

REPARATIONS, UNJUST ENRICHMENT, AND THE IMPORTANCE OF KNOWING THE DIFFERENCE BETWEEN THE TWO

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The question of whether and how to sue in private law for the injuries caused by slavery in the United States is important from both a social and legal perspective. Here, I am going to examine a very small and specific part of the question. My advice to those who wish to address the question of historic injustice through tort suits is to move forward very carefully, and therefore I will risk boring you by picking a topic that might strike you as unbelievably tangential to the hot-button issues of reparations. I am going to talk to you about—I hate to say it—the separation of law and equity.

Discussing law and equity is important because the root theory for legal liability in the American slavery cases, and one of the two root theories for liability in the Holocaust slave labor cases, is a claim of “unjust enrichment.”¹ It is very interesting that out of such an obscure, almost forgotten part of American private law, such a powerful new legal movement has been born. In this symposium others have written about other theories of recovery and I do not mean to suggest that unjust enrichment is the only approach. But, it was an element of the Holocaust litigation—not the only one, but a large one. It is, in fact, the foundation of the most recent lawsuit

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1. See Plaintiff’s Compl. and Jury Trial Demand, *Farmer-Paellmann v. Fleet-Boston Fin. Corp.*, No. CV 02-1862 (E.D.N.Y. filed Mar. 26, 2002) at 18 (plaintiff invoking the theory of unjust enrichment in the context of slavery in America); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 470–71 (D.N.J. 1999) (same for forced labor during the Holocaust); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 252, 254 (D.N.J. 1999) (same for forced labor during the Holocaust). The other major legal theory for claiming damages in the Holocaust suits was provided by the Alien Tort Claims Act. See 28 U.S.C. § 1350 (2001). For a discussion of the theories involved in the Holocaust litigations, see Burt Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 615 (2003).

filed in federal court in Brooklyn.² It is thus very important to understand what unjust enrichment means.

The irony is especially striking to me because when I went to law school we were not taught about unjust enrichment or even equity in general. It was seen as a relic of the nineteenth century. The whole idea of splitting up the world into law and equity was supposed to have been buried by the Legal Realists, who taught us that such categories were formalistic and unsustainable.³ Yet, the division has come back in two important groups of litigation. The first is tobacco litigation by the states against the tobacco industry.⁴ Interestingly, when the legal strategy of the attorneys in the states' claims is peeled away, it was a claim of unjust enrichment which resulted in a \$243 billion settlement.⁵ Why did those lawyers choose unjust enrichment? There are a variety of reasons, but one was that they thought they could achieve a tactical advantage. A claim for unjust enrichment, as a claim in equity, would be immune to certain affirmative defenses in law. These included assumption of risk, a defense which had been bedeviling lawyers in many of the products' liability cases.⁶ Whether or not the strategy was right or wrong is still open to debate. The case was settled before any court really had a chance to examine the reasoning of the plaintiffs' lawyers,⁷ but the affirmative defense problem was the reason for choosing unjust enrichment. Similarly, in the Holocaust cases, unjust enrichment played a certain tactical role. And it may be suspected that in the American slave labor cases, unjust enrichment has been

2. See Plaintiff's Compl. and Jury Trial Demand, Farmer-Paelmann, No. CV 02-1862.

3. See, e.g., GRANT GILMORE, *THE AGES OF AMERICAN LAW* 41-67 (1977).

4. This litigation was ended in a historic settlement known as the "Master Settlement Agreement." See *Master Settlement Agreement*, available at <http://www.naag.org> (Nov. 23, 1998). A suit by the federal government, based in part on a theory of unjust enrichment or disgorgement (by way of RICO), is still being litigated in the District Court of the District of Columbia. See *United States v. Philip Morris Inc.*, 116 F. Supp. 2d 131, 151-52 (D.D.C. 2000) (denying a motion to dismiss the RICO disgorgement claim).

5. See Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 GA. L. REV. 847, 853 (1999).

6. In writing on this point, Rendleman notes:

The State's Medicaid recovery suit surmounted two of the major obstacles which had impeded smokers' quest for tort recovery. It evaded the tobacco companies' argument that the people who had chosen to smoke were responsible for their own plight; the State plaintiff never smoked, instead the State was required to pay the medical expenses for those who did.

Id. at 926.

7. See Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331, 337-40 (2001).

chosen for specific, tactical reasons, one of which is likely that the plaintiffs will be able to evade defenses based on statutes of limitations.

I would like to explain now what an unjust enrichment claim really means and why I think it will not be as successful as one might hope. But, this is only cautionary. It does not mean one should not pursue the strategy; rather, it means that one should pursue the strategy with eyes open and an understanding of the pitfalls.

The history of unjust enrichment is complicated and, some might say, a little tedious. But it is important to remember that before the unification of law and equity in the United States, the form of action in which the claim was brought was almost as important as the substantive claim itself. The distinction between a suit for damages and a suit for an injunction was critical and often fatal to a careless lawyer.⁸

Unjust enrichment is an interesting example of a cause of action that was formed on the borderline between a claim for damages and a claim for an injunction. Originally, when early courts consistently held that either a claim for damages or equity would preclude the other, the problem arose of how to bring a claim involving an intangible form of property. It was clear that if one held legal title to a thing and could show that one had been physically dispossessed of it, one could get an injunction to have it returned.⁹ It was also clear that if one had legal title to a thing, and that thing was injured, damages were recoverable.¹⁰

But what if the right were to something intangible, and thus incapable of bearing title? For example, consider labor. Even though labor is plainly something of value, it is neither a moveable nor real property. From a doctrinal point of view, labor is therefore something in which one could not claim legal title. In order to accommodate this type of concern, early English courts created a cause of action called the writ of *assumpsit*. Essentially, the writ of *assumpsit* was a form of action in which someone who did not have

8. See CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* 437 (4th ed. 1983) ("The forms of action are abolished. No longer is a judgment to be reversed because the pleader chose the wrong form."); see also FED. R. CIV. P. 2 ("There shall be one form of action to be known as 'civil action.'"); FED. R. CIV. P. 18(a) (Plaintiff "may join . . . as many claims, legal, equitable, or maritime, as the party has against an opposing party."); see generally, 1 DAN B. DOBBS, *THE LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* § 4.1(3) (2d ed. 1993).

9. See DOBBS, *supra* note 8, § 4.2(1), at 570-71.

10. *Id.* at 577-78. This was the action of trespass on the case, which is the genesis of much of modern tort law, of course.

legal title to an interest, because that interest was intangible, could nonetheless claim damages for it.¹¹ Although an injunction could not be used to protect intangible property, at least damages could be ordered by the court. This was a radical new development around 1600,¹² which evolved into a form of action as a claim for quasi-contract, recognized first by Lord Mansfield in 1760.¹³ This is really what is meant when discussing a claim in equity for the return of something of value for which there is no title, regardless of whether one called the action quasi-contract or “quantum meruit,” which is a subcategory of quasi-contract.¹⁴ Both are old common law forms of action based upon the arguments set out by Mansfield in *Moses v. Macferlen*.¹⁵ In *Moses*, Mansfield explained the rationale behind treating these claims in equity as if they were claims in law, an explanation still quoted today in leading state court opinions: “[D]efendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.”¹⁶

Beginning with *Moses*, an intersection between law and equity is visible, in which equity is doing the substantive work but law gives rise to the form of the cause of action. This hybrid action is not nearly as necessary as it once was because of the combination of courts of law and equity. Today suits for damages are much easier to bring because the complaint need only specify the remedy demanded. But hybrid actions like quasi-contract and quantum meruit survive today and are useful in a handful of cases.¹⁷ However, the hybrid actions bring some risks.

First, the ability to claim compensation for the loss of an intangible interest to which no legal title exists, perfect for when labor is taken but not paid for, is nevertheless still a claim in damages and therefore technically still a claim in law. Most state codes refer to a quasi-contract or quantum meruit claim as a claim in law (for damages) and apply a closely analogous statute of limitations (usually the statute for contract actions).¹⁸ Therefore, the idea that the stat-

11. See DOBBS, *supra* note 8, § 4.2(3), at 576–77.

12. *Id.* at 578.

13. See *Moses v. Macferlen*, 97 Eng. Rep. 676, 678 (K.B. 1760).

14. See DOBBS, *supra* note 8, § 4.2(3), at 581, 583.

15. *Moses*, 97 Eng. Rep. at 678, 680.

16. *Id.* at 681. For a typical modern citation, see State *ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 154 n.1 (Iowa 2001) (quoting the same statement of Lord Mansfield to explain unjust enrichment in the modern case).

17. See, e.g., Doug Rendleman, *Quantum Meruit for the Subcontractor: Has Restitution Jumped off Dawson's Dock?*, 79 TEX. L. REV. 2055 (2001).

18. See, e.g., N.Y. C.P.L.R. 213 (Consol. 2002) (six-year statute of limitations in New York).

ute of limitations problem is avoidable simply by using a claim of equity is a mistake. However, though there are statute of limitations requirements under *assumpsit*, courts are willing to bend the categorization. As a result, some people have argued it is possible to treat claims of unjust enrichment as equitable under certain circumstances.¹⁹

But, what if the claim is treated as one in equity? One faces even bigger problems. It is hornbook law that equitable defenses fare much better against claims in equity than claims in law.²⁰ For example, one of the most important equitable defenses raised in remedies practice is that the defendant is an innocent holder or bona fide purchaser. Innocent holders or bona fide purchasers who do not have legal title are at a disadvantage to plaintiffs who can prove legal title. But plaintiffs who can only claim equitable title are on the same footing as innocent holders who also can claim equitable title, depending on the history of the transactions by which they gained the benefit.²¹ Therefore anyone who wants to bring an unjust enrichment claim from a hundred years ago must face the fact that there are going to be many innocent holders. Interestingly this may explain why the primary focus of the pending American slave labor cases is on corporations. It is not clear to me that a corporate defendant like Aetna can be seen as an innocent holder. Aetna existed a hundred years ago and is perhaps the same holder that it was a hundred years ago.²² Nevertheless, it is going to be a big problem with certain land transfers.

The final problem in terms of treating reparations claims as equity is the problem of tracing damages. Unlike claims in law for something to which one has a legal title, by definition a claim for something to which one has no legal title but only equitable title is a vague and unformed interest in which the equitable claims of others are mixed. In equity, to trace the thing one has lost, accounting for it is required. The plaintiff will have the burden of proof to show how much of the current thing sought for recovery

19. See DOBBS, *supra* note 8, § 4.2(3), at 581–84.

20. See DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 4.7(1) (Hornbook Series, 2d ed. 1993).

21. Compare *Price v. Neal*, 97 Eng. Rep. 871, 872 (K.B. 1762) (announcing the rule that an innocent payee cannot be compelled by a payor to refund money paid to him on a forged bill), with *Peed v. Burleson's, Inc.*, 94 S.E.2d 351, 353 (N.C. 1956) (holding that the purchaser of the stolen goods did not obtain legal title and was thus obliged to pay the rightful owner); see generally DOBBS, *supra* note 20, § 4.7(1)–(2).

22. See <http://www.aetna.com/history/index1.htm> (last visited Aug. 31, 2002) (providing timeline of Aetna's history).

came from the plaintiff, and how much of it came from the labor or improvements of the present holder, even if they are a wrongful holder.²³ Of course, this puts a tremendous burden on plaintiffs who are claiming unjust enrichment. One could argue these cases are not going to be tried anyway. They are going to be settled, and this issue will be worked out in the conference room. Nonetheless, it raises yet another barrier.

This talk focuses on claims of unjust enrichment, not claims under the Alien Tort Claims Act, which represent a different set of legal issues.²⁴ However, I want to raise a question which I raised in the context of Holocaust litigation:²⁵ to what extent does the language of law shape us, and to what extent do we shape the language of law? One can say that the master's tools will take apart the master's house. In that respect, one can use the category law professors dwelt upon in 1890 called "unjust enrichment." But the problem is that this buys into a rhetoric and vocabulary which fundamentally commodifies the wrong because, ultimately, claims in equity for unjust enrichment are about replacing and returning lost property. The claims are not about violations of human rights. The claims are not about destruction of culture. And the claims are not about the oppression of people. They are about returning property that has been wrongfully taken.

The archetypical case in unjust enrichment concerns a piece of property which was wrongfully or mistakenly taken, and is now being claimed in replevin.²⁶ Since few people really want to focus on the exact legal categories in question, the American slavery class action, which is really an action in assumpsit, has been explained in the media in terms that make the suit sound more like an action in replevin—for the return of property that was had and lost. Why should anyone care about the minute distinctions between these technical categories, both of which have "something" to do with equity and unjust enrichment? Why should it matter if the lawsuit,

23. See DOBBS, *supra* note 8, § 4.1(2), at 561.

24. See generally Matthew R. Skolnik, *The Forum Non Conveniens Doctrine in Alien Tort Claims Act Cases: A Shell of Its Former Self After WIWA*, 16 EMORY INT'L L. REV. 187 (2002); Lisa Lambert, *At the Crossroad of Environmental and Human Rights Standards: Aguinda v. Texaco, Inc. Using the Alien Tort Claims Act To Hold Multinational Corporate Violators of International Laws Accountable in U.S. Courts*, 10 J. TRANSNAT'L L. & POL'Y 109 (2000).

25. See Anthony J. Sebok, *Un-Settling the Holocaust (Part I)*, at <http://www.writ.news.findlaw.com/sebok/20000828.html> (August 28, 2000); Anthony J. Sebok, *Unsettling the Holocaust (Part II)*, at <http://writ.findlaw.com/sebok/20000829.html> (August 29, 2000).

26. See, e.g., *Wright v. Redding*, 408 F. Supp. 1180 (E.D. Pa. 1975).

and those who press it, end up making a case in equity for the return of lost property? My caution is this: the shape and informal structure of unjust enrichment can be turned to make a political point, but the reverse can be true as well.

The shape and structure of unjust enrichment can be used to turn back and sap the moral language of the reparations movement.²⁷ What was wrong about slavery under the Holocaust was not that people were not paid for their labor. What was wrong about slavery in the Holocaust was that people were enslaved because of their religion, and because of sexual orientation, and because of beliefs. What was wrong about slavery in the African American context was not that African Americans were not asked if they wanted to get on ships and come to America and work on plantations before they were dragged onto ships, nor that they were not paid. What was wrong about chattel slavery is rooted in the ideology of racial oppression. And therefore, one must consider that trying to address the wrongs of racial oppression through the language of missing property opens up a door which we must be very careful about walking through.²⁸

27. I present this critique in Anthony Sebok, *Prosaic Justice*, LEGAL AFFAIRS Sept.–Oct. 2002, at 51.

28. Cf. Donald Aquinas Lancaster, Jr., *The Alchemy and Legacy of the United States of America's Sanction of Slavery and Segregation: A Property Law and Equitable Remedy Analysis of African American Reparations*, 43 HOW. L. J. 171, 212 (2000) (acknowledging that “coming to grips with injustice is difficult for all” and advocating that “African Americans must utilize every resource to correct past wrongs and prevent future injustices. A demand for African American reparations must be advocated for until each and every Lancaster, and each and every other African American family receives reparations for 306 years of slavery and segregation”); Jeremy Levitt, *Black African Reparations: Making a Claim for Enslavement and Systematic De Jure Segregation and Racial Discrimination Under American and International Law*, 25 S.U. L. REV. 1, 4 (1997) (describing “the movement for black reparations” as “an international human rights issue”); Willie E. Gary, et al., *Making the Case for Racial Reparations: Does America Owe a Debt to the Descendants of its Slaves?*, HARPER'S, Nov. 2000, at 37.

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