

## *Unconventional Wisdom #103*

### The Incisive Relevance of *Nemo Dat*

by

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I'm afraid I've been a bit more annoying than usual lately. You see, I have this new obsession, an enchantingly esoteric notion named *nemo dat*. And because I can't stop thinking about *nemo dat*, I can't stop talking about *nemo dat*. Problem is, you can't just toss a morsel of moral philosophy into polite conversation. Because then polite people are forced to feign interest, while they frantically search for an elusive segue to just about anything else.

It doesn't help that *nemo dat* is Latin. And I don't know Latin, which, if possible, makes its use even more pretentious. Nor does it help that this object of my fixation is almost unknown outside of a rather specialized area of the law. Even by other lawyers, according to my unscientific, smart-aleck sampling.

At this point the conventional wisdom would be to just shut up. But, of course, the title of this essay series is "*Unconventional Wisdom*," which gives me permission to do hairbrained stuff, as long as it sounds somewhat sagacious. So, driven by the dubious conviction that you'll thank me later, I'd like to introduce you to the incisive relevance of *nemo dat*.

Even if you're "lucky" enough to know Latin, you might not find anything remarkable about this three-syllable phrase, which literally means, "no one gives." But *nemo dat* is far more than a cryptic Latin phrase. It is shorthand for the equally arcane Nemo Dat Rule, which reads as follows: *Nemo dat quod non habet*. Translation: "One cannot give what one does not have."

The Nemo Dat Rule is a product of English common law and appears in texts about property law throughout the Commonwealth nations. Because American jurisprudence traces its roots to that same legal tradition, the Nemo Dat Rule occasionally surfaces U.S. legal arguments as well. The principle behind this Rule, however, is far more ancient than its modern formulation, tracing its roots all the way back to Roman law.

It's hard to object to the Nemo Dat Rule, due its practically tautological truth. But you might be a bit underwhelmed by the insightfulness of a statement such as "One cannot give what one does not have." Like, duh. Do we really need a *rule* to figure that out?

Still, it's always good to begin an argument with something that doesn't need proving. Because then you can lean back into that already-agreed-upon principle, once it becomes clear that its real-life application is not exactly what you might expect. Because, guess what? This apparently unassailable rule is quite frequently flouted.

In fact, human history is positively teeming with instances of people passing something on to someone else that they do not legally or legitimately possess in the first place. Perhaps they know that what they "have" is not theirs, because they took it. Alternatively, they may have received stolen property, either knowingly or unknowingly. It could even be that their otherwise legally-acquired property has come under a lien or other encumbrance.

But then they try to transfer this thing that's not really theirs to someone else, often in exchange for money. And that's when Nemo Dat steps in to re-center the matter, by insisting that, hang on a minute, you cannot give what you do not have.

So, the Nemo Dat Rule is actually a bit more clever than it may first appear. It's not just about what one "has" but about the legitimacy of that possession. And it's not really about what *cannot* be done, in terms of mere possibility. Indeed, anyone *could* potentially pass along ill-gotten gain. It's really about what we *ought not* do from a moral and/or legal point of view.

So, when someone tries to transfer property that does not legitimately belong to them in the first place—in other words, when someone breaks the Nemo Dat Rule—what's the remedy? Well, if the potential transgression is discovered early enough, Nemo Dat can nip a bad intention in the bud. If the illegal goods have already been sold or otherwise transferred to someone else, there seems to be a corollary to the Nemo Dat Rule: Not only should you not pass on what doesn't belong to you, but anything you have in your possession that doesn't actually belong to you should be returned to its legitimate owner(s).

During the Third Reich the Nazis plundered vast quantities of artwork, much of it from Jewish people and especially from victims of the Holocaust. Under the U.S. Army's postwar Safehaven program, a significant amount of this art was returned. Nevertheless, as late as the mid-nineties, 16 of the top 40 paintings were still missing, along with more than 100,000 works of art overall.

But time and circumstance did not negate Nemo Dat. A major international accord signed in Washington in 1998 re-asserted the rightness of returning all such art to its original owners or their heirs. And that effort continues to this day; regardless of whether the pieces in question have been sold and re-sold, inherited, or even donated to museums. And guess what guiding principle has been foundational to this entire restorative undertaking? Nemo Dat.

So, it's three cheers for Nemo Dat, at least when it's interrupting some shady criminal enterprise or striking back at those nasty old Nazis. But like any moral principle, Nemo Dat is nosy. And it eventually gets around to rattling the skeletons in our own closet. Like the trillions of dollars we looted from millions of African-American slaves over hundreds of years. And the multifarious material marginalization that has gone on ever since.

Some might argue that, unlike the Nazi thefts, nothing was actually “stolen” from slavery’s victims, since slavery was legal. Or because they didn’t actually own anything. But when you enslave someone, you don’t steal *something* from them. You steal *everything* from them, from their freedom to the fruit of their labor. And, whether the law condemns that activity or not, it’s still stealing. And the benefits derived from it are, therefore, illegitimate. And the transfer of those benefits to others stands condemned by none other than Nemo Dat.

Yes, it’s true that only a small percentage of people ever owned slaves. But a whole society benefitted from the slave enterprise, as its ill-gotten gains were directly and indirectly disseminated.

Some of that wealth was inherited, creating prosperity in an ever-widening circle. With the passing of generations, that money gets socially “laundered.” That is, it becomes more respectable as it grows more distant from its source. But it never gets clean. Like that stolen art.

Moreover, the direct descendants of slaveowners were not the only beneficiaries of slavery’s bounty. All kinds of jobs were created and investments financed by proceeds from this illegitimate industry. Indeed, at that time the vast majority of America’s exported goods were produced by slaves, contributing to the capital of an entire nation and transforming the United States into an international economic powerhouse.

Regardless of the mechanism by which white advantage has been transmitted across time and space, the undeniable fact is that it has endured to this day. Because the current median net financial worth of a white person in this country is ten times that of a black person. Ten times. Look at that gap, and you’ll see the proof that an illicit advantage has indeed been transmitted. Measure that gap, and you’ll see the extent of the plunder.

This nation is currently engaged in a historic conversation about reparations at the highest levels. I don’t pretend to know what will happen. The details are dauntingly complex, but the principle, it seems, is simple. You can’t give what you don’t have. And if someone does pass along to you something they did not legitimately possess in the first place, you must return it to its rightful owners. That’s the incisive relevance of Nemo Dat.