

## ARTICLES

### PROPONENTS OF EXTRACTING SLAVERY REPARATIONS FROM PRIVATE INTERESTS MUST CONTEND WITH EQUITY'S MAXIMS

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“The sensitive ear has heard the collective ‘thank you’ from those who were freed, as well as the historic apologies in words and deeds from persons of good will for the evils of slavery.”—Charles Ronald Norgle, District Judge.<sup>1</sup>

#### ABSTRACT

A court of law or a court of equity is not an appropriate forum in which to resolve issues of collective descendant entitlement and collective descendant liability, which are at the core of the national conversation on slavery reparations.<sup>2</sup> This article considers the vulnerabilities of private property to a judicial reparations decree that would compensate descendants of African slaves for the adverse economic effects of slavery, an institution that was lawful in parts of the United States before the ratification of the Thirteenth Amendment in 1865. This article concludes that there is no basis, either at law or in equity, for such relief. This article focuses on the vulnerability to judicial levy of the property of defendants in slavery reparations actions, not on who might have standing in the first place to bring such an action. The article assumes both standing and some

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1. *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d 721, 781 (N.D. Ill. 2005).

2. Professor Mari J. Matsuda, a proponent of descendant liability, writes: “Members of the dominant class continue to benefit from the wrongs of the past and the presumptions of inferiority imposed upon victims. They may decry this legacy, and harbor no racist thoughts of their own, but they cannot avoid their privileged status.” Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 379 (1987). According to Professor Alfred L. Brophy, the argument that has been “advanced most seriously against reparations [] is that the people currently asked to pay had nothing to do with the injustices of the past.” Alfred L. Brophy, *The Cultural War over Reparations for Slavery*, 53 DEPAUL L. REV. 1181, 1202 (2004).

demonstrable in rem nexus between plaintiffs and the private property sought to be reached. Because courts and scholarly commentaries quite rightly have concentrated on the threshold standing question, questions of defendant liability, whether in rem or in personam, have been given short shrift. This article endeavors to close the analytical loop.

#### INTRODUCTION

Since the end of the Civil War, former African slaves and their descendants have sought reparations for the wrongful enrichment of slave owners and slave traffickers when slavery was lawful in parts of the United States. Their strategy has been twofold: (1) to attempt to legislatively tap into the federal treasury; and (2) to attempt to reach, primarily by judicial decree, the private property of their fellow citizens.<sup>3</sup> This article considers the vulnerabilities of private property to a slavery-based judicial reparations decree<sup>4</sup> and concludes that there is no basis, either at law or in equity, for such relief.<sup>5</sup>

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3. See generally *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 734-36 (noting that while the political initiatives of the slavery reparationists to legislatively tap into the federal treasury began in earnest at the end of the nineteenth century, it was only at the beginning of the twenty-first century that descendants of slaves begin in earnest to seek judicial “reparations from private corporations that were alleged to have unjustly profited from the institution of slavery”). Reparation has one private law meaning and two public law meanings. In the private law context, reparation is a substantive remedy for unjust enrichment that is levied against a private interest by a court. See generally CHARLES E. ROUNDS, JR. & CHARLES E. ROUNDS, III, LORING AND ROUNDS: A TRUSTEE’S HANDBOOK § 7.2.3.3 (Supp. 2011) [hereinafter LORING AND ROUNDS]. In the public law context, there are the war reparation and the legislative reparation. War reparation is an economic sanction that a state imposes by force of arms on another state. The provisions of the Treaty of Versailles (1919), which “formally asserted Germany’s war guilt and ordered it to pay reparations to the Allies,” come to mind. See COLUMBIA ENCYCLOPEDIA 2304 (5th ed. 1993). Some reparation payments were to be made in cash, while others were to be made in kind, such as by transfer of coal, steel, and ships. *Id.* Legislative reparation is the appropriation of general tax revenues to fund social programs. See generally ALFRED L. BROPHY, REPARATIONS PRO & CON 141-64 (2006). Such programs might provide for direct grants to individuals in order to remedy the alleged residual adverse economic effects of enslavement on those individuals. War reparation and legislative reparation are beyond the scope of this article. While each activity may be politically controversial, neither raises legal issues that are particularly troublesome. See *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 781 (noting that “from the onset of the Civil War until present, the historical record clearly shows that the President and Congress have the constitutional authority to determine the nature and scope of the relief [that slavery reparationists seek]”). That said, the conflation of the judicial decree and the legislative appropriation in the national slavery reparations conversation has not been helpful. See Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 690 (2003) (noting that “commentators on all sides of the issue focus excessively on abstract questions about the justice of reparations while ignoring institutional and prudential questions about how reparations schemes should be designed”).

4. By private economic interests, I mean one’s legal or equitable property rights. The enforcement of a reparation decree that depletes the assets of a private corporation, for example, erodes the legal property rights of its stockholders. The enforcement of a reparation decree against the assets of a private corporation which itself is an asset of a mutual fund erodes the equitable property rights of those who own participations in the fund. It is said that property does not have rights; people do. See *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972). A corollary to

In 1865, General William Tecumseh Sherman issued Special Field Order, No. 15, granting each family of freed slaves a surplus Army mule plus 40 acres of tillable land, *land that had been in private hands* before the Civil War.<sup>6</sup> This order was part of Congress's and President Lincoln's general effort to confiscate land from former slave owners to redistribute it to former slaves during and immediately after the Civil War.<sup>7</sup> As it turned out, "[t]hese attempts ultimately failed in 1865, when President Johnson ordered that lands be returned to their 'pre-Civil War owners.'"<sup>8</sup> So ended the executive's effort to unilaterally parcel out slavery reparations at the expense of private interests.

In 2006, the U.S. Court of Appeals for the Seventh Circuit dismissed nine class actions that African-American descendants of slaves had brought against certain private corporations, thus upholding the trial court's decision.<sup>9</sup> The plaintiffs alleged that prior to the enactment of the Thirteenth Amendment, the corporations or their predecessor entities had been complicit in the enslavement of Africans.<sup>10</sup> The court based its ruling on the plaintiffs' lack of standing to bring the suits and on their failure to allege a connection between the defendants' alleged misconduct and "the financial and emotional harm that the plaintiffs claim to have suffered as a result of that conduct."<sup>11</sup>

This article focuses on the vulnerability to judicial levy of private property in a slavery reparations action, not on the plaintiffs' standing to bring such actions in the first place. This article assumes both standing and some demonstrable in rem nexus between the plaintiffs and the private property. Because courts and scholarly commentaries quite rightly have concentrated on the threshold standing question, questions of defendant liability, whether in rem or in personam, have been given short shrift. Professor Alfred L. Brophy's excellent *Reparations Pro & Con* is a notable exception. In Chapter Five, he writes:

The unjust enrichment rationale is particularly complicated because it deals with rights to some identifiable property. There are two claimants; often both are innocent, but we are trying to apportion property to one or the other. There are particularly strong equities when we are dealing with the current possessor who is a

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that maxim is that a for-profit corporation does not have property rights; its owners do. The corporation is the property. While by statute the corporation may be a legal person, it is not an equitable one. We shall see that equity's ability to pierce the corporate veil on occasion will ultimately work against the case for judicial reparations for the moral wrong of slavery.

5. Opponents of slavery reparations against private interests would actually be well-advised to embrace the equity paradigm; proponents need to either invoke some other rationale for judicially reaching the private economic interests of their fellow citizens, or resign themselves to merely advocating for social legislation that would directly or indirectly shunt general tax revenues into the hands of those who claim to stand in the shoes of African slaves.

6. *Sherman's Field Order No. 15*, NEW GEORGIA ENCYCLOPEDIA, <http://www.newgeorgiaencyclopedia.org/nge/Article.jsp?id=h-3353> (last visited Jan. 20, 2011).

7. *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 734.

8. *Id.*

9. *In re African-American Slave Descendants Litig.*, 471 F.3d 754, 756, 763 (7th Cir. 2006).

10. *Id.* at 757.

11. *Id.* at 759.

gratuitous beneficiary of the original wrongdoer. The statute of limitations does not offer so strong a support when you are contemplating disgorging a benefit from someone who has received it unjustly. So if there were still slaveholders alive, the case against them is compelling. In a manner of speaking, there are still some who hold from slaveholders, because there are some people who are gratuitous beneficiaries of those slaveholders. Here tracing is important, because that allows us to follow assets into a new form—the “innocent” beneficiary of another’s wrong. When we have a beneficiary of a gratuitous transfer (such as something passed down within a family), there is at least the possibility of treating that beneficiary as standing in the shoes—and taking the property subject to the same obligations—of the grantor.<sup>12</sup>

This article has no quarrel with the content of that paragraph. Rather, the concern is the vast amount of background equity doctrine that is merely alluded to, presumably on the assumption that it is common knowledge. This assumption, however, is unwarranted:

On this side of the Atlantic, there are now few left who are equipped, by formal legal training at least, to appreciate the boldness of the efforts of the realists, via the *Restatement of Restitution* (1937), to colonize the “vast *terra incognita* occupied by the set of legal actions grouped under the impenetrable name of ‘quasi-contract’ and a miscellaneous set of equitable remedies (principally constructive trust)” in that “many American lawyers would be hard pressed even to say what equity is (or was).”<sup>13</sup>

Hence the need for a primer on the critical background equity doctrine that would be applicable and controlling in a slavery reparations action against private interests.

It has been suggested that the law of unjust enrichment is tailor-made to remedy the wrongs of slavery.<sup>14</sup> This article explains why judicial-reparations advocates should not get their hopes up. The law, even as it has been enhanced by equity, has never been sympathetic to stale claims:

Statutes of limitations are based on “[t]he theory that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation

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12. BROPHY, *supra* note 3, at 113-14. Another exception is Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustice*, 103 COLUM. L. REV. 689, 699-703 (2003) (likewise, these authors merely allude to a vast body of doctrine that likely would frustrate the plaintiffs’ efforts in a slavery reparations action to obtain equitable relief).

13. Charles E. Rounds, Jr., *Relief for IP Rights Infringement is Primarily Equitable: How American Legal Education Is Short-Changing the 21st Century Corporate Litigator*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 313, 332 (2010) [hereinafter Rounds, *Relief for IP Rights Infringement*] (quoting Andrew Kull, *Restitution and Reform*, 32 S. ILL. U. L.J. 83, 87 (2007)).

14. See, e.g., Margalynne Armstrong, *Reparations Litigation: What About Unjust Enrichment?*, 81 OR. L. REV. 771, 772 (2002).

and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.”<sup>15</sup>

Equity has also been unsympathetic to stale claims, as evidenced by the maxim, “Delay defeats equities.”<sup>16</sup>

A reparations action brought at law in quasi-contract or tort against a slave owner or a private corporation that at one time profited from the slave trade is doomed to fail for several reasons. First, slavery was a lawful form of ownership in parts of the United States until the Thirteenth Amendment was ratified in 1865, and thus the slave trafficker and the slave owner could not have been unjustly enriched by their involvement with slavery.<sup>17</sup> Second, the statutes of limitations applicable to such actions at law would have run long ago.<sup>18</sup> Similarly, a reparation action brought at law against the stockholders of the corporation personally would be an act of futility. In addition, the law generally insulates corporate stockholders from the corporation’s contract and tort liabilities, while the corporation itself is generally insulated from the personal contract and tort liabilities of the stockholders.<sup>19</sup>

On the other hand, if in exercising its equitable powers, a court could be persuaded to pierce the corporate veil as it will in isolated instances in the fiduciary context,<sup>20</sup> then it is theoretically possible that the court could be

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15. *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d 721, 770-71 (2005) (citing to *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944)).

16. *See* SNELL’S EQUITY ¶ 5-16 (John McGhee et al. eds., 31st ed. 2005) (delay defeats equities, or, equity aids the vigilant and not the indolent: *vigilantibus, non dormientibus, jura subveniunt*).

17. “This violent and oppressive system was supported by the United States legal system for a long period of time. Thus slavery was historically more than simply a social and economic institution. It was also an established legal system.” *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 728. One who is unjustly enriched is unjustifiably enriched; that is to say, there is no legal or equitable basis for the enrichment. *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1, cmt. b (Discussion Draft 2000). Since enslavement was a legally permissible form of ownership in parts of the United States prior to ratification of the Thirteenth Amendment, a slave owner could not have been unjustly enriched by the services of the slave, absent the retroactive application of new law to the contrary.

18. *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 774 (noting that the discovery rule, the continuing violation doctrine, equitable estoppel, or equitable tolling cannot revive claims already barred by a statute of limitations).

19. *See generally* Henry Hansmann, Reiner Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335, 1335 (2006) (“While limited liability shields owners’ personal assets from a firm’s creditors, entity shielding protects firm assets from the owners’ personal creditors (and from creditors of other business ventures), thus reserving those assets for the firm’s creditors.”).

20. *See, e.g.*, LORING AND ROUNDS, *supra* note 3, § 6.1.3 (in the case of a fully entrusted non-charitable corporation, trust law generally trumps corporate law); *id.* § 9.8.1 (the charitable corporation is a trust in substance though not in form); Charles E. Rounds, Jr., *Lawyer Codes Are Just About Licensure, the Lawyer’s Relationship with the State: Recalling the Common Law Agency, Contract, Tort, Trust, and Property Principles that Regulate the Lawyer-Client Fiduciary Relationship*, 60 BAYLOR L. REV. 771, 802 (2008) [hereinafter Rounds, *Lawyer Codes*] (incorporation cannot limit the lawyer-agent’s liability to the client-principal in tort); Charles E. Rounds, Jr. & Andreas Dehio, *Publicly-Traded Open End Mutual Funds in Common Law and Civil*

persuaded to equitably follow the shares from transferee to transferee down through time;<sup>21</sup> to declare the shares' current owners constructive trustees of the shares for the plaintiffs' benefit;<sup>22</sup> and to order the constructive trustees to transfer title to the shares to the plaintiffs as slavery reparations.<sup>23</sup>

The core of the strategy would be this: Instead of the corporation being the defendant in an action at law, it would be deemed the equitable encapsulation of the unjust enrichment. In other words, the corporation would be treated in equity as the very subject of the litigation, with the shares of stock being the securitization of that unjust enrichment. At least in theory, these shares could be equitably followed *in specie*, that is in kind, from the time when they left the hands of their original owners—who had profited directly from slavery and thus were arguably culpable in equity—down in time to when they entered their present owners' innocent hands. The theoretical advantage of this strategy is twofold. First, the doctrine of laches may be applicable rather than some statute of limitations, the former tending to be more flexible and somewhat more forgiving than the latter.<sup>24</sup> Second, in an equitable following action, a current stockholder's innocence would not necessarily be a bar to recovery.<sup>25</sup> The stockholder would have to have paid full value for the shares and be without notice of any unjust enrichment of the prior owners of the shares.<sup>26</sup>

Unfortunately for the plaintiffs, in the real world most of the stockholders would qualify as bona fide purchasers for value without notice ("BFPs"). Thus, this strategy would likely collapse under the weight of the law and the actual facts. In addition to the BFP-defense, there are several other equally potent equitable defenses. These defenses are creatures of equity's maxims, which taken together would surely spell doom for any judicial reparations action that seeks satisfaction from private interests for the alleged adverse effects of slavery.<sup>27</sup>

Section II of this article provides a general explanation of the limits on equity's jurisdiction. The concepts of unjust enrichment and reparations are discussed generally in Sections III and IV respectively. Section V compares and contrasts the procedural equitable remedy and the substantive equitable remedy. Section VI explains why the case for judicial reparations is doomed to fail under the best of circumstances, as so much time has elapsed since the Thirteenth

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*Law Jurisdictions: A Comparison of Legal Structures*, 3 N.Y.U. J.L. & Bus. 473, 492 (2007) ("[W]e assert without reservation that an entrusted mutual fund is neither a partnership nor a corporation; it is a trust. We go much further, however. We suggest that in the mutual fund context, a U.S. mutual fund operating in corporate form does so in form only. In substance and in equity it is a common law trust with a few peripheral statutory corporate attributes.").

21. See *infra* Part V (discussing the procedural equitable remedy of following *in specie*).

22. See *infra* Part V (discussing the procedural equitable remedy of imposing a constructive trust).

23. See *infra* Part IV (defining reparations).

24. See *infra* Part VIII.D (discussing the equitable doctrine of laches).

25. Unless the stockholder were also a purchaser for value. See generally *infra* Part VIII.C ("Where there is equal equity, the law shall prevail.").

26. See generally RESTATEMENT OF RESTITUTION § 172 (1937).

27. These equitable defenses are discussed *infra* Part VIII.

Amendment was ratified in 1865. Section VII nonetheless proffers a set of facts that would best support a judicial action for slavery reparations, and Section VIII applies to those facts equity's core principles as they have been communicated through its maxims. Section IX concludes that slavery reparations and the equity doctrine are incompatible. The post script debunks the trust as a substantive equitable remedy for slavery's moral wrongs and continuing adverse effects on the society.

This article assumes that slavery is a type of servitude that was by definition state-sanctioned and lawful.<sup>28</sup> A bundle of rights cannot constitute property unless those rights are enforceable in some court.<sup>29</sup> Moreover, by being the property of someone else, the slave lacked standing to bring suit on his or her behalf.<sup>30</sup>

While possession is possible in a state of nature, ownership requires a government. Thus, "[u]nder Roman law, possession divorced from ownership received only a limited protection: if a nonowner in possession of land was ejected by armed force (*vi et armata*) he had a right to be restored, provided the defendant was not himself the owner."<sup>31</sup> In the case of an unlawful and involuntary servitude, the captive is possessed, not enslaved. Kidnapped persons are merely in the custody of their captors; they are not owned by them. Similarly, captors do not own prisoners of war, war-time slave laborers, and duly incarcerated criminals; they are simply in the custody of their captors.

Because American slaves were lawfully owned, the equitable judicial remedy of involuntary emancipation was unavailable to them as against their owners. A slave owner, on the other hand, could invoke the power of the state to enforce a particular enslavement, such as by obtaining a judicial order of equitable restitution against someone who was *in possession* of a runaway slave.

## II. EQUITY'S FLEXIBILITY HAS ITS LIMITS

Equity is an English cultural phenomenon of ancient origin that has evolved over time to smooth out the common law's rough edges. One commentator explains:

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28. See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 320 (1983) ("As a result of the Papal Revolution the church for the first time gave a systematic legal formulation of its views on slavery. It took the position that slavery itself was not illegal but that it was a sin for a Christian to hold a Christian as a slave. In England, for example, almost 10 percent of the population recorded in Domesday Book just after the Norman Conquest were slaves. These were mostly herdsmen and ploughmen. In the succeeding two or three generations most of them were given small holdings as serfs, and slavery in England virtually disappeared.").

29. The RESTATEMENT OF PROPERTY § 1 (1936) provides as follows: "A right, as the word is used in this Restatement, is a legally enforceable claim of one person against another, that the other shall do a given act or shall not do a given act." Thus the judicially enforceable right to exclude others is an important stick in the bundle of rights known as property.

30. See generally *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d 721, 728-30 (N.D. Ill. 2005) (discussing *Dred Scott v. Sandford*, 60 U.S. 393 (1856)).

31. BERMAN, *supra* note 28, at 454.

In the rough days of the thirteenth century, a plaintiff was often unable to obtain a remedy in the common law courts, even when they should have had one for him, owing to the strength of the defendant, who would defy the court or intimidate the jury. Either deficiency of remedy or failure to administer it was a ground for petition to the King in Council to exercise his extraordinary judicial powers. A custom developed of referring certain classes of these petitions to the Chancellor, and this custom was confirmed by an order of Edward II in 1349. The Chancellor acted at first in the name of the King in Council, but in 1474 a decree was made on his own authority, and this practice continued, so that there came to be a Court of Chancery as an institution independent of the King and his Council.<sup>32</sup>

After the American Revolution, the 13 original states adopted substantially the entire common law of England. This included, with little change, its system of equity jurisprudence, of which the institution of the trust was an integral part.<sup>33</sup> Massachusetts was the last hold-out, not fully recognizing equity as a complementary part of its judicial system until 1877.<sup>34</sup> In most states, with the notable exception of Delaware,<sup>35</sup> there are no longer separate courts of law and equity. The consolidation, however, has left intact the substantive differences between legal interests and equitable interests.<sup>36</sup> The classic equitable interest is a beneficial interest in a trust, which itself is a creature of equity.<sup>37</sup> A mutual fund participation is an equitable interest as well.<sup>38</sup>

The consolidation also has left intact the substantive differences between legal duties and equitable duties: "An equitable duty is a duty enforceable in a court of chancery or in a court having the powers of a court of chancery."<sup>39</sup> Equity is not separate and apart from the common law, but a gloss or a collection of appendices to the common law:<sup>40</sup> "Equity without common law would have been a castle in the air, an impossibility."<sup>41</sup> By way of example, equity accepts that the trustee of a trust has legal title to the subject property, but, regarding it as against conscience for the title to be held other than for the benefit of the beneficiary, imposes on the trustee equitable duties.<sup>42</sup> But it would also be

32. SNELL'S EQUITY, *supra* note 16, ¶ 1-08.

33. GEORGE GLEASON BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 6 (rev. 2d ed., repl. vol. 1992) (1935).

34. Edwin H. Woodruff, *Chancery in Massachusetts*, 5 LAW Q. REV. 370, 383-84 (Oct. 1889). *See also* 1 AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER & MARK L. SCOTT, SCOTT & ASCHER ON TRUSTS § 1.9 (5th ed. 2006) [hereinafter SCOTT & ASCHER].

35. Morton Gitelman, *The Separation of Law and Equity and the Arkansas Chancery Courts: Historical Anomalies and Political Realities*, 17 U. ARK. LITTLE ROCK L.J. 215, 244 (1995).

36. RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. f (1959).

37. F.W. MAITLAND, EQUITY 23 (2d ed. 1936) ("Of all the exploits of Equity the largest and the most important is the invention and development of the Trust.").

38. *See generally* Rounds & Dehio, *supra* note 20, at 473.

39. RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. e.

40. SNELL'S EQUITY, *supra* note 16, ¶ 1-03.

41. MAITLAND, *supra* note 37, at 19 ("We ought not to think of common law and equity as of two rival systems. Equity was not a self-sufficient system, at every point it presupposed the existence of common law.").

42. SNELL'S EQUITY, *supra* note 16, ¶ 19-02.



incorrect to suggest that the procedural blending of law and equity—the consequence of a law reform movement that began on this side of the Atlantic in the mid-nineteenth century<sup>43</sup>—has eliminated the substantive distinctions between the two regimes. Had that happened, a wholesale abolition of the law of trusts would have resulted. It did not.

Today, advocates of judicial reparations for the moral wrong of slavery are re-discovering the world of equity. They think they are on to something. Equity is about conscience; they are convinced their cause is as well. It is high time to marshal the forces of equity against those who have been, at least in the eyes of the reparations advocates, unjustly enriched by the moral wrong.<sup>44</sup> Were it only that simple.

### III. DEFINING UNJUST ENRICHMENT

If one is unjustly enriched, there is no legal or equitable basis for the enrichment, such as what the law of gifts, contracts, or property might supply.<sup>45</sup> Unjust enrichment can be either an equitable or a legal wrong.<sup>46</sup> Whether in equity or at law, unjust enrichment is the basic principle, at least on this side of the Atlantic, that underlies the substantive remedy of restitution.<sup>47</sup>

At law, the concept of unjust enrichment incubated in the corner of the common law now referred to as quasi-contracts.<sup>48</sup>

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43. Michael Lobban, *Preparing for Fusion: Reforming the Nineteenth Century Court of Chancery, Part II*, 22 *LAW & HIST. REV.* 565, 584 (2004) (“The key political impetus for fusion came from America.”).

44. Professor Margalynne Armstrong suggests that the forces of equity are just waiting to be marshaled in the just cause of extracting reparations from private interests:

This Article examines the role of unjust enrichment in substantive and remedial restitution as one option available to the movement that seeks to secure reparations for the descendants of the millions who were enslaved, transported from the African continent, and dispersed throughout the Americas and Europe. The reparations movement also seeks fitting remedies for the continuing depredations imposed upon people of African descent in the years that have followed the abolition of slavery. The substantive and remedial law of restitution, particularly the concepts of unjust enrichment and the [equitable] remedy of constructive trust, provide particularly apt vehicles for reparations claims.

Armstrong, *supra* note 14, at 772. She endorses Professor Mari Matsuda’s justification for seeking to extract slavery reparations from private interests: “Members of the dominant class continue to benefit from the wrongs of the past and the presumptions of inferiority imposed upon victims. They may decry this legacy, and harbor no racist thoughts of their own, but they cannot avoid their privileged status.” *Id.* at 779 (quoting Matsuda, *supra* note 2, at 379).

45. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1, cmt. b (Tentative Draft No. 7, 2000).

46. Andrew Kull, *James Bar Ames and the Early Modern History of Unjust Enrichment*, 25 *OXFORD J. LEGAL STUD.* 297, 297 (2005).

47. Edwin W. Patterson, *Reviews*, 47 *YALE L.J.* 1420, 1421 (1938) (reviewing RESTATEMENT OF RESTITUTION (1937)).

48. RESTATEMENT OF RESTITUTION Gen. Scope Note.

That heading includes a wide variety of situations . . . , as where a person by mistake pays a debt a second time, *or is coerced into conferring a benefit upon another*, or renders aid to another in an emergency or is wrongfully deprived of his chattels by another who has used them for his own benefit.<sup>49</sup>

The legal remedy is generally limited to the payment of money.<sup>50</sup> In equity, the concept of unjust enrichment evolved as a corollary to both the fiduciary principle and constructive trust jurisprudence.<sup>51</sup>

*The Restatement of Restitution* (1937) endeavored to sever restitution for unjust enrichment from its various cultural roots and place it on an equal footing with the other fundamental constructs of the common law, as enhanced by equity: “The task of ‘restatement,’ in this instance, took the form of a radical reconception of an important area of the law that antiquated formal categories had previously obscured, following exactly in this regard the prescriptions of some noted legal realists.”<sup>52</sup>

One of the unfortunate effects of this “radical reconception” was to marginalize all aspects of equity in the American law school curriculum, including the cultural context in which it had evolved. Out went the baby with the bathwater. Equity, which is not just about unjust enrichment, however, remains very much “out there” in the real world, as this article attempts to explain in the context of the slavery reparations controversy. The English and the Australians have yet to buy fully into the American idea of a freestanding law of restitution for unjust enrichment.<sup>53</sup>

As it happens, an action based on the unjust enrichment of a slave owner or a slave trafficker that seeks judicial reparation against a private interest also is a case study in how the law of unjust enrichment straddles law and equity. If the case is based on the actions of the slave owner, it is essentially an action at law for damages, sounding almost in quasi-contract.<sup>54</sup> The measure of recovery would somehow relate to the market value of the slave’s services, irrespective of their benefit to the slave owner.<sup>55</sup> On the other hand, if the action is based on the unjust enrichment of a corporate slave trafficker, then one could be either in the realm of law or equity.

In an action at law, the corporation would be the defendant. In an equitable action, the plaintiffs would endeavor to follow the chain of ownership of stock in the entity from the allegedly culpable initial owners down through time to the

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49. *Id.* (emphasis added).

50. *Id.* (confirming that the subject of quasi-contracts is limited to actions at law to secure the payment of money).

51. See generally HAROLD GREVILLE HANBURY & RONALD HARLING MAUDSLEY, *MODERN EQUITY* ch. 14 (10th ed. 1976) (the constructive trust).

52. Andrew Kull, *Restitution and Reform*, 32 S. ILL. U. L.J. 83, 86 (2007).

53. See Rounds, *supra* note 13, at 332-35.

54. See RESTATEMENT OF RESTITUTION § 152 (1937) (“Where a person is entitled to restitution from another because the other has obtained his services, or services to which he is entitled, by fraud, duress or undue influence, the measure of recovery for the benefit received by the other is the market value of such services irrespective of their benefit to the recipient.”).

55. *Id.*

hands of the current owners.<sup>56</sup> *Subject to the rights of innocent third parties*, the corporation might either be a stakeholder defendant in the equitable action or its assets made the subject of an equitable lien. This assumes the imposition of either procedural equitable remedy were called for in order to maintain the status quo pending a final judicial determination of the substantive rights and obligations of the parties.

#### IV. DEFINING REPARATIONS

Restitution is the primary remedy for the wrong of unjust enrichment: “A person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money.”<sup>57</sup> At one time, restitution was limited to the return of a specific item of property. In other words, it was a synonym for specific reparation, which is restitution *in specie*.<sup>58</sup> Now, restitution has a meaning that is broader than specific reparation:

In modern legal usage, [the restitution remedy] has frequently been extended to include not only the restoration or giving back of something to its rightful owner and returning to the status quo, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to, another.<sup>59</sup>

In the national conversation on slavery reparations and in this article, the term reparation is employed as a synonym for restitution as its meaning has been extended in modern usage. In particular, this article focuses on the specific reparation of corporate stock.

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56. The plaintiff in a slavery reparations action who seeks to equitably follow *in specie* shares in the corporate slave trafficker must demonstrate that he or she possesses the equitable title to those shares, or that at least the slave in whose shoes the plaintiff stands at one time did. *See* SNELL’S EQUITY, *supra* note 16, ¶ 28-35 (following and tracing in equity). If the shares are the equitable securitization of the unjust enrichment of those who profited from the slave trade, then arguably the equitable title to the shares is in the plaintiff. Of course, there would have to be some demonstrable *in rem* nexus between the plaintiff and the actual shares. Attempting to prove such a nexus to a court’s satisfaction would be an extraordinarily expensive and time-consuming proposition under the best of circumstances, so much time having elapsed since the Thirteenth Amendment was ratified in 1865.

57. RESTATEMENT OF RESTITUTION § 1, cmt. a.

58. This in-kind relief is expansive enough to capture like properties. For example, if a trustee makes off with trust property, the court may compel the trustee to hold the trustee’s own property subject to the trust or compel the trustee to procure similar property for the trust if it is readily available in the market. *See* 4 SCOTT & ASCHER, *supra* note 34, § 24.11.3.

59. 66 AM. JUR. 2D *Restitution and Implied Contracts* § 1 (2010).

V. THE PROCEDURAL EQUITABLE REMEDY PREPARES THE GROUND FOR THE  
SUBSTANTIVE EQUITABLE REMEDY

Equitable accounting;<sup>60</sup> following;<sup>61</sup> tracing (following property into its product);<sup>62</sup> equitable lien;<sup>63</sup> preliminary/temporary injunction;<sup>64</sup> and constructive

60. An equitable accounting is not only a form of litigation discovery, but also a critical procedural equitable remedy, critical in that it lays the informational groundwork for all the other equitable remedies, both procedural and substantive. "Save in exceptional cases, the right to an account is dependent upon the existence of a fiduciary relationship," such as the relationship of trustee and beneficiary or agent and principal. SNELL'S EQUITY, *supra* note 16, ¶ 18-05. Needless to say, the owner of a slave owed the slave no fiduciary duties, it being impossible to be in a fiduciary relationship with an item of property. Unjust enrichment, however, is one of those exceptional cases where the right to an equitable accounting is not dependent upon the existence of a fiduciary relationship. See RESTATEMENT OF RESTITUTION § 125 cmt. a. (1937).

61. Following property *in specie* (in kind) is essentially a rule of evidence allowing a claimant to identify misapplied property. SNELL'S EQUITY, *supra* note 16, ¶ 28-32. It is the process of "identifying the same property as it is transferred from one person to another." *Id.* ¶ 28-32. On the other hand, tracing (following property into its product) is the process of "identifying a new asset as the substitute for an original asset which was misappropriated from the claimant." *Id.* ¶ 28-32.

62. It is said that tracing (following property into its product) is concerned with the same person but different assets, while following *in specie* is concerned with the same asset but different persons. JOHN MOWBRAY ET AL., LEWIN ON TRUSTS ¶ 41-05 (17th ed. 2000).

63. Sometimes, however, the facts are such that the judicial imposition of a constructive trust is not an option, such as where the trustee wrongfully uses entrusted property to improve property that the trustee has rightfully acquired with his personal funds. RESTATEMENT OF RESTITUTION § 206 (improvements upon wrongdoer's property). In that case, the beneficiaries are entitled to the imposition of an equitable lien on the trustee's improved property, but not to the imposition of a constructive trust on it. *Id.* § 206 cmt. b. Had the trustee wrongfully swapped entrusted property for other property which he then wrongfully kept for himself, then the Court could impose either a constructive trust or an equitable lien on the other property. *Id.* § 202 (U.S.); SNELL'S EQUITY, *supra* note 16, ¶ 28-36. If the wrongfully-acquired property has fallen in value, then the equitable lien is the beneficiary's better procedural remedy; if it has risen in value, then the constructive trust is. RESTATEMENT OF RESTITUTION § 161 cmt. a; SNELL'S EQUITY, *supra* note 16, ¶ 28-36 (Eng.). If the wrongfully-acquired property becomes less valuable than the wrongfully-alienated entrusted property, the trustee is still personally liable for the full value of the wrongfully-alienated entrusted property, the equitable lien being merely security for the beneficiary's equitable claim against the trustee. RESTATEMENT OF RESTITUTION § 202, cmt. d (U.S.); SNELL'S EQUITY, *supra* note 16, ¶ 28-36. English law is in accord:

Against an asset in the hands of the trustee, the claimant has an election between two proprietary remedies. He may enforce an equitable lien against it for the value of the original asset which was applied to acquire it. The lien is for this fixed amount, and does not change in value even if the substituted asset rises or falls in value. Alternatively, he may claim the entire beneficial ownership of the substituted asset under a constructive trust. The value of this proprietary security will vary in accordance with fluctuations in the value of the substituted asset. The claimant has an unrestricted election between whichever of the remedies is more advantageous to him.

SNELL'S EQUITY, *supra* note 16, ¶ 28-36. If the property subject to an equitable lien is encumbered or transferred, the lien's fate will depend upon the particular facts and circumstances: "The equitable claimant is entitled to priority over the creditors of the owner of the property, since the creditors are not bona fide purchasers [for value ("BFPs").]" RESTATEMENT OF RESTITUTION § 161, cmt. c. On the other hand, an equitable lien could be cut off if title to the subject property were to pass to a legitimate BFP, or if it were disposed of in such a way as to be rendered untraceable.

trust<sup>65</sup> are not equitable remedies in the sense that a permanent injunction, decree for specific performance, or a restitution order are. The former group constitutes just “part of the process of establishing the substantive rights of the parties.”<sup>66</sup> For example, having held that a claimant has a right to follow a particular item of property and that the transferee of that property has the duties of a constructive trustee with respect to it,<sup>67</sup> (in other words, having adjudicated the rights, duties, and obligations of the parties to the dispute), the court in the exercise of its equitable powers can now fashion whatever substantive remedies are appropriate to make the claimant whole. Perhaps it will issue a restitution order coupled with a permanent injunction. Still, imposing a constructive trust on identifiable property is a remedy in the sense that it freezes the status quo—it prevents the transferee from consuming or alienating the subject property to third parties. The least remedy-like of the procedural remedies is the equitable accounting, essentially little more than litigation discovery “in aid of a purely equitable

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Still, “[w]here property is subject to an equitable lien and the owner of the property disposes of it and acquires other property in exchange, he holds the property so acquired subject to the lien.... So also, where the property which is subject to the lien is mingled with other property in one indistinguishable mass, the lien can be enforced against the mingled mass.” *Id.* § 161, cmt. e.

64. A preliminary/temporary injunction to preserve trust property—the English employ the term “interim injunction”—is a procedural equitable remedy. *MOWBRAY*, *supra* note 62, ¶ 38-09. Its purpose is to maintain the status quo pending a final determination of the parties’ substantive rights. Further, “[a] court of equity has never hesitated to use the strongest powers to protect and preserve a trust fund in interlocutory proceedings on the basis that, if the trust fund disappears by the time the action comes to trial, equity will have been invoked in vain.” *Id.* ¶ 38-09. If the property to be frozen is not in the hands of the trustee, it at least must be susceptible of being followed *in specie* or traced (followed into its product). *Id.* Otherwise, the issuance of a preliminary or temporary injunction to preserve trust property is not an option. If trust property is in the hands of a third party, a preliminary or temporary injunction against the third party would be justified if there were a possibility that that trust property could pass into the hands of a BFP. *Id.* ¶ 38-10. Enjoining further alienation of the trust property to anyone pending a final determination of the substantive rights, duties, and obligations of the parties is usually advisable. The more parties that have to be brought into the litigation, the more inconvenience and expense for all concerned. *Id.*

65. A constructive trust is an express trust which doubles as a procedural equitable remedy. That is, its purpose is to support the substantive equitable remedy of restitution for unjust enrichment. See generally *Rounds, Relief for IP Rights Infringement*, *supra* note 13, at 313. The *Restatement of Restitution* is not fully in accord, suggesting that a constructive trust is something other than a true trust. See *RESTATEMENT OF RESTITUTION* § 160, cmt. a (1937). The *Restatement of Restitution* states: “Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.” *Id.* § 160. A constructive trust can also be judicially imposed as a procedural equitable remedy on property wrongfully in the hands of a third party to a trust relationship: “Where a fiduciary in violation of his duty to the beneficiary transfers property or causes property to be transferred to a third person, the third person, if he gave no value or if he had notice of the violation of duty, holds the property upon a constructive trust for the beneficiary.” *Id.* § 201(1). If the third party were a BFP of the entrusted property, there would be no unjust enrichment and thus there could be no imposition of a constructive trust on the property that had been transferred out. If circumstances warrant, however, a constructive trust could be judicially imposed on the proceeds from the sale of entrusted property to a BFP. See *id.* § 198, cmt. a.

66. *SNELL’S EQUITY*, *supra* note 16, ¶ 12-17.

67. *Id.*

right.”<sup>68</sup> Thus, in the case of imposing a constructive trust to facilitate the remediation of an unjust enrichment, unjust enrichment is the wrong; following and the imposition of a constructive trust is the cocktail of procedural remedies; and restitution is the substantive remedy.

#### VI. THE JUDICIAL REPARATIONIST’S LITIGATION STRATEGY CAN ONLY BE TO DELAY THE INEVITABLE

That enslavement was a legally permissible form of ownership prior to enactment of the Thirteenth Amendment is not helpful to the judicial reparationists’ cause. In fact, it probably constitutes a fatal flaw in their case, especially in an action at law against a slave owner or corporate slave trafficker. Slavery’s legality would likely be fatal to an action in equity as well, given the most ancient of its maxims, “[E]quity followeth the law.”<sup>69</sup> Assuming a plaintiff could somehow get around the fact that slavery was legally permissible in parts of the United States prior to the Thirteenth Amendment’s ratification, should the action be based on the alleged unjust enrichment of the slave owner or of the corporate slave trafficker and its shareholders?

An action based on the slave owner’s unjust enrichment faces a number of substantive and procedural legal obstacles. The plaintiff might want to assert that although prior to the Thirteenth Amendment’s enactment ownership of an African was not criminal, it was still tortious, in that the slave’s services were acquired under duress.<sup>70</sup> A complaint for reparation against persons alive today would then be based on the unjust enrichment of a slave owner at the expense of the slave. The slave owner *ab initio* was under a duty of restitution to the slave for the market value of the slave’s services, plus interest.<sup>71</sup> The market value of the slave’s services was the measure of the damages that were assessable against the slave owner’s general assets. In other words, the slave at law was a general creditor of the slave owner.

Even if there were segregated funds attributable to the enslavement, securing equitable relief would be a long shot for the *freed slave*, not to mention for those who would now stand in his or her shoes. *The Restatement of Restitution* explains:

But if it is shown that the property or its proceeds have been dissipated so that no product remains, [the claimant is only a] general creditor of the wrongdoer. Thus, if

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68. *Id.* ¶ 18-04.

69. *Id.* ¶ 5-07 (quoting Co. Litt. 290b, n.1 (xvi), Butler’s note).

70. RESTATEMENT OF RESTITUTION § 134(1) (1937) (“A person who has obtained the services of another by conduct which is tortious towards the other is under a duty of restitution to the other for the value of the services.”). *See also id.* § 134 cmt. a (explaining that Subsection (1) to § 134 “is applicable to a person who obtains the services of another by fraud, false imprisonment, or other tortious means”).

71. *Id.* § 152 (“Where a person is entitled to restitution from another because the other has obtained his services, or services to which he is entitled, by fraud, duress or undue influence, the measure of recovery for the benefit received by the other is the market value of such services irrespective of their benefit to the recipient.”).

the wrongdoer has used the money of the claimant in speculation and has lost it all, the claimant cannot enforce a constructive trust of or an equitable lien upon other property of the wrongdoer, and has only a personal claim against the wrongdoer, and is not entitled to priority over other creditors of the wrongdoer.<sup>72</sup>

In other words, the freed slave would bump up against the law with all its formalistic limitations if the alleged unjust enrichment were occasioned by the tortious acquisition of the slave's personal services. One such limitation would likely be the so-called "short" statute of limitations or "nonclaim statute," which typically applies to the claims of a decedent's creditors.<sup>73</sup> A former slave's failure to bring suit against the slave owner's executor for the market value of slave's uncompensated services within the applicable short statute of limitations would likely have rendered the freed slave's filing of an action at law for reparations an act of futility. That would also be the case for someone alive today purporting to stand in the freed slave's shoes.

This article now explores whether an action against a corporation that directly or indirectly benefited from the commercial trafficking in slaves prior to the ratification of the Thirteenth Amendment, or perhaps against its stockholders, would hold more promise. For some purposes, the law deems a corporation to be a person.<sup>74</sup> Some predecessors of corporations operating today directly or indirectly participated in the enslavement of Africans before the ratification of the Thirteenth Amendment.<sup>75</sup> By going after immortal corporations instead of mortal human beings, the plaintiff not only reduces the size of the defendant class, but also bypasses the myriad property-related obstacles that the law throws

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72. *Id.* § 215 cmt. a.

73. According to the Uniform Probate Code, "Every state has a statute requiring creditors [of a decedent] to file claims within a specified time period; claims filed thereafter are barred. These are known as *nonclaim statutes*. They come in two basic forms: Either (1) they bar claims not filed within a relatively short period after probate proceedings are begun, generally two to six months (four months under the UPC); or (2) whether or not probate proceedings are commenced, they bar claims not filed within a longer period after the decedent's death, generally one to five years (one year under the UPC). U[NIF. ]P[ROBATE ]C[ODE] § 3-803. Under short-term statutes, creditors are usually notified of the requirement to file claims only by publication in a newspaper after probate proceedings are opened." JESSE DUKEMINIER, ROBERT H. SITKOFF, & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 44-45 (8th ed. 2009).

74. For example:

The law allows corporations to do some things that people do. They may enter into contracts, buy and sell land, commit torts, sue and be sued. Other rights and liabilities are denied. Corporations cannot hold public office, vote in elections, or spend the night in jail. In spite of evident differences between a corporation and a flesh-and-blood human, there are sufficient similarities for the law to treat the corporation as a person.

Sanford A. Schane, *The Corporation Is a Person: The Language of Legal Fiction*, 61 TUL. L. REV. 563, 563 (1987).

75. JPMorgan Chase and Wachovia, for example, have apologized for the involvement of their predecessors directly or indirectly in the enslavement of Africans. See BROPHY, *supra* note 3, at 14; Rupert Cornwell, *Companies Sued over American Slave Trade*, INDEPENDENT, Mar. 26, 2002, available at <http://www.independent.co.uk/news/world/americas/companies-sued-over-american-slave-trade-655445.html>.

up when a property-owner dies.<sup>76</sup> But such an action at law would likely have been long ago time-barred by some statute of limitations.<sup>77</sup> An equitable action to follow *in specie* and levy on the corporation's stock may be a way around the statute-of-limitations problem. In equity, substance trumps form.<sup>78</sup> In substance, if not in legal form, the stockholders collectively own the enterprise; the fictional legal package that encapsulates it does not.<sup>79</sup> In the case of an action based on the tortious unjust enrichment of the slave owner, there is generally nothing *in specie* to follow down through time. Money is fungible.

At first glance, the procedural equitable remedies of following property *in specie*, the injunction, equitable lien, and constructive trust would seem tailor-made to support the substantive equitable remedy of restitution for unjust enrichment that a corporation and/or its stockholders perpetrated in the distant past. The problem, however, is that once property has passed *in specie* into the hands of a BFP, the equitable rights of prior claimants are cut off.<sup>80</sup>

Following *in specie* poses serious practical problems as well. Remediating just one enslavement could tie up a federal court for decades; remediating hundreds of thousands of enslavements could bring the entire U.S. judicial system to a halt. Those who consider this hyperbole have not followed the progress of the long-running Indian trust account litigation, a contentious, fractionated interest case that has had a generally inconclusive and unsatisfactory

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76. For example, some have suggested that in a slavery reparations action against a corporation, its immortality may well work to its disadvantage:

I believe that suing a corporation is much different than suing a person. Legally, corporations are immortal; they do not die except by their own hand. So a company that is around in 2002 can be the same company that was around in 1602. And where that company owes its profitability to its slave trading, that company should acknowledge that fact and make some form of restitution.

Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051, 1069 (2003).

77. See *In re African-American Slave Descendants Litig.*, 471 F.3d 754, 759 (7th Cir. 2006). The court stated:

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.

*Id.* (emphasis added).

78. See generally SNELL'S EQUITY, *supra* note 16, ¶ 5-24 (equity looks to the intent rather than to the form).

79. See Posner & Vermeule, *supra* note 3, at 737 ("The convenient way in which an institution can be made to stand in for individuals should not obscure the fact that morally blameless individuals must bear the costs of reparations: current shareholders in the case of [a corporation], taxpayers in the case of the United States.").

80. See RESTATEMENT OF RESTITUTION § 172 (1973) ("Where a person acquires title to property under such circumstances that otherwise he would hold it upon a constructive trust or subject to an equitable lien, he does not so hold it if he gives value for the property without notice of such circumstances.").



outcome.<sup>81</sup> In the case of the Indian trust account litigation, the property at issue had at all times been in the custody of at least a single entity, namely the United States, or was supposed to have been.<sup>82</sup> In a consolidation of enslavement cases, there would be thousands of constructive trusts of fractionated equitable interests in entrusted corporate stock scattered about the entire country that would have to be judicially corralled, accounted for, and sorted out.

#### VII. A JUDICIAL REPARATIONIST'S DREAM LITIGATION FACT PATTERN

This article concludes that the plaintiffs in a slavery-based judicial reparations action do not have the law or the facts on their side. This article tests that conclusion by assuming an ideal set of facts from the plaintiffs' perspective in an equitable following action against the innocent shareholders of a former corporate slave trafficker.

Under the authority of an act of a state legislature, a corporation was created in 1850 for the express purpose of trafficking in African slaves. The corporation was called The Target Corporation ("TTC"). At its creation, TTC had three shareholders, X, Y, and Z. Doing business as TTC, they proceeded to traffic in African slaves. Upon ratification of the Thirteenth Amendment in 1865, TTC ceased trafficking in slaves and became a plain vanilla insurance company. A year later, X, Y, and Z gave away their shares. Since then, all transfers of TTC shares have been donative. No former slave, descendant of a former slave, or charity has ever been a donee. All donees have been white Americans, none of whom fought for the Union Army in the Civil War or had relatives who did. A class of slave descendants has filed suit against current TTC shareholders, seeking judicial reparations for the wrong of slavery. The court has found the class to have standing and has also found an in rem nexus between TTC stock and the plaintiffs.

Needless to say, one could have conjured up different facts that would make the plaintiffs' case even more equitably problematic than it already is, such as if some of the shares had passed through the hands of BFPs. One could have assumed that some TTC shares are now in the hands of descendants of deceased veterans of the Union Army.<sup>83</sup> One could have assumed that some descendants of African slaves now directly or indirectly own shares in TTC. Some shares may have even passed through the hands of the NAACP. All these assumptions

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81. See *Cobell v. Kempthorne*, 532 F. Supp. 2d 37, 103 (D.D.C. 2008). After 11 years of litigation, the presiding trial judge, all but throwing up his hands, stated:

My conclusion that Interior is unable to perform an adequate accounting of the IIM trust does not mean that a just resolution of this dispute is hopeless. It does mean that a remedy must be found for the Department's unrepaired, and irreparable, breach of fiduciary duty over the last century. And it does mean that the time has come to bring this suit to a close.

*Id.*

82. *Id.* at 39.

83. Posner & Vermeule, *supra* note 3, at 702 ("Many wrongdoers passed their unjust profits to descendants who made sacrifices for the sake of slaves. Should these descendants have to pay less to the descendants of slaves as a consequence?").

would be reasonable ones in the real world. Also, this fantasy litigation fact pattern does not reflect the likelihood that in the real world, the class of wrongdoer descendants would substantially intersect with the class of victim descendants.<sup>84</sup>

#### VIII. EQUITY'S MAXIMS ARE A PROBLEM FOR THE JUDICIAL REPARATIONIST

While equity in its popular sense is “practically equivalent to natural justice or morality,”<sup>85</sup> equity can also be mean and nasty. A judgment of the common law courts was generally enforced by a writ of execution on a defendant's property.<sup>86</sup> Equity took a different approach:

But the Court of Chancery, originally at any rate, did not itself interfere with the defendant's property, but merely made an order against the defendant personally, and if he failed to comply with it, punished him for his disobedience by attachment or committal for contempt, *i.e.*, by “execution *in personam* peculiar to the Court of Equity.”<sup>87</sup>

A society aspiring to be fair and just could not possibly permit such a potent appendage to its common law to function independently and arbitrarily. Nor could the appendage be allowed to evolve to the point where it was actually wagging the law. Boundaries needed to be set. Maxims in all their folksiness have evolved over time to quite effectively perform that negative function within the Anglo-American legal tradition. Maxims are, in a sense, the equity defendant's bill of rights.

There are myriad maxim-based defenses to a complaint in equity that might as well have been designed for the sole purpose of taking the current corporate shareholders in a slavery reparations following action off the hook. Before examining these maxims in greater detail, however, this article calls the reader's attention to a rogue maxim of limited application that could mislead the uninitiated: “Equity will not suffer a wrong without a remedy.”<sup>88</sup>

This maxim by no means suggests that equity will address every moral wrong: “The maxim must be taken as referring to rights which are suitable for judicial enforcement, but were not enforced at common law owing to some technical defect.”<sup>89</sup> Here is an example:

[I]t was often necessary for a claimant in a common law action to obtain disclosure of facts resting in the knowledge of the defendant, or of deeds, writing or other things in his possession or power. The common law courts, however, had no power

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84. *See id.* (“And there are related problems concerning the mixture of the classes of descendants of wrongdoer and victim, the immigration of nondescendants, and so forth.”).

85. SNELL'S EQUITY, *supra* note 16, ¶ 1-01.

86. *Id.* ¶ 5-27.

87. *Id.*

88. *See generally id.* ¶¶ 5-02, 5-03, 5-04.

89. *Id.* ¶ 5-02.

to order such disclosure, and recourse was therefore had to the Court of Chancery, which assumed jurisdiction to order the defendant to make disclosure on his oath.<sup>90</sup>

Sir William Blackstone provided an example of equity's limitations when it comes to remedying moral wrongs in a passage on descendant liability, or the lack thereof: "Hard is the common law still subsisting, that land devised, or descending to the heir, shall not be liable to simple contract debts of the ancestor or devisor, although the money was laid out in purchasing the very land . . . ."<sup>91</sup> This particular moral wrong has subsequently been remedied by statute.<sup>92</sup> That equity has traditionally left it to the law to regulate the liability of descendants for the sins of their ancestors is not helpful to the plaintiff's equity case against TTC.

A. *Equity Follows the Law*

The maxim that equity follows the law confirms that the Court of Chancery has never claimed to override the courts of common law.<sup>93</sup> As Joseph Story stated, "[w]here a rule, either of the common or the statute law, is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it."<sup>94</sup> Thus, because slave trafficking was legally permitted in parts of the United States prior to ratification of the Thirteenth Amendment, this fact should be fatal to the plaintiff's equity case against TTC, even under this article's fantasy fact pattern. Unjust enrichment is enrichment that has no legal basis.<sup>95</sup>

The Anglo-American legal tradition does not take kindly to changing the rules in the middle of the game, such as by broadening the definition of slavery to include simple racial discrimination or by retroactively tolling some statute of limitations that has already run.<sup>96</sup> For example, people question "[h]ow . . . plaintiffs [can] come into court in 2006 and ask for relief for a claim arising before 1865? And, given that slavery was legal before 1865, how can there be relief for harms imposed during the era of slavery?"<sup>97</sup> Both at law and in equity, there are the due process considerations.<sup>98</sup> In equity, there are also the

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90. *Id.* ¶ 5-04.

91. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 430 (reprint 1st ed. 1992).

92. SNELL'S EQUITY, *supra* note 16, ¶ 1-05.

93. *Id.* ¶ 5-05.

94. JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, BY HON. MR. JUSTICE STORY 34 (3d ed. 1920).

95. RESTATEMENT (THIRD) OF RESTITUTION § 1 cmt. b (Discussion Draft 2000).

96. *See Matsuda, supra* note 2, at 385.

97. BROPHY, *supra* note 3, at 103.

98. *See generally* Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1181 (2005).

inconvenient maxims, such as “he who seeks equity must do equity.”<sup>99</sup> When balancing the equities, such as the interests of the lawful present-day shareholder of corporate stock versus the interests of the descendant of an African slave, equity strives to be scrupulously fair. Crafting social legislation is another matter. In deciding whether to tap into the federal treasury, Congress is free to broaden the definition of slavery for its purposes or attribute a particular twenty-first century societal problem to slavery’s fall-out.<sup>100</sup>

*B. Equity Looks to Substance Rather than to Form*

If it is appropriate for equity to intervene in a contested matter, equity will not allow form to trump substance.<sup>101</sup> There is no better example of this concept than equity’s willingness to pierce the corporate veil in extraordinary situations. A corporation is a legal fiction, not an equitable one.<sup>102</sup> Thus, equitable fiduciary principles incident to the laws of agency will apply to lawyers who are shareholders of a professional corporation, and equitable fiduciary principles incident to the law of trusts generally will apply to a fully-entrusted noncharitable corporation or to the administration of a charitable one.<sup>103</sup> Trust principles, not corporate principles, govern the administration of an incorporated mutual fund operating in a common law jurisdiction.<sup>104</sup>

In the TTC case, it would be a stretch for the court to pierce the corporate veil when X, Y, and Z had not been in any kind of fiduciary relationship with the slaves they trafficked. But, an argument exhorting the court to pierce the corporate veil even in the absence of a fiduciary relationship might go something like this: Slavery so shocks the conscience that it would have been inequitable to allow the principals in a slavery enterprise to benefit from the law’s formalities.

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99. SNELL’S EQUITY, *supra* note 16, ¶ 5-09 (“To obtain equitable relief the claimant must be prepared to do ‘equity’, in its popular sense of what is right and fair to the defendant.”).

100. *See In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d 721, 781 (N.D. Ill. 2005) (“Ultimately, the legal obstacles prohibiting judicial resolution of such claims cannot be circumvented by the courts. Moreover, from the onset of the Civil War until present, the historical record clearly shows that the President and Congress have the constitutional authority to determine the nature and scope of the relief sought in this case, not the courts. This is historically manifested in the signing of the Emancipation Proclamation, the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, and the promulgation of over a century of civil rights legislation and governmental programs.”).

101. *Parkin v. Thorold*, (1852) 51 Eng. Rep. 698 (Ch.).

102. *See generally* Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563 (1987).

103. *See* Rounds, *Lawyer Codes*, *supra* note 20, at 802 (incorporation cannot limit the lawyer-agent’s liability to the client-principal in tort); LORING AND ROUNDS, *supra* note 3, § 6.1.3 (in the case of a fully entrusted non-charitable corporation, trust law generally trumps corporate law), § 9.8.1 (the charitable corporation is a trust in substance though not in form).

104. *See* Rounds & Dehio, *supra* note 20, at 492 (“[W]e assert without reservation that an entrusted mutual fund is neither a partnership nor a corporation; it is a trust. We go further, however. We suggest that in the mutual fund context, a U.S. mutual fund operating in corporate form does so in form only. In substance and in equity it is a common law trust with a few peripheral statutory corporate attributes.”).

Just as a lawyer cannot hide behind the corporate veil in a breach of fiduciary duty action brought by the client, the principals in a slave trafficking enterprise also should not be permitted to do so. Equity could have imposed personal liability on the initial shareholders of a corporate slave trafficker for the enterprise's contracts and torts. The problem is that this strategy asks the court to conduct what amounts to a trial *in absentia*. X, Y, and Z, now long dead, are in no position to defend themselves. This article assumes, however, that in exercising its equitable powers, the court has imposed the status of surrogate defendants on the *current* TTC shareholders, which would certainly be breaking new jurisprudential ground in the Anglo-American legal tradition.<sup>105</sup> These current shareholders must appear before the Chancellor to answer for the alleged sins of their predecessors in title going back to X, Y, and Z.

Equity's ability to pierce the corporate veil under exceptional circumstances may benefit a plaintiff who is suing his or her lawyer, or assist a trust beneficiary who is unhappy with a trustee's management of a fully entrusted corporation. For example, the equitable doctrine of laches with its special subjective notice requirements may be more forgiving than an otherwise applicable statute of limitations.<sup>106</sup> But what is sauce for the goose is sauce, as well, for the gander. In this action for judicial reparations, the individual TTC shareholders are necessary party defendants.<sup>107</sup> Their property rights are at stake. In equity, TTC is the property or at best, a technical stakeholder of the corporate assets. To prevail, the plaintiffs will have to enlist equity in the cause of divesting each individual shareholder of his or her property rights in TTC, shareholder by shareholder, once there has been a proper equitable accounting. This article assumes that the plaintiffs have been given leave to amend their complaint to add all current TTC shareholders as party defendants and that each individual defendant has been duly served with the amended complaint.

According to one jurist and scholar, equity varies with the length of the Chancellor's foot.<sup>108</sup> What if the presiding judge sitting declined to pierce the

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105. *But cf.* BROPHY, *supra* note 3, at 102. ("Georgetown University Law Professor Mari Matsuda offers an alternative test for gauging the relationship between past wrong and present claim. She proposes that victim status continue as long as "a victim class continues to suffer a stigmatized position enhanced or promoted by the wrongful act in question." Matsuda suggests that the statute of limitations is extended for as long as there is a group that is suffering harm, which is potentially generations. *Such creative lawyering poses interesting ways of viewing the past; it has not yet been recognized in the U.S. courts, however.*" (quoting Matsuda, *supra* note 2, at 385 (emphasis added))).

106. *See* LORING AND ROUNDS, *supra* note 3, § 7.2.10 (noting that a cause of action against a trustee for breach of the duty of loyalty, for example, would not be barred by laches until a reasonable time after the beneficiaries, both current and remainder, had acquired an actual subjective understanding of the applicable law and facts).

107. For an *in rem* decree, quasi or otherwise, to be final and binding, the affected parties must have been given notice and an opportunity to be heard sufficient to have satisfied the due process requirements of the federal Constitution. *See* 7 SCOTT & ASCHER, *supra* note 34, § 45.2.2; BOGERT, *supra* note 33, § 292, at 235 (each citing as authority *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), a case involving the settlement of the accounts of a trustee of a common trust fund).

108. *See* JOHN SELDEN, TABLE TALK OF JOHN SELDEN 43 (Frederick Pollock ed., 1927).

corporate veil? Then, the sole defendant would be TTC. As a result, it is hard to see what equitable relief would be available *to the plaintiffs today*. TTC merely would have been allegedly liable in tort to the freed slaves and perhaps in quasi-contract as well. The applicable statutes of limitations would have run a few years after the Thirteenth Amendment had been ratified,<sup>109</sup> and all TTC stockholders and their future successors in interest would have been home free thanks to the corporate veil. The corporate shares' subsequent fate over time would be totally irrelevant. The corporation today would be owned by innocent persons who have not been made parties to the litigation and who have property rights that would have to be accommodated. *Liability having been cut off at the corporate level long ago, there is no quantifiable ill-gotten economic gain that could somehow be traced into the hands of someone alive today who is not a BFP.*

Who better than the slave was in a position to understand the true nature and implications of the slave's predicament and the corporation's involvement in it? Immediately upon ratification of the Thirteenth Amendment, all applicable statutes of limitations would have begun to run against the adult former slaves, who would never have been in a fiduciary relationship with their corporate tormentors. As each minor former slave came of age, the applicable statute of limitations would have immediately begun to run against him or her as well, assuming it had not begun to run against the minor slave immediately upon emancipation.<sup>110</sup> Again, the corporate former slave trafficker would not have owed the minor former slave any fiduciary duty of loyalty, such as the duty to apprise the former slave's formal or informal guardian of any rights of action that the former slave might have had in quasi-contract or tort against the trafficker.<sup>111</sup>

But let us assume that though the court declines to pierce the corporate veil, it does make new equity by finding that TTC has been unjustly enriched by its *immoral* trafficking in slaves prior to ratification of the Thirteenth Amendment. Now the plaintiffs would have to contend with the maxim: "Equity suffers not Advantage to be taken of a Penalty or Forfeiture, where Compensation can be made."<sup>112</sup> Assuming the court were to ignore the myriad equitable defenses that are the subject of this article, the plaintiffs would be entitled only to restitution—that is to say, only to that portion of TTC's current net worth attributable to the unjust enrichment. After all, the current TTC stockholders all would be innocent, and most would have paid full value for their shares. An award of punitive damages or a forfeiture of the entire enterprise would hardly seem equitable. The costs to all the parties in time and treasure of litigating what portion of TTC's assets should be turned over to the plaintiffs as restitution would be astronomical. It would be a discovery nightmare. That is why, from the plaintiffs' perspective,

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109. *See, e.g.*, 28 U.S.C. § 2501 (2006).

110. *See, e.g.*, WASH. REV. CODE ANN. § 4.16.190 (West 2010).

111. *Cf. O'Connor v. Redstone*, 896 N.E.2d 595, 607 (Mass. 2008) ("In cases where a beneficiary has pursued a claim against a trustee directly for breach of fiduciary duty, ... we have held that the statute of limitations does not commence 'until the beneficiary has actual knowledge of the fiduciary's breach. Constructive knowledge is insufficient.'").

112. *See LORING AND ROUNDS, supra* note 3, § 7.2.3.2 (punitive or exemplary damages).

tracing corporate shares into the hands of non-BFPs would seem the better litigation strategy, at least better than litigating what has been going on under the hood of the enterprise since before the Civil War.

Still, as equity looks to the substance of a matter, and as those who seek equity must do equity, it is hard to see how the innocent current shareholders, each and every one of them, would not be entitled *under equitable principles* to notice and an opportunity to raise the equitable defenses that are the subject of this article, even in the face of liability being fixed at the entity level. After all, any judicial relief afforded the plaintiffs would ultimately be at the expense of those very innocent current shareholders. Thus, a judicial finding for the plaintiffs that the corporate entity had been unjustly enriched by its pre-Civil War slave trafficking would likely prove to be a Pyrrhic victory.

C. *Where There Is Equal Equity, the Law Shall Prevail*

The maxim that where there is equal equity, the law shall prevail<sup>113</sup> would likely pose an insurmountable hurdle for the plaintiffs if the TTC fact pattern were a realistic one. That would not necessarily be the case if standing is based on the unjust enrichment of TTC's stock holders, there is some demonstrable *in specie* nexus between the TTC stock and the plaintiffs, and legal title to the TTC stock has found its way into the hands of the current TTC shareholders as a result of *an unbroken succession of donative transfers*, rather than through a succession of arms-length commercial transactions. In such a situation, which is the article's fantasy fact pattern, equity would not necessarily defer to the law. Why? Because of the maxim that equity looks to substance rather than form. That *legal* title to the TTC stock is in the innocent defendants is not necessarily in and of itself the end of the plaintiffs' case.

There is no better example of why possession of title alone does not necessarily carry the day than the trust, a creature of equity. While the trustee has the legal title to the underlying trust property, equity deems the trust beneficiaries to possess the true economic interests.<sup>114</sup> To the world, the trustee is the legal owner of the subject property; in equity, the beneficiaries are the true owners, and equity acts accordingly.<sup>115</sup> In the TTC case, the shareholders—even if they had had no notice of X, Y, and Z's equitable culpability—could be compelled to turn the legal title over to the plaintiffs, this because the shareholders had not given value for their shares.<sup>116</sup>

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113. 30A C.J.S. *Equity* § 136 (2010).

114. 90 C.J.S. *Trusts* § 265 (2010).

115. See generally LORING AND ROUNDS, *supra* note 3, § 3.5.1 (discussing the natures of the trustee's legal estate and the beneficiary's equitable estate).

116. See RESTATEMENT OF RESTITUTION § 172 (1937) (“The principle that a person who innocently has acquired the title to property *for which he has paid value* is under no duty to restore it to one who would be entitled to reclaim it if he had not been innocent or had not paid value therefor, is of wide application, *being a limitation upon the principle that a person who has been wrongfully deprived of his property is entitled to restitution.*”) (emphasis added)).

Now if one were to change the facts ever so slightly to make most of the individual stockholders BFPs of TTC stock—as most would likely be in the real world—then the equities would balance out, and the plaintiffs’ case would likely collapse under the weight of the facts and law. Only the non-BFPs would be left in the defendant class. The plaintiffs and the individual BFP-defendants all would be equally innocent.<sup>117</sup> That being the case, the plaintiffs’ equitable rights to the TTC stock that is in the hands of the BFP-defendants would have been cut off.<sup>118</sup> Legal title does have critical significance when it is lodged in a BFP. As far as equity is concerned, the BFPs would be the true and rightful legal owners of the stock to which they possessed the legal title. Why? Because of the maxim where there is equal equity, the law shall prevail. *The Restatement of Restitution* is generally in accord: “Where a person acquires title to property under such circumstances that otherwise he would hold it upon a constructive trust or subject to an equitable lien, he does not so hold it if he gives value for the property without notice of such circumstances.”<sup>119</sup> Individual non-BFP defendants who could trace their titles back to BFPs of TTC stock also would be in luck.<sup>120</sup>

In the case of an initial transfer of TTC stock by, say, X, Y or Z to a BFP, in theory the plaintiffs could still trace any substituted assets that made it into the hands of the seller (following property into its product), but this is easier said than done, particularly as the transfer would have occurred far back in time.<sup>121</sup>

In theory, the maxim that a thief cannot pass good title, even to a BFP, remains an arrow in the plaintiffs’ quiver.<sup>122</sup> The problem is that because slavery was legal prior to ratification of the Thirteenth Amendment, it cannot be said that X, Y, and Z funded TTC with property that was stolen *from the slaves*. The unfortunate consequence of slavery’s legitimacy was that it was the slaves themselves that were the property. The slaves being property, the only claim left to assert and eventually prove is that the slaves themselves or their services were somehow stolen from the slave owners or other slave traders, and that what was stolen ended up as property of TTC. Presumably the descendants, heirs-at-law, or assignees of the slave owners and other slave traders would have to prove these assertions. It would be passing ironic if at some point they were granted access to the plaintiff class in this article’s fantasy TTC action.

It took a Civil War to extinguish enslavement as a permissible form of property ownership and it may well take additional legislation to remediate its

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117. *See generally id.* (“The question in such cases is which of two innocent persons should suffer a loss which must be borne by one of them. The principle which is applied by courts of equity is that they will not throw the loss upon a person who has innocently acquired title to property for value. The bona fide purchaser is not only entitled to retain the property free of trust, but he is under no personal liability for its value.”).

118. *Id.* § 172(1).

119. *Id.* *See also* SNELL’S EQUITY, *supra* note 16, ¶ 4-44.

120. SNELL’S EQUITY, *supra* note 16, ¶ 4-44.

121. *Id.* ¶ 28-36.

122. “If a chattel is stolen, the thief acquires no title, and in accordance with the maxim *nemo dat quod non habet* (one cannot give what one does not have), cannot give good title to a buyer from him, even if the buyer is innocent of knowledge that the property was stolen.” J.E. PENNER, MOZLEY AND WHITELEY’S LAW DICTIONARY 280 (12th ed. 2001).



last vestiges. The fact that property rights incident to that unfortunate form of ownership were judicially enforced prior to enactment of the Thirteenth Amendment is one of the critical reasons why the equitable arguments of the judicial reparationists are likely to continue to gain little traction in the courts. Having said that, let there be no misunderstanding: This article is merely about equity's limitations. In no way should it be construed as endorsing enslavement as a form of property ownership.

*D. Delay Defeats Equities, or, Equity Aids the Vigilant and not the Indolent*

Laches is the technical term for a delay sufficient to prevent a claimant from obtaining equitable relief:<sup>123</sup>

In the words of Lord Camden L.C., a court of equity "has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive and does nothing."<sup>124</sup>

Even under the fantasy TTC fact pattern, it is hard to see how the plaintiffs' demands are not stale. It is not as if the freed slaves and those individuals down through the years who have stood in their shoes were unaware of the institution of slavery and its fate in the United States. Who was more privy to the facts of enslavement than the slave? Why have those who purport to stand in the shoes of slaves taken so long to bring suit against TTC and its stockholders? So much time has elapsed that gathering the facts as to the chain of ownership of TTC stock alone will be a discovery nightmare. The defendants can take some comfort in the Restatement's hardship exception to the granting of restitution for unjust enrichment:

A suit for restitution by proceedings in equity is barred by lapse of time only if it would be unjust to allow the complainant to maintain it. The existence of such injustice depends on the affirmative answer to two questions: Has the party seeking restitution been unreasonable in his delay after learning the facts; has the delay made it unfair to permit the suit either because a hardship would result to the

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123. SNELL'S EQUITY, *supra* note 16, ¶ 5-16 (defining laches). For a discussion of the interplay of laches and statutes of limitations in an equitable environment, see Restatement of Restitution § 148, cmt. f (1937).

The statutes commonly known as statutes of limitations ordinarily are applicable to actions at law. They also apply to equitable proceedings in which there is concurrent legal remedy. As commonly interpreted, the ordinary statutes do not apply to other equitable proceedings; in some States, however, there are statutes specifically applicable to equitable proceedings and ... equitable proceedings may be barred by analogy to the statute of limitations.

*Id.*

124. SNELL'S EQUITY, *supra* note 16, ¶ 5-16 (quoting *Smith v. Clay*, (1767) 3 Bro. C.C. 639 n., 640 n.).

respondent or to third persons because of a change of circumstances or because there would be a substantial chance of reaching an erroneous decision as to the facts?<sup>125</sup>

But even if the former slaves were not privy to the facts of their own enslavement, sufficient time has elapsed such that it is likely that circumstances have so changed that it would be inequitable to compel the TTC stockholders, even those stockholders who acquired the stock by donative transfer, to relinquish their interests to the plaintiffs. *The Restatement of Restitution* explains:

- (1) The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution.
- (2) Change of circumstances may be a defense or a partial defense if the conduct of the recipient was not tortious and he was no more at fault for his receipt, retention or dealing with the subject matter than was the claimant.<sup>126</sup>

The current owners of TTC stock were in no way complicit in the enslavement of the plaintiffs' ancestors prior to 1865, and *their receipt* of the stock was in no way incident to the commission of some tort. Moreover, the right to enforce a constructive trust may be terminated as a result of the defendant's change of position such that it would be inequitable to compel him or her to surrender the subject property, a fact-based defense that can only further complicate and prolong the discovery process.<sup>127</sup> For instance, an elderly shareholder might have divested himself of all his personal assets except his TTC stock, which was to be his source of support in his final years.

#### *E. He Who Seeks Equity Must Do Equity*

This article assumes for the sake of argument that all the equitable defenses of the few individual TTC stockholders still left in the defendant class have been beaten back. The court has now imposed a constructive trust on their TTC stock for the plaintiffs' benefit. Before restitution orders can issue, however, there is the maxim that the plaintiffs must contend with that could well wrest defeat from the jaws of victory, namely "[h]e who seeks equity must do equity."<sup>128</sup> The defendants being innocent, they would only be liable to the extent they had been unjustly enriched *at the expense of the plaintiffs*.<sup>129</sup> But what if some of the remaining defendants were actually descendants of soldiers of the Union Army

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125. RESTATEMENT OF RESTITUTION § 148 cmt. a. The Restatement also states: "The hardship upon the other party may be because he would lose something, as where there has been a material change of values in the subject matter, or because in view of his changed financial condition restitution would be very difficult, or for other similar reasons." *Id.* § 148 cmt. c.

126. *Id.* § 142 (Change of Circumstances).

127. *Id.* § 178 (Change of Position).

128. See generally SNELL'S EQUITY, *supra* note 16, ¶ 5-09.

129. RESTATEMENT OF RESTITUTION § 204 cmt. a (1937).

who had died in battle? According to equity principles, “[t]o obtain equitable relief the claimant must be prepared to do ‘equity’, in its popular sense of what is right and fair to the defendant[s].”<sup>130</sup> The slaves from whom the plaintiffs descend were deprived of their freedom by the institution of slavery; the Union soldiers from whom some of the current TTC stockholders descend were deprived of their very lives in the cause of eradicating that institution. On the scale of equities, how do loss of freedom and loss of life balance out? At best they balance; at worst they tip in favor of the defendants. In the Civil War, “Union soldiers, sailors, and marines gave their lives on bloody battlefields and the sea to maintain one sovereign nation in which slavery would be eradicated. The impact of this struggle on the families of the wounded and the dead was immeasurable and lasting.”<sup>131</sup> Any liability of the defendants needs to be somehow off-set by the value of their ancestors’ sacrifices in aid of the plaintiffs’ ancestors. What is sauce for the goose is sauce, as well, for the gander. He who seeks equity must do equity.

#### IX. CONCLUSION: SLAVERY REPARATIONS AND THE EQUITY DOCTRINE ARE INCOMPATIBLE

A court of law or a court of equity is not an appropriate forum in which to resolve issues of collective descendant entitlement and collective descendant liability,<sup>132</sup> which are really at the core of the national conversation on slavery reparations.<sup>133</sup> In an equitable unjust enrichment case affecting property rights of the current shareholders of a former corporate slave trafficker, the enormous universe of necessary parties alone would cause the litigation to collapse before the first answer had been filed, even assuming that somehow the initial shareholders, X, Y, and Z in the fantasy fact pattern, could be tried *in absentia* decades and decades and decades after the last survivor of them has died. And looming ahead would still have been a powerful phalanx of equitable defenses, each defense being rooted in one or more of the maxims that are the subject of this article and each sufficiently lethal standing alone to bring an end to the plaintiffs’ case once and for all. It just is never going to happen.

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130. SNELL’S EQUITY, *supra* note 16, ¶ 5-09.

131. *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d 721, 780 (N.D. Ill. 2005).

132. *See id.* at 735-36 (“The specific problem with bringing this issue before a court is that courts are equipped for, and charged with the responsibility of, ‘dealing with claims by well-identified victims against well identified wrongdoers....’ Claims asserting harms against groups of long dead victims, perpetrated by groups of long dead wrongdoers, are particularly difficult to bring in modern American courts of law.... However, reparations advocates who bring their claims before legislatures face no such problems.”) (internal citations omitted).

133. Professor Mari J. Matsuda, a proponent of descendant liability, writes: “Members of the dominant class continue to benefit from the wrongs of the past and the presumptions of inferiority imposed on victims. They may decry this legacy, and harbor no racist thoughts of their own, but they cannot avoid their privileged status.” Matsuda, *supra* note 2, at 379. According to Professor Alfred L. Brophy, the argument that has been advanced most seriously against reparations “is that the people currently asked to pay had nothing to do with the injustices of the past.” Brophy, *supra* note 2, at 1202.

Now, whether a fully-compensated public taking of private property to effect its transfer from a class of citizens of one race to a class of citizens of another race would be legally permissible and procedurally possible is an entirely different matter, but one beyond this article's limited scope.

X. A POST SCRIPT: DEBUNKING THE TRUST AS A SUBSTANTIVE EQUITABLE REMEDY FOR SLAVERY'S MORAL WRONGS AND ADVERSE SOCIETAL AFFECTS

This article is the sixth in a series of articles that share a common theme, namely that equity's relevance in the Anglo-American legal tradition has by no means diminished with time. In fact, as the twenty-first century progresses, equity's tentacles reach ever farther and ever deeper into the societies of the common law jurisdictions. In *Publicly-Traded Open End Mutual Funds in Common Law and Civil Law Jurisdiction: A Comparison of Legal Structures*,<sup>134</sup> the focus was on a critical commercial application of the trust, equity's signature institution.<sup>135</sup> In *Lawyer Codes Are Just About Licensure, the Lawyer's Relationship with the State: Recalling the Common Law Agency, Contract, Tort, and Trust Principles That Regulate the Lawyer-Client Fiduciary Relationship*,<sup>136</sup> the subject was the twenty-first century lawyer as an agent-fiduciary.<sup>137</sup> The fiduciary principle took center stage in *The Common Law Is Not Just About Contracts: How Legal Education Has Been Short-Changing Feminism*,<sup>138</sup> which endeavored to make the case that the private side of the legal ledger—the common law/equity side—has been chronically under-examined by feminist scholars, particularly as a vehicle for empowering and protecting women economically.<sup>139</sup> *State Common Law Aspects of the Global Unwindings of the Madoff Ponzi Scheme and the Sub-Prime Mortgage Securitization Debacle*<sup>140</sup> suggested that globalization has only increased equity's commercial relevance.<sup>141</sup> *Relief for IP Rights Infringement is Primarily Equitable*<sup>142</sup> proceeds from the expectation that as the American economy completes its transition to a data economy, equitable restitution for unjust enrichment will increasingly become the principal remedy for the infringement of economic interests generally, at least on this side of the Atlantic.<sup>143</sup> This article has focused on the continuing relevance of equity's maxims—all critical players in the equity game that, for one reason or another, had been relegated to the sidelines in the other articles.

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134. Rounds & Dehio, *supra* note 20, at 473.

135. *Id.*

136. Rounds, *Lawyer Codes*, *supra* note 20, at 771.

137. *Id.*

138. Charles E. Rounds, Jr., *The Common Law Is Not Just About Contracts: How Legal Education Has Been Short-Changing Feminism*, 43 U. RICH. L. REV. 1185 (2009).

139. *Id.*

140. Charles E. Rounds, Jr., *State Common Law Aspects of the Global Unwindings of the Madoff Ponzi Scheme and the Sub-Prime Mortgage Securitization Debacle*, 27 WISC. INT'L L.J. 99 (2009).

141. *Id.* at 2.

142. Rounds, *supra* note 13, at 313.

143. *Id.* at 314.

Now a post script about the trust, itself a creature of equity. Some vocal reparatationists, such as Randall Robinson and Robert Westley, have proposed that some type of giant trust be established to provide a global remedy for certain continuing wrongs that slavery has allegedly inflicted on certain segments of the American society.<sup>144</sup> Seeking salvation in the trust is a time-honored tradition. Since time immemorial, advocates of one cause or another have seen the trust as an institution with magical properties. When all else has failed, set up a trust and all things will be made right.

H.G. Wells is a prime example of someone who had this abiding, almost touchingly naive faith in the trust and the miracles it could work. In 1920, he had occasion to interview Lenin at his offices in the Kremlin.<sup>145</sup> Wells came away with the view that as brutal and as incompetent as the Bolshevik regime was, it was preferable to whatever the counter-revolutionaries would be in a position to install.<sup>146</sup> To constructively engage the Bolsheviks with their “invincible prejudice” against individual businessmen, the intermediary of a trust would have to be employed.<sup>147</sup> Presumably American and Western European companies would transfer title to investment capital to a board of trustees, each taking back a share of beneficial/equitable interest in the entrusted investment pool that was proportionate to its contribution to the pool. The board would then enter into commercial deals with Lenin on behalf of the beneficial/equitable interests. Wells suggested that this entrusted investment pool “should resemble in its general nature one of the big buying and controlling trusts that were so necessary and effectual in the European States during the Great War.... This indeed is the only way in which a capitalist State can hold commerce with a Communist State.”<sup>148</sup> Wells observed that “[t]he larger big business grows the more it approximates to Collectivism.”<sup>149</sup> He feared that if his trust solution were not implemented, there would be a “final collapse of all that remains of modern

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144. Randall Robinson, taking a page from Robert Westley’s book, proposes a slavery reparations trust fund:

The exact amount of the trust, Robinson believes, should be determined once “an assessment can be made of what it will cost to repair the long-term social damage.” Robinson proposes that the trust fund provide for at least two generations of precollege education (with boarding schools for at-risk children), college for those who cannot afford it, and additional week-end schools that teach “the diverse histories and cultures of the black world.” He also proposes the following: a study of the extent to which companies and families have been enriched by slavery, followed by recovery of that money, which would be reinvested in the trust; funding of black civil rights and political organizations; and commitments to Caribbean and African countries, including “full debt relief, fair trade terms, and significant monetary compensation.” But that is only the beginning, not a comprehensive plan.

Brophy, *supra* note 2, at 1199-1200 (quoting RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 244, 245, 246 (2000)).

145. *See* H.G. WELLS, *RUSSIA IN THE SHADOWS* 145 (1921).

146. *See id.* at 173-74.

147. *See id.* at 175.

148. *See id.*

149. *See id.* at 178.

civilisation throughout what was formerly the Russian Empire.”<sup>150</sup> In Wells’s view, it was not beyond the realm of possibility that all modern civilization ultimately could tumble into the abyss as well.<sup>151</sup>

Fast forward to the state of affairs in Russia after the downfall of communism, and one still sees that when all else fails, there are those who continue to look to the trust for salvation. The hapless executives of the Yukos Oil Company did so, albeit unsuccessfully, as Putin’s forces bore down upon them. The Yukos Oil Company was an open stock holding company organized under the laws of the Russian Federation.<sup>152</sup> It was the parent of 200 subsidiary legal entities, one of which was a Texas corporation.<sup>153</sup> The assets of the conglomerate “[were] massive relative to the Russian economy, and, since they [were] primarily oil and gas in the ground, [were] literally a part of the Russian land.”<sup>154</sup> Yukos became fully privatized during 1995 and 1996.<sup>155</sup> In a last ditch effort to thwart the efforts of the Russian government to loot the conglomerate by retroactive tax assessments, on February 11, 2005, elements of the Yukos management and its foreign investors filed a Chapter 11 plan of reorganization in the United States Bankruptcy Court in Houston, Texas.<sup>156</sup> This reorganization plan aimed to effect a subordination of the Yukos tax debt and the transfer of causes of action into a common law trust to facilitate the continuation of defensive litigation.<sup>157</sup> It was the largest bankruptcy case ever filed in the United States.<sup>158</sup> Those aggrieved by the Russian government’s actions had sought refuge in the institution of the trust, which in the opinion of Professor Maitland, has been the greatest achievement of English jurisprudence, the most important of equity’s exploits.<sup>159</sup> Alas, however, it was equity’s less accommodating, more cold-blooded side that ultimately proved to be their undoing. There is the maxim that equity does nothing in vain.<sup>160</sup> It will not issue decrees that cannot be enforced.<sup>161</sup> To put it crudely: Equity will not make a fool of itself. In this case, equity invoked the doctrine of forum non conveniens and stood aside.<sup>162</sup>

Assume that a massive slavery reparations trust is ordered by Congress or some federal court. A trust is a fiduciary relationship with respect to property, to

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150. *See id.*

151. *See id.* at 179.

152. *See In re Yukos Oil Co.*, 321 B.R. 396, 400 (Bankr. S.D. Tex. 2005).

153. *See id.*

154. *Id.* at 399.

155. *See id.* at 400.

156. *Id.* at 401, 403.

157. *See id.* at 403.

158. *Id.* at 399.

159. F.W. MAITLAND, EQUITY: A COURSE OF LECTURES 23 (A.H. Chaytor & W.J. Whittaker eds., 2d ed. 1936) (1909).

160. HAROLD GREVILLE HANBURY & RONALD HARLING MAUDSLEY, MODERN EQUITY 43 (10th ed. 1976).

161. *Id.*

162. *See generally* Dmitry Gololobov & Joseph Tanega, *Yukos Risk: The Double-Edged Sword—A Case Note on International Bankruptcy Litigation and the Transnational Limits of Corporate Governance*, 3 N.Y.U. J.L. & BUS. 557, 568-70 (2007).

which the trustees have the legal title.<sup>163</sup> Where would the trust property come from and how would the trust be structured? Would the trust property come from legislative appropriations, fully-compensated governmental takings of private property, or litigation recoveries? Who would be the trustees, and what would be the mechanism for filling vacancies? The trustees presumably would have the power to vote the entrusted stock to which they had the legal title. Such massive concentrations of economic power in the hands of a few trustees have raised concerns in the past. The Statute of Uses was Henry the VIII's response to the concentration of most of the land of England in the hands of a few fiduciaries.<sup>164</sup> The Sherman Antitrust Act was Congress's answer to the entrustment of large segments of the U.S. economy in the hands of a few trustees.<sup>165</sup> What if the title and voting power were lodged in the United States as trustee of the massive slavery reparations trust? There is an ancient equity maxim that one cannot enforce a use, a type of proto-trust, against the Crown.<sup>166</sup> Even with leave to do so, the plaintiffs in a trust enforcement action against the United States, as a practical matter, would be engaging in an act of futility, as the American Indians have learned from bitter experience.<sup>167</sup> Inevitably, control of such a vast amount of economic power would become a prize in the political power game. That is a given.<sup>168</sup> Any attempt by one Congress to put in place statutory safeguards to prevent the trust fund from being hijacked by the politicians could easily be undone by a future Congress, as "[o]ne Congress may not bind a future one."<sup>169</sup> Because the devil is in the details, those who muse about the establishment of a massive reparations trust need to provide some specifics. Otherwise, there is no way to adequately assess its legal and practical feasibility, let alone its general social utility.

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163. RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).

164. By the time of the War of the Roses (1455-1485), most of the land in England already was held to uses, the use being the precursor to the trust. *See* 1 SCOTT & ASCHER, *supra* note 34, § 1.5. In 1536, Parliament enacted the Statute of Uses in an effort "to put a stop to the drainage of royal revenues by the evasion of feudal dues through the practice of conveying to uses." CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 203 (2d ed. 1988). The citation to the Statute of Uses is 27 Hen. VIII, c. 10. (1536).

165. COLUMBIA ENCYCLOPEDIA 2793 (5th ed. 1993) ("The arrangement at which the Sherman Antitrust Act was directed was a business application of the trust form. The Standard Oil Company, for example, induced stockholders in various enterprises to assign their stock to a board of trustees and to receive dividend-bearing trust certificates in return.")

166. *See* United States v. Mitchell, 463 U.S. 206, 235 n.8 (1983) (Powell, J., dissenting) (citing AUSTIN W. SCOTT, LAW OF TRUSTS § 95, at 772 (3d ed. 1967)).

167. *See generally* Cobell v. Kempthorne, 532 F. Supp. 2d 37 (D.D.C. 2008).

168. *See generally* Charles E. Rounds, Jr., *Why Social Investing Threatens Public Pension Funds, Charitable Trusts, and the Social Security Trust Fund*, in PENSION FUND POLITICS: THE DANGERS OF SOCIALLY RESPONSIBLE INVESTING 56-76 (Jon Entine ed., 2005).

169. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810) (in which Chief Justice Marshall enunciated the constitutional principle that one legislature cannot abridge the powers of a succeeding legislature). *See also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (unlike the Constitution, a legislative Act is "alterable when the legislature shall please to alter it").