

2012

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### Recommended Citation

Deleso A. Alford *HeLa Cells and Unjust Enrichment in the Human Body*, 21 *Annals Health L.* 223 (2012).  
Available at: <http://lawcommons.luc.edu/annals/vol21/iss1/21>

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## HeLa Cells and Unjust Enrichment in the Human Body

*Deleso A. Alford, J.D., LL.M.\**

Henrietta Lacks is buried Clover, Virginia.<sup>1</sup> She achieved fame and immortality in the world of science.<sup>2</sup> In 1951, Johns Hopkins Hospital harvested the tissue of Ms. Lacks, a 31-year-old African American woman diagnosed with cervical cancer to mass produce “HeLa cells.”<sup>3</sup> The money derived from her cell line produced wonders and scientific breakthroughs in technology, biology and medicine which “far exceeds that reflected in the published literature, because it is the reference cell in so many research laboratories.”<sup>4</sup>

Ms. Lacks – raced by social construction<sup>5</sup> and gendered by biology for

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1. *See generally* REBECCA SKLOOT, *THE IMMORTAL LIFE OF HENRIETTA LACKS* (Crown Pub. Group 2010) (discussing the life of Ms. Henrietta Lacks and her cells, known as HeLa cells, the first “immortal” cells to be grown in culture).

2. Lisa Ikemoto, *The Racialization of Genomic Knowledge*, 27 SETON HALL L. REV. 937, 948 (1997).

3. *See* SKLOOT, *supra* note 1, at 86. Henrietta Lacks died within 8 months of her first visit to John Hopkins from cervical cancer.

4. Howard W. Jones, Jr. et al., *George Otto Gey. (1899-1970): The HeLa Cell and a Reappraisal of its Origin*, 38 OBSTETRICS & GYNECOLOGY 945, 948 (1971).

5. *See* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 30 (1994) (arguing that “because races are constructed, ideas about race form part of a whole social fabric into which other relations, among them gender and class, are also woven.”). *See generally* See Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

all mankind stood at the crossroads of public health care (circa 1951)<sup>6</sup> – in an apartheid state of reality in the United States and ploughed back into medicine. The biological uniqueness<sup>7</sup> of her cells allowed scientists and researchers to benefit society as a whole. In this essay, I place Ms. Lacks' parts (tissue cells) back into her body to raise a claim of unjust enrichment.

I discuss the ongoing debate as to whether the ownership of cells is a legally protected interest. I explore historical facts and apply them to eke out justice for Ms. Lacks and her descendants. I sketch the elements for unjust enrichment under Restatement (Third) of Restitution and Unjust Enrichment (2011). The new restatement offers an opportunity to re-visit the unauthorized taking of and profiting from Ms. Lacks' cell line. Even if it does not fit expressly within the definition of unjust enrichment, it fits within the purpose and goals of the concept.

### I. THE DEBATE: LEGALLY PROTECTED INTEREST IN THE BODY?

The legal debate about individuals claiming property interest in their tissue surfaced in *Moore v. Regents of the University of California*.<sup>8</sup> This case was subsequently followed by an appeal and a final decision by the California Supreme Court in 1990. It relied upon policy implications and the potential chilling effect on research to find that the plaintiff had no property interest in his excised cells. However, the court acknowledged that the acquisition and use of Moore's tissue cells constituted a physician's breach of fiduciary duty. Succinctly put, the court reasoned that a physician owes a patient a fiduciary duty to the same tissue cells that the patient does not possess a proprietary interest in the first place.<sup>9</sup> The debate as to the

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6. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (Oxford Univ. Press 1966) 7 (noting that laws and customs furthered racial ostracism in hospitals among other social aspects of life).

7. See Terry Sharrer, "HeLa" Herself, Celebrating the Woman Who Gave the World Its First Cell Line, Scientist, July 1, 2006, available at <http://classic.the-scientist.com/2006/7/1/22/1/> (explaining that HeLa cells are unique and grow aggressively because of:

[a] combination of human papillomavirus 18, which produces a protein that degrades the p53 tumor suppressor gene protein without mutating *p53* itself, and a mutation with Lacks' HLA supergene family, on chromosome 6, that allowed severe chromosome damage to occur. The results include such abnormalities as the long arm and centromere of chromosomes 1 being attached to the long arm of chromosome 3, and four or five copies of the short arm of chromosome 5 ending with a centromere.).

8. *Moore v. Regents of the Univ. of California*, 249 Cal. Rptr. 494, (Cal. Ct. App. 1988), modified, 793 P.2d 479 (Cal. 1990), cert. denied, 499 U.S. 936 (1991).

9. See Press Release, Berman Institute Scholar Calls for a New Legal, Ethical Framework for Research With Human Tissue Specimens (June 18, 2010) available at <http://www.bioethicsinstitute.org/web/module/press/pressid/230/interior.asp> (referencing Javitt, "[t]he court's reasoning with respect to informed consent is flawed' . . . because [it]

correctness of this decision is often faced with compelling points made by the concurring and dissenting opinions.<sup>10</sup> It is beyond the scope of this essay to debate the *Moore* holding. As Professor Gail Javitt puts it:

[w]hile it is true that there is no legal consensus on the status of human tissue—although the issue has been the subject of scholarly discussion—resolution of the property status is unnecessary in order to impose an obligation on researchers with respect to prospective contributors of human tissue. As both Rebecca Skloot’s book and public opinion research reveal, many people do harbor strong possessive, or at least protective, feelings towards their tissue. Such feelings may find their source in religious views of the body—as is the case with Henrietta’s daughter, who believed that her mother’s soul, in some sense, resides in her cells. Alternatively, they may reside in notions of bodily integrity, i.e. the conviction that, as a matter of autonomy, individuals should retain the power to control the use of their body parts by virtue of the fact that those parts originated in, and once were a part of, their body.<sup>11</sup>

I contend that the *Moore* court acknowledged a property interest in the patients’ spleen that was on one hand subject to being patented by his physician, yet incapable of proprietary ownership by the patient.<sup>12</sup> This article intends to shed light on the unique facts supporting a claim for unjust enrichment in the human body of Henrietta Lacks. For purposes of contextualization, I call for a critical examination of the *Moore* court’s majority opinion’s act of erasing the identity<sup>13</sup> of Ms. Lacks as both a person and/or traceable cell line, commonly referred to as the HeLa cell line. In a footnote reference, the *Moore* court states that “[t]he first human tumor cell line, which still is widely used in research, was isolated in 1951.”<sup>14</sup> The majority court relegated Ms. Lacks’ valuable product line to a year in time without acknowledgement of her identity. Nevertheless, the court relied on the absence of authority to not find a property interest in human tissue cells *sui generis* in *Moore*. The court appeared to reason that since the “first” immortal cell line has not raised a property interest in her cell line (since 1951) then one does not exist in 1993. The obvious

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‘failed to distinguish between Moore as patient and Moore as research subject’”).

10. Benjamin Appelbaum, *Moore v. Regents of the University of California: Now That the California Supreme Court Has Spoken, What Has It Really Said?*, 9 N.Y.L. SCH. J. HUM. RTS. 495, 516-25 (1992).

11. Gail Javitt, *Why Not Take All of Me? Reflections on Immortal Life of Henrietta Lacks and the Status of Participants in Research Using Human Specimens*, 11 MINN. J.L. SCI. & TECH. 713,750-51 (2010).

12. Michele Goodwin, *Formalism and The Legal Status of Body Parts*, 2006 U. CHI. LEGAL F. 317, 327-328 (2006).

13. See Ikemoto, *supra* note 2, at 948-50.

14. See *Moore*, 793 P.2d at 488, n. 15.

silencing of Ms. Lack's valuable contribution (HeLa cells) to society in the seminal case of *Moore* goes beyond a lively debate on tissue cells property ownership. It speaks volumes to a call for justice for Ms. Lacks' descendants for the benefit conferred to society.

## II. THE CLAIM

Dr. Howard Jones – the first Johns Hopkins physician to diagnose Ms. Lacks with cervical cancer – notes that, “[s]cientific progress and indeed progress of all kinds is often made at great cost, such as the sacrifice made by Henrietta Lacks.”<sup>15</sup> This essay frames the so-called “sacrifice” made by Ms. Lacks in term of unjust enrichment. Most recently, the story of Ms. Lacks has been met with a degree of astonishment that either warrants utter disbelief and/or deep gratitude for her “gift.”<sup>16</sup> However, the word “sacrifice” is not an accurate assessment of what happened in the instant matter. Ms. Lacks' tissue cells were not only taken and commercially used without her consent, but she was neither informed of the nature of the proposed procedure, nor its risks of infertility.<sup>17</sup> Upon Ms. Lacks' admission to Johns Hopkins, she signed an “OPERATION PERMIT,” which read, “I hereby give consent to the staff of The Johns Hopkins Hospital to perform any operative procedures and under any anesthetic either local or general that they may deem necessary in the proper surgical care and treatment of: \_\_\_\_\_.”<sup>18</sup> Ms. Lacks printed her name in the blank space, which was duly witnessed.<sup>19</sup> It is without question that Johns Hopkins, through its physicians, acted within the scope of the expressed consent form as it relates to putting Ms. Lacks under anesthesia for the radium cancer treatment to address her diagnosis of invasive cervical carcinoma.<sup>20</sup> I argue that the interference of Henrietta's interest by the

15. Howard W. Jones, Jr., *Record of the First Physician to see Henrietta Lacks at the Johns Hopkins Hospital: History of the Beginning of the HeLa Cell Line*, 176 AM. J. OBSTETRICS & GYNECOLOGY S227, S228 (1997).

16. Nathalie Rothschild, *How One Woman's Cells Revolutionised Science*, SPIKED, Oct. 28, 2011, available at [http://www.spiked-online.com/index.php/site/reviewofbooks\\_article/11347/](http://www.spiked-online.com/index.php/site/reviewofbooks_article/11347/). See SKLOOT, *supra* note 1, at 29-30. (noting that during Ms. Lacks' 1951 hospital visit, Dr. Richard TeLinde, Johns Hopkins top cervical expert believed in using patients from the public wards usually without their knowledge for research purposes).

17. Arthur Derse, *The Ethics of Self-Determination: The Diving Bell and the Butterfly*, in THE PICTURE OF HEALTH 51 (Henri Colt et al. eds. 2011)(noting that, “[o]ver the past century, American law and medical ethics newly recognized that ‘[e]very human being of adult years and sound mind has a right to determine what shall be done with his [or her] own body.’ Not only must the patient give consent for medical treatment, but the patient must also be informed of the nature of the proposed procedure, as well as the benefits, risks, and alternatives”).

18. See SKLOOT, *supra* note 1, at 31.

19. *Id.*

20. See *id.* at 31-33.

wrongful taking and transferring of tissue cells occurred when the surgeon on duty “shaved two dime-sized pieces of tissue from [Ms. Lacks’] cervix: one from her tumor, and one from the healthy cervical tissue”<sup>21</sup> for research purposes without her knowledge or consent. This act exceeded the scope of the operation permit signed by Ms. Lacks.

Furthermore, the application of a critical race feminist lens would allow one to critique the “her-story” narrative of Ms. Lacks’ multidimensional existence as a raced, classed, and gendered patient marginalized in history, at best. At the time of Ms. Lacks’ treatment, it had been the practice of Johns Hopkins to warn patients about the risks of fertility loss before cancer treatment.<sup>22</sup> Ms. Lacks signed a consent form for cancer treatment.<sup>23</sup> During this time, the accepted treatment consisted of putting strips of lead inside the vagina to protect the colon and lower spine from radiation.<sup>24</sup> Ms. Lacks’ doctors failed to apprise her of the risks of infertility before the cancer treatment, in direct violation of the hospital’s practice.<sup>25</sup> Ms. Lacks’ medical record indicates that “if she had been told [of the risks] before, she would not have gone through with treatment.”<sup>26</sup> It appears that Ms. Lacks’ denial of identity as a “woman” worthy of being warned of the potential inability to reproduce was overshadowed by her intersecting identity as a “poor Southern tobacco farmer who worked the same land as her [enslaved] ancestors”<sup>27</sup> in the body of a 31 year-old wife, mother of five gaining free public health care.

As Skloot contends, “[m]any scientists believed that since patients were treated for free in the public wards, it was fair to use them as research subjects as a form of payment.”<sup>28</sup> Another notion of “fairness” will be addressed in terms of unjust enrichment as to Ms. Lacks and her descendants. The nonconsensual transfer of tissue cells for research purposes and/or substantial profit did not end with Ms. Lacks. It is well

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21. *See id.* at 33.

22. *Id.* at 47. *See also* Richard W. TeLinde, *Hysterectomy: Present-Day Indications*, JMSMS, July 1949, at 829, (noting in part, “[t]he woman on whom hysterectomy is contemplated is entitled to a simple explanation of the facts. She may be truthfully told that aside from the loss of reproductive function and the inconvenience of menstruation she may expect no physical or psychical change.”).

23. *See* Ruth R. Faden, *Informed Consent and Clinical Research*, KENNEDY INST. ETHICS J., Dec. 1996, at 356, 256 (explaining that, “[d]uring the forties and fifties, duties to obtain informed consent, whether for treatment or for research, were simply not part of the doctor-patient experiences.”). This author believes that Johns Hopkins failure to adhere to its own custom of warning its female patients of the potential loss of fertility amounts to a failure to obtain informed consent.

24. *See* SKLOOT, *supra* note 1, at 46-47.

25. *Id.* at 47-48.

26. *Id.* at 48.

27. The Lacks Family (2011), <http://www.lacksfamily.com>.

28. *See* SKLOOT, *supra* note 1, at 29-30.

documented that medical representatives continued to take blood and tissue cell samples from her surviving family members without informed consent.<sup>29</sup> I submit that Ms. Lacks' descendants have a viable claim for unjust enrichment under Restatement (Third) of Restitution and Unjust Enrichment.

### III. THE RELIEF: RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT

Professor Andrew Kull, Reporter for the Restatement (Third) of Restitution and Unjust Enrichment (“Restatement”) states his proposition on the law of restitution as “be[ing] defined exclusively in terms of its core idea, the law of unjust enrichment.”<sup>30</sup> Professor Kull points out that, “it would be axiomatic (i) that no liability could be asserted in restitution other than one referable to the unjust enrichment of the defendant, and (ii) that the measure of recovery in restitution must in every case be the extent of the defendant’s unjust enrichment.”<sup>31</sup> Based upon the unique facts surrounding Ms. Lacks, I argue that the impossibility of measuring the defendant’s unjust enrichment with mathematical exactness should not prevent restitution required under a notion of transformative justice.

Section 44 of the Restatement (Third) of Restitution and Unjust Enrichment states that:

(1). A person who obtains a benefit by conscious interference with a claimant’s legally protected interests (or in consequence of such interference by another) is liable in restitution as necessary to prevent unjust enrichment, unless competing legal objectives make such liability inappropriate.

(2). For purposes of subsection (1), interference with legally protected interests includes conduct that is tortious, or that violates another legal duty or prohibition (other than a duty imposed by contract), if the conduct

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29. KARLA FC HOLLOWAY, *PRIVATE BODIES, PUBLIC TEXTS: RACE, GENDER AND A CULTURAL BIOETHICS* 19 (Duke Univ. Press 2011); Susan H. Hsu et al., *Genetic Characteristics of the HeLa Cell*, 191 *SCIENCE* 392, 392 (1976) (noting that “in an effort to clarify the characteristics of the HeLa cell and establish its probable genotype for better-known polymorphisms, we studied HLA and other markers in the surviving husbands and children of Henrietta Lacks”).

30. Andrew Kull, *Rationalizing Restitution*, 83 *CAL. L. REV.* 1191, 1196 (1995). I want to personally thank Professor Kull for the inspiration to use the Restatement as a legal anchor on behalf of Ms. Lacks after his presentation “Restitution Revival – The Restatement (3d) of Restitution and Unjust Enrichment” at the Southeastern Association of Law Schools (SEALS) 2010 Annual Meeting.

31. *Id.*

constitutes an actionable wrong.<sup>32</sup>

Johns Hopkins' practice of taking tissue cells without Ms. Lacks' knowledge or consent amounted to a conscious interference with her legally protected interests, thereby rendering the institution liable for restitution to prevent unjust enrichment. Johns Hopkins nonconsensual transfer of Ms. Lacks' tissue cells for research purposes led to the first immortal cell line referenced as HeLa cells. The HeLa cells' benefit to society, including helping advance in vitro fertilization, cloning, and gene mapping<sup>33</sup> was made possible by Johns Hopkins' nonconsensual transfer in 1951. The viability of a claim for unjust enrichment involving the body parts at issue in *Moore* has been thoroughly addressed by Michael Traynor in the Restatement.<sup>34</sup> Traynor correctly argues that "[i]f Moore was wronged, a remedy is appropriate that is in tune with the principle that restitution should be available when a person is 'unjustly enriched at the expense of another.'"<sup>35</sup> Further, he adds, "[a]s between awarding damages for an unmeasurable and uncertain loss of the right to informed consent and awarding restitution of a reasonable portion of any net profit based on an evaluation of the relative values of the contributions, restitution may be the preferable remedy, at least in some cases."<sup>36</sup> The Restatement, in section 44, seemingly adopted Traynor's view as to recognizing a claim for unjust enrichment in its useful illustration derived from the facts of *Moore*<sup>37</sup>:

Patient consults Doctor for treatment of a rare blood disorder. Doctor recognizes that certain characteristics of Patient's blood cells make them unusually valuable for research purposes. Without request or disclosure to Patient, Doctor retains the blood samples taken from Patient on subsequent visits and sells them to interested researchers, realizing a total of \$25,000. Doctor's decision to examine samples of Patient's blood is medically appropriate; the same amount of blood would have been drawn from Patient in any event; and Patient suffers no physical injury from Doctor's activities. By the law of the jurisdiction, Patient cannot maintain an action for conversion of blood or other tissue removed from his body for medical purposes. On the other hand, local law governing disclosure by physicians and informed consent by patients is violated when Doctor, without disclosure or consent, makes any use of Patient's blood

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32. Restatement (Third) of Restitution & Unjust Enrichment § 44 (2011).

33. Annette Dula, *Research and Racism: Miss Evers' Boys*, in *THE PICTURE OF HEALTH* 83 (Henri Colt et al. eds. 2011).

34. Michael Traynor, *The Unjust Enrichment Claim in Moore v. Regents*, 9 BIOTECHNOLOGY L. REP. 240, 241-45 (1990).

35. *Id.* at 241.

36. *Id.* at 244.

37. See Restatement (Third) of Restitution & Unjust Enrichment § 44 cmt. b, illus. 11, rept. note b (2011).



for purposes unrelated to his care of Patient. Patient may recover \$25,000 from Doctor by the rule of this section.<sup>38</sup>

A similar case subsequent to *Moore* addressing unjust enrichment for the “new tort of nondisclosure of research or economic interest”<sup>39</sup> is *Greenberg v. Miami Children’s Hospital Research Institute*.<sup>40</sup> Professor Mark A. Rothstein points out that in *Greenberg*, Judge Moreno paid particular attention to the fact that the plaintiffs’ asserted “that they would not have made their contributions to the research had they known of the defendant’s intentions to commercialize their genetic material.”<sup>41</sup> This essay unearths the marginalized aspect of Ms. Lacks’ assertion that she would not have agreed to the cancer treatment had the Johns Hopkins physicians informed her of the potential risk for infertility pursuant to their standard practice.

#### A. *Prima Facie* case for Unjust Enrichment

Ms. Lacks’ descendant’s claim for unjust enrichment must satisfy certain elements to prove a *prima facie* case.<sup>42</sup> Generally, the elements include: a benefit conferred upon the defendant by the plaintiff; awareness, appreciation, or knowledge by the defendant of the benefit; and acceptance or retention of the benefit by the defendant under such circumstances as to make it inequitable for the defendant to retain the benefit to plaintiff.<sup>43</sup> Pursuant to section 1 of the Restatement, “[a] person who is unjustly enriched at the expense of another is subject to liability in restitution.”<sup>44</sup>

#### 1. Benefit Conferred

The benefits conferred by Ms. Lacks’ HeLa cell line can be summed up in this way, HeLa, the first human cells to grow outside the body, have been

38. *Id.* at *illus.* 11.

39. Traynor, *supra* note 34, at 241 (noting that:

... in the absence of recognizable personal injury and accompanying norms of compensability, or property damage and accompanying standards of market value, there are no established standards for determining damages for the new tort of nondisclosure of research or economic interest. Moreover, the potential liability for damages is open ended and is not necessarily limited to the defendants [sic] gain.).

40. *Greenberg v. Miami Children’s Hospital Research Institute, Inc.*, 264 F. Supp. 2d 1064 (S.D. Fla. 2003).

41. Mary R. Anderlik & Mark A. Rothstein, *Current In Contemporary Ethics*, 31 J.L. MED. & ETHICS 450, 452 (2003).

42. Debra L. Greenfield, *Greenberg v. Miami Children’s Hospital: Unjust Enrichment and the Patenting of Human Genetic Material*, 15 ANNALS HEALTH L. 213, 217 (2006).

43. *Id.*

44. Restatement (Third) of Restitution & Unjust Enrichment §1 (2011).

used in more than 60,000 experiments involving leukemia, Parkinson's disease and AIDS. They were instrumental in developing "the polio vaccine, chemotherapy, cloning, gene mapping, [and] in vitro fertilization."<sup>45</sup> Due to the unique nature of Ms. Lacks' cells, they continue to play a vital role in medical advances worldwide.<sup>46</sup> However, a more telling narrative that fills the gap between Ms. Lacks' benefit conferred and value gained in return is as follows: "[e]ven though Henrietta's cells launched a multimillion-dollar industry that sells human biological materials, the family never saw any of the profits, and for decades after her decade, many of her descendants struggled in Baltimore, often going years without health insurance."<sup>47</sup>

## 2. Awareness, Appreciation, or Knowledge by the Defendant of the Benefit

### a. Johns Hopkins, April 10, 1951

Dr. George Gey, head of Johns Hopkins' tissue culture research lab stood on national television holding a vial containing Ms. Lacks' cells as "he explained that his lab was using [the] cells to find ways to stop cancer. He said, "[i]t is quite possible that from fundamental studies such as these that we will be able to learn a way by which cancer cells can be damages or completely wiped out."<sup>48</sup>

Robert Stevenson of the American Association of Tissue Banks put it this way, "[t]he initial importance of the HeLa cells was clear very quickly . . . [and] by growing easily and abundantly, they became the model system to use for the isolation of poliovirus. When this became available, it meant immediately that you could culture patients in a routine and inexpensive way and determine if they were infected with polio."<sup>49</sup>

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45. Dwight Garner, *A Woman's Undying Gift to Science*, N.Y. TIMES, Feb. 3, 2010, at C1, available at <http://www.nytimes.com/2010/02/03/books/03book.html>.

46. Johns Hopkins Inst. for Clinical & Transitional Research, The Henrietta Lacks Memorial Lecture Series (2011), <http://ictr.johnshopkins.edu/ictr/2010/10/the-henrietta-lacks-memorial-lecture-series.html> [hereinafter Johns Hopkins].

47. The Lacks Family, *supra* note 27.

48. SKLOOT, *supra* note 1, at 57. See also Van Smith, *Wonder Woman: The Life, Death, and Life After Death of Henrietta Lacks, Unwitting Heroine of Modern Medical Science*, BALTIMORE CITY PAPER, Apr. 17, 2002, available at <http://www.citypaper.com/news/story.asp?id=3426>.

49. Rebecca Skloot, *An Obsession with Culture*, PITT MAG., Mar. 2001, <http://www.pittmag.pitt.edu/mar2001/culture.html> (stating that:

Gey and his colleagues soon showed that HeLa cells were more sensitive to polio than some primate cells then used for testing the vaccine. Almost immediately,

b.     Johns Hopkins – From its Official Statement About HeLa Cells and Their Use – February 1, 2010

The following statement issued by Johns Hopkins addresses some question raised surrounding the release of Skloot’s book about the lack of informed consent from Ms. Lacks or her family to permit the use of her cells for scientific research, and about some financial issues related to their use:

Johns Hopkins Medicine sincerely acknowledges the contribution to advances in biomedical research made possible by Henrietta Lacks and HeLa cells. It’s important to note that at the time the cells were taken from Mrs. Lacks’ tissue, the practice of obtaining informed consent from cell or tissue donors was essentially unknown among academic medical centers. Sixty years ago, there was no established practice of seeking permission to take tissue for scientific research purposes. The laboratory that received Mrs. Lacks’ cells had arranged many years earlier to obtain such cells from any patient diagnosed with cervical cancer as a way to learn more about a serious disease that took the lives of so many. Johns Hopkins never patented HeLa cells, nor did it sell them commercially or benefit in a direct financial way. Today, Johns Hopkins and other research-based medical centers consistently obtain consent from those asked to donate tissue or cells for scientific research.<sup>50</sup>

This essay does not raise the unjust enrichment claim based on Johns Hopkins’ lack of a duty to seek informed consent for research purposes in 1951, but for the institution’s (through its physicians) breach of a fiduciary duty to the patient as to their failure to inform her of the attendant risks of infertility prior to gaining Ms. Lacks’ written consent to cancer treatment as evidenced by the OPERATION PERMIT. The nonconsensual transfer of Ms. Lacks’ tissue cells continues to benefit science and technology in a way

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the National Foundation for Infantile Paralysis established facilities at the Tuskegee Institute for the mass production and distribution of HeLa cells, some 600,000 cultures which they shipped around the country. But that was just the beginning. Gey gave HeLa cells to researchers around the world—often flying with test tubes in his breast pocket for safety—providing a tool that would help uncover the secrets of cancer, viral growth, protein synthesis, the human genome . . . the list goes on. Cosmetic companies bought HeLa cells by the millions to test their products for side effects. And though Henrietta never traveled farther than the day she left her native Virginia for Baltimore, her cells sat in nuclear test sites from America to Japan and multiplied in a space shuttle far above Earth.).

50. Press Release, Johns Hopkins Medicine, A Statement From Johns Hopkins Medicine About HeLa Cells and Their Use (Feb. 1, 2010), [http://www.hopkinsmedicine.org/news/Media/releases/A\\_Statement\\_From\\_Johns\\_HopkinsMedicine\\_About\\_HeLa\\_Cells\\_and\\_Their\\_Use](http://www.hopkinsmedicine.org/news/Media/releases/A_Statement_From_Johns_HopkinsMedicine_About_HeLa_Cells_and_Their_Use).

that neither Ms. Lacks nor her descendants profited from.

### 3. Acceptance or Retention of an Inequitable Benefit

Ms. Lacks' tissue cells were taken and transferred at the hands of Johns Hopkins. The institution and its researchers accepted the notoriety of being the laboratory site of the first "immortal" human cell culture line. Ms. Lacks is a sum of her parts worthy of restitution for the interference of her protected interest. She received nothing in return for the nonconsensual transfer of her valuable cell line. Upon her death, Ms. Lacks' descendants have yet to profit from the benefit conferred.<sup>51</sup>

Accordingly, "[r]estitution as a measure of recovery matters precisely when defendant's gain exceeds plaintiff's provable loss, either because plaintiff's loss is small or because it is hard to prove."<sup>52</sup> As to Ms. Lacks's multi-dimensional existence as a raced, gendered, and classed patient, the right to "own" one's power of decision making to date has not been adequately addressed.<sup>53</sup> The application of unjust enrichment would acknowledge the failure of Johns Hopkins to see Ms. Lacks as worthy of explaining the attending risk of the loss of reproductive capacity before she signed the operation permit for cancer treatment.

## IV. TRANSFORMATIVE JUSTICE

"Lady Justice must remove her blindfold, and develop a keen sense of sight, which will allow for deliberate vision calculated towards an application of principles of social equity."<sup>54</sup> A notion of transformative justice should be firmly rooted in the ethical principle of justice.<sup>55</sup> Justice does not allow us to continue the denial of Henrietta Lacks' as a person (the sum of her parts) due to the public narrative that continues to benefit society

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51. See Patricia Cohen, *Returning the Blessings of an Immortal Life*, N.Y. TIMES, Feb. 4, 2011, available at <http://www.nytimes.com/2011/02/05/books/05lacks.html>.

52. Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1288 (1989).

53. George J. Annas, *Blinded by Science*, 9 Biotechnology L. Rep. 245, 247 (1990) (explaining that in Moore, Justice Broussard's dissenting opinion argued that the majority was confusing "the right to control one's body parts after removal with the right to control them prior to removal.").

54. John Blum, *Is Justice for One Justice for All? The Dilemma of Public Health Enforcement in an Interconnected World*, 36 LOYOLA U. CHI. L.J. 349, 362 (2005) (advocating for a public health justice principle that balances the impact of policies on individuals both nationally and internationally).

55. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 12 (noting justice as one of the "four principle" approach to Bioethics). See also Ruqaiyah Yearby, *Good Enough To Use For Research, But Not Good Enough To Benefit From the Results of That Research: Are the Clinical HIV Vaccine Trials In Africa Unjust?* 53 DEPAUL L. REV. 1127, 1132-38 (2004) (exploring the principle of justice and its application to clinical trials internationally and in the United States).

at-large from the use of her parts (tissue cells) as a cell line without acknowledging any obligation for Ms. Lacks' descendants to be made whole.<sup>56</sup> The principles of social equity mandate that we acknowledge the salient issues of race, gender, class, and medicine that penetrated our public healthcare system both then and now. A public sense of justice for Ms. Lacks' family is worthy of due praise for taking steps to recognize her legacy.

Rebecca Skloot founded a non-profit foundation with a mission to show appreciation for those who have contributed to science in the way Ms. Lacks has. In fact, her foundation has directly impacted the lives of Ms. Lacks' descendants by providing a high-tech hearing aid for one of her sons, truck repairs for another son, new teeth for a granddaughter, braces for a great-granddaughter, and tuition, books, and fees for five of her grandchildren and great-grandchildren.<sup>57</sup> Skloot is also trying to raise over \$125,000 to pay the medical costs associated with the quadruple-bypass surgery for one of Henrietta's sons.<sup>58</sup> She was instrumental in ensuring that Henrietta's three surviving sons were hired as consultants for an HBO film being produced by Oprah Winfrey's Harpo Films and screenwriter Alan Ball.<sup>59</sup> Additionally, individual readers – cancer survivors and scientists – have contributed much of the \$50,000 to the foundation.<sup>60</sup> The Johns Hopkins Institute for Clinical and Translational Research is the establishing sponsor of the Henrietta Lacks Memorial Lecture Series.<sup>61</sup> It is

[a]n annual reminder of the gratitude, respect, and clear communication due to all research participants. . . . By coming together each year to remember the woman behind this lifesaving, world-changing development in biomedical science, the Johns Hopkins research community will never again forget that HeLa stands for Henrietta Lacks.<sup>62</sup>

Johns Hopkins also established financial awards including the Henrietta Lacks East Baltimore Health Sciences Scholarship, sponsored by the Johns Hopkins Health System, an award of up to \$10,000 per year to support promising graduates of Paul Laurence Dunbar High School,<sup>63</sup> as well as the

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56. See HOLLOWAY, *supra* note 29, at 154-55 (noting that Ms. Lacks' story is not only "important in its individual sense, [but] the wrong perpetrated on her family after her death is read into a narrative of black death and dying that has made race matter").

57. Cohen, *supra* note 51.

58. *Id.*

59. *Id.*

60. *Id.*

61. Johns Hopkins, *supra* note 46.

62. *Id.*

63. Johns Hopkins Inst. for Clinical & Transitional Research, Where Science and Henrietta Lacks East Baltimore Health Sciences Scholarship, sponsored by the Johns

Henrietta Lacks Award for Community-University Collaboration, sponsored by the Johns Hopkins Urban Institute, which provides a \$15,000 annual award to recognize outstanding, pre-existing community-university collaborations in Baltimore.<sup>64</sup>

## V. CONCLUSION

In conclusion, Ms. Lacks entered the free, colored ward of Johns Hopkins as a patient and unknowingly became a research subject, yielding the first immortal cell line – and also a valuable product line – to medical science and society alike. Johns Hopkins failed to adhere to its own standard practice of informing its female patients of the attendant risks of infertility prior to obtaining a signed consent form for cancer treatment from Ms. Lacks. To date, her descendants have not benefited from a fair apportionment of the subsequent profits gained, resulting in a viable claim for unjust enrichment under Restatement (Third) of Restitution and Unjust Enrichment.

The Lacks matter provides an opportunity to strike an equitable balance between the medical community’s need for biotechnology research and the “financial needs of the patient community and society as a whole.”<sup>65</sup> I offer a new way to think about an approach to bioethics, torts, and race. Scientists and researchers not only gained massive profits and valuable medical knowledge from HeLa cells without granting any financial benefit to Ms. Lacks’ descendants, but continued to take blood from the surviving family members without their informed consent in order to further study the HeLa cells. Societal constructions of race, gender, and class defined Ms. Lacks’ body and marginalized her existence while profiting from the cells her body produced. The fact that Ms. Lacks’ descendants have not received any compensation under current legal regimes for the taking of and profiting from HeLa cells raises bioethical concerns regarding cell ownership. The Restatement is a viable means to address the notion that the non-consensual transfer of Henrietta’s cells amounts to an interference with her protected interest for which restitution is due. The Restatement not only provides a potential remedy for the descendants of Henrietta Lacks, but further elaborates on the illustration recognizing restitution for interference

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Hopkins Health System, Connect (Oct. 7, 2010), <http://ictr.johnshopkins.edu/mt/mt-search.cgi?search=Henrietta+Lacks+East+Baltimore+Health+Sciences+Scholarship%2C+sponsored+by+the+Johns+Hopkins+Health+System%2C+&IncludeBlogs=16&limit=20>.

64. Johns Hopkins Inst. for Clinical & Transitional Research, When Science and UHI Henrietta Lacks Memorial Award Connect (Jun. 15, 2011), <http://ictr.johnshopkins.edu/mt/mtsearch.cgi?search=uhi+Henrietta+lacks+Memorial+Award&IncludeBlogs=16&limit=20>.

65. Luisa A.M. Giuffrida, *Moore v. Regents of the University of California: Doctor, Tell Me Moore!* 23 PAC. L.J. 267, 313 (1991).

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**with other protected interests, such as cells in the human body.**