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Two Concepts of Injustice in Restitution for Slavery

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 overlapped with contract and property disputes, although it has been noted that restitution currently lacks the doctrinal coherence found in other areas of private law.\footnote{See Rationalizing Restitution, supra note 1, at 1194-95 (discussing the adverse consequences of the lack of certainty over the doctrine of restitution). Kull goes further: "To put it bluntly, American lawyers today (judges and law professors included) do not know what restitution is." Id. at 1195; see also Doug Rendleman, Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?, 33 GA. L. REV. 847, 892 (1999) (quoting Kull and describing the law of restitution as a lost art).}

In the 1990s, two very different strands of cases came together that confirmed restitution's potential for forcing powerful corporate defendants to acknowledge – or at least address – their past actions. One line of cases involved suits by Holocaust survivors and others forced into slavery by the Nazi government for the restitution of property that had unjustly enriched contemporary corporations and banks.\footnote{See infra notes 9-34 and accompanying text.} The other line of cases involved suits by forty-six states against the tobacco industry for restitution of funds that the industry acquired unjustly because the states, it was argued, had paid for health care costs that should have been borne by the industry.\footnote{See infra notes 35-65 and accompanying text.}

Both the Holocaust and tobacco litigation are examples of a phenomenon I have described elsewhere under the rubric of "mass restitution."\footnote{See Anthony Sebok, A Brief History of Mass Restitution Litigation in the United States, in CALLING POWER TO ACCOUNT: LAW'S RESPONSE TO PAST INJUSTICE (D. Dyzenhaus & M. Moran eds., forthcoming 2004) [hereinafter A Brief History] (manuscript on file with author).} The basic definition of a mass restitution claim is that it is a suit for restitution brought against a private party (usually a corporation) for the monetary equivalent of property or labor taken from a large number of people during a period when the wrongdoing leading to the unjust enrichment was accepted by the society in which it occurred (or at least by those who controlled that society). A further feature of the mass restitution suits is that they are a result of a change in attitudes within society itself – not only is the earlier period recognized as wrong, but it is viewed as a period of great wrongdoing that was made possible because of the breakdown of the political system, a fact which helps justify, in the eyes of later generations, the use of law.

A. Holocaust Litigation

The Holocaust mass restitution litigation came about incrementally, each stage building on the last. The first wave of litigation began in the United States with the filing of a class action lawsuit naming a number of Swiss banks as defendants in 1996.\footnote{See In re Holocaust Victim Assets Litig., 105 F. Supp. 2d 139, 141 (E.D.N.Y. 2000)} The class plaintiffs claimed the Swiss banks were

of an agreement requiring pre-publication clearance and requiring that the profits derived thereby be held in constructive trust to avoid the unjust enrichment of the author.\footnote{See Rationalizing Restitution, supra note 1, at 1194-95 (discussing the adverse consequences of the lack of certainty over the doctrine of restitution). Kull goes further: "To put it bluntly, American lawyers today (judges and law professors included) do not know what restitution is." Id. at 1195; see also Doug Rendleman, Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?, 33 GA. L. REV. 847, 892 (1999) (quoting Kull and describing the law of restitution as a lost art).}
holding thousands, perhaps even tens of thousands, of "dormant accounts" that the banks knew belonged to Jews killed in the Holocaust, and which the banks were wrongfully withholding from the heirs of the account-holders. Soon, other plaintiffs filed suits and the grounds for the suits widened. The plaintiffs claimed that the Nazis looted property, including gold from the bodies of Holocaust victims, and sold it to the Swiss banks during the war. The Plaintiffs also claimed that the profits of slave labor were similarly "laundered" through the Swiss banks, and that by actively cooperating with the Nazi regime, the banks aided and abetted human rights violations including slave labor and genocide.

The Swiss bank cases illustrate how fluid the concept of unjust enrichment can be in a claim involving massive and systemic human rights violations. The central claim was that the banks took money and never returned it. The heart of the cases was, therefore, the 'dormant accounts' themselves. Further claims concerning property that the Nazis took and transferred to the Swiss banks were an extension of the dormant account claim – the wrong at issue was the wrongful possession of someone else’s property. These claims were essentially actions for restitution based in replevin, in which the banks held the proceeds of the wrongfully taken property in constructive trust on behalf of the accounts’ true owners.

The Swiss bank cases also included some claims for restitution of the value of slave labor itself, and the settlement of the cases ultimately included a component of compensation for this slave labor. Technically, these were claims for quantum meruit, or the value of plaintiffs' labor that unjustly enriched the defendants. Such actions stood on a footing of restitution rather than replevin, in part because the claims were not for the return of anything to

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9 Id. at 157.
10 Id. at 141-42.
11 Id. In 1998, the banks and the plaintiffs settled the suit for $1.25 billion. The settlement, which Judge Edward Korman approved, created a fund which allowed "Victims or Targets of Nazi Persecution" to collect some form of reparations. The claimants included those who could prove that they or their families had deposited assets with the banks. The settlement also included payments of between $500 to $1500 to claimants who could prove they were forced to perform slave labor for the Nazis, and $145 million to existing charities to provide reparations to the community of victims for the looted property that had been laundered through the banks. Id. at 142-43.
12 Id. at 151 (recounting the findings of the Volcker committee, which determined "that approximately 54,000 Swiss bank accounts appear[ed] to have a 'probable' or 'possible' connection to a Holocaust victim").
13 See DAN B. DOBBS, LAW OF REMEDIES § 4.2(2) (2d ed. 1993).
14 In re Holocaust Victim Assets Litig., 105 F. Supp. 2d at 141.
15 Id. at 148.
16 See DOBBS, supra note 13, § 4.2(3).
which the plaintiffs had title. Rather, the plaintiffs asked the court to use its equitable powers to remedy a wrong that resulted in the defendants’ unjust enrichment.\footnote{At an earlier time, these claims would have been made in assumpsit. “Restitution at law proceeded mainly in two large streams. The first dealt with cases in which plaintiff had legal title . . . . [The second] derived from the writ of assumpsit. This kind of claim dealt with cases in which the plaintiff could not assert title . . . .” Id. § 4.2(1) (emphasis in original).}

In 1998, many of the same lawyers who were handling the Swiss Bank litigation initiated a new set of lawsuits demanding reparations for victims of Nazi activities.\footnote{Compare In re Holocaust Victim Assets Litig., 105 F. Supp. 2d at 139 with Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 424 (D.N.J. 1999). Professor Burt Neuborne at New York University Law School has played a particularly active role in lawsuits seeking reparations for forced labor during World War II. See MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS 59 (2003).} They filed these suits against corporations that used slave labor during World War II.\footnote{See, e.g., Iwanowa, 67 F. Supp. 2d at 433-34 (recounting how Ford, operating through Ford Werke, employed slave labor in Germany during World War II).} The legal claims were both similar to, and quite different from, the Swiss Bank claims. They were similar in that they focused on private corporations that had taken advantage of the horrible acts of the Nazi government. For example, the first such lawsuit was against an American company, Ford, on the theory that Ford’s German subsidiary benefited from slave labor organized by the Nazis with Ford’s cooperation.\footnote{Id. at 445 (describing the plaintiffs’ allegation that Ford was a de facto state actor).} Following the Ford lawsuit, fifty-six more lawsuits were filed in California, Illinois, Indiana, New Jersey, and New York.\footnote{BAZYLER, supra note 18, at 64-65 (discussing lawsuits against German and Austrian companies for employing “slave labor during World War II”).} They differed from the Swiss Bank lawsuits in that any connection with real property was now almost completely forgotten. These new lawsuits were not for replevin (the defendant firms never received any real property) but for quantum meruit (the labor taken and, more importantly, the profit created through that labor).\footnote{See, e.g., Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 252-53 (D.N.J. 1999) (describing the plaintiffs’ claims as, inter alia, claims of unjust enrichment seeking “restitution of . . . the value of slave and/or enforced labor”).}

As with the Swiss bank cases, the defendant firms mounted a defense based on numerous technical objections. These defenses fell primarily into two classes. The first might be described as the “political question” defense – claiming that the reparations claims arose as result of activities by Germans while Germany was at war with the United States; therefore, the claims were, for purposes of American jurisdiction at least, subsumed under the Executive’s power to make and enforce treaties.\footnote{See BAZYLER, supra note 18, at 347 n.27 (listing the German companies’ procedural objections).} The defendant firms’ second defense
might be described as the 'statute of limitations' defense. They argued that, assuming the suits were not barred because they implicated political questions, and assuming that the plaintiffs could establish jurisdiction under the relevant statutes, the suits were time-barred because the plaintiffs had waited too long to bring their claims.24 Unlike the Swiss bank cases, in which the judge delayed answering the defendants' motions to dismiss, in the German slave labor cases, a few judges actually ruled on the defendants' dispositive motions. Judge Debevoise, of the United States District Court for the District of New Jersey, dismissed the plaintiffs' suit in *Burger-Fischer v. DeGussa AG* because, for the most part, he accepted the political question defense.25 In another case, Judge Greeneway, from the same district, dismissed the plaintiffs' suit in *Iwanowa v. Ford Motor Co.* because, for the most part, he accepted the statute of limitations defense.26 All told, five lawsuits were dismissed by November 1999.27

Despite experiencing some success in court, on December 19, 1999, the defendants struck a deal with the lead plaintiffs in all the slave labor suits.28 The plaintiffs designed the settlement to end all current litigation and ensure that no new litigation would occur.29 They agreed that, if the plaintiffs voluntarily abandoned their lawsuits and did not object to the dismissal of all similar suits, the German Parliament would charter, with the full cooperation of various German industry associations, a private, ten billion Deutschmark "German Fund Foundation," and that this foundation would pay reparations to individuals and organizations who qualified under the principles established in the agreement.30 Despite prevailing in court, the German defendant corporations were willing to pay approximately $5.2 billion for "legal peace."31 Why they chose to do so is a matter of some speculation. Some have opined that the Swiss experience made political and social pressure more effective.32 Before the first suits were dismissed, New York City was

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24 Id.
26 67 F. Supp. 2d 424, 491 (D.N.J. 1999). The lawyers for the plaintiff were confident that these district court decisions would be overturned on appeal. For a vigorous statement of their views, see Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 19 (2000).
27 See BAZYLER, supra note 18, at 74.
28 See id. at 79.
29 See id. at 80-81.
31 See STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* 257 (2003) (quoting Roger Witten, the German firms' lead lawyer in settlement negotiations); see also BAZYLER, supra note 18, at 83-88.
32 See BAZYLER, supra note 18, at 74-77.
considering sanctions similar to those that had been threatened against the Swiss banks. After the suits were dismissed, legislation was introduced in Congress threatening to overturn the decisions.

B. Tobacco Litigation

The state tobacco litigation came after forty years of mostly ineffective attempts to hold the tobacco companies responsible for manufacturing a defective product. While some earlier suits alleged that cigarettes were defective for no other reason than that they were associated with disease, most suits focused on the failure of the tobacco industry to warn the public about the risks of tobacco use, ranging from the health effects of smoking to the addictive properties of nicotine. Despite a handful of promising victories—including short-lived certification of a national products liability class action—personal injury claims arising from the manufacturing and marketing of tobacco products were not succeeding. Not only had they failed to generate enough liability judgments to force significant changes in the industry’s conduct, but the litigation had not produced a dramatic or powerful breakthrough in the industry’s traditional defenses, which included their steadfast insistence that they had not concealed or suppressed scientific

33 Political pressure was undoubtedly placed on the Swiss banks to settle the suits. Senator Alfonse D’Amato, the Republican Chairman of the Senate Banking Committee, held hearings on the dormant Swiss bank accounts. New York and California’s comptrollers also threatened to withhold business from the Swiss banks and their American subsidiaries unless the banks resolved the claims against them. See David E. Sanger, McCall and State Dept. Clash on Sanctions Against Swiss Over Gold, N.Y. TIMES, July 23, 1998, at B1 (reporting on threatened sanctions against the Swiss banks).

34 See BAZYLER, supra note 26, at 78.


36 Id. at 184-85 (stating that “[t]hrough two waves of tobacco litigation, plaintiffs based their claims on the industry’s failure to warn of the health risks of smoking . . . . [N]icotine addition, as a focal point . . . . had been tentatively explored [by a few plaintiffs’ lawyers] in the waning days of the second wave, but that had never been developed into the centerpiece of the litigation” (emphasis in original)).

research establishing the risks of smoking.\textsuperscript{38}

In 1994, Mississippi began a Medicaid restitution action against the tobacco companies.\textsuperscript{39} The suit, which was filed in chancery, sought restitution claiming the tobacco companies were unjustly enriched because the Mississippi’s Medicaid payments saved the tobacco companies the money they ought to have paid to smokers.\textsuperscript{40} Within a year, scores of other states filed similar lawsuits alleging much the same claim of unjust enrichment.\textsuperscript{41} The Mississippi lawsuit settled in July of 1997 for $3.6 billion to be paid by the tobacco companies over twenty-five years.\textsuperscript{42} Florida settled its suit against the industry in August 1997 for $11.3 billion,\textsuperscript{43} Texas settled its suit in January 1998 for $15.3 billion\textsuperscript{44} and Minnesota finally settled its suit for $6.1 billion on the eve before the jury was to render its verdict. Following this trend, the Attorneys General from the remaining states negotiated a $206 billion global industry settlement in reimbursement for Medicaid and related health care costs.\textsuperscript{45}

The state reimbursement claims shifted the legal terrain, which had allowed the industry almost a half-century of legal immunity for its actions. While the state claims were not exclusively based on an effort to get the industry to repay

\begin{itemize}
  \item \textsuperscript{38} See Rabin, supra note 35, at 184-85 (recounting the tobacco industry’s efforts to conceal the health effects of smoking, and describing the process by which these efforts were exposed in the 1990s).
  \item \textsuperscript{40} See Rabin, supra note 35, at 189-93 (discussing lawsuits filed by states seeking reimbursement of health care costs).
  \item \textsuperscript{41} Not all states chose to follow Mississippi’s legal theory, however. Minnesota’s Attorney General filed a suit in 1994 alleging that the tobacco companies violated Minnesota’s consumer protection statutes designed to shield consumers from industry fraud and deception. See Gary L. Wilson & Jason A. Gillmer, Minnesota’s Tobacco Case: Recovering Damages Without Individual Proof of Reliance under Minnesota’s Consumer Protection Statutes, 25 WM. MITCHELL L. REV. 567, 568 (1999). These acts were “the Prevention of Consumer Fraud Act, the Unlawful Trade Practices Act, the False Statement in Advertising statute, and the Uniform Deceptive Trade Practices Act.” Id. at 569. Minnesota argued that the consumer fraud statute gave standing to the state to recover Medicaid expenses that accrued because of consumer fraud. Id. at 574.
  \item \textsuperscript{42} Milo Geyelin, Mississippi Becomes First State to Settle Against Big Tobacco Companies, WALL ST. J., July 7, 1997, at B8.
  \item \textsuperscript{43} Barry Meier, Cigarette Makers Agree to Settle Florida Lawsuit, N.Y. TIMES, Aug. 26, 1997, at A1.
  \item \textsuperscript{44} Milo Geyelin, Tobacco Firms to Pay Texas $15.3 Billion, WALL ST. J., Jan. 19, 1998, at A3.
  \item \textsuperscript{45} In the Settlement, the tobacco companies agreed to pay roughly $206 billion by 2025 to forty-six states. This payout was in addition to the separate agreements with Mississippi, Florida, Texas, and Minnesota (totaling $40 billion). See Milo Geyelin, Top Tobacco Firms Agree to Pay States Up to $206 Billion in 25-Year Settlement, WALL ST. J., Nov. 16, 1998, at A3.
\end{itemize}
or reimburse the states, the unjust enrichment dimension of the litigation strategy gave the states’ litigation strategy its shape. The architects of the Mississippi case, for example, shifted the focus from the harms smoking caused to smokers to the harms smoking caused to the health care system. They did this for two reasons. First, they believed that by focusing on the losses suffered by the state, the question of smokers’ own conduct would be mooted, removing the single most powerful weapon in the tobacco industry’s defensive arsenal. Second, and just as important, by making the state the plaintiff, all issues of class certification raised in the context of earlier failed attempts at personal injury class action litigation were mooted as well, because instead of millions of plaintiffs, there would be only one. Concerns over common issues of fact which doomed earlier class actions, and the predominance and superiority tests of federal and state class action statutes would no longer bar the lawsuits. A state could argue that although the question of whether a state could recover against the tobacco defendants might involve contested factual issues resolvable only through the testimony of potentially numerous individual smokers, because those smokers were not parties to the suit, their due process rights were not at issue and there was no Castano-type numerosity or superiority barrier to the state’s suits.

The move towards the single, unitary plaintiff came with some risks. Even if, as lawyers for the states believed they could demonstrate, after exhaustive discovery, the tobacco companies had lied to smokers and sold them a product which was deliberately designed to cause injury and addiction, what standing did the states have to bring a claim? There are a number of ways of establishing standing. The most obvious would have been for the states to have brought suit under the equivalent of “contractual” subrogation, a right that they had under both state and federal law.

46 See Rabin, supra note 35, at 189-93.
47 "[T]he states could not successfully frame their claims against the tobacco companies in terms of either the traditional tort doctrine of subrogation or the codified version of the doctrine that allows most state governments to seek reimbursement for medical expenditures. Subrogation ... would put the states in the shoes of smokers - who, as we know, had uniformly failed in their lawsuits against the tobacco companies up to that point.” Michael DeBow, The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage, 31 SETON HALL L. REV. 563, 571 (2001). Or, as Attorney General Michael Moore put it: “This time the industry cannot claim that a smoker knew full well what risks he took each time he lit up. The state of Mississippi never smoked a cigarette. Yet it has paid the medical expenses of thousands of indigent smokers who did.” Mike Moore, The States Are Just Trying to Take Care of Sick Citizens and Protect Children, 83 A.B.A. J. 53, 53 (1997).
48 See Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (reversing class certification on the grounds that the plaintiffs failed the predominance and superiority tests).
49 See, e.g., N.Y. SOC. SERV. LAW § 367-a(2)(b) (Gould 2004) (subrogating social service officials for medical care costs); 18 N.Y. COMP. CODES R. & REGS. tit. 18, § 542.1 (2004) (subrogating social service officials for smokers’ medical expenditures); see also
shortcomings of subrogation, the states turned to other legal theories.\textsuperscript{50}

Some states tried to frame their demand for reimbursement as a claim of indemnity.\textsuperscript{51} The classic case of indemnification occurs in tort, when one party who has a duty to an injured victim pays that victim (either as a result of judgment or settlement) and then sues another party who also owed a duty to the victim for the entirety of the amount paid to the victim.\textsuperscript{52} The duty to indemnify cannot arise just because the payor "volunteers" to satisfy an obligation owed by another.\textsuperscript{53} Beyond this, the common law in most states does not permit indemnification except under very limited circumstances.\textsuperscript{54}

Even if the claim for indemnification could be made sensible as a matter of doctrine, it would still have put the states right back where they did not want to

\textsuperscript{50} Subrogation claims applied to tobacco litigation would be vulnerable to the same defenses that the industry could have raised in the context of individual smoker's suits. The most significant of these would have been a defense based on the statute of limitations, which would have begun to run presumably at different times based on each smoker's knowledge and a defense based on the fault of the smokers or their assumption of risk. See William H. Pryor Jr. et al., Report of the Task Force on Tobacco Litigation Submitted to Governor James and Attorney General Sessions, 27 CUMB. L. REV. 575, 585-86 (1997).

\textsuperscript{51} Those states that claimed a right to indemnity simply misunderstood the meaning of that claim. As stated in section seventy-six of the RESTATEMENT (FIRST) OF RESTITUTION, indemnification may be demanded where "[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other . . . ." RESTATEMENT (FIRST) OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS § 76 (1935).

\textsuperscript{52} See W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 51 (5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS].

\textsuperscript{53} See DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 708-09 (3rd ed. 2002). This is made explicit in the draft RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 26 (Council Draft No. 3, 2001) [hereinafter RESTATEMENT (THIRD) OF RESTITUTION]. It clearly states that indemnification is a duty that arises between parties who breached a joint duty that resulted in an injury to the victim, the compensation of which was provided by the one party who now seeks indemnification from the other. See id. ("A claim to indemnity or contribution arises when the claimant has discharged all or part of a common liability. A claim under this Section must be distinguished, therefore, from the analogous claim that arises when A and B owe independent duties to a third party, C, or when A, acting with adequate justification, renders a performance to C for which B would have been liable to C directly").

\textsuperscript{54} For example, in Iowa, if the parties are not joint tortfeasors, common law indemnification is permitted only where there is an express contract, vicarious liability, or the breach of an independent duty between the indemnitor and the indemnitee. See Daniels v. Hi-Way Truck Equip., 505 N.W.2d 485, 490 (Iowa 1993). For this reason, Iowa's Supreme Court summarily affirmed the dismissal of the indemnity claim. State ex rel. Miller v. Philip Morris, Inc., 577 N.W.2d 401, 406 (Iowa 1998); see also Maryland v. Philip Morris, Inc., No. 96122017, 1997 WL 540913, at *9-11 (Md. Cir. Ct. May 21, 1997).
be – in the position of having to prove that the tobacco companies owed a duty to compensate the smokers on whose behalf the states had expended funds for medical care.\textsuperscript{55} The tobacco industry thus could argue that indemnification for the entire class of smokers who received medical care could not be presumed, but would have to be proven on an individual, case-by-case basis, thus putting the states back in the same place they would have been in had they pursued multiple subrogation claims.

For this reason, many of the states opted to describe their reimbursement claims as demands for restitution based on unjust enrichment.\textsuperscript{56} In a number of state in which unjust enrichment claims were challenged on motions to dismiss by the tobacco companies, courts found that the alleged benefit conferred by the states onto the tobacco companies was either too speculative to be actionable or the result of mere volunteerism.\textsuperscript{57} In a number of other states, such as Mississippi, the tobacco companies’ legal challenges never received substantive review by any court (despite extensive briefing) before the cases settled.\textsuperscript{58} As Douglas Rendleman pointed out, the unjust enrichment claims by the states were an attempt to establish that the funds the tobacco companies never spent for tort compensation was a benefit \textit{unjustly} conferred on them by the states, which had, by offering medical care for free, somehow eliminated that liability.\textsuperscript{59} The weakest part of this argument was that its status assumed the states had stepped in to partially pay (or mitigate) an obligation that the tobacco companies would have been obliged to pay, which is exactly the issue that the state had hoped to avoid when it abandoned the subrogation argument.\textsuperscript{60}

\textsuperscript{55} The existence of an obligation between the indemnitee and the victim who received money from the indemnitor is a prerequisite for the existence of a duty to indemnify between the indemnitor and the indemnitee. \textit{See} \textsc{Restatement (Third) of Restitution, supra} note 53, § 26.

\textsuperscript{56} In many states this claim was barred under the doctrine that unjust enrichment is not available if any other remedy is available. This was the holding of courts in Iowa, Maryland, Washington, and West Virginia.


\textsuperscript{58} Professor Douglas Rendleman’s exhaustive review of the claims in equity made by the lawyers working for the state takes a dim view of the cause of action from the perspective of Mississippi law. Doug Rendleman, \textit{Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?} 33 \textsc{Ga. L. Rev.} 847, 850-51 (1999).

\textsuperscript{59} \textit{Id.} at 852-55 (explaining Mississippi’s theory of why it was owed restitution by the tobacco companies).

\textsuperscript{60} Professor Rendleman further explained that:

The plaintiff’s first step in unjust enrichment is showing defendant’s enrichment as a benefit. The tobacco companies argue they were not enriched. A defendant must have ‘economic benefit’ as a prerequisite to restitution \ldots\ldots Only if the tobacco companies were liable to the smokers for damages would the State’s Medicaid payments to the
Yet, like the Holocaust litigation, despite the absence of strong (or even persuasive) legal support for the admittedly unusual use of restitution law in the states’ campaign against the tobacco industry, the defendants settled. One can only speculate on the industry’s motivations. As with the Swiss banks, the litigation itself brought out information about the past practices of the tobacco industry that had not been available to the public. Some of it, such as the vast trove of documents that were pried out of the industry by aggressive discovery conducted by the private attorneys representing the states, was a direct result of the litigation. Other documents, such as those produced by whistle-blowers, received much more attention in the media than they probably would have otherwise because of the litigation, which gave both context and credence to their claims. As with the Holocaust litigation, the information generated by the lawyers caught the eye of politicians. Finally, as with the

smokers be an ‘economic benefit’ to the tobacco companies. The tobacco companies would have been enriched if the State had paid an obligation the tobacco companies really owed. A restitution-indemnity plaintiff who discharges a duty to the defendant owed may recover from the defendant . . . . The State cannot recover its payments for the smokers’ health care costs from the tobacco companies as restitution-indemnity unless the tobacco companies were liable to the smokers.

Id. at 899 (internal citations omitted); see also Hanoch Dagan & James J. White, Governments, Citizens, and Injurious Industries, 75 N.Y.U. L. REV. 354, 374-76 nn.90-91 (2000) (disputing that any type of indemnity or unjust enrichment claim could have been made by the states and acknowledging the difficulties for the states posed by the affirmative defenses available to the tobacco companies in case subrogation claims were brought); Tiffany S. Griggs, Comment, Medicaid Reimbursement From Tobacco Manufacturers: Is The States’ Legal Position Equitable?, 69 U. COLO. L. REV. 799, 800 (1998) (“argu[ing] that that the states should not be able to obtain special advantages [in the Medicaid reimbursement litigation] which are not available to individual claimants”).

61 The Minnesota case settled after the judge instructed the jury but before they could begin deliberating. According to one news report, the jurors felt angry at having been usurped and were also surprised by the size of the settlement, suggesting that they would not have awarded such a large sum. See David Phelps & Deborah Caulfield Ryback, Jury Instructions Spurred Settlement Talks, STAR TRIB., Nov. 25, 1998, at 1D.


63 In the early 1990’s, Merrell Williams, a paralegal working for the firm representing tobacco giant Brown & Williamson, procured documents containing evidence of the industry’s knowledge of the health risks and addictive nature of smoking. Jeffrey Wigand, the head of research and development at Brown & Williamson, was fired in 1993 after years of battling the company’s refusal to acknowledge publicly the health risks of smoking and nicotine’s addictive qualities. Both Wigand’s and Williams’s revelations appeared in the New York Times, the Wall Street Journal, and Congressional hearings on tobacco, and ended up in the hands of anti-tobacco activists. Rabin, supra note 35, at 184.

64 The question of whether the CEOs of the seven major tobacco companies had lied to Congress during hearings in 1994 was revived once the states uncovered evidence they
Holocaust litigation, it is possible that at some point the managers of the tobacco companies decided that the costs of the settlement would be worth paying in exchange for putting the issue behind them. As many commentators have noted, the master settlement agreement ("MSA") provided the industry with a variety of benefits (including, perhaps, the creation of a barrier to new entrants into their market) with a relatively modest cost, since the $240 billion paid out would be collected from smokers over twenty-five years much like a tax privately negotiated between the government and the firms who would collect the tax on their behalf.\textsuperscript{65}

C. \textit{American Slavery and Mass Restitution}

In 2002, a number of lawsuits were filed in state and federal court that demanded some form of compensation from corporations that benefited from slavery.\textsuperscript{66} The team of lawyers who brought the first suit in Brooklyn, New York, spoke about the suit in terms of reparations for wrongdoing. Deadria Farmer-Paellmann, one of the architects of the recent strategy of suing corporations for unjust enrichment, said of the suits, "[t]he perpetrators of the crimes committed against Africans are still here . . . . They profited from stealing people and labor, torturing and raping women to breed children."\textsuperscript{67} The purpose of the suit was to secure "atonement" from those who had done wrong to the plaintiffs.\textsuperscript{68}

It is hard to know how literally to take statements like this. It would seem they reflect at least some of the lawyers' true motivations and the motivations of those class members who support the suit. There is a potential disjunction between the language of punishment and atonement and the structure of restitution law. Typically, as noted above, restitution's main purpose is not to believed proved the industry knew nicotine was addictive when the CEOs told Congress is was not. See Mark Curriden, \textit{Texas to Subpoena Ex-Tobacco CEOs: They Denied Addictive Nature of Nicotine in '94}, \textit{DALLAS MORNING NEWS}, Dec. 12, 1997, at 1A.

\textsuperscript{65} See DAGAN \& WHITE, supra note 60, at 379-80. See generally W. KIP VIS CUS!, \textit{SMOKE-FILLED ROOMS: A POSTMORTEM ON THE TOBACCO DEAL} (2002).


\textsuperscript{68} \textit{Id.}
punish wrongdoers or to force wrongdoers to compensate victims for the wrongful injuries they have caused. Those functions are better served by public law (either criminal or regulatory) or tort law. 69 Restitution’s function, as Andrew Kull has put it, “is not to compensate the plaintiff, but to strip the defendant of a wrongful gain . . . [and] disgorgement, prima facie at least, does not punish.” 70

Some of the rhetorical force behind all of the mass restitution suits discussed in this section comes from the normative resonance of Ms. Farmer-Paellmann’s language. The enslavement of Africans by Europeans, their transport to the Americas, and the treatment that they and subsequent generations suffered until emancipation was immoral and tortious. The human rights of the men, women and children enslaved were violated, and they suffered, in the language of tort, untold “wrongful losses” as a result of a wide range of acts, ranging from battery to false imprisonment to the negligent and intentional infliction of emotional distress. 71 Against the proper defendants, the idea of some kind of legal action designed to punish and to secure compensation seems not only sensible, but also compelling.

However, as with the Holocaust and tobacco litigation, the structure of the slavery litigation is grounded much less on criminal or compensatory claims than on restitutionary claims. The reasons for this in the context of the Holocaust suits was that the negotiated end of the Second World War had settled the question of political and criminal responsibility for all the acts of the Nazis and their agents. 72 The treaties signed by the new German government and the trials conducted by the Allies were the only punishment states were going to visit upon the parties responsible for the atrocities that would later form the foundation of the Holocaust restitution suits. 73 The main compensation demanded in the Holocaust cases was for contract damages. 74

69 On this latter point, see Ernest J. Weinrib, Restitutionary Damages as Corrective Justice, in 1 THEORETICAL INQUIRIES L. 1, 12 (2000).
72 See A Brief History, supra note 7, at 21-22.
73 By 1998, Germany (the Federal Republic) had paid at least $60 billion in reparations to the various parties entitled under the treaties described above. See BAZYLER, supra note 18, at 291. This figure is consistent with the numbers provided by Judge Debevoise in Burger-Fischer v. De Gussa AG, 65 F. Supp. 2d 248, 270 (D.N.J. 1999). The Allies dealt with corporate criminal liability after the war. The United States Military Tribunal at Nuremberg prosecuted two bankers. Karl Rasche was acquitted of the charge that he had provided loans for the construction of concentration camps, while Emil Puhl was convicted of the charge that he had actively participated in the theft of gold from the victims of the camp. See Anita Ramasastry, Banks And Human Rights: Should Swiss Banks Be Liable For Lending To South Africa’s Apartheid Government?, FINDLAW, at http://writ.news.findlaw.com/ramasastry/20020703.html (July 3, 2002).
74 “Plaintiffs’ German law claims were garden-variety contract and unjust enrichment
To the extent that tort-like damages were mentioned, it was in connection with the suffering that resulted from the confinement of the slave laborers, not the evils that formed the main core of the Holocaust — the campaign to exterminate certain populations on the basis of their religion, ethnicity, or sexual orientation.\(^75\) In the tobacco litigation, for reasons that should be depressingly familiar to American audiences, there has never been a serious effort by the states or the federal government to penalize the tobacco industry for the wrongdoing alleged in the states' restitution suits.\(^76\) Because the states did not want to encounter the same problems with affirmative defenses that had defeated so many previous suits for personal injury, the restitution suits carefully did not depend on proof that the tobacco industry caused wrongful losses, only that it had acted wrongfully and thereby profited.\(^77\)

The *Plaintiff's First Amended Complaint* in the consolidated slavery lawsuit reflects the same emphasis on restitution seen in earlier mass restitution cases.\(^78\) The plaintiffs sued only corporate defendants, not the United States, nor any single state, nor any individuals.\(^79\) They describe fourteen counts, seeking compensation for the reasonable value of their coerced services and appropriate compensation for suffering caused by wretched conditions of confinement."


\(^75\) There was, in addition to the contract and unjust enrichment claims, a demand for damages based on the Alien Tort Claims Act ("ATCA"). This cause of action was premised on the violation of the norm of customary international law prohibiting the enslavement of conquered populations and on the Nuremberg principles barring the commission of war crimes and crimes against humanity. My criticism of mass restitution litigation does not have any connection with the attempt by the plaintiffs to use human rights laws to address mass historical wrongs such as slave labor. The current African American slavery suit also raises, as a separate basis for corporate liability, the ATCA. The problems with using the ATCA in these sorts of cases are beyond the scope of this article. *See* BAZYLER, *supra* note 18, at 177 (explaining that the attempt to use the ATCA as the basis for jurisdiction for some of the suits arising from Holocaust).


\(^77\) *Id.* at 135 (explaining that basis for the government’s lawsuits).


\(^79\) *Id.* ¶ 2(a).
ranging from crimes against humanity to violations of the consumer protection laws of five different states.\textsuperscript{80} The dominant relief requested for each count was the same: "an accounting of profits earned from slave labor, a constructive trust imposed on such profits, restitution, equitable disgorgement, and punitive damages."\textsuperscript{81} With the exception of the demand for punitive damages, the remedies demanded are typical of restitution (especially the demand for an accounting of profits) and focus almost exclusively on the identification of and return of the wealth the corporate defendants gained illegally and still hold.\textsuperscript{82}

The focus on corporate defendants, as in the Holocaust litigation, is probably a result of certain contingent legal considerations. In \textit{Cato v. United States}, the Ninth Circuit held that the United States Government could not be sued for slavery.\textsuperscript{83} The suit was rejected on the ground that it did not satisfy the requirements of the Federal Tort Claims Act, the law that sets out the conditions under which the federal government has consented to be sued.\textsuperscript{84} More specifically, in addition to statute of limitations problems, the court pointed out that the plaintiffs lacked standing, since their claim essentially was that the U.S. Government had failed to take certain steps to positively enforce the Thirteenth Amendment.\textsuperscript{85} While the \textit{Cato} decision has been discussed frequently since it was issued, few commentators have argued that it is legally infirm.\textsuperscript{86} The states are also probably immune from suit for similar reasons.

Private individuals are obviously unattractive targets for suit for two reasons. First, those directly responsible for the human rights violations and the torts committed before emancipation are not available to be sued.\textsuperscript{87}


\textsuperscript{81} \textit{In re} African-Am. Slave Descendants Litig., 304 F. Supp. 2d 1027, 1042 (N.D. Ill. 2004). The damages which would be awarded under the ATCA claim (which was pled in the alternative) and the consumer fraud statutory claims were not specified.

\textsuperscript{82} First Amended Complaint, \textit{supra} note 78, at 8.

\textsuperscript{83} 70 F.3d 1103, 1111 (1995).

\textsuperscript{84} \textit{Id.}; see 28 U.S.C. § 1346 (2004).

\textsuperscript{85} \textit{Cato}, 70 F.3d at 1109-110.


\textsuperscript{87} This point is separate from whether descendents of legal wrongdoers should feel a
Therefore, the only way to raise claims for personal injuries directly would be to identify a defendant that still exists to be sued, which would naturally entail identifying a corporate defendant, which could then be held responsible either derivatively under the doctrine of respondeat superior or directly under the theory that its agents engaged in wrongdoing under the direction of the firm's management.88 Second, to the extent that the descendents of individual slaveholders, slave traders, and other officials who operated the machinery of slavery hold property that belonged to slaves or hold wealth created by slaves, they are likely to be immune from suit under the good faith purchaser doctrine.89 An heir is not a purchaser but someone who received money and relied (presumably) in good faith that the transfer was valid by making expenditures and, in the case of slavery, passing the property on to another generation of heirs, who also acted in good faith.90 As a theoretical matter, the plaintiffs might have been able to make a claim for restitution of wealth inherited by the heirs of wrongdoers from the nineteenth century. As a practical matter, any suit would require tracing the movement of chattel and money over many generations and an uphill battle to overcome the balance of equities which would, as an initial matter, favor the defendants.91


89 See RESTATEMENT (THIRD) OF RESTITUTION, supra note 53, at § 26.


91 It should be noted that heirs of slave wealth might not be as obviously innocent as the bona fide purchaser defense requires. It is an open question how much each subsequent generation after emancipation knew about the origins of family property as it descended. Furthermore, as Alfred Brophy noted, claims for restitution of chattel or real property may strike courts as less susceptible to the bona fide purchaser defense than restitution of profit. See Brophy, supra note 90, at 127 (discussing Altmann v. Republic of Austria, 317 F.3d. 954 (9th Cir. 2000), in which the niece (and heir) of the owner of a painting that had been given to the Austrian Gallery under duress sued for its return). The Altmann case is not a very convincing example, as the defendant cannot honestly be described as an innocent...
Other practical considerations made claims for restitution from corporate defendants the most sensible course of action. Although the plaintiffs alleged in their complaint actions by the defendants that sounded in personal injury, their argument for why their claim was not time-barred by applicable statute of limitations depends in crucial ways on the wrong arising from a failure on the part of the defendants to disgorge their wrongful gains. Judge Norgle noted that, in answer to the inevitable question of why suits arising from events ending in the nineteenth century were not barred by statute of limitations for common law and statutory claims that ranged from one to six years, the plaintiffs invoked the discovery rule, the continuing violation doctrine, equitable estoppel, and equitable tolling. While Judge Norgle was unpersuaded by the plaintiffs’ arguments, they reveal why, relatively speaking, their claims for restitution against existing corporations would be more likely to survive a statute of limitations attack than a suit for personal injury against an individual or corporation or a suit for restitution against a corporation. The plaintiffs used the complex and continuing existence of the corporate defendants as an additional factor designed to move judicial discretion in their favor. In the complaint, the plaintiffs emphasized that the original plaintiffs, the slaves themselves, could not know about the “investments, insurance policies, joint ventures[,] and other schemes developed by [the] defendants ... to profit from slavery.” This is in contrast, presumably, to the kidnapping, beatings, murder, and rape the slaves knew about and over which they could...
have sued after emancipation (albeit without any credible hope of success). Furthermore, while not argued explicitly, there is an expectation that corporations are more capable of maintaining and handling information than individuals. A court that might have taken the view that the absence of information that could have led to a restitution claim within the applicable statute of limitations was no one's fault in the case of a claim between the descendents of a slave and a slaveholder, they might take a less charitable view in a case involving a corporate defendant. Firms and other corporate entities, such as universities, could be seen as willfully blind if they made no inquiry into the source of their assets, thus strengthening the claim that the failure to engage in an accounting of assets is a continuing violation or worse, grounds for the plaintiff to claim equitable estoppel.

For reasons relating to the selection of defendant and the desire to avoid various affirmative defenses, the slavery suit that was filed was basically a restitution suit. As the media noted, the suit clearly arose from one of the most widespread and injurious assault on human rights in history. Yet, as with the Holocaust and tobacco suits, the logic of mass restitution forced the plaintiffs to depict slavery not as a personal or dignitary injury, but as a dispute over wrongfully held property. Farmer-Paellmann has conceded that tactical and legal concerns led the lawyers to focus their claims on only a subset of wrongdoers (corporations) and a subset of private law remedies (unjust enrichment): "We focused on the path of least resistance, the corporations . . . . The theory, basically, is that the corporations are in possession of our inheritance."

II. THE RISKS OF MASS RESTITUTION

Is there any reason to regret the strategic choice to reframe a claim about the crime of slavery as a claim about the wrongful gains of corporations? There are two ways to think about this question. The first is to accept the premise of
the question (that the pursuit of restitution is a second-best solution to alternate legal claims) but to weigh the costs and benefits of using a legal fiction such as restitution. The second is to reject the premise and argue that there is nothing second-best about the restitution claims— that the disgorgement of wrongfully gained corporate profits should be one of (although not the only) core purposes of a legal response to massive historical wrongdoing. I shall look at each argument in turn.

A. Commodification

The basic argument against using restitution as a tactic is that it obscures the real wrong that originally motivated the change in social attitudes that made the litigation possible. This might seem like a highly formalistic concern. After all, the lawyers and activists who bring mass restitution suits are probably more aware than most that too little attention had been paid to the underlying wrongs relating to the relationship between German and Swiss corporate elites and the Nazi government, or the enduring power of the tobacco industry over both American government and media, or the failure of American society to take steps to rectify the consequences of centuries of slavery. Yet the temptation to do something might obscure the cost of doing anything instead of doing nothing. Is there a cost?

It is hard to approach the question empirically. Before the Holocaust suits were brought, the public had paid little attention to the conduct of Swiss banks or the role of slave labor in German industry during World War II. Undoubtedly, more attention is being paid now, and one should think that this is a good thing. The same can be said for the state reimbursement suits against the tobacco industry. Before the states began their litigation, public attitudes about the industry, while increasingly hostile, had not yet completely turned. As I have argued elsewhere, the most important consequence of the state’s litigation has been on the political environment, which has turned decidedly negative towards the tobacco industry. One might argue that individual smokers’ cases have also been affected, and that the relatively higher rate of plaintiff victories (as well as spectacular punitive damages) is a direct result of the litigation.

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98 "The risk of litigation is not simply acting in default, it is defaulting too much in action." LaFrance, supra note 37, at 202 (discussing the failure of the tobacco litigation).


100 Since the Master Settlement Agreement, the tobacco industry’s record has still been impressive, but it is now losing a greater proportion of cases than in the period described in the text accompanying note 37, supra. See Peter D. Jacobson & Soheil Soliman, Litigation as Public Health Policy: Theory or Reality?, 30 J.L. Med. & Ethics 224, 230-31 (2002) (of post-MSA trials examined, the tobacco industry won 12 cases and lost six). See, e.g., Burton v. R.J. Reynolds Tobacco Co., 205 F. Supp. 2d 1253, 1254 (D. Kan. 2002) (jury returned a verdict granting Burton a $196,416 compensatory award and authorizing punitive damages; the court later added a $15 million punitive award); Boeken v. Philip Morris, Inc.,
Against the general and untestable assertion that mass restitution litigation has changed social attitudes and enabled further and salutary legal and political progress, there is some evidence that the restitution strategy in the Holocaust litigation and tobacco reimbursement suits failed to provide a clear normative judgment about the wrongfulness of the defendants' underlying conduct. One ironic result of the MSA, for example, is that the same states that sued the tobacco industry on the grounds that it had profited from the promotion of a product that caused sickness and death are now dependent on the sale of that product to maintain their state budgets. Observers critical of the MSA have argued that it has blunted or halted momentum towards a larger discussion of national or state-wide smoking policy. Arthur LaFrance argued that this was because the consequences of litigation, if truly carried out, would have been too calamitous for American society to accept, so the states allowed a process to go forward that neither forced the industry to address its tortious conduct nor achieved the sort of public health policy that legislative debate and compromise might have produced.

122 Cal. App. 4th 684, 692-93 (2004) (jury awarded $5,539,127 in compensatory and $3 billion in punitive damages; punitive damages reduced to $50 million on appeal); Henley v. Philip Morris Inc., 114 Cal. App. 4th 1429, 1437, 1475 (2004) (jury awarded $1.5 million in compensatory and $50 million in punitive damages; punitive damages reduced to $9 million on appeal); Frankson v. Brown & Williamson Tobacco Corp., 781 N.Y.S.2d 427, 427 (N.Y. App. Div. 2004) (jury originally awarded $350,000 in compensatory and $20 million in punitive damages); Williams v. Philip Morris, Inc., 92 P.3d 126, 130 (Or. Ct. App. 2004) (jury awarded $821,485.80 in compensatory, later reduced by the court to $521,485.80, and $79.5 million in punitive damages). Because of the Supreme Court's decision in State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003) (establishing a framework for determining whether punitive damage awards are excessive and therefore violate the Due Process clause of the Fourteenth Amendment), virtually all of the punitive damages awards in these cases either have or will be appealed, and have or probably will be reduced.

101 For example, in two recent cases where it appeared that the industry might face bankrupting court proceedings brought by private litigants, the states came to the aid of the tobacco industry, and helped the industry blunt legal maneuvers by private plaintiffs to fatally wound the industry. See John Kennedy, Tobacco Verdicts Light Up Fears: Lawmakers Are Afraid Settlement Money Might Disappear, ORLANDO SENTINEL TRIB., April 11, 2000, at D1 (Florida legislature plans to cap appeals bonds retroactively to protect tobacco industry in Engle suit); States Try to Save Cigarette Maker and Their Own Coffers: Philip Morris Threatens Bankruptcy: One Suit too Many?, DETROIT NEWS, April 12, 2003, at D6 (a majority of the nation's state attorneys general filed a brief in an Illinois consumer class action seeking to protect Philip Morris from paying the full amount of a $12 billion appeal bond). Most states seem to have diverted much of their MSA payments towards general funds. See, e.g., Kevin Corcoran, Efforts to Reduce Smoking Take a Hit: Budget Diverts Tobacco Funds to Other Programs, INDIANAPOLIS STAR, May 13, 2003, at 1B.

102 LaFrance, supra note 37, at 189 (arguing that the MSA has not adequately addressed the wrongs committed by the tobacco industry).

103 "What is different about tobacco litigation, however, is that the potential claimants are so numerous, the scope of the defending conduct so vast and the resources of the defendants
Libby Adler and Peer Zumbansen have argued that the Swiss bank and German slave labor litigation was not a success because it failed to produce a clear normative judgment about the conduct of the defendants. The corporations were permitted to represent to the world that they had accepted "moral" but not legal responsibility for their actions by settling the cases. According to Adler and Zumbansen, this was a sham: the settlement had no actual moral force because all the participants in its negotiation, such as the United State's representative, Stuart Eizenstat, treated the legal claims as if they were mere pretense. By successfully persuading the public that the legal claims had little merit, the defendants also avoided a serious debate over their moral responsibility. Adler and Zumbansen observed that the settlement left many of the plaintiffs in the class action feeling unsatisfied, since no credible correspondence existed between the remedy the lawsuits demanded and the settlement actually secured.

Adler and Zumbansen argued that the slave labor claims, when asserted, were open to two interpretations: as restitution for unpaid labor or as so huge, that conventional litigation is simply inadequate to capture and contain the issues or assure appropriate relief. It thus fails both as a policy and a compensatory vehicle." Id.


105 Id. at 54 (concluding that the companies' statements that they owed a moral, though not legal duty, are untenable).

106 Id. at 28-30.

107 Adler and Zumbansen describe this tactic:

The strategy of separating moral or political responsibility from legal responsibility has served the companies well. Today's enlightened German industrialists have earned endless congratulations for courageously coming to terms with injuries largely ignored for 55 years while at the same time leaving themselves room to deny the validity of the legal claims. A close examination of the legal issues reveals, however, that the separation is a false one, and that some of the most difficult moral questions associated with the Holocaust—questions about agency and about why it happened—underlie the particular legal issues raised. . . .

Ultimately, therefore, the refrain offered by the companies that they owe a moral responsibility but not a legal one is untenable. Each of the defenses that the companies proffered implies not just a disclaimer of legal liability, but also a larger denial of remorse.

Id. at 53-54 (internal citations omitted).

108 This dissatisfaction is illustrated by two plaintiff's experiences:

On June 28, the day she received at most $2,200, Alicja Chyl of Poland told the Associated Press, "It's a pitiful amount of money . . . . It's nothing for my work." Aron Krell, a Polish-born survivor living in New York, lamented, "To me this is partial back pay—very little, very late . . . . Even if you said we were owed the minimum wage that was prevalent then in Germany, with a tiny rate of interest the amounts would have to be much, much larger than what we're getting."

Id. at 29 (citations omitted).
reparations for an injury rooted in racist ideology. The defendants seized upon the settlement to suppress the latter interpretation and promoted the former because it carried with it little or no moral consequences. I agree with this characterization of what happened, and its aftermath. What Adler and Zumbansen did not consider, however, is the degree to which the plaintiffs' own tactical choices produced the opportunity seized by the defendants. Adler and Zumbansen argued that a reparative interpretation could have been imposed on the mass restitution suits that had been filed. Their view is consistent with Hanoch Dagan's paper in this volume. As a historical matter, they agree that something was lost in the course of the Holocaust litigation. Whether reparative meaning can be preserved in suits for restitution is something that will have to be set aside until the next section.

Why might reframing tort-like claims relating to personal and dignitary injuries into a claim about unpaid labor fail to capture the wrongful conduct that originally motivated mass restitution claims? By grounding their claims in unjust enrichment, the plaintiffs are emphasizing the defendants' wrongful retention of some thing (wealth) that legally belongs to the plaintiffs and not the defendants. This is merely an elaboration of the fact that wealth held by the corporations is the present-day value of the labor that was wrongfully obtained by those same defendants during slavery. It is true that one way of describing slavery is that it is forced labor without pay. But that's an impoverished understanding of slavery, which involves a complex series of harms, and which is not necessarily primarily about the failure to compensate another for labor. To focus on the value of the labor "commodifies" the wrongs of slavery by equating one type of remedy (disgorgement) with the wrong (unjust enrichment).

109 Id. at 53.

[T]he Nazi labor program can be viewed as either war-related or as a matter of racial ideology. . . . War as well as racist ideological motives propelled the program and gave rise to plaintiffs' injuries, so neither the legal conclusion that plaintiffs were seeking reparations nor the contrary conclusion that they were seeking compensation for a private wrong was required.

Id. at 48.

110 Id. at 53.

111 Id. at 49.

112 See Dagan, Restitution and Slavery, supra note 90, at 1140-41 (establishing a framework for evaluating mass restitution suits).

113 There are multiple definitions of slavery designed for multiple purposes (the enforcement of international law, the Thirteenth Amendment, or historical research). The purpose of this article is to analyze the conceptual structure of private law and its function in American society. For this purpose, the following definition seems to capture a broad sense of the term slavery: "A power relation of domination, degradation, and subservience, in which human beings are treated as chattel, not persons." Akhil Reed Amar & Daniel Widawsky, Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney, 105 HARV. L. REV. 1359, 1365 (1992).
The minimum requirements for a claim of unjust enrichment based on quantum meruit are:

(1) [A] benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge of the benefit by the defendant; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.\(^{114}\)

The slavery class action requires its plaintiffs to argue that the legal claim that have been preserved and carried forward for generations of African Americans is not that their ancestors were kidnapped from their homes, their political freedoms denied, and their culture obliterated, but that they were not paid for the work they did under those conditions. The problem with this claim is not that it is legally invalid – the factual conditions for a quantum meruit claim are satisfied by slavery.\(^{115}\) The problem is that a claim for restitution as a result of work done during enslavement seems to treat the other wrongful aspects of slavery as nothing more that events of wealth-production. By making restitution the only remedy (assuming the tort and human rights actions are dismissed), the litigants have limited their complaint about the grotesque wrongs of slavery to complaints that the grotesque wrongs produced wealth to which they were entitled. This is what I mean by commodification.

B. Legal Fictions

One response to this concern is to note that the law makes productive use of "legal fictions" all the time.\(^{116}\) Lon Fuller defended legal fictions on the ground that they are sometimes necessary to allow an unfamiliar or emerging legal concept to take root in a legal system.\(^{117}\) A legal fiction could provide a

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\(^{114}\) Haz-Mat Response v. Certified Waste Servs., 910 P.2d 839, 847 (Kan. 1996). To define the grounds for restitution based on a claim for quantum meruit in terms of unpaid labor is not to say that it is not a form of rights vindication, however. That is, if the withholding of the wealth produced by the plaintiff's labor is wrong, then the plaintiff has a prima facie right to the wealth. On this point I agree with Dagan. See Dagan, Restitution and Slavery, supra note 90, at 1148-49 (quoting Ernest J. Weinrib, Restitutionary Damages as Corrective Justice, 1 THEORETICAL INQUIRIES L. 1, 4-5, 11 (1999)).

\(^{115}\) Similarly, there is no doubt that the claims for the money, property, and wealth gained from slavery were properly the subject of restitution claims based on claims for replevin, money had and received and quantum meruit in the Swiss Bank cases and the Holocaust slave labor cases. As Irwin Cotler put it, "we are talking about thefticide – the greatest mass theft on the occasion of the greatest mass murder in history." Irwin Cotler, The Holocaust, Thefticide and Restitution: A Legal Perspective, 20 CARDozo L. REV. 601, 602 (1998). The question this article raises is not whether theft occurred, but whether "thefticide" is a category that should stand in the same normative and political space as genocide. See id.


\(^{117}\) LON FULLER, LEGAL FICTIONS 70 (1967).
rationale or justification for a line of cases that fits the precedents, but which would not necessarily persist as a principle. Fuller quoted from John Chipman Gray, who said that "[s]uch fictions are scaffolding – useful, almost necessary, in construction – but, after a building is erected, serving only to obscure it." Applying this viewpoint to the mass restitution cases, it suggests that my formalist concerns can be set aside as long as the fictions employed are designed (or have the potential) to allow a new and less provisional set of legal concepts to take hold.

Fuller took the position that fictions which identified themselves as such were usually harmless and often helpful – doctrines that claimed for themselves “nonfictitious” status “often ha[ve] a spurious self-evidence about [them].” However it is not clear whether the decision to sue for restitution is a legal fiction as opposed to an exercise of discretion to choose one legal avenue instead of another (albeit for understandable tactical reasons). As mentioned above, unjust enrichment claims compose part of the prima facie claims that a proper plaintiff could demand from defendants who played a role American slavery. They are not fictional, just as the genuine prima facie restitution suits arising from Holocaust and the tobacco litigation are not fictional. The issue of legal fiction in these cases is not so much about the adoption of a rationale for the doctrine the plaintiffs’ hope to use – quantum meruit – but about the rationale for choosing that species of private law claim as opposed to one sounding in tort or constitutional law.

In any event, according to Fuller, a legal fiction “that is plainly fictitious must seek its justification in considerations of social and economic policy.” What negative consequences might flow from the “commodification” of the plaintiffs’ claims in the slavery suits, even if the claims are properly called legal fictions?

In her book Contested Commodities, the legal scholar Margaret Radin noted that there is a real risk in adopting the rhetoric of property when discussing serious issues involving bodily integrity. Her argument was based on the problem of how to properly describe the wrong of rape. Radin was disturbed by the growing popularity among private law scholars of defining

118 For example, the original justification for the “attractive nuisance” doctrine may no longer be plausible, but it served to help establish the exception to landowner liability rules that were otherwise too pro-defendant. Id. at 71.

119 Id. at 70 (quoting JOHN CHIPMAN GRAY, NATURE AND SOURCES OF LAW 35 (2d ed. 1921)).

120 Id. at 71.

121 Id.

122 See MARGARET JANE RADIN, CONTESTED COMMODITIES 87 (1996) [hereinafter CONTESTED COMMODITIES] (noting problems with using the rhetoric of property when discussing matters of bodily integrity).

123 Id. at 86 (questioning Posner’s use of market theory to discuss rape).
rape as a decision to "bypass" the market.\textsuperscript{124} Radin's concern went beyond worrying that such arguments might be mishandled, resulting in an undervaluing of the "costs" of rape.\textsuperscript{125} Her larger concern related to the rhetoric itself. The phrase "market bypass" implied that there is a proper market for the attribute sought by the wrongdoer (in this case, a rapist).\textsuperscript{126} Radin argued that to most people, this presumption "seems intuitively out of place ... so inappropriate that it is either silly, or somehow insulting to the value being discussed, or both."\textsuperscript{127}

Radin explained her intuition by drawing a distinction between bodily integrity, which is an "attribute" of personhood, and the things over which a person has control, which can properly be called objects or things (even if they are intangible, such as the product of human imagination). Radin's objection to some scholars' use of market language in the context of rape is instructive. Her complaint went beyond the mere instrumental. A market language approach to rape might be quite well-intentioned, but no matter how hard its advocates hope it would produce a world in which women were better off, it would fail for a fundamental reason.\textsuperscript{128} There is, Radin argued, a cost to detaching an attribute of personhood from a person:

Systematically conceiving of personal attributes as fungible objects is threatening to personhood because it detaches from the person that which is integral to the person. Such a conception makes actual loss of the attribute easier to countenance. . . . [I]f my bodily integrity is an integral personal attribute, not a detachable object, then hypothetically valuing my bodily integrity in terms of money is not far removed from valuing me in terms of money.\textsuperscript{129}

Radin suggested that while many scholars believe they are wielding conceptual tools, exactly as they want to when they "borrow" the language of the market—often to appear hard-nosed—they risk becoming unwilling allies to the idea that everything can be reduced to forms of money and property.\textsuperscript{130}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{124} Id. at 86-87 (citing \textit{RICHARD POSNER, ECONOMIC ANALYSIS OF LAW} 218 (4th ed. 1992) (concluding that rapists bypass the normal sexual relations market); Guido Calabresi & A. Douglas Melamed, \textit{Property Rules, Liability Rules, and Inalienability: One View of the Cathedral}, 85 \textit{Harv. L. Rev.} 1089, 1124-27 (1972) (arguing that people should hold an entitlement, akin to property laws, for their personal bodily integrity)).
\item \textsuperscript{125} Id. at 87 (explaining that some users of a cost-benefit analysis may not place sufficient value on the costs of rape).
\item \textsuperscript{126} Keith Hylton adopts the phrase "market bypassing" from Posner in his discussion of the tort of slavery. \textit{See} Hylton, \textit{supra} note 71, at 1244.
\item \textsuperscript{127} \textit{CONTESTED COMMODITIES, supra} note 122, at 87.
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} \textit{Id.} at 88.
\item \textsuperscript{130} Id. at 92 (reflecting on whether to view rape, in a cost-benefit scheme, as an act that benefits the rapist); \textit{see} Jeanne L. Schroeder, \textit{The Midas Touch: The Lethal Effect of Wealth Maximization}, 1999 \textit{Wis. L. Rev.} 687, 717 (1999) ("The most prominent proponent of what
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\end{footnotesize}
She called this a "domino theory," in which, despite the best intentions of all involved, market language crowds out non-market language.\textsuperscript{131} The ultimate cost of using market language is not necessarily that the specific goal which led to the tactical adoption of the commodified language is stymied, but rather that there are less obvious spill-over "social" effects, such as the infiltration of market language into contexts where non-market values and reasons should dominate.\textsuperscript{132}

Radin was skeptical of the domino theory, but not necessarily as a descriptive matter.\textsuperscript{133} Yet she felt that there were good reasons why people should resist the spread of market rhetoric, and noted that, unless carefully handled, language that commodifies attributes of personality can often lead lawyers and legal language astray.\textsuperscript{134} She preferred a conception of property that allowed for "incomplete commodification." An interaction can reflect incomplete commodification to the extent that it allows market and non-market interpretations simultaneously.\textsuperscript{135} The example she used to illustrate this concept was work. Radin noted that aspects of work could be commodified while others could not.\textsuperscript{136} The details of which aspects of work as a contested concept fall on which side of the divide is less important for my discussion of slavery than noting that, for Radin, the key to avoiding the caricatured legal rhetoric of commodification depended on keeping straight which legal categories could be appropriately treated by market language (and concepts) and which could not.\textsuperscript{137}

is here called 'romanticism' — the fear that market transactions will result in an alienating universal commodification of subjects as well as objects — is Margaret Jane Radin.

\textsuperscript{131} CONTESTED COMMODITIES, supra note 122, at 99-100 (explaining that there is a slippery slope, wherein market regime language beings to include everything that has value).

\textsuperscript{132} "Margaret Radin has presented a powerful argument that [market] rhetoric can and does, over time, influence the way we conceptualize the world, and ultimately act in the world." Stephen D. Osborne, Protecting Tribal Stories: The Perils of Propertization, 28 AM. INDIAN L. REV. 203, 235 n.211 (2003).

\textsuperscript{133} CONTESTED COMMODITIES, supra note 122, at 103 (arguing that the domino theory is not absolute, in that when both market and nonmarket understandings exist, the market theory will not necessarily win out); see Wendy J. Gordon, Render Copyright unto Caesar: On Taking Incentives Seriously, 71 U. CHI. L. REV. 75, 91 n.62 (2004) (agreeing with Radin that the domino theory is not absolute in its prediction that some commodification will lead to absolute commodification).

\textsuperscript{134} "This kind of resistance to the domino theory would see a nonmarket aspect to much of the market." CONTESTED COMMODITIES, supra note 122, at 101.

\textsuperscript{135} Id. at 102-03 (explaining that market and nonmarket understandings can exist and overlap if the individual understandings of each are not crystallized).

\textsuperscript{136} Id. at 105 (explaining that the concept of work contains both commodified and noncommodified elements).

\textsuperscript{137} "Complete commodification of work – pure labor – does violence to our notion of what it is to be a well-developed person." Id. at 107.
A claim for unjust enrichment from slavery measures the wrongful taking from the slave entirely by the slave’s labor-value, and so suggests a rhetoric of complete commodification. The risk, therefore, in responding to slavery through the lens of unjust enrichment is that it fails to offer a legal characterization of the wrong that occurs when the non-commodifiable aspect of labor is violated.138

III. THE HARM OF “LOSS OF CONTROL” AND COMMODIFICATION

Another argument that can be made in response to the commodification problem is that claims for restitution of labor are not legal fictions at all – they do exactly what they ought to do, which is to allow people to “vindicate” their rights to autonomy through money damages. Hanoch Dagan makes this argument forcefully in his forthcoming book, The Law and Ethics of Restitution, and also in an article in this symposium.139

Dagan’s argument is complex, and I will simplify it here. He argues that the right to a resource is a complex and contested concept.140 In this sense, he agrees with Radin, who also described property as a contested concept.141 For Dagan, the question of restitution is not so much about the right to property but the entitlements one has in various resources. Those rights are determined by the variety of values society wishes to recognize in an entitlement.142 They include the “cherished libertarian value of control, [the] utilitarian value of well-being, [and the] value of sharing . . . [which] calls for other-regarding actions and seeks to inculcate other-regarding motives.”143 These values, become the entitlements for which a property-holder can demand restitution if they are infringed.144

The two values that are of the most importance for claims of restitution arising from slavery are the values of control and well-being. In his earlier work, Dagan had analogized control to the entitlement protected by a

138 A tort action for battery or false imprisonment would not really do this either, which is why Hylton suggests a new hybrid tort, which he calls the “social torts” of slavery. See Hylton, supra note 71, at 1224-29. This article does not necessarily reject this proposal. It only argues that unjust enrichment cannot capture the “incompletely commodified” nature of free labor.

139 DAGAN, THE LAW AND ETHICS OF RESTITUTION (forthcoming 2004) (manuscript on file with the author) [hereinafter DAGAN, LAW AND ETHICS OF RESTITUTION]; Dagan, Restitution and Slavery, supra note 90, at 1148.

140 DAGAN, LAW AND ETHICS OF RESTITUTION, supra note 139 (manuscript at 239).

141 CONTESTED COMMODITIES, supra note 122, at 104 (explaining that there are situations of contested commodification that should be compared to how powerful the market conceptualization is).

142 DAGAN, LAW AND ETHICS OF RESTITUTION, supra note 139 (manuscript at 230-31).

143 Id.

144 Dagan, Restitution and Slavery, supra note 90, at 1148-49 (arguing that the wrongs committed are not wrongs against property rights, but against basic human rights).
Calabresi-Melamed property rule and well-being to the entitlement protected by a Calabresi-Melamed liability rule. The former protects the right-holder’s power of consent over the resource, and the latter protects the right-holder’s interest in an objective level of utility in the resource. The different entitlements are protected by different measures of recovery: consent by the “profits measure” and well-being by the measure of the resource’s “fair-market value.” According to Dagan, each measure of recovery is a form of rectification and thus fits within the corrective justice model of private law: “The profits measure reflects and reverses a breach of the plaintiff’s entitlement to control the resource, while the fair-market value reflects and reverses a breach of her entitlement to the well-being embodied by the resource.”

According to Dagan, the commodification problem dissolves because not all restitutionary remedies rectify a resource-holder’s loss of economic value. A restitutionary remedy for the loss of control has a social meaning different from a restitutionary remedy for loss of well-being. When a restitutionary remedy of profits is awarded, it vindicates a resource-holder’s autonomy. Dagan takes from this that, in unjust enrichment, restitution for profits in excess of the fair market value of the thing taken is conditioned on the loss of plaintiff’s control over her labor, not over the labor itself. Thus, when the plaintiffs in a mass restitution suit sue in restitution for the profits of slavery, they are not only not engaged in a legal fiction, they are explicitly using the law to recover the loss of an interest that is central to what makes slavery uniquely wrong – the loss of control or autonomy.

This is a very promising argument, but is based on a confusion of what kind of injustice is rectified by unjust enrichment law. Dagan’s definition of restitution is broader than others’, but it still remains fundamentally tethered to the concept of a remedy for the infringement of a right to a resource. It is not, for example, meant to compensate people for wrongful losses (that is the

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146 DAGAN, UNJUST ENRICHMENT, supra note 145, at 15.
147 DAGAN, LAW AND ETHICS OF RESTITUTION, supra note 139 (manuscript at 242). Dagan thus argues that his approach fits within the spirit, if not the letter, of the argument set out by Weinrib in Restitutionary Damages, supra note 69.
148 Dagan, Restitution and Slavery, supra note 90, at 1147-49 (explaining that restitutionary claims may be undesirable in that they deny the absolute right of people to control their own labor).
149 Id. (discussing the plaintiffs’ loss of control over their own labor).
150 See DAGAN, UNJUST ENRICHMENT, supra note 145, at 4-5 n.15 (distinguishing the approach adopted in UNJUST ENRICHMENT from the “narrow property-based approach” of Samuel J. Stoljar and Daniel Friedmann).
job of tort law), although sometimes tort remedies and restitution overlap. The vindication of the right to control is not compensatory in the sense that the plaintiff is compensated for pain, suffering or emotional distress, or even a wrongful loss analogous to the dignitary harms compensated through tort claims for false imprisonment or the violation of the right to privacy. If it were, suits based on loss of control of a resource would really be tort suits, and their presentation as suits in restitution would be nothing more than "clever pleading" made necessary by "technical distinctions [that] may arise in states that take the pleading fictions seriously."

Dagan's answer to this objection is that restitutionary damages that exceed the fair market value of the resource taken by the infringer are, strictly speaking, neither compensation nor property. What are they, exactly? In the famous case of Olwell v. Nye and Nissen Co., the defendant secretly used an egg-washing machine owned by the plaintiff. The defendant profited from the deceit because labor was expensive and the machine, left unused by the plaintiff, was a great help to the defendant. Rather than award the rental value of the machine (fair market value), the court forced the defendant to give back all the money he had saved (his profits). Dagan says that disgorgement of the profits served to "vindicate[] the plaintiff's role as the ultimate decisionmaker with respect to the use of such resource."

In earlier writings, Dagan defined "vindication" as: (1) the remedy of a "mischief — such as the diminution of one's well-being, or any disrespect to one's control;" and (2) an ex ante incentive to deter wrongdoing. The latter meaning of the term is a familiar instrumentalist explanation of why profits should be taken from conscious-wrongdoers in restitution — to deter market

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151 Most of the cases that would entail a measure of recovery for loss of control would fall under the category of waiver of tort. See, e.g., Olwell v. Nye & Nissen Co., 173 P.2d 652, 654 (Wash. 1946) (holding that because plaintiff elected "to waive his right of action in tort and to sue in assumpsit on the implied contract," he is entitled to the restitutionary measure of recovery (emphasis in original)). Laycock has argued that in such cases, while the remedy is restitutionary, the substantive basis for the recovery is another department of private law such as tort or contract. See Douglas Laycock, The Scope and Significance of Restitution, 67 Tex. L. Rev. 1277, 1286 (1989). Dagan, who clearly is concerned with the substantive basis of restitution, thinks otherwise, and considers the grounds for recovery independent of tort or contract law in cases such as Olwell. See DAGAN, UNJUST ENRICHMENT, supra note 145, at 5-6.

152 Laycock, supra note 151, at 1286.


154 DAGAN, RESTITUTION AND SLAVERY, supra note 90, at 1150.

155 DAGAN, UNJUST ENRICHMENT, supra note 145, at 9 n.28. Klimchuk takes a similar position. Dennis Klimchuk, Unjust Enrichment and Reparations for Slavery, 84 B.U. L. Rev. 1257, 1275 (2004) ("The refusal to make restitution to slaves for unpaid wages amounts to the claim that the value of their labour is retained by slaveholders on an adequate legal basis.");
Dagan offers an interpretation of the instrumentalist account that takes it outside of the welfare-maximizing rationale criticized by Radin in her discussion of the law-and-economics rationale for penalties for rape. He observes that by disgorging the wrongdoer’s profits, society expresses its disapproval of the infringement. Thus, not only does profit as a measure of recovery promote social ends unrelated to the interests of the plaintiff, but it actually conveys to the plaintiff an important message. It tells the plaintiff that the infringement she suffered related not only to the market-value of the resource at issue, but also that it takes the moral dimension of the loss of control seriously.

Dagan’s interpretation of the “noninstrumentalist” reason for disgorging profits in cases like Olwell is attractive, but it cannot explain why giving the profits gained by the infringer to the plaintiff further promotes the end of communicating the social meaning of the restitution suit. The problem he faces is similar to that faced by Jean Hampton in her defense of retribution. Hampton argued that retribution could be a form of corrective justice because it forced wrongdoers to repair their victims’ “moral injury,” not just their economic, physical, and hedonic injuries. Moral injury is not a physical harm, nor the psychological pain that one might experience after being the object of a moral injury. It harms the victim’s value in that while the wrongdoer denies the victim’s true value, her value is not being fully realized. The diminution of the realization of the victim’s value can have other harmful consequences, but the original failure of realization is itself a wrong. Left uncorrected, a denial of the true value of one person (and the wrongful elevation of the value of another) may be a continuing harm because the persistence of the false statement of value may be a reason others come to

See, e.g., James J. Edelman, Unjust Enrichment, Restitution, and Wrongs, 79 Tex. L. Rev. 1869, 1876 (2001) (discussing the deterrence rationale of Olwell); Dagan, Law and Ethics of Restitution, supra note 139 (manuscript at 236).

See discussion supra notes 122-138 and accompanying text.

Dagan, Restitution and Slavery, supra note 90, at 1151-52.


Hampton’s concept of moral injury is very similar to Dagan’s concept of vindication for loss of control:

A person behaves wrongfully in a way that effects a moral injury to another when she treats that person in a way that is precluded by that person’s value, and/or by representing him as worth far less than his actual value; or, in other words, when the meaning of her action is such that she diminishes him, and by doing so, represents herself as elevated with respect to him, thereby according herself a value that she does not have.

Correcting Harms, supra note 160, at 1677 (emphasis in original).

Id. at 1666.
express towards the victim the false view that his value is less than equal.163 In fact, the "decision not to [correct the false expression of value is itself] expressive: it communicates to the victim and to the wider society the idea that such treatment, and the status it attributes the victim, are appropriate."164

As in Dagan's account of vindication of control, there may be a temptation to convert this argument into some form of consequentialism: The reason we punish moral injury is to deter it, and the reason we want less moral injury is because it is associated with the infliction of physical and emotional injuries. Hampton flatly rejected this argument.165 What the retributivist wants to achieve is not just (or even) that the victim feel better, but rather that the false statement about the victim's value is "annulled."166 Thus, what is required is a response that is connected to "that which makes the wrongful act wrong."167 What makes moral injury wrong is that it expresses a false claim about the value of the victim. The response must express and establish not only that the victim has value, but that the value-judgment contained in the wrongdoer's act was wrong. For Hampton, the only way to reassert the correct moral status of the victim is to punish the wrongdoer:

When we face actions that not merely express the message that a person is degraded relative to the wrongdoer but also try to establish that degradation, we are morally required to respond by trying to remake the world in a way that denies what the wrongdoer's events have attempted to establish, thereby lowering the wrongdoer, elevating the victim, and annulling the act of diminishment.168

The criticism that Hampton had to answer was why the correction of "moral reality" had to come through the imposition of hard treatment on the wrongdoer. Why would it not be enough for the state to announce that the wrongdoer was, in fact, wrong about the victim's lack of moral equality? As Hampton sarcastically put it, "why not simply hold a parade for her?"169 Hampton's answer was that punishment of the wrongdoer compensates the victim.170 The wrongdoer's suffering puts the victim "back" to where she was

163 Id. at 1678.
164 Id. at 1684.
165 See FORGIVENESS, supra note 160, at 125.
166 Id. at 131.
167 Id.
168 Correcting Harms, supra note 160, at 1686-87 (emphasis added).
169 Id. at 1695.
170 Id. at 1698. As Emily Sherwin notes, the motive of retaliation seems to overlap with the motive of retribution in Hampton's work. A victim secures redress through moral defeat by making the wrongdoer worse-off. See Emily L. Sherwin, Reparations and Unjust Enrichment, 84 B.U. L. Rev. 1443, 1456-57 (2004). The difference between retaliation and retribution is not necessarily in form but in purpose. Retaliation may be motivated merely to eliminate a wrongful gain, whereas retribution is motivated by a desire to correct a wrongful loss.
before the moral injury was inflicted.

Hampton’s argument for retribution is much more complex than I have presented it here. Whether it is ultimately persuasive is not the point of raising it in the context of a discussion of Dagan’s argument for the vindicatory power of restitution. It is, however, a corrective justice argument with some of the same ambitions as Dagan’s. Hampton began her analysis at a very different point. She did not specify the measure of the penalties that would serve to restore victims to their pre-moral injury state. Because, for Hampton, the victim’s moral injury was repaired through an expressive act (the public punishment of the wrongdoer), the measure of the penalty was not necessarily reflected in the profit gained by the wrongdoer. For Hampton, if the Otwell case was an example of retribution in action, it was because of the expressive defeat expressed by the loss of profit. The profit itself could not be seen as the measure of the moral injury. Thus, even had the defendant made no profit at all, there would still be a need to punish him, whether by punitive damages directly, or some form of civil or criminal penalty.

Dagan’s first sense of ‘vindication’ of interference with control seems to parallel Hampton’s understanding of retribution for moral injury. If indeed it follows Hampton’s idea, then it is much less likely to run afoul of the commodification problem. However, if restitution of profits “vindicates” control by expressing to the victim and the wrongdoer that the infringement is viewed as a social offense, then the restitutionary act is the reversal of the infringement and not the disgorgement of the profits. The disgorgement of the profits is just a vehicle or means by which the expression of social condemnation is communicated to the plaintiff. It should be noticed that the profits, which “measure” recovery for loss of control, are not really a measure at all: they are the evidence that the proper kind of notice has occurred. The amount of money awarded is contingently determined because the amount of profit the infringer produced is a matter of moral luck. Like Hampton’s punitive damages, the particular quantum of profit, under Dagan’s account, cannot be defended as being too much or too little, because by definition they do not refer back to any particular resource of the plaintiff whose loss has an objective welfare value. The practice of awarding profit damages is a legal device designed to promote the ends or institution of restitution law without utilizing the particular rules of restitution law. 172


172 In this sense, Dagan’s account of profit damages in restitution law parallels not only Hampton’s account of punitive damages as private retribution but also Rawls’ account of practices like punishment or promise-keeping. Rawls noted that utilitarian justification of these practices must take into account “the distinction between the justification of a practice
According to Dagan, the restitution of wealth demanded in the slave litigation produces only an "incomplete commodification" of the slaves' claims because a portion of the money demanded (the profits) represents the vindication of the entitlement to control infringed by the defendants.\footnote{Dagan, \textit{Restitution and Slavery}, supra note 90, at 1151-52 (citing \textit{Contested Commodities}, supra note 122, at 184-91).} The invocation of Radin's terminology at this point highlights the difficulty with Dagan's position. Radin's discussion of tort damages for emotional distress as incompletely commodified was fraught with questions about the costs and benefits of using market rhetoric to capture incommensurable interests, such as the interest to be free of pain.\footnote{\textit{Contested Commodities}, supra note 122, at 203. Radin noted that Richard Abel, a progressive torts scholar, recommended doing away with pain and suffering damages because they "'commodify our unique experience.'" \textit{Id.} at 203 (quoting Richard Abel, \textit{A Critique of Torts}, 37 UCLA L. REV. 785, 804-06 (1990)).} Like Hampton, Radin viewed the practice of awarding a quantum of compensation in order to rectify a non-quantifiable harm as controversial and in need of justification. Dagan, too, has a justification, but his is on slightly less secure ground in the context of using the language of restitution to provide redress for the nonmonetizable injuries of slavery.

Like non-economic injuries or punitive damages, the primary argument for having them, notwithstanding the dangers of commodification is that a system of monetized damage awards is the only way to deliver to the plaintiff the expressive or symbolic content contained in the non-commodified portion of the award. Money for pain and suffering and punitive damages is typically justified instrumentally. Radin and Hampton understood the non-commodified portion of these awards not just non-instrumentally, but expressively. Radin quoted Louis Jaffe, who suggested that pain and suffering damages were a \textit{solatium}, a payment that "signifi[es] society's sincerity."\footnote{Margaret Jane Radin, \textit{Compensation and Commensurability}, 43 DUKE L.J. 56, 71 (1993) (quoting Louis L. Jaffe, \textit{Damages for Personal Injury: The Impact of Insurance}, 18 LAW & CONTEMP. PROBS. 219, 224 (1953)).} Hampton understood the moral defeat suffered by a defendant who suffered retribution as an act that expressed to the plaintiff a specific belief about the plaintiff's "real" moral status. Each of these damages practices work (if they work) because they communicate \textit{to the plaintiff} a belief \textit{about the plaintiff}. This is how vindication works within Dagan's model of restitution as well, but can this model of damages work if the original subjects of the wrong are dead?

The point of this question is not to challenge the logical possibility that and the justification of a particular action falling under it." \textit{John Rawls, Two Concepts of Rules} (1955), \textit{reprinted in Collected Papers} 3, 31 (1999). Dagan believes that the practice of restitution is characterized by certain principles, such as the rectification of the infringement of an entitlement. Where the injury to the infringement is incalculable, the proper response is not to abandon the practice of restitution but to reinterpret its practice and to justify the reinterpretation "by reference to the practice." \textit{Rawls, supra} at 42.
expressive or symbolic damages can be carried forward by survival actions. The old rule of actio personalis, in which an action in tort dies with the estate, has been modified by statute in almost all fifty states. The question, as Dagan himself recognizes, is whether the doctrine of restitution, which has not been affected by statutory modifications of tort law, should be interpreted by the courts to extend to heirs a form of remedy not recognized by common law tort.

When an heir inherits an estate’s actions maintained by a state’s survivorship laws, she is suing in the name of the victim of the tort. This is in contrast to wrongful death, where a legislatively designated member of the decedent’s family sues for damages in her own name. The instrumentalist reasons for survivorship statutes are easy to see. From a perspective of deterrence, there would be no way to ensure that the full cost of tortious conduct would be internalized if some of the costs of that activity were not charged to the tortfeasor because his victims died as a result of his acts. There may be other instrumentalist reasons relating to the inadequacy of other forms of support for the heirs, or the inadequacy of wrongful death as a source of compensation, that may justify the survivorship of claims.

The non-instrumentalist reasons for permitting tort claims to survive the death of the plaintiff are rarely articulated. As one author put it, the issue with a “survival statute . . . is making the decedent’s estate whole, not whether the decedent’s relatives are entitled to any benefit.” Why should the decedent’s estate be made whole, if not for the interest of others in receiving the money the decedent was to receive from the defendant? It is precisely because of the suspicion that the interests of heirs are served by survivorship that most states

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177 Dagan, Restitution and Slavery, supra note 90, at 1160-61.

178 See LAW OF TORTS II, supra note 176, § 295 (discussing damages under and the scope of survival actions). “In contrast to the wrongful death action, the survival action . . . merely reverses the common law rule that a cause of action abates with the death of either party.” Id. at 805.

179 This often includes loss of the cost of burial and the value of the decedent’s future estate to the family, as well as the loss of future earnings, the loss of future services, and sometimes compensation for the family member’s emotional distress. See, e.g., Lorenz v. Air Ill., Inc., 522 N.E.2d 1352, 1357 (Ill. App. Ct. 1988) (listing standard jury instructions on loss of estate); N.Y. EST. POWERS & TRUSTS LAW § 5-4.3(a) (McKinney 2004) (allowing recovery for burial expenses); OHIO REV. CODE ANN. § 2125.02(b)(5) (West 2004) (allowing recovery for mental anguish).

do not allow future earnings expectancy to be awarded through survivorship, on the theory that heirs should (and will) receive a share of the decedent’s expected earnings through their wrongful death claim. Where the decedent has no heirs who can collect under a wrongful death action, the risk of double-recovery is eliminated, but the question remains: Other than deterring the defendant, what is the point of allowing recovery? In one case where a court allowed future economic loss to be included in a survivorship claim even where there are no heirs who would qualify to collect under a wrongful death claim, the court argued that there where other parties with interests in the decedent’s estate being made whole, namely, “creditors and heirs or devisees” not recognized by the wrongful death statute. As the Ohio Supreme Court noted in its decision rejecting prospective income from survivorship, the legislative decision to abandon the common law rule of actio personalis was designed to repair the estate of the decedent by forcing the defendant to pay compensation for the “immediate” or “temporal” injury suffered by the decedent before he died.

The major category of damages that is maintained by survivorship rules is pain and suffering prior to death. As Dobbs notes, suits for “dignitary torts” such as defamation, malicious prosecution, and the right to publicity often do not survive death. It is worth considering why, when state legislatures

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183 See Ellis v. Brown, 77 So. 2d 845, 848 (Fla. 1955).

184 See LAW OF TORTS II, supra note 176, § 295. “Damages in the survival action are often quite limited in amount. They reflect only the damages the decedent herself could have claimed at the moment of her death.” Id. Lost earnings post-injury and prior to death are a logical possibility but arise more infrequently than pain and suffering and medical expenses post-injury. As noted, lost future injuries post-death are not often allowed.

185 Id. A substantial number of state survival statutes still do not empower a deceased’s estate to bring a cause of action for a dignitary tort such as libel, slander, false imprisonment, malicious prosecution, privacy, or permit punitive damages to be awarded. See, e.g., Allred v. Solaray, Inc., 971 F. Supp. 1394, 1399 (D. Utah, 1997) (holding that, under UTAH CODE ANN. § 78-11-12 (1977), claims of injuries to rights, reputation, or property do not survive death); Conly v. Conly, 121 Mass. 550, 550 (1877) (holding that actions for malicious prosecution do not survive under the Massachusetts common law); Walters v. Nettleton, 59 Mass. 544, 544 (1850) (holding that actions for libel to not survive death under the Massachusetts common law); ALA. CODE § 6-5-462 (2004) (excluding claims based on injury to reputation); ALASKA STAT. § 09.55.570 (Mitchie 2004) (excluding defamation); ARIZ. REV. STAT. § 14-3110 (2004) (excluding “breach of promise to marry, seduction, libel, slander, separate maintenance, alimony, loss of consortium, and invasion of right of privacy”); ARK. CODE. ANN. § 16-62-101(a)(2) (Mitchie 2003) (excluding slander and libel); COLO. REV. STAT. § 13-20-101 (2003) (excluding actions for libel and slander); HAW. REV. STAT. § 663-7 (2003) (excluding defamation and malicious prosecution); IDAHO
decided to extend tort actions past death, they often decided not to include dignitary damages such as reputation.186 Another way of framing the question is: Why have legislatures so often excluded dignitary injuries from the category of "temporal" harm? From an instrumental perspective, one could see certain social benefits to forcing wrongdoers to compensate for the injuries resulting from dignitary wrongs; one would hope that such wrongdoing would be discouraged.

One explanation for the hesitancy to include dignitary harms in the category of temporal harms is that, despite the instrumental benefits of deterrence and compensation that come with any form of damage award associated with antisocial conduct, there is a certain conceptual incoherence to the idea of symbolic or expressive redress for nonmonetizable interests when the party who is repaired is an "estate" instead of the natural person whose dignity was injured. If the purpose of using monetized damages is to (however incompletely) communicate to the victim that the wrong they have suffered has been identified and corrected, then the point of this interpretation of the practice of awarding damages seems lost when the victim is dead. Of course, if one took the viewpoint that any type of injury that is compensable through private law is a commodity, then the death of the victim after the wrong occurred but before the remedy could be provided is irrelevant. Our common law takes this view with regard to property and contract but not with regard to tort. The son of a man who was owed money because he was not paid for his labor should be able to press that claim in quantum meruit after his father's

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death, assuming that all other statute of limitations questions were not at issue. The son, however, does not automatically inherit his father’s claims in tort, as if they were property to be handed down. Any right to a remedy relating to his father’s money that he might have inherited or been given would be grounded not on the son inheriting the father’s tort claim, but on the son gaining a tort claim of his own as a result of his father’s death (e.g. under his state’s wrongful death statute).

The structure of private law suggests remedies that redress commodifiable losses can be passed between generations somewhat easily, while remedies that redress noncommodifiable interests can pass between generations only as the result of some considered effort, usually involving legislation. This is not an argument in itself for denying that the original slaves had claims in restitution, or that if they had been in possession of such claims, those claims could in theory descend to their children and their children’s children, subject to the constraints of the applicable rules of statutes of limitations. It also is not an argument against the claim that if the slaves had brought a suit in restitution, their damages would have included profits. It is an argument about how we should interpret the reason why the slaves would have had a claim in restitution. If the reason is, as Dagan has argued, that the claim in restitution was to rectify the loss of control by means of awarding symbolic damages, then we are faced with a dilemma. One the one hand, we can accept Dagan’s characterization of the rationale for the restitution of profits. The problem with doing so is that we would then be forced to permit the descent of symbolic damages without statutory authority, with the full knowledge that they would not even be able to achieve the ends that provide the rationale for having incompletely commodified remedies. In the alternative, we could refuse to allow the claims to be inherited, not just because of concerns with statutes of limitations, but because we feel the risk of comodification is too large. Dagan acknowledges that the second choice might be preferable on the balance of policy reasons.

CONCLUSION

In this article I have argued that lawyers should be discouraged from adopting the categories and language of restitution to address the wrongs of slavery. My view is not that the wrongs of slavery cannot be addressed in the language of private law. American slavery can be analyzed through the lens of

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187 The descendability of claims for the “temporal injury” of pain and suffering is explicable partly because it is the result of a legislative act. Pain and suffering damages, which cannot ever truly repair what a victim has lost, are already monetized for a variety of reasons by the tort system, as Radin noted. See supra notes 122-137 and accompanying text. The decision to fully commodify them by making them part of an estate’s “interest” in a survivorship action only underscores the extent to which the commodification of certain non-monetizable injuries is a step that requires careful justification.

188 Dagan, Restitution and Slavery, supra note 90, at 1163-64.
tort law, although it has its own perils, and once the question of legal redress is properly framed, the correct answer to the correct question will disappoint and frustrate those who seek justice in the courts. The purpose of this article is to suggest that the language of tort law should be adequate for a complete analysis of the compensation of the dignitary injuries caused by slavery. 189

My argument against adopting the language of restitution is partially a matter of comparative institutional competence – tort law can make more sense of the real non-commodified injury at the root of the slave litigation – and partially a matter of guesswork about the unanticipated consequences of changing the language of restitution. The real question is not whether claims for unjust enrichment have taken into account conduct that, as Dagan has argued, interferes with the interest in the control of oneself. It clearly has. The question the slavery cases raise is whether lawyers should choose to treat an injury to this interest as a contingent or essential feature of the plaintiffs’ rights to restitution. To the extent that lawyers are encouraged to do this because they find tort law unsatisfactory due to technical or practical issues, the flight to restitution to avoid these problems will not provide a more stable or safer haven.

189 For this reason, Hylton’s article in this symposium offers a very thoughtful reconsideration of the interests injured as a result of slavery and the potential for framing new claims for redress under the existing common law of tort. See generally Hylton, supra note 71.