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REPARATIONS AND UNJUST ENRICHMENT

EMILY SHERWIN*

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INTRODUCTION

Reparations claims growing out of the institution of slavery in the United States can be framed in two ways: as claims for compensation for loss or as claims for restitution of unjust gains. A number of commentators, as well as lawyers filing claims in court, have viewed the claim for restitution as more promising.¹ Restitution avoids some of the conceptual difficulties and problems of proof that affect claims to compensation for temporally distant wrongs.² Restitution also appears, at first glance, to be more easily reconcilable with the prevailing understanding that legal and moral rights and duties belong to individuals rather than groups.³

I shall argue that, despite an initial appearance of superior doctrinal fit, restitution is not an appropriate vehicle for reparations claims based on slavery and similar large-scale historical injustices. My argument is not that the law of

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¹ See *In re African-Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1042-44 (N.D. Ill. 2004) (adjudicating reparations claims that relied, in large part, on unjust enrichment and related claims to restitutionary relief); see also HANOCH DAGAN, *THE FOURTH PILLAR: THE LAW AND ETHICS OF RESTITUTION* 281-295 (forthcoming 2004) (suggesting that unjust enrichment can guide analysis of, if not resolve, the question of slavery reparations); Bernard Boxhill, *The Morality of Reparation*, in *REVERSE DISCRIMINATION* 270, 275-77 (Barry R. Gross ed., 1977) (arguing for reparations on the basis of unjust enrichment); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 700-01 (2003) (finding that restitution, as compared to compensation, provides a stronger basis for reparations).

² See Posner & Vermeule, *supra* note 1, at 700-03 (asserting that “because the victim and claimant do not need to be the same person . . . the restitution argument provides a stronger case for reparations than the compensation argument does”).

³ See *id.* at 698-701 (comparing compensation and restitution as grounds for reparations under a theory of “ethical individualism”). I suggest below that a reparations claim based on unjust enrichment ultimately must rely on a group-oriented understanding of rights. See *infra* notes 13-17 and accompanying text.

restitution fails to support reparations claims, although that may well be the case. Instead, I propose that the justifying principle behind restitution – prevention of unjust enrichment – lacks the moral force necessary to resolve a controversial public dispute about moral rights and obligations among segments of society.

Courts and scholars tend to associate restitution and unjust enrichment with a special attentiveness to morality and particularized justice not found elsewhere in law.⁴ Yet, the virtues of a claim based on unjust enrichment are mixed at best. At its core, an unjust enrichment claim seeks to right a wrong not by alleviating the adverse consequences to the victim, but by diminishing the position of others. In other words, the notion of unjust enrichment is a comparative idea that draws on resentment and the desire for retaliation, rather than the desire to be made whole.⁵ Retaliatory impulses are probably inevitable in human affairs,⁶ and asserting a legal claim to restitution is a comparatively civilized form of retaliation. Therefore, it seems wise to include restitution among the legal remedies available in private disputes. But the lofty moral claims sometimes made for restitution are puzzling. For this reason, restitution seems out of place in a major public controversy, such as the debate over slavery reparations. To the extent that reparations claims are resolved through private legal actions adjudicated by courts, the dominant theory of recovery should focus on harm and compensation, rather than on distributive comparisons and elimination of gains.

In making this argument, I take no position on the overall moral or legal viability of a claim to reparations for slavery. Nor do I discuss the propriety of judicial, as opposed to legislative, resolution of the slavery reparations issue. My point is only that reparations claims should be made and assessed as claims for compensation, not as claims for restitution based on unjust enrichment.

I. REPARATIONS AS COMPENSATION FOR HARM

Slavery reparation claims, when asserted as claims for compensation, face a

⁴ See, e.g., *Sharp v. Kosmalski*, 351 N.E.2d 721, 724 (N.Y. 1976) (suggesting that unjust enrichment is defined by “application of the principles of equity”); 1 DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* § 4.1(1) (2d ed. 1993) (suggesting that in cases of unjust enrichment, as in cases of equity, courts apply “a law of ‘good conscience’”); Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WISC. L. REV. 695, 700-04 (criticizing the “conservative” approach to restitution taken by the draft RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, and preferring to treat restitution as a source of flexibility and particularized justice in law).

⁵ See *infra* notes 77-88 and accompanying text (illustrating the connection between claims for unjust enrichment and desires for retaliation fueled by resentment).

⁶ See Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1411 (2003) (suggesting that retaliatory motives, such as revenge, “have deep roots in human nature”).

variety of difficulties that have been well described by others.⁷ Looking only at the initial harm to slaves, there are problems in determining an appropriate baseline from which to measure the effects of enslavement.⁸ If the initial injury can somehow be defined, the passage of time and the countless human acts and choices that have intervened lead to daunting problems in tracing the injury to current generations of African Americans and separating the harm of enslavement from the effects of more recent public and private acts.⁹ The problem of linking past harm to present claimants is not only a problem of proof, but also one of logic because few if any current claimants would exist in a counterfactual world in which slavery did not occur.¹⁰ Further, time has eliminated all or nearly all defendants who participated in the wrongdoing.¹¹

⁷ See Stephen Kershnar, *The Inheritance-Based Claim to Reparations*, 8 LEGAL THEORY 243, 247-51 (2002) (arguing that slavery did not cause compensable injury to descendants because those descendants would not have existed in the absence of slavery, but recognizing a limited claim based on an inheritance of injury); Ellen Frankel Paul, *Set-Asides, Reparations, and Compensatory Justice*, in COMPENSATORY JUSTICE: NOMOS XXXIII 97, 111-22 (John W. Chapman ed., 1991) (concluding that remedial programs for descendants of slaves cannot be justified on grounds of compensatory justice); Posner & Vermeule, *supra* note 1, at 699-701 (summarizing the problems surrounding claims to compensation); Jenna Thompson, *Historical Injustice and Reparation: Justifying Claims of Descendants*, 112 ETHICS 114, 115-20 (2001) (explaining the problems of identity and causation entailed in a claim to compensation for direct injustice, but defending a claim based on loss of inheritance); Jeremy Waldron, *Redressing Historic Injustice*, 52 U. TORONTO L.J. 135, 143-58 (2002) (identifying serious difficulties in the counterfactual analysis of the effects of historical injustice when time and human choice have intervened, and suggesting that entitlements may fade over time or be superceded by current concerns); Jeremy Waldron, *Superceding Historic Injustice*, 103 ETHICS 4, 7-11 (1992) (discussing further the difficulties involved in any counterfactual analysis of the effects of historical injustice).

⁸ See Paul, *supra* note 7, at 119-20 (posing questions about the position of slave descendants). *But see* Kershnar, *supra* note 7, at 245-46 (arguing that the focus should be on token harms rather than on net harm and benefit).

⁹ See Paul, *supra* note 7, at 124-28 (discussing the difficulties of “[r]ecreating each person’s history and ancestry of brutalization” in Stalin’s reign of terror); Waldron, *Redressing Historic Injustice*, *supra* note 7, 143-46 (commenting on the difficulties of the counterfactual speculation involved in reparations cases, which seeks “to transform the present so that it matches as closely as possible the way things would be now if the injustice had not occurred”); Thompson, *supra* note 7, at 115-17 (explaining why claims based on historical injustice “collapse . . . to demands for reparation for present or recent injuries”).

¹⁰ See Kershnar, *supra* note 7, at 246-47 (arguing that slavery may have caused the existence of current claimants); Thompson, *supra* note 7, at 115-17 (“African-Americans who presently exist would never have been born if their ancestors had not been abducted and forced into slavery.”); Waldron, *Redressing Historic Injustice*, *supra* note 7, at 145 (“Children may be conceived and born, and leave descendants, who would not have existed if the injustice had not occurred.”).

¹¹ See Paul, *supra* note 7, at 118 (explaining that “the heirs of immigrants who arrived in the post-Civil War period comprise most of the population of the United States” and, thus, “individuals who never themselves contributed to slavery . . . must bear the burden of the

These problems affect the moral case for reparations and harden into serious doctrinal obstacles when reparations claims are presented to courts.¹²

Some of the difficulties entailed in a compensation-based reparations claim can be solved, or bypassed, by characterizing the claim as a group claim to reparations – a claim for harm inflicted on African Americans by whites.¹³ Groups, at least arguably, have a life span that exceeds the lifetime of individual members and they can assert claims without identifying the harm suffered by particular members of the group.

A group claim, however, raises problems of group definition, particularly in light of subsequent intermarriage and immigration.¹⁴ Given the passage of time, group claims also raise the possibility of offsets, such as credit for losses suffered by whites during the Civil War.¹⁵ More fundamentally, the concept of a group claim conflicts with common understandings of moral and legal rights and duties.¹⁶ In thinking about corrective justice, we generally assume that

remedy”).

¹² See *In re African-Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1051-52 (N.D. Ill. 2004) (holding that the class action plaintiffs lacked standing because they suffered no direct injury traceable to the conduct of the defendants). There may be flaws in the district court’s analysis of standing, particularly in regard to injury-in-fact. See *id.* at 1044-53 (analyzing the doctrinal foundations of standing and applying those doctrines to the slave descendant plaintiffs to bar them from pursuing their claim). Yet, even if the standing requirement can be met, the problems the court referred to are likely to resurface as substantive obstacles to a claim to compensation. For an insightful discussion of the injury-in-fact requirement as developed by the Supreme Court, see Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. (forthcoming 2004) (manuscript at 32-36).

¹³ See Boxhill, *supra* note 1, at 277 (arguing that those who identify with and accept the benefits of membership in a group assume responsibility for group debts); Posner & Vermeule, *supra* note 1, at 711 (finding merit in a version of “ethical collectivism” that rests on the desire to eliminate collective “moral taint”); Paul W. Taylor, *Reverse Discrimination and Compensatory Justice*, in REVERSE DISCRIMINATION, *supra* note 1, at 296, 298-302 (arguing that discrimination based on a morally irrelevant characteristic makes that characteristic relevant for purposes of compensatory justice and justifies compensation to a group defined by that characteristic). See generally Carl Wellman, *Alternatives for a Theory of Group Rights*, in GROUPS AND GROUP RIGHTS 17, 17-42 (Christine Sistare et al. eds., 2001) (providing an overview of moral and legal rights as applied to groups).

¹⁴ See Boris Bittker, *Identifying the Beneficiaries*, in REVERSE DISCRIMINATION, *supra* note 1, at 279, 279-87 (discussing the difficulties of racial identification); Posner & Vermeule, *supra* note 1, at 707 (noting the indeterminacy and overlap of all “groups”). Within groups, of course, not all members will have equal connections to the injustice. See Alan H. Goldman, *Reparations to Individuals or Groups?*, in REVERSE DISCRIMINATION, *supra* note 1, at 321, 322 (“[T]hose individuals will always be hired first who have suffered least from prior discrimination . . .”).

¹⁵ See Posner & Vermeule, *supra* note 1, at 708 (posing questions about group-based counterfactuals).

¹⁶ See, e.g., J. L. Cowan, *Inverse Discrimination*, in REVERSE DISCRIMINATION, *supra*

claims to compensation belong to individual victims of wrongs and responsibility rests with individual wrongdoers.¹⁷

II. THE DOCTRINAL APPEAL OF RESTITUTION

For plaintiffs asserting a legal claim to reparations, the law of restitution offers several doctrinal advantages over ordinary rules for recovery of compensatory damages. The first of these is the much-cited principle of unjust enrichment.¹⁸ Restitution was first recognized as a field of law and ground of recovery in 1937, when the American Law Institute published the first *Restatement of Restitution*.¹⁹ The Restatement was founded on the theory that a variety of remedies and claims with ancient roots could be understood as instances of a single principle of moral and legal liability; the principle that one person should not be unjustly enriched at the expense of another.²⁰ Despite some differences of opinion about the meaning and operative force of this principle, unjust enrichment has become a familiar part of legal vocabulary.²¹

note 1, at 291, 292-93 (arguing that “injustice done . . . [African Americans] as individuals should be prevented or rectified insofar as possible. But past or future discrimination and injustice done ‘them’ as a group and special advantages to them as a group are both out of the question, since in the moral context there is no such group”).

¹⁷ See, e.g., *id.* (arguing that “the original premise of the moral irrelevance of blackness on the basis of which the original attribution of unjust discrimination rests implies that there is and can be no morally relevant group which could have suffered or to which retribution can now be made”); Paul, *supra* note 7, at 121 (“If every victim of an unjust act were compensated, where is the remainder of injustice that is owed to the group? What is the group, other than its members . . . ?”); Posner & Vermeule, *supra* note 1, at 699 (describing “ethical individualism” as “a strong tradition in the United States”); cf. James W. Nickel, *Should Reparations Be to Individuals or to Groups?*, in *REVERSE DISCRIMINATION*, *supra* note 1, at 314, 315-16 (favoring reparations to groups on administrative grounds, but asserting that the underlying justification must be the harm done to individuals).

¹⁸ See Warren A. Seavey & Austin W. Scott, *Restitution*, 54 L.Q. REV. 29, 32 (1938) (explaining the underlying theory of restitution as a remedy for one person’s unjust enrichment at the expense of another).

¹⁹ See RESTATEMENT OF RESTITUTION § 1 (1937); Seavey & Scott, *supra* note 18, at 29-35 (explaining the Restatement of Restitution’s publication and purpose).

²⁰ See Seavey & Scott, *supra* note 18, at 32 (stating the foundation of the law of restitution as the notion that “[a] person has a right to have restored to him a benefit gained at his expense by another, if the retention of the benefit by the other would be unjust. The law protects this right by granting restitution of the benefit which otherwise would, in most cases, unjustly enrich the recipient”).

²¹ For discussion of the principle of unjust enrichment, see generally PETER BIRKS, *AN INTRODUCTION TO THE LAW OF RESTITUTION* 18-25 (1989), DAGAN, *supra* note 1; JOHN P. DAWSON, *UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS* (1951), Symposium, *Restitution and Unjust Enrichment*, 79 TEX. L. REV. 1763 (2001), Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191 (1995), and Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277 (1989). A draft Restatement (Third) of Restitution and Unjust Enrichment is now in preparation.

Because the term unjust enrichment is broad and morally charged, it has become a popular vehicle for novel legal claims.²² Tort and contract law, although substantively attentive to fairness, are not associated with any similar emblematic reference to what is just.²³ The comparatively recent entry of restitution into law also makes a broad principle such as unjust enrichment particularly potent, because rules of restitution have not been as fully elaborated as rules of tort and contract. Thus, for better or worse, the principle of unjust enrichment invites courts to innovate in ways they might not when operating within the doctrinal confines of tort and contract law.²⁴

Unjust enrichment may also provide an answer to the objection that slavery was permissible under the positive law of the time.²⁵ On its face, the term unjust enrichment reaches beyond what is illegal to what is simply unjust.²⁶ Therefore, unlike compensation, unjust enrichment can be read to cover conduct that was morally wrong although sanctioned by law.²⁷

A second advantage for reparations claimants is that the structure of an unjust enrichment claim avoids some of the problems of proof that affect compensation claims. A claim of unjust enrichment requires proof that the defendant was enriched at the plaintiff's expense.²⁸ This does not necessarily imply that the plaintiff must prove that he or she suffered an injury to person or property; it is enough that the plaintiff lost an expected benefit or, in some cases, that the plaintiff simply has a superior moral claim to whatever enrichment the defendant obtained.²⁹ For example, when the beneficiary of a

²² For example, courts have sometimes recognized unjust enrichment claims by unmarried cohabitants following a break-up. See, e.g., *Watts v. Watts*, 405 N.W.2d 303, 313-14 (Wis. 1987) (holding that "unmarried cohabitants may raise claims based upon unjust enrichment following the termination of their relationships where one of the parties attempts to retain an unreasonable amount of the property acquired through the efforts of both"); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28 (Tentative Draft No. 4, 2004); DAGAN, *supra* note 1, at 194-213.

²³ See Seavey & Scott, *supra* note 18, at 29-32 (indicating that contract and tort law remedies focus on "wrong and harm" and that restitution serves the different, yet often overlapping, purpose of achieving justice).

²⁴ See, e.g., DAGAN, *supra* note 1, at 194-213.

²⁵ See *id.* at 281 n.138 (noting, in this connection, that restitution does not require that the defendant's act be legally wrongful).

²⁶ See *infra* notes 32-36 and accompanying text (explaining that the law of restitution applies in many cases even though the defendant has not committed any wrongful or illegal act).

²⁷ See *infra* notes 32-36 and accompanying text.

²⁸ RESTATEMENT OF RESTITUTION § 1 (1937).

²⁹ See *id.* § 1 cmt. c (noting that restitution may be appropriate when "a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust"); Daniel Friedman, *Restitution for Wrongs: The Basis of Liability*, in *RESTITUTION: PAST, PRESENT, AND FUTURE: ESSAYS IN HONOUR OF GARETH JONES* 133, 152-54 (W.R. Cornish et al. eds.,

will murders the testator, an heir who would not otherwise have inherited the estate may claim restitution from the murderer.³⁰ Similarly, a trust beneficiary may recover a bribe paid to the trustee even if trust assets were not impaired.³¹ Precedents of this type suggest that reparations claimants suing on the ground of unjust enrichment need not establish that they personally were harmed by the practice of slavery.

Nor does a claim of unjust enrichment require that the defendant be a wrongdoer.³² There are many recognized instances of restitution from defendants who innocently obtained a benefit to which they were not fairly entitled. For example, one who pays a debt to the wrong person by mistake may recover the payment although the recipient committed no wrong.³³ A plaintiff defrauded of property by a wrongdoer may recover from the wrongdoer's innocent donee.³⁴ The intended beneficiary of a will that was wrongfully suppressed may recover from an heir who benefited incidentally from another heir's misdeeds.³⁵ By analogy, it appears that reparations

1998) (discussing situations in which claimants may be entitled to restitution although the defendant did not appropriate the claimant's property).

³⁰ See, e.g., *Riggs v. Palmer*, 22 N.E. 188, 191 (N.Y. 1889) (holding that a murderer-beneficiary may not benefit under the testator-victim's will and, instead, granting the decedent's estate to the testator's heirs at law); RESTATEMENT OF RESTITUTION § 187 (2) & cmts. g, h ("Where a person is murdered by his heir or next of kin, and dies intestate, the heir or next of kin holds the property thus acquired by him upon a constructive trust for the person or persons who would have been heirs or next of kin if he had predeceased the intestate.").

³¹ See RESTATEMENT OF RESTITUTION § 197 ("Where a fiduciary in violation of his duty to the beneficiary receives or retains a bonus or commission or other profit, he holds what he receives upon a constructive trust for the beneficiary.").

³² See *id.* §§ 1, 3 (distinguishing between restitution based on unjust enrichment, which does not require the defendant be a wrongdoer, and restitution based on tort, which does require some legally wrongful act); *BIRKS*, *supra* note 21, at 23-24, 39-44 (distinguishing between restitution based on "subtraction" from the claimant and restitution based on wrongdoing); see also *Kull*, *supra* note 21, at 1192 (remarking that liability in restitution can be independent of any breach of duty recognized by tort or contract law).

³³ See RESTATEMENT OF RESTITUTION § 22 ("A person who has paid money to or for the account of another not intended by him, is entitled to restitution from the payee or from the beneficiary of the payment, unless the payee or beneficiary is protected as a contracting party or as a bona fide purchaser."); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 6 (Discussion Draft, 2000) (stating that "[p]ayment of money to one who is not the intended recipient, or payment when no payment is intended, gives the payor a claim in restitution against the recipient" and that "[p]ayment of money resulting from a mistake as to the existence or extent of the payor's obligation to an intended recipient gives the payor a claim in restitution against the recipient to the extent the payment was not due"). This is one of many forms of mistaken payment of money for which restitution is commonly available.

³⁴ See RESTATEMENT OF RESTITUTION § 204 & illus.1.

³⁵ See, e.g., *Pope v. Garrett*, 211 S.W.2d 559, 561-62 (Tex. 1948) (imposing a

claimants, proceeding on the basis of unjust enrichment, need not establish that the defendants participated in the institution of slavery.³⁶

It is not surprising, therefore, that the plaintiffs in a class action seeking slavery reparations relied substantially on unjust enrichment.³⁷ The suit was filed on behalf of descendants of slaves against corporate defendants alleged to have participated in or supported the institution of slavery.³⁸ The complaint described the many injuries suffered by the plaintiffs' ancestors, as well as continuing harm to the plaintiffs themselves.³⁹ It sought not only compensatory and punitive damages, but also restitution for the value of labor

constructive trust).

³⁶ Some restitution scholars might find the description of doctrine offered in the last two paragraphs overly generous. Precedents in the law of restitution include many instances of recovery by claimants who have not suffered a direct loss, and many instances of recovery against defendants who have not committed legal wrongs. See *supra* notes 28-35 and accompanying text. It is difficult, however, to find instances of recovery in which there is neither a loss to the claimant nor a legal wrong by the defendant. The closest cases may be those in which an expectant legatee claims restitution from heirs who received a portion of the decedent's estate but did not participate in the wrongs that led to their inheritance. See *id.* Even here, however, the disappointed legatee has a plausible claim of personal loss although she lacks a property interest in the estate. At least some analyses suggest that this is not simply the result of incomplete elaboration of the principle of unjust enrichment, but an inherent limit on the scope of restitution. See BIRKS, *supra* note 21, at 23-24, 32-38, 40-43 (analyzing the phrase "at the plaintiff's expense" and dividing instances of restitution into cases of "subtraction" from the claimant and cases of wrongdoing to the claimant). But see Friedman, *supra* note 29, at 152-54 (discussing several situations in which claimants may be entitled to restitution although the defendant did not appropriate property of the plaintiff and did not commit an act that, apart from retention of gains, would constitute a legal wrong toward the plaintiff).

³⁷ See *In re African-Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1042-44 (N.D. Ill. 2004) (describing the counts of the claimants' complaint, which included a claim based on unjust enrichment). This case consolidated a number of similar claims filed in different district courts. See *In re African-Am. Slave Descendants Litig.*, 231 F. Supp. 2d 1357, 1358-59 (J.P.M.L. 2002). The case ultimately was dismissed without prejudice. See *In re Slave Descendants Litig.*, 304 F. Supp. 2d at 1075; see also *infra* note 46 and accompanying text.

³⁸ Specifically, defendants included the corporate successors in interest to banks and brokers that loaned money to slave traders and slaveholders, insurance companies that allegedly issued policies protecting against loss of human property, railroads built with slave labor, and companies that traded in cotton and tobacco cultivated by slaves. See *In re Slave Descendants Litig.*, 304 F. Supp. 2d at 1039-41.

³⁹ First Consolidated and Amended Complaint and Jury Demand at 10-115, *In re African-Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027 (N.D. Ill. 2004) (MDL No. 1491) (discussing, in detail, the history of slavery and racial discrimination in the United States, and highlighting the harms that the plaintiffs and their ancestors suffered because of such slavery and discrimination), available at http://www.aetna.com/legal_issues/suits/06-26-03_complaint.pdf.

converted from slaves and disgorgement of profits from slavery.⁴⁰

An obvious difficulty affecting the claim to compensation is that the plaintiffs' enslaved ancestors are long dead.⁴¹ Harms suffered by the Plaintiffs themselves are most plausibly viewed as the products of later policies, acts, and omissions.⁴² Meanwhile, even if the defendants (viewed as the present embodiments of their corporate predecessors) were responsible for harms to slaves, they are not linked in any concrete way to these more recent sources of harm to the plaintiffs.⁴³

The various claims to restitution included in the complaint are less vulnerable to objections based on harm and responsibility. As recounted above, standard restitution doctrine suggests that claimants can prevail without proving that they personally sustained a loss or that the defendants caused their ancestors a loss.⁴⁴ Thus, reparations plaintiffs need only show that the defendants in fact benefited from slavery and that, if slaves had been paid or treated humanely, at least some of the value the defendants retain might have found its way to the plaintiffs as descendants.⁴⁵

Ultimately, the District Court dismissed the case.⁴⁶ It concluded that the plaintiffs lacked standing and added a series of alternative grounds for dismissal, including justiciability and failure to comply with applicable statutes of limitation.⁴⁷ Nevertheless, it is easy to see why the plaintiffs believed that an unjust enrichment claim would place their suit on sounder doctrinal footing than a simple claim to compensation for harm. If the case is revived, unjust enrichment is likely to play a role.⁴⁸

This is not to say that the legal case for reparations based on unjust enrichment is unimpeachable. One difficulty is that the principle of unjust

⁴⁰ *Id.* at 116 (stating plaintiffs' prayers for relief).

⁴¹ See Thompson, *supra* note 7, at 116-17 (discussing the difficulties of claims based on harm to ancestors).

⁴² See *id.* at 118-19 (explaining that living plaintiffs' claims of harm from slavery collapse into claims based on harm from subsequent policies).

⁴³ See *In re Slave Descendants Litig.*, 304 F. Supp. 2d at 1049-50 (finding an absence of allegations connecting defendants with continuing injuries to the plaintiffs).

⁴⁴ See *supra* notes 28-36 and accompanying text.

⁴⁵ See *supra* notes 28-36 and accompanying text.

⁴⁶ *In re Slave Descendants Litig.*, 304 F. Supp. 2d at 1075.

⁴⁷ See *id.* (finding no injury in fact or causation, but proceeding to adjudicate other grounds for dismissal as well). As noted earlier, the court's analysis of standing may not have taken proper account of the gain-orientation of restitution claims. See *supra* note 12 and accompanying text.

⁴⁸ The case was dismissed without prejudice, *In re Slave Descendants Litig.*, 304 F. Supp. 2d at 1075, and the plaintiffs have since filed an amended complaint. See Second Consolidated and Amended Complaint and Jury Demand, *In re African-Am. Slave Descendants' Litig.*, MDL No. 1491, (N.D. Ill. April 5, 2004). The new complaint contains, among other things, additional information about the class representative and their ancestors. See *id.* at 25-35.

enrichment may not be as far-reaching as it first appears. Most of the established grounds for restitution against defendants who are not wrongdoers can be explained by reading the term "unjust enrichment" to mean enrichment that lacks legal justification, without reference to injustice in a purely moral sense.⁴⁹ On this interpretation, compliance with positive law might continue to be an obstacle to recovery. More generally, there is disagreement about whether unjust enrichment is in fact an authoritative principle of law from which judges can deduce a right to recovery in novel situations.⁵⁰

Another difficulty is that, when a long period of time has passed since the initial injustice, restitution raises its own problems of proof, logic, and fairness. Slave descendants must establish that those who profited from slavery did so at the descendants' expense.⁵¹ Not only is ancestry difficult to trace, but there is no guarantee that descendants would eventually have enjoyed assets or advantages lost to their ancestors.⁵² Reparations claimants must also establish

⁴⁹ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (Discussion Draft, 2000) (referring to "what is more appropriately called *unjustified enrichment* Unjustified enrichment is enrichment that lacks an adequate legal basis" (emphasis added)). The question whether to interpret unjust enrichment as referring to justice generally or only to enrichment without legal justification has been a source of controversy in discussions surrounding the draft Restatement (Third) of Restitution and Unjust Enrichment. See, e.g., Peter Linzer, *Comments on Discussion Draft of the Restatement of the Law Third, Restitution and Unjust Enrichment*, 2000 A.L.I. PROC. 237, 237-38 (arguing for a broader interpretation of unjust enrichment).

⁵⁰ See, e.g., JACK BEATSON, *THE USE AND ABUSE OF UNJUST ENRICHMENT* 1-2 (1991) (endorsing the view that unjust enrichment is a source of legal obligations); BIRKS, *supra* note 21, at 18-25 (suggesting that unjust enrichment is an organizing principle rather than a standard for decision); DAGAN, *supra* note 1, at 12 (maintaining that unjust enrichment is "both a 'common theme or an organizational principle'" and "a helpful reminder of the potential viability of the normative underpinnings of" restitution); Robert Goff, *The Search for Principle*, in *THE SEARCH FOR PRINCIPLE* 313, 324 (William Swadling & Gareth Jones eds., 1999) (suggesting that unjust enrichment is a decisional principle and that the role of doctrine is to define its limits); Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083, 2084, 2112-13 (2001) (favoring the view that unjust enrichment functions as "a descriptive and organizational principle" rather than a standard for decision).

⁵¹ See RESTATEMENT OF RESTITUTION § 1 (1937) ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other." (emphasis added)).

⁵² The district court made this point in the course of dismissing reparations claims in *In re Slave Descendants Litig.*, 304 F. Supp. 2d at 1048 ("Plaintiffs can only speculate that their ancestors' estates would have been passed on to them, and cannot say that they would have inherited their ancestors' lost pay"). See also Kershner, *supra* note 7, at 258 (citing "the proliferation of factors that lead families over generations to lose wealth, sell off claims . . . , or disinherit one another"); Waldron, *Redressing Historic Injustice*, *supra* note 7, at 144 (discussing counterfactuals involving choice, which illustrate the difficulty of tracing benefits across generations).

the fact of enrichment.⁵³ The continued existence of corporate entities makes it possible to identify existing defendants who were enriched by slavery.⁵⁴ Assuming that corporate principals were aware at the time of the source of their gains, it also rules out a change of position defense.⁵⁵ The actual costs of a judgment against the corporation, however, will fall on shareholders,⁵⁶ and perhaps on consumers if liability is industry-wide. It is difficult to see how individual shareholders who purchased their shares at market value after the abolition of slavery have been enriched.⁵⁷ The argument that purchasers of shares understand that the corporation may be liable for past wrongs of this kind is implausible and, in any event, would not establish an unjust enrichment unless the price of shares was reduced to reflect potential liability.⁵⁸

These various doctrinal and evidentiary difficulties suggest that despite initial appearances, a restitution-based claim to reparations for slavery, like a compensation claim, is most plausibly described as a claim by and against groups rather than individuals. Group membership, not ancestry, provides the most direct link between current claimants' demand for reparations and defendants' unjust gains.⁵⁹ Corporate defendants, meanwhile, are stand-ins for, and perhaps rough loss-spreaders within, the group that initially reaped a gain.⁶⁰

⁵³ See RESTATEMENT OF RESTITUTION § 1 (requiring an unjust *enrichment* before a meritorious restitution claim vests).

⁵⁴ See Posner & Vermeule, *supra* note 1, at 738 (asserting that many corporations that benefited from slavery still exist and, thus, "recent efforts to target corporations that issued insurance policies to slave owners might be more successful").

⁵⁵ See RESTATEMENT OF RESTITUTION § 142 & cmts. a & c (permitting a change of circumstances defense, but limiting the defense to cases in which the defendant did not act tortiously, was no more at fault than the claimant, and was not aware of the grounds for restitution).

⁵⁶ See Posner & Vermeule, *supra* note 1, at 704 ("The victim seeks compensation from the 'corporation,' but this means that shareholders would have to pay. And this is true even if the current shareholders - the ones who must pay through devaluation of their shares - are different from the shareholders at the time that the wrong was committed").

⁵⁷ See *id.* at 705-06 (discussing a hypothetical reparations case and noting that the shareholders "who pay the reparations through the corporation are different from the people who committed the wrong through the corporation").

⁵⁸ See *id.* at 703-06 (describing, without endorsing or rejecting, various "soft individualist" approaches to corporate and individual collective responsibility).

⁵⁹ See *supra* notes 13-17 and accompanying text (examining the advantages and disadvantages of framing slavery reparations claims in terms of the harms caused to slaves and their descendants as a homogeneous group).

⁶⁰ See Posner & Vermeule, *supra* note 1, at 736-39 (discussing the role of corporate and other institutional defendants in reparations cases as "stand-ins" for the individuals who committed the actual wrong).

III. THE ETHICS OF UNJUST ENRICHMENT

A reparations claim styled as a claim to restitution avoids some, but not all, of the doctrinal obstacles to a claim to compensation for loss.⁶¹ Attention to gains means, first, that plaintiffs need not prove a direct injury to themselves and, second, that gain substitutes for responsibility on the defendants' side.⁶² In this section, I shall assume that, notwithstanding some doctrinal obstacles, a legal case can be made for reparations based on unjust enrichment.

Even if unjust enrichment has doctrinal advantages over standard tort law, there are normative reasons why reparations claims should not be argued and resolved on this ground. Unjust enrichment is not a good platform for reparations claims because it draws on sentiments of resentment that are out of place in a highly-charged public controversy. For this reason, reparations claims should stand or fall as claims to compensation.

Recall, first, that unjust enrichment focuses on gains. Restitution claims often – although not always – involve a combination of loss on one side and gain on the other. Losses, however, are properly handled by compensatory remedies and related substantive law. Restitution operates when the defendant's gains exceed the claimant's loss,⁶³ when the claimant has suffered no compensable harm,⁶⁴ or when the defendant holds gains, but has not committed a wrong that makes him, her, or it responsible for the claimant's loss.⁶⁵ Thus, what restitution and the principle of unjust enrichment contribute to the law is the claim to gains.⁶⁶

At least when the defendant has committed no wrong to the plaintiff, the organizing principle of restitution is the idea that one person should not be unjustly enriched at another's expense.⁶⁷ The unjust enrichment principle states what is generally assumed to be an impeccable maxim of corrective

⁶¹ See *supra* notes 7-60 and accompanying text (discussing the doctrinal benefits and problems in framing claims for slavery reparations in terms of restitution instead of compensation).

⁶² See *supra* notes 25-36 and accompanying text.

⁶³ See, e.g., RESTATEMENT OF RESTITUTION § 151 (1937) (providing for disgorgement of the profits of conscious wrongdoers).

⁶⁴ See *supra* notes 28-31 and accompanying text.

⁶⁵ See *supra* notes 32-36 and accompanying text.

⁶⁶ See Kull, *supra* note 21, at 1196-98 (arguing that restitution should be defined exclusively as a gain-based ground of liability). But see John P. Dawson, *Restitution Without Enrichment*, 61 B.U. L. REV. 563, 577 (1981) (suggesting that restitution remedies are not always dependent, or even essentially dependent, on enrichment).

⁶⁷ There is disagreement between those who see unjust enrichment as the organizing principle behind all of restitution law, and those who divide restitution into restitution based on wrongdoing and restitution based on unjust enrichment in the absence of legal wrongdoing. See Kull, *supra* note 21, at 1196-97 (defining restitution in terms of unjust enrichment); Peter Birks, *Unjust Enrichment and Wrongful Enrichment*, 79 TEX. L. REV. 1767, 1769-77 (2001) (adopting a "multicausalist" position, in opposition to the view that restitution "quadrates" with unjust enrichment).

justice and lends a special moral tone to restitution claims. John Dawson explained the appeal of the principle of unjust enrichment “by invoking some rudimentary psychology To the person who has suffered loss, the loss alone is a grievance. But if this loss can be located and identified in the gain received by another, the anguish caused by the loss will be felt as more than doubled.”⁶⁸ Lon Fuller, arguing that restitution is the strongest ground for recovery for breach of contract, observed that “the restitution interest presents twice as strong a claim to judicial intervention as the reliance interest, since if A not only causes B to lose one unit but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two.”⁶⁹

The long history and wide influence of the principle of unjust enrichment suggest that the logic described by Dawson and Fuller has a strong grip on human imagination.⁷⁰ The moral force of a claim of unjust enrichment, however, is seldom fully analyzed. If unjust enrichment is to serve as the basis for novel claims, and especially for socially divisive claims such as reparations for slavery, a closer examination is in order.

The discussion that follows centers on the posture a claimant assumes in asserting an unjust enrichment claim, rather than the effects that legal relief in this form may have on behavior.⁷¹ Different legal strategies reflect, and possibly encourage, different attitudes and sentiments on the part of disputing parties. These attitudes and sentiments are the focus of my analysis.

As a starting point, consider a series of possible ways in which the victim of a wrong or injury may respond to the cause of harm. First, the victim may seek compensation, meaning a transfer of resources designed to restore the victim as nearly as possible to his or her “rightful position.”⁷² Compensatory

⁶⁸ See DAWSON, *supra* note 21, at 5.

⁶⁹ L. L. Fuller & William R. Purdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 56 (1936).

⁷⁰ Unjust enrichment, as a basis for legal recovery, dates at least to Roman times and plays a significant role in modern civil law as well as common law. For a classic historical and comparative analysis of unjust enrichment, see DAWSON, *supra* note 21, at 41-109.

⁷¹ In making this argument, I do not intend to present an expressive theory of unjust enrichment. See generally, Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000). My argument is simply that a reparations claim based on unjust enrichment reflects certain attitudes on the part of parties and interested observers, and that recognition of the claim might encourage those attitudes. It may be that judicial recognition of an unjust enrichment-based reparations claim would also express official endorsement of the attitudes it entails. On the other hand, it seems implausible that by recognizing such a claim, courts would communicate endorsement in a linguistic sense. In any event, I am concerned here with the posture of the parties, rather than the symbolic significance of judicial action.

⁷² DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 16-17 (3d ed. 2002) (identifying and explaining the phrase “rightful position” as it relates to claims for compensation).

damages are, of course, the standard form of legal relief in private law.⁷³

Assuming that the expectation of security in one's person and holdings is a fair one, a claim to compensation is ethically appealing.⁷⁴ Compensation restores the victim's welfare and affirms his or her rights. According to prevailing theories of corrective justice, compensatory liability imposed on wrongdoers enforces moral duties owed by injurers to their victims.⁷⁵ The practice of compensating victims also has societal benefits; it protects entitlements, reduces the need for wasteful precautions, and, when liability is placed on those who caused the harm, forces injurers to internalize the costs of their acts.⁷⁶ Thus, a victim who seeks compensation can be seen as pursuing his or her own interests in a way that is morally justified and has desirable consequences for society.

A second possible response to injury is to inflict harm on the injurer. When the injurer is blameworthy and the harm imposed is proportionate to the wrong done, this type of response can be viewed as retributive. The morality of retribution is a disputed question, but for those who accept retribution as a form of justice, it enforces moral desert and may perform other functions as well.⁷⁷ In law, retributive penalties are most often imposed collectively

⁷³ See, e.g., *id.* at 11-231 (analyzing and illustrating compensatory remedies).

⁷⁴ I have argued elsewhere that nominally compensatory remedies, as they appear in law, are not purely compensatory because they also accommodate the desire to retaliate. Sherwin, *Compensation and Revenge*, *supra* note 6, at 1411-13 ("[T]he reverent descriptions of compensation that prevail in legal discussion are disingenuous. People are aggressive, they retaliate when hurt, and lawsuits provide vehicles for retaliatory aggression. Corrective justice, despite the high moral ground often claimed for it, is a close companion to revenge."). I refer here to claims motivated solely by the desire to restore one's welfare following an injury.

⁷⁵ See, e.g., JULES L. COLEMAN, *RISKS AND WRONGS* 374-75 (1992) (defending a "mixed conception" of corrective justice); Stephen R. Perry, *Loss, Agency, and Responsibility for Outcomes: Three Conceptions of Corrective Justice*, in *TORT THEORY* 24, 25-26, 38-47 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993) (defending a "comparative conception" of corrective justice). See generally Symposium, *Corrective Justice and Formalism: The Care One Owes One's Neighbors*, 77 *IOWA L. REV.* 403 (1992) (connecting Aristotle's conception of corrective justice to modern philosophies of private law).

⁷⁶ See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 610, at 192, 209 (3d ed. 1986) (discussing the incentive effects of compensatory damages).

⁷⁷ For varying retributive theories of punishment, see ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 374-80 (1981) (explaining retribution as necessary to connect the wrongdoer to "correct" moral values); Jean Hampton, *The Retributive Idea*, in *FORGIVENESS AND MERCY* 111, 122-47 (Jeffrie G. Murphy & Jean Hampton eds., 1988) [hereinafter Hampton, *Retributive Idea*] (explaining retribution as a means of affirming the value of the victim); Michael S. Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS* 179, 182 (Ferdinand Schoeman ed., 1987) (defending retribution as a good in itself, on grounds of moral desert); Herbert Morris, *Persons and Punishment*, 52 *THE MONIST* 475, 482-86 (1968) (explaining retribution as a balance of moral accounts). The debate between utilitarians and retributivists over justifications for punishment is described

according to criminal law. Victims, however, may be authorized to pursue retribution through punitive damages and to participate, in a limited way, in the criminal process.⁷⁸

The purest and most easily defensible sentiment on the part of one who seeks retribution against a wrongful injurer is what Jean Hampton called moral indignation.⁷⁹ Moral indignation is a form of righteous anger directed toward the wrongful act and the immoral values that inspired it.⁸⁰ Closely associated with moral indignation is moral or retributive hatred directed toward the wrongdoer because the wrongdoer has adopted unacceptable values or practices.⁸¹ These retributive sentiments may be felt not only by victims of the wrong, but by all members of society.⁸²

At this point a distinction should be drawn between retributive responses and retaliation.⁸³ Retribution and retaliation may coalesce in a single act of revenge, but they differ in several respects.⁸⁴ Retaliation is particular to victims or associates of victims acting on the victims' behalf.⁸⁵ The primary sentiment accompanying retaliation is not impersonal moral indignation, but personal resentment of the injury and the comparative advantage of the wrongdoer.⁸⁶ In a typical case of retaliation, the victim of an injury feels

in Joel Feinberg, *The Classic Debate*, in PHILOSOPHY OF LAW 727, 728-31 (Joel Feinberg & Jules Coleman eds., 6th ed. 2000).

⁷⁸ On victim participation in the criminal process, see generally Robert P. Mosteller, *Victims' Rights*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1639, 1639-44 (Joshua Dressler ed., 2d ed. 2002) (describing the goals and accomplishments of victims' rights groups). On punitive damages, see generally 1 DOBBS, *supra* note 4, § 3.11(i)-(iii), and LAYCOCK, *supra* note 72, at 719-68.

⁷⁹ Jean Hampton, *Forgiveness, Resentment and Hatred*, in FORGIVENESS AND MERCY, *supra* note 77, at 35, 56-60 [hereinafter Hampton, *Forgiveness*] (defining moral indignation and distinguishing it from resentment). Acts of revenge that function in a retributive way may be driven by a variety of less appealing emotions. See Moore, *supra* note 77, at 192 (discussing the "witch's brew" of "resentment, fear, anger, cowardice, hostility, aggression, cruelty, sadism, envy, jealousy, guilt, self-loathing, hypocrisy, and self-deception").

⁸⁰ See Hampton, *Forgiveness*, *supra* note 79, at 56 (explaining that those who are morally indignant focus "on the fact that the wrongdoer has made a moral mistake" and "they protest the action because they want to defend the value which makes the behavior wrong").

⁸¹ See *id.* at 79-83 (defining moral hatred); Jeffrie Murphy, *Hatred: A Qualified Defense*, in FORGIVENESS AND MERCY, *supra* note 77, at 88, 89-90 [hereinafter Murphy, *Hatred*] (associating retribution with "retributive hatred" – meaning a desire to inflict harm in order to restore "moral balance").

⁸² See Hampton, *Forgiveness*, *supra* note 79, at 56 (describing moral indignation as an impersonal anger, often felt by witnesses).

⁸³ See NOZICK, *supra* note 77, at 366-68 (highlighting the differences between retribution and revenge).

⁸⁴ See *id.*

⁸⁵ See *id.* at 367.

⁸⁶ See *id.* (characterizing revenge, in contrast to retribution, as "personal"); Hampton,

diminished and demeaned, and seeks to resist the implicit suggestion that the injurer's activities are more important than the victim's well-being.⁸⁷ Accordingly, the victim strikes back, and by inflicting some retaliatory harm on the injurer, asserts his or her own equivalent value.⁸⁸

Because retaliation and resentment are based on the diminished position of the victim, they are not necessarily limited to wrongful harm.⁸⁹ When the injurer is not blameworthy, moral indignation is out of place and the desire to strike back cannot properly be characterized as retributive. Nevertheless, the victim of injury may compare his or her own position to that of the injurer and resent the fact that the injurer is untouched, or is even enjoying a gain.⁹⁰ The victim's resentment of this state of affairs will surely be stronger when the injurer is morally at fault,⁹¹ but the comparative comfort of the injurer may be enough in itself to provoke an angry response. In addition, the victim may resent the seeming indifference of an injurer who has caused the victim a setback and has done nothing to alter the distributive imbalance that results.

Thus, retaliatory responses to injury are distinct from retributive responses

Forgiveness, *supra* note 79, at 56 (defining resentment as a "personally defensive protest").

⁸⁷ See Hampton, *Forgiveness*, *supra* note 79, at 57-58 (describing the feelings frequently associated with "resentment" and explaining that "[t]he resenter *denies* to himself (and anyone else) that he is low in rank and value, and thereby defies the appearance (implicit in the demeaning action) that he is").

⁸⁸ See *id.* at 59-60 (defining resentment as "*the defiant reaffirmation of one's rank and value in the face of treatment calling them into question in one's own mind*"); Jeffrie Murphy, *Forgiveness and Resentment*, in *FORGIVENESS AND MERCY*, *supra* note 77, at 14, 25 [hereinafter Murphy, *Forgiveness*] (Injuries are "*messages* - symbolic communications. They are ways a wrongdoer has of saying to us, 'I count but you do not,' or 'I can use you for my purposes,' or 'I am here up high and you are there down below'").

⁸⁹ Murphy and Hampton generally associate resentment with wrongdoing. See Hampton, *Forgiveness*, *supra* note 79, at 54-55 (defining resentment as a response to wrongdoing); Murphy, *Forgiveness*, *supra* note 88, at 16 (linking resentment to "wrongs against oneself"). Others, however, have recognized that resentment and retaliation may respond to injury alone. See PETER A. FRENCH, *THE VIRTUES OF VENGEANCE* 95, 97 (2001) (describing "simple resentment" as a possible response to non-wrongful injury); NOZICK, *supra* note 77, at 366-67 (stating that victims may seek revenge for slights or injuries, in addition to wrongs); cf. WILLIAM IAN MILLER, *FAKING IT* 78-81 (2003) (proposing that "stupidity and carelessness of others can provoke us to vengeance as readily as pointed assaults can[.]" and that apologies for accidental harms are often more genuinely heartfelt than apologies for intentional harms).

⁹⁰ See Murphy, *Hatred*, *supra* note 81, at 89 (arguing that retributive desires often arise due to "feelings that another person's current level of well-being is undeserved or ill-gotten (perhaps at one's own expense) and that a reduction in that well-being will simply represent his getting his just deserts").

⁹¹ See *id.* at 89-90 (differentiating between retributive hatred based on moral or righteous dimensions and the more irrational and less strongly held hatred motivated by envy and spite).

and broader in scope.⁹² Retaliation also differs from pursuit of compensation, in that retaliation seeks to diminish the injurer rather than to make the victim whole. Ethically, retaliation is less attractive than a claim to compensation because the objective of retaliation is competitive and the means are destructive. Inflicting a retaliatory harm may give the victim a sense of satisfaction,⁹³ but it does not enable the victim to gain real ground because diminishing another's position does not increase one's own objective value.⁹⁴

Although retaliatory responses to wrongs or injuries are harder to justify than claims for compensation or pursuit of retributive penalties,⁹⁵ retaliation should also be distinguished from spite or envy.⁹⁶ Spite and envy are best described as responses to another person's competitive success or to advantages possessed by others, such as beauty, skill, or luck.⁹⁷ A desire to strike at those who are more successful or luckier than oneself is vicious because it stems from one's own failings or deficiencies.⁹⁸ Retaliation, in contrast, responds not just to naturally occurring disadvantage, but to a disadvantage that stems from a specific transaction involving harm. The sentiment of resentment that accompanies retaliation reflects the sense that the victim of an injury is slighted if the source of injury is allowed to carry on unaffected – or worse yet, to profit. In this way, resentment and retaliation are tied to self-respect.⁹⁹ If not virtuous, they are at least more understandable than simple envy or spite.

Among the possible responses to injury discussed above, a claim based on unjust enrichment has most in common with retaliation. By definition, compensation is not at issue; restitution enters the picture only when compensatory remedies are inadequate or unavailable.¹⁰⁰ Nor can restitution

⁹² See NOZICK, *supra* note 77, at 366-70 (differentiating between retribution and retaliatory revenge).

⁹³ See FRENCH, *supra* note 89, at 3 (admitting that the "[t]he sense of accomplishment and moral righteousness [of successful retaliation] . . . can be intoxicating, exhilarating, [and] sweet").

⁹⁴ See Hampton, *Forgiveness*, *supra* note 79, at 63-64 (describing resentment and retaliation as self-defeating).

⁹⁵ See *supra* notes 83-94 and accompanying text (discussing retaliatory responses and the emotions and justifications behind those responses).

⁹⁶ See Murphy, *Hatred*, *supra* note 81, at 89-90 (arguing that retaliatory motives "typically have a *righteous* dimension" that is lacking in hatred caused by petty envy and spite).

⁹⁷ See Hampton, *Forgiveness*, *supra* note 79, at 76-78 (describing spiteful hatred and distinguishing it from retaliation).

⁹⁸ Cf. Murphy, *Hatred*, *supra* note 81, at 89 (distinguishing the desire to avenge a wrong from spite on the ground that spite reflects "a simple desire to look better than Jones on some morally irrelevant scale of comparison").

⁹⁹ See Murphy, *Hatred*, *supra* note 81, at 93-95 (arguing that resentment "is essentially tied to self-respect").

¹⁰⁰ See *supra* notes 28-31 and accompanying text.

be explained as a form of private retribution. As noted, unjust enrichment is not limited to wrongful gains; the injustice involved may consist of passive receipt of something that should more fairly belong to the claimant.¹⁰¹ Thus, although retribution and moral indignation may be present in some restitution claims, they have no role to play in others.

Of course, a claim to unjust gains is not the prototypical form of retaliation in which the victim of an injury inflicts a new and comparable injury on the source of harm. Instead, the claimant extracts gains that are connected in some way to his or her injury or loss of opportunity.¹⁰² Nevertheless, like retaliation in its classic form, a claim to restitution is motivated by the comparison between the defendant's position and that of the claimant, and operates by taking from the defendant. Restitution enables claimants to even the score by eliminating gains that, if not wrongful, appear comparatively unfair. In this way they reflect, and possibly abet, sentiments of resentment.¹⁰³

I am not the first to express doubts about the virtues of claims based on unjust enrichment. Christopher Wonnell has argued that a body of law concerned with eliminating unjust benefits, rather than repairing unjust harms, is normatively unattractive.¹⁰⁴ Wonnell associates the desire to remove benefits from another with envy, and notes that "a long philosophical tradition, both deontological and consequentialist, stands against the general legitimacy of gratuitous desires to bring down others."¹⁰⁵ Even Dawson, who saw much promise in the principle of unjust enrichment when used with caution, made the connection between unjust enrichment and resentment.¹⁰⁶ After commenting that loss located in other's gain is "felt as more than doubled," he added that the same sentiment was exploited "by Karl Marx, who tapped an

¹⁰¹ See *supra* notes 32-36 and accompanying text.

¹⁰² See RESTATEMENT OF RESTITUTION § 1 cmt. d (1937) (indicating that in typical cases of unjust enrichment the loss to one and the benefit to the other are coextensive and, thus, the law of restitution compels "one to surrender the benefit which he has received and thereby to make restitution to the other for the loss which he has suffered").

¹⁰³ See FRENCH, *supra* note 89, at 3 (discussing resentment as a desire "to retaliate, to inflict a like, or greater, injury on your offender").

¹⁰⁴ Christopher T. Wonnell, *Replacing the Unitary Principle of Unjust Enrichment*, 45 EMORY L.J. 153, 177-90 (1996) (linking gain-based recovery to envy).

¹⁰⁵ *Id.* at 180. Wonnell proposes that the supposedly unitary field of law identified by Seavey and Scott in the 1937 Restatement should be unraveled, and the principle of unjust enrichment replaced by four more limited legal principles, none of which is premised on elimination of unjust gains. See *id.* at 191-219 (recommending that courts require disgorgement of profits as a second-best remedy for clear wrongs when compensation is not feasible; provide a cost-based remedy in cases of "partial divestiture" of title to property; require disgorgement for deterrent purposes in cases of deliberate violations of rights; and provide a cost-based remedy when the plaintiff conferred a benefit on the defendant for which the defendant would have contracted in the absence of high transaction costs).

¹⁰⁶ See DAWSON, *supra* note 21, at 5-8.

inexhaustible supply of resentment with the aid of his labor theory of value.”¹⁰⁷

As noted earlier, I place claims of unjust enrichment and the type of resentment that accompanies them on a higher plane than simple envy of others’ advantages.¹⁰⁸ Resentment, as I have used the term, grows out of a transaction that caused a setback to the interests of the claimant or someone connected to the claimant.¹⁰⁹ It is linked to self-respect and probably useful in dealing with others and facing losses.¹¹⁰

I do not mean to suggest that the idea of unjust enrichment should be abandoned, or that its role in law should be significantly diminished. Gain-based recovery serves good ends. It deters wrongdoing and overreaching in appropriate cases.¹¹¹ It also corrects outcomes that occur without wrongdoing, but are evidently unwarranted and are not otherwise addressed by law.¹¹² For example, if one person pays money to another by mistake, there is no tort or breach of contract on which to base liability, but the recipient has no good

¹⁰⁷ *Id.* at 5 (“Marx made it appear that the gains received by economic groups other than labor – particularly by owners of land and other capital assets – were unjustified by their contribution to the economic product and in the long run were taken from labor.”)

¹⁰⁸ See *supra* notes 95-99 and accompanying text.

¹⁰⁹ See *supra* notes 85-88 and accompanying text (defining and discussing retaliation that is motivated by resentment).

¹¹⁰ See FRENCH, *supra* note 89, at 3, 35 (recognizing the pleasures and popularity of revenge); J. L. Mackie, *Morality and the Retributive Emotions*, in 2 PERSONS AND VALUES: SELECTED PAPERS 206, 215-18 (Joan Mackie & Penelope Mackie eds., 1985) (discussing the evolution of vengeful sentiments); see also Vincy Fon & Francesco Parisi, *Revenge and Retaliation*, in THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR (forthcoming Univ. Chicago Press) (unpublished manuscript, on file with author, abstract available at <http://ssrn.com/abstract=359200>) (presenting a game theoretical analysis of revenge); Murphy, *Hatred*, *supra* note 81, at 93-94 (offering a limited defense of resentment based on its connection to self-esteem); Jeffrie G. Murphy, *Two Cheers for Vindictiveness*, 2 PUNISHMENT & SOC’Y: INT’L J. PENOLOGY 131, 137-39 (2000) (noting some benefits of revenge).

¹¹¹ See RESTATEMENT OF RESTITUTION § 151 (1937) (defining the measure of recovery in cases of property acquired by “consciously tortious conduct” as the value of the property at the time of acquisition or a higher value “if required to avoid injustice”); *id.* § 202 (authorizing the creation of constructive trusts in cases of conscious wrongdoing); Laycock, *supra* note 21, at 1289 (recognizing the connection between culpability and measures of restitution). Deterrence, however, is not likely in play in a reparations case. Corporate liability can deter corporate principals from leading their entities into misbehavior, but current liability for acts and decisions that contributed to the wrong of slavery is too remote from the responsible human actors to have any significant deterrent effect on those who might now be tempted to engage in comparable conduct.

¹¹² See Kull, *supra* note 21, at 1192-93 (illustrating that restitution applies in many instances because no other substantive law provides an adequate remedy); see also *supra* notes 32-36 and accompanying text (explaining that a claim for restitution does not require that the defendant committed any wrongful act, but instead merely requires a benefit, that if retained, would unjustly enrich the defendant).

ground, legally or morally, for keeping the money.¹¹³ In any event, there may be good practical reasons for law to provide outlets for the resentment that often follows human interactions. Retaliation played a prominent role in primitive legal systems,¹¹⁴ and even a mature legal system invites circumvention if it refuses to accommodate in any way the vengeful elements in human nature. For all these reasons, claims of unjust enrichment have a place in private law.

A claim to reparations for slavery illustrates what I have said about unjust enrichment generally. A reparations case, on reasonably favorable assumptions, involves a claim by parties who are not themselves victims of slavery, but are probably in a better position than any other living persons to say that gains from slavery were obtained at their expense.¹¹⁵ On the other side are corporate entities that profited from the institution of slavery.¹¹⁶ The harm suffered by slaves was certainly wrongful, and the defendant entities may have participated in the wrong, but these entities are now owned by individuals who are personally innocent of wrongdoing.¹¹⁷ Thus, we have a very significant harm, but not one suffered by the claimants personally. We have a gain, but not one that matches to the loss. We have a wrong, but the parties who will bear the costs of judgment are not wrongdoers.

Compensation is excluded from the analysis by definition. A reparations claim against corporate entities that participated in or exploited the institution of slavery might be viewed as a retributive response, motivated by moral indignation. This characterization, however, assumes that the defendant corporations bear *moral* responsibility for the acts of their predecessors in past centuries.¹¹⁸ Corporate ownership structures make this assumption

¹¹³ See Kull, *supra* note 21, at 1192-93 (discussing the role of restitution in cases that do not fit within established tort or contract law).

¹¹⁴ For discussion of the connection between Anglo-Saxon codes and private blood-feuds, see 2 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 42-45 (4th ed. 1966); 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I* 46-48 (2d ed. 1923); A. W. B. Simpson, *The Laws of Ethelbert*, in *LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW* 1, 11-13 (1987) (acknowledging the basis of Anglo-Saxon codes on "the institution of the blood feud"). For analysis of a wide selection of ancient codes, see James Lindgren, *Why the Ancients May Not Have Needed a System of Criminal Law*, 76 B.U. L. REV. 29, 32-33 (1996).

¹¹⁵ See *In re African-Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1038-39 (N.D. Ill. 2004) (explaining that the plaintiffs were not directly harmed by the institution of slavery, but that they represent descendants of those harmed and exploited by slavery).

¹¹⁶ See *id.* at 1039-41 ("The named defendants . . . are eighteen present-day companies whose predecessors are alleged to have been unjustly enriched through profits earned either directly or indirectly from the Trans-Atlantic Slave Trade and slavery between 1619 and 1865, as well as post-Emancipation slavery through the 1960s.").

¹¹⁷ See Posner & Vermeule, *supra* note 1, at 704.

¹¹⁸ See Hampton, *Forgiveness*, *supra* note 79, at 56-60 (defining moral indignation as a

unrealistic.¹¹⁹ Moral indignation against a corporate entity, when all the individuals who owned or controlled the corporation at the time of the wrong are long dead, is much like moral indignation against a deodand.¹²⁰ It may provide some satisfaction, but it is irrational and should not be encouraged by law. Thus, neither compensation nor retribution can explain a reparations claim against the holders of gains derived from slavery.

Like many other restitution claims, the unjust enrichment component of a reparations claim has a closer affinity to retaliation. The claim is triggered by a serious injury.¹²¹ The claimants are not the primary victims of the injury,¹²² but they claim a personal connection to the victims that could easily bring them to resent both the injury and anyone who gained at the victims' expense.¹²³ The claimants are not seeking to retaliate in the sense of inflicting a corresponding harm, but they are pursuing a remedy that aims at removing resources from the defendants' control rather than compensating victims. The sense of injustice is comparative: the parties who ultimately will pay are not morally blameworthy, but they possess assets that, in the absence of a wrong, would or at least might have belonged to the claimants.¹²⁴

I have suggested that unjust enrichment serves important purposes in private law, and that one such purpose is to give vent to the form of resentment likely to arise when one person gains at another's expense.¹²⁵ A claim for slavery reparations, however, is not an ordinary private claim. The subject of

"moral anger" targeted at "the wrongdoer's 'immoral cause'" (emphasis added)).

¹¹⁹ See LARRY MAY, *SHARING RESPONSIBILITY* 84 (1992) (distinguishing between negligence, which can be attributed to groups, and intentional guilt, which cannot plausibly be attributed to groups).

¹²⁰ See 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I* 471-74 (1895) (discussing deodands); see also William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1898-1916 (1995) (discussing rat trials in sixteenth century France).

¹²¹ See, e.g., *In re Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1033-38 (N.D. Ill. 2004) (recounting the history of slavery in the United States); First Consolidated and Amended Complaint and Jury Demand at 10-31, *In re African-Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027 (N.D. Ill. 2004) (MDL No. 1491) (discussing, in detail, the destructive history of slavery and its consequences), available at http://www.aetna.com/legal_issues/suits/06-26-03_complaint.pdf (discussing, in detail, the destructive history of slavery and its consequences).

¹²² See *In re Slave Descendants Litig.*, 304 F. Supp. 2d at 1038-39 (acknowledging that the plaintiffs were all descendants of slaves and were not themselves directly harmed by the institution of slavery).

¹²³ Retaliation by kin is an ancient phenomenon, reflected, for example, in Anglo-Saxon law. See 2 HOLDSWORTH, *supra* note 114, at 35-38 (discussing the rights of kin); 1 POLLACK & MAITLAND, *supra* note 114, at 31 (emphasizing the role and importance of the family in early Anglo-Saxon society).

¹²⁴ See Posner & Vermeule, *supra* note 1, at 704-06.

¹²⁵ See *supra* notes 111-114 and accompanying text.

reparations is controversial, to say the least.¹²⁶ At its core lies the difficult subject of race. The debate over reparations is public¹²⁷ and sometimes acrimonious.¹²⁸ Opinions on reparations differ radically and are passionately held.¹²⁹ The implications of the controversy are not only national, but also international as questions arise about who should receive any payments that ultimately are made.¹³⁰ Most importantly, even if a reparations claim can be fit, for legal purposes, into the mold of a claim by and against individuals, it is widely viewed as linked to questions about the rights and responsibilities of groups.¹³¹ In a society that seeks to accommodate a plurality of races and

¹²⁶ A Google search for “slavery” and “reparations” yields nearly 60,000 related websites. See <http://www.google.com/>.

¹²⁷ See, e.g., *Millions for Reparations*, at <http://www.millionsforreparations.com> (last visited Sept. 20, 2004) (announcing a protest in favor of reparations at the United Nations in September 2003).

¹²⁸ See, e.g., *Reparations for Slavery? Or Discrimination Against Light-Skinned Citizens?*, Adversity.Net News and Analysis, at http://www.adversity.net/reparations/reparations_for_reverse_discrimination.htm (last visited Sept. 20, 2004) (claiming that proponents of reparations have labeled opponents as racists and responding by charging proponents with “racial McCarthyism”); *Millions for Reparations*, *supra* note 127.

¹²⁹ To give just a few brief examples from an enormous literature, Thomas Sowell writes: The first thing to understand about the issue of reparations for slavery is that no money is going to be paid. The very people who are demanding reparations know it is not going to happen. Why then are they demanding something that they know they are not going to get? Because the demagogues themselves will benefit, even if nobody else does. Stirring up historic grievances pays off in publicity and votes . . . [S]lavery is not something you apologize for, any more than you apologize for murder. You apologize for accidentally stepping on someone’s toes or for playing your TV too loud at night. But, if you have ever enslaved anybody, an apology is not going to cut it. And if you never enslaved anybody, then what are you apologizing for?

Thomas Sowell, *Reparations for Slavery?*, JEWISH WORLD REV., at <http://www.jewishworldreview.com/cols/sowell071700.asp>

In contrast, Malcolm X is quoted as saying:

The only reason that the present generation of white Americans are in a position of economic strength . . . is because their fathers worked our fathers for over 400 years with no pay We were sold from plantation to plantation like you sell a horse, or a cow, or a chicken, or a bushel of wheat All that money . . . is what gives the present generation of American whites the ability to walk around the earth with their chest out . . . like they have some kind of economic ingenuity.

Millions for Reparations, *supra* note 127 (quoting EL-HAJJ MALIK EL SHABAZZ, MALCOLM X: BY ANY MEANS NECESSARY 123 (1970)).

¹³⁰ See Rachel L. Swarns, *Race Talks Finally Reach Accord On Slavery and Palestinian Plight*, N.Y. TIMES, Sept. 9, 2001, at 1 (describing an accord reached after much debate at the United Nations’ World Conference on Racism, which omitted a call for reparations and instead recommended debt relief and aid to African countries – the United States left the conference before the accord was signed).

¹³¹ See *supra* notes 13-17 and accompanying text.

cultures, disputes between constituent groups should be resolved on the highest ground possible.

Against this background, formal deliberation on the question of reparations should not be shaped by a legal theory that, by focusing on unjust gains rather than unjust losses,¹³² invites resentment and highlights the retaliatory aspects of the claim.¹³³ Assuming that reparations is an appropriate subject for judicial resolution, the primary attention of all involved should be on injury and responsibility, not on possession of the fruits of the initial wrong.

CONCLUSION

I have argued that, contrary to common assumptions about the strong moral foundation of restitution claims, the principle of unjust enrichment draws on sentiments of resentment that victims feel toward those who have gained at their expense and it provides a remedy akin to retaliation. I have also suggested that, as a general matter, the law should provide an outlet for the type of resentment reflected in restitution claims. The debate over slavery reparations, however, is too important to American society to be framed or resolved on this basis. Accordingly, unjust enrichment should be set aside in arguments over reparations. Instead, claims to reparations should be confronted and evaluated as group-based claims to compensation for injuries.

¹³² See Seavey & Scott, *supra* note 18, at 32 (explaining that restitution, unlike other substantive areas of law, focuses primarily on unjust gains received by defendants and not directly on compensable losses to plaintiffs).

¹³³ See *supra* notes 100-103 and accompanying text (discussing the retaliatory nature of claims for restitution).