that property has more rights than people do.

##### 1. Antebellum Slavery

My master used to whisper foul words in my ear. Young as I was, I could not remain ignorant of their import. I tried to treat them with indifference or contempt. The master’s age, my extreme youth, and the fear that his conduct would be reported to my grandmother, made him [sic] bear this treatment for many months.<sup>83</sup>

“I wanted to confess . . . that I was no longer worthy of . . . love; but I could not utter the dreaded words.”<sup>84</sup>

Most slaves were forever marked by the institution in some way, either physically or psychologically. “It was almost impossible . . . to spend the greater part of one’s life in a condition such as slavery and to escape, entirely or even to any significant extent, the influences of the institution upon one’s character.”<sup>85</sup> In childhood, the slave acquired lifelong patterns of response to bondage – including how to accommodate and when to

80. *See id.* at 33-34.

81. Cook & Millsaps, *supra* note 9, at 8.

82. Napier, *supra* note 58, at 1002.

83. HARRIET A. JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 27 (Jean Fagan Yellin ed., Harvard Univ. Press 2000) (1861).

84. *Id.* at 56.

85. FELDBSTEIN, *supra* note 29, at 241-42.

resist.<sup>86</sup> As one slave stated, being a slave at age four or five was not only the organizing fact of her childhood, it also shaped how she saw herself nearly forty years later.<sup>87</sup>

Is it reasonable to extend real property common law recognition of any intrusion on land relegating it changed forever, to an invasion on the human beings, presuming the same categorical relegation? We are born in our bodies, we can never depart from them, and they are the only things we take with us when we die. If damage is presumed for illicit entries of land should not the benefit of an analogy be extended to people?

## 2. Incest

After that first time there would be frequent contacts whenever anybody wasn't looking. If I was alone with him, or even with the whole family around, he would touch me or he would reach over to kiss me good-bye and French-kiss me instead. He was constantly pulling me sexually. He would not let me escape the sexual aspect of him.<sup>88</sup>

"Think of the lowest thing in the world, and whatever it is, I'm lower."<sup>89</sup>

Incest occurs when the victim is a child with diminished comparative ability than her parents to control her environment. The adult is physically larger, controls the money and possesses parental rights of discipline.<sup>90</sup> The child adopts an illusion of responsibility for the abuse in order to have a sense of control over her life.<sup>91</sup> Insistence that her seductiveness precipitated the incestuous activity induces the daughter to view herself as the cause of the incestuous abuse. Additionally, "she may harbor feelings of guilt and shame because she believes she is responsible for her own victimization."<sup>92</sup>

Initially, the child may think the relationship is normal.<sup>93</sup> As she grows older she discovers the shame and taboo that surrounds incest.<sup>94</sup> The accompanying guilt often makes her self-destructive and self-punishing, suffering from a fundamental lack of self-confidence and self-respect.<sup>95</sup>

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86. See LEE, *supra* note 36, at 30-31.

87. See Jennifer Fleischner, *Memory, Sickness, and Slavery: One Slave Girl's Story*, 51 AM. IMAGO, 397 (1994).

88. FORWARD & BUCK, *supra* note 7, at 59.

89. *Id.* at 19.

90. See FRANK, *supra* note 17, at 109.

91. See Lamm, *supra* note 55, at 2193.

92. Cook & Millsaps, *supra* note 5, at 3.

93. Lamm, *supra* note 55, at 2192.

94. *Id.* at 2193.

95. See generally Liz Tong et al., *Personality Development Following Sexual Abuse*, 11 CHILD ABUSE & NEGLECT 371 (1987). A study of thirty-seven girls and twelve boys who had been sexually abused by a parent reveals the depth of its impact. The study showed that: (1) seventy-six percent of the children were less confident than before, (2) thirty

She feels undeserving of emotional, physical or material satisfaction.<sup>96</sup> She has feelings of betrayal and self-loathing at the loss of her bodily privacy and respect.<sup>97</sup>

The effects and symptoms of incestuous abuse continue to develop throughout a victim's life. An adult survivor may "experience anxiety and fear manifested through anxiety attacks, sleep disturbances, nightmares and various phobias."<sup>98</sup> She may experience problems in the areas of sexual arousal, response and satisfaction.<sup>99</sup> Incest may affect the victim's sexual preference and orientation.<sup>100</sup> She may believe she is a liar or a slut.<sup>101</sup> She may be promiscuous, yet mistrust men.<sup>102</sup> She may experience difficulties in forming close personal relationships with others, including her own children.<sup>103</sup> Her need for self-punishment often leads to abusive behaviors like alcoholism, drug abuse<sup>104</sup> or prostitution.<sup>105</sup> The trauma may smolder in a victim's unconscious and cause symptoms for a lifetime.<sup>106</sup>

percent had fewer friends, (3) twenty percent were more aggressive, (4) twenty-four percent had increased sexual awareness, (5) seventeen percent had repeated a year at school and (6) seventeen percent had deteriorated in their school work. *See id.*

96. *Id.*

97. *Id.*

98. *See Napier, supra* note 58, at 1004.

99. *Id.* at 1005.

100. *Id.*

101. *Id.*

102. FORWARD & BUCK, *supra* note 7, at 62.

103. *See Napier, supra* note 58, at 1005.

104. *See FORWARD & BUCK, supra* note 7, at 23.

Odyssey House, a residential drug treatment program with centers throughout the country, reports that 44 percent of its female drug addicts had been incestuously abused as children. John Silverson, a Minneapolis therapist who has treated over five hundred teenage drug addicts, reportedly estimates that figure to be closer to 70 percent.

*Id.*

105. *Id.*

A study of 150 rapists in New Jersey found that 75 percent of them had been sexually abused as children. Studies of prostitution have also yielded a high incidence of incest. Jennifer James, of the University of Washington in Seattle, found that of two hundred prostitutes interviewed, one out of four had been a victim of incest. Other studies have placed the figure closer to 75 percent.

*Id.* at 25-26.

106. *Id.* at 62.

Abused children often grow up to be physically sick adults, plagued by alcoholism, depression, addictions, and obesity, a report released Thursday found.

Psychologists and child experts have been saying for years a troubled childhood has repercussions in adulthood, but this time the Centers for Disease Control and Prevention, or CDC, weighed in with a full report.

Dr. Vincent Felitti of the Kaiser Permanente medical group in San Diego, Dr. Robert Anda of the CDC and colleagues interviewed 9,000 people about a wide variety of factors in their lives and their health, and found episodes of childhood abuse were closely linked with bad health habits in adulthood.

*Abused Kids Often Face Physical Ills as Adults*, ORANGE COUNTY REG. (Cal.), May 15,

## III. PRAYER FOR RELIEF

“Where there is no vision, the people perish: but he that keepeth the law, happy is he.”<sup>107</sup>

. . . What, then, is the constitution? I will tell you. It is no vague, indefinite, floating, unsubstantial, ideal something, colored according to any man’s fancy, now a weasel, now a whale, and now nothing. On the contrary, it is a plainly written document, not in Hebrew or Greek, but in English, beginning with a preamble, filled out with articles, sections, provisions, and clauses defining the rights, powers, and duties to be secured, claimed, and exercised under its authority.

. . . I repeat, the paper itself, and only the paper itself, with its own plainly written purposes is the constitution. It must stand or fall, flourish or fade, on its own individual and self-declared character and objects. Again, where would be the advantage of a written constitution, if instead of seeking its meaning in its words, we had to seek them in the secret intentions of individuals who may have had something to do with the writing of the paper? What will the people of America a hundred years hence care about the intentions of the scribes who wrote the constitution? These men are already gone from us, and in the course of nature were expected to go from us. They were for a generation, but the constitution is for ages.<sup>108</sup>

Justice is not partial. It either exists or it does not. Justice is not served by limiting civil actions on fraudulent violations of liberty. It is in the best interest of the nation to facilitate recovery for those who suffer damage from past abuse. Knowledge of this abuse increases the potential for protection from abusers and awareness can stop the progression.

Victims benefit when the law properly places the responsibility for their abuse on another. Facing the abuser through public confrontation may assist in the therapeutic process by helping the survivor regain a sense of control and personal power.<sup>109</sup> Confrontation is necessary in establishing responsibility by placing it in the rightful hands of the aggressor.<sup>110</sup>

While there are civil and criminal remedies available to victims of

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1998, at 13.

107. *Proverbs* 29:18 (King James).

108. See JAMES M. GREGORY, *FREDERICK DOUGLASS THE ORATOR* 119-21 (Springfield, Mass., Willey & Co. 1893).

109. See Crnich, *supra* note 56, at 75. “Current research is demonstrating that even at a very young age a child’s ability to recall events accurately is better than both the law and common belief formally recognized.” *Id.*

110. See FRANK, *supra* note 17, at 109.



incest,<sup>111</sup> they fall short. The law has failed to provide meaningful relief for victims of childhood incest. Criminal sanctions provide some deterrent effect, but are rarely initiated, and are usually unsuccessful when prosecuted.<sup>112</sup> Even so they do not compensate victims for their injury and, in many cases, are an undesirably extreme measure.<sup>113</sup>

A civil remedy may be a more attractive form of relief. Victims of incest benefit from civil remedies that enable them to place the blame for incest on the abuser publicly, thereby exonerating themselves in their own view.<sup>114</sup> However, civil tort actions for damages present major obstacles that discourage pursuit of this legal remedy. In addition to the emotional strain of bringing suit against their fathers, plaintiffs face substantive problems with the burden of proof and the procedural obstacles of short and inconsistent statutes of limitations.<sup>115</sup> These statutes restrict the period during which a suit may be brought after injury.<sup>116</sup> Because of a variety of recognized psychological reactions ranging from avoidance and denial to complete repression of the incestuous events, victims are often unable to bring their civil tort cases to court within the time frame prescribed.<sup>117</sup>

Because the Thirteenth Amendment does not have a federal statute of limitations, a civil action under that theory is not precluded by the passing of time. The standard of proof remains the same, so that the passage of time becomes relevant for carrying the burden to the plaintiff and is not prejudicial to the accused. A perpetrator should not have the benefit of the peace of mind knowing that the time for filing has lapsed when the victim suffers for the rest of their life. State laws should be an alternative form of action but the overarching principle of recovery should at least be protected by the federal Constitution.

Preclusion of suits by statutes of limitations effectively denies adult incest plaintiffs compensatory and emotional relief for injuries they suffer as a result of childhood victimization. It also prevents notice to the community. Even if one remembers incidents of abuse, many years may lapse before realizing the ultimate effects of such. What seems like unreasonable delay is in fact reasonable under the circumstances.<sup>118</sup>

The Constitution can be likened to a trust, or an arrangement where property is transferred to another to hold legal title with the intention that it

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111. Criminal remedies are an extreme measure that do compensate the victim for her abuse, while civil remedies present substantive problems with the burden of proof and procedural obstacles of short and inconsistent statutes of limitation. *See* Lamm, *supra* note 55, at 2195. For a more complete discussion of representation of adult survivors of incest see generally Crnich, *supra* note 56.

112. *See* Lamm, *supra* note 55, at 2189.

113. *Id.* Criminal prosecutions may be psychologically overwhelming and an extreme measure for survivors who want their fathers to be treated rather than incarcerated.

114. *See* Lamm, *supra* note 55, at 2195.

115. *See id.*

116. *See id.*

117. *Id.* at 2192.

118. *See id.*

be administered for the benefit of another. The citizens of the United States are the true owners, as well as the beneficiaries. We exchange a measure of God given personal freedom, or an interest in ourselves, for the protections of the Constitution. The trustee is the federal government who holds a legal interest, subject to an equitable obligation, to keep or use the property for our benefit.

Children are beneficiaries whose rights do not vest until the age of majority. Parents are co-trustees and agents of the government. They simultaneously hold legal title and the social authority to act in the best interests of the true owner, the child. A breach of trust occurs when the corpus is invaded for an improper purpose or when the trustee fails to exercise his fiduciary duties resulting in loss to the trust. Trustees are liable for all resulting losses. Where there is a violation of the plain meaning or spirit of these promises, there has been a breach. The damage is measured by what it would take to make the child whole.

The Supreme Court has defined the concept of "property as an entitlement", recognizing that an individual's legally entitled benefit creates an expectancy that the benefit will not be arbitrarily terminated.<sup>119</sup>

The concept of "liberty" is more amorphous than that of property, embodying principles of freedom that lie at the roots of our legal system. The Court has said that liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, . . . to worship God according to the dictates of his conscience and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men."<sup>120</sup>

I have attempted to analogize antebellum slavery to modern day incest. The analogy is not perfect. But the parallels between the two provide a compelling case for treating father-daughter incest as slavery under the Thirteenth Amendment. The men who wrote the Thirteenth Amendment may be gone from us, but their words live on for ages: "Neither slavery nor involuntary servitude. . . shall exist within the United States or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation."<sup>121</sup>

"But how recognize a slave child from a free child? Unlike a free adult, a free child is customarily subject to the custody, control, and guardianship of another."<sup>122</sup> This distinction however, should not categorically exempt the parent-child relationship from the protections of

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119. CHEMERINSKY, *supra* note 25, at 431-32.

120. JEROME A. BARRON & C. THOMAS DIENES, *CONSTITUTIONAL LAW* 190 (2d ed. 1991) (citation omitted).

121. U.S. CONST. amend. XIII, §§ 1, 2.

122. AMAR & WIDAWSKY, *supra* note 37, at 1374.

the Thirteenth Amendment.<sup>123</sup> “A parent’s control over a free child is more akin to trusteeship than title: parental control is justified only if such control is plausibly in the interests of the child.”<sup>124</sup> Parents hold the constitution in trust for their children.

Arguably, in fashioning a test, the focus should be not on the subjective will of an individual child but rather, “whether custody over a child looks more like the ‘family’ system the Amendment was designed to protect, or the ‘slavery’ system it was designed to prohibit.”<sup>125</sup> When control ceases to be plausibly in the best interests of the child, it looks more like title than trusteeship, and thus, more like true “slavery” than true “family”.<sup>126</sup> “When the child’s interests are utterly disregarded, the child is in effect being treated as a possession, as a chattel – as a slave – rather than as a ‘free’ person with interests (even if not a fully formed will) of her own, interests worthy of respect.”<sup>127</sup>

If the Thirteenth Amendment is to be more than a dead letter, courts must recognize that fathers who engage in incest engage in slavery, showing apparent authority, representing fraudulent power, with the intent to overcome the will of another. Damages, therefore, must be presumed, and survivors of incest must have meaningful legal remedies.

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123. *See id.* For a description of how parents can treat their children as slaves, see Stuart Pfeifer, *Girl’s Parents Face Trial On Pimp Charges*, ORANGE COUNTY REG. (Cal.), Nov. 8, 1996, at 1.

She was only ten-years old and she was scared, she said. Her dad pushed her toward Beach Boulevard and said, “Learn how to have guts.”

With that, a school girl from Stanton said she began her two-year career as a prostitute – forced to work the streets by her parents, who pocketed the proceeds.

They were two years of dark streets, cheap motel rooms, and humiliation that the girl said left her contemplating suicide and put her parents in jail facing state prison.

Judge Corey S. Cramin on Thursday ordered the girl’s parents to stand trial on felony pimping and pandering charges after the girl testified for two days in West Orange County Municipal Court in Westminster.

“I was scared of my dad,” the girl testified. “If I said no . . . then he would treat me like a piece of trash.”

Cramin also ordered the father, a 39-year-old auto mechanic, to stand trial on charges that he sexually molested the girl. Her mother is charged with a misdemeanor for allegedly visiting the girl at Orangewood Children’s Home and pressuring her to change her story.

*Id.*

124. AMAR & WIDAWSKY, *supra* note 37, at 1376.

125. *Id.*

126. *Id.*

127. *Id.* at 1377. I have substituted the concept of “control” for the authors’ concept of “custody”. The definition of slavery as total control of one human being over another might seem, without further qualification, to emancipate a child at birth.