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The Coxford Lecture
Corrective Justice and Reparations for Black Slavery

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Over the last two decades, legal scholarship has been catching up with the more than century old calls by black Americans for reparations.[1] Tax scholar Boris Bittker (in)famously launched the viability of black reparations into legal scholarship with his now classic monograph, *The Case for Black Reparations*.[2] However, it would take more than twenty years for mainstream legal scholarship to take up the robust and wide-ranging set of questions raised by the possibility of reparations for American slavery.[3] In the late 1990s private law scholars leapt into the debate, discussing unjust enrichment and torts-based models of black reparations.[4] While these scholars made a variety of distinct arguments, collectively, their model rested on the contention that America had wrongfully expropriated the labor of generations of enslaved African Americans and the result had been systemic unjust enrichment, or a species of mass torts. Grounded in various

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1. See e.g. Mary Frances Berry, *My Face Is Black Is True: Callie House and the Struggle for Ex-Slave Reparations* (Vintage, 2006) (exploring first call for black reparations in the form of pensions for emancipated slaves) and Adjoa A Aiyetoro & Adrienne D Davis, "Historic and Modern Social Movements for Reparations: The National Coalition for Reparations in America (N'COBRA) and its Antecedents" (2010) 16:4 Tex Wesleyan L Rev 687 (surveying black reparations movements). A casual survey of Lexis shows more than one thousand publications with 'reparations' in the title.
2. Boris I Bittker, *The Case for Black Reparations* (Random House, 1972). Although published by a trade press, Bittker's book has exerted a significant influence on reparations scholarship. See also Derrick A Bell Jr, "Dissection of a Dream" (1974) 9:1 Harv CR-CLL Rev 156 (reviewing Bittker, *The Case for Black Reparations*).
3. Early examples include Vincene Verdun, "If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans" (1993) 67:3 Tul L Rev 597; Mari J Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" (1987) 22:2 Harv CR-CLL Rev 323; Rhonda V Magee, "The Master's Tools from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse" (1993) 79:4 Va L Rev 863. A Symposium on the Japanese-American internment included several articles that helped to launch reparations into the mainstream of legal scholarship. See Chris K Ijima, "Reparations and the 'Model Minority' Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation" (1998) 19:1 Boston College Third World LJ 385; Robert Westley, "Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?" (1998) 19:1 Boston College Third World LJ 429; Eric Yamamoto, "Racial Reparations: Japanese American Redress and African American Claims" (1998) 19:1 Boston College Third World LJ 477.
4. See e.g. Hanoch Dagan, Keith N Hylton, Anthony J Sebok, "Symposium: The Jurisprudence of Slavery Reparations" (2004) 84:5 BUL Rev 1135. See also Alfred L Brophy, "Reparations for Slavery and the Tort Law Analogy" (2004) 24:1 Boston College Third World LJ 81.

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conceptions of corrective justice, these models conceive black reparations as a set of claims that would be litigated through the courts. Over the ensuing two decades, the private law model has become somewhat of an outlier in reparations discussions, largely set aside in favor of broader, more explicitly political approaches.

In this essay, I would like to revisit the litigation-based, corrective justice model of black reparations. I believe that the advantages of this model have not been sufficiently excavated and that even its scholarly advocates have missed the full power of their own insights about private law, corrective justice, and black reparations. In a broader paper in which I explore reparations and conceptions of justice more deeply, I ultimately discount corrective justice as the best underpinning for the black reparations cause. Still, even with its doctrinal limits, the private law, corrective justice approach yields some significant benefits as a discursive framework for grappling with reparations.

This essay runs the corrective justice model through slavery's injuries and injustices to amplify and reinforce some of my private law colleagues' insights and fill in some gaps that have been left. After briefly reviewing the literature on private law and reparations, I would like to make four points about the upsides of an approach such as this one that proceeds through the judicial system. The first two points are interrelated. They are about American slavery as a labor system that subordinated African Americans' economic subjectivity and capacity, or what I have called "economic personality."[5] The final two points are ones about law itself, how combining torts, unjust enrichment, and reparations—what we might think of as the corrective justice discourse of reparations—may yield some doctrinal and jurisprudential insights beyond the immediate question of cognizable reparations claims. The third point contemplates advantages of corrective justice's litigation-based approach compared to calls for reparations pursued through the political process. The fourth point is that part of the power of the corrective justice model is to reveal the limits of other justice frameworks to support black reparations, namely distributive justice. The discourse of corrective justice and reparations may even yield some doctrinal insights for torts and unjust enrichment more broadly.

I.

Several legal scholars have advocated for black reparations as a private law claim grounded in corrective justice. Some urge an unjust enrichment analysis,[6] which

5. See Adrienne D Davis, "The Case for United States Reparations to African Americans" (2000) 7:3 Human Rights Brief 3 at 4: "[P]olitical and economic personality are closely intertwined. For blacks as for many other groups, the denial of full citizenship rights, such as voting and jury service, was also accompanied by circumscribed market rights: property, contract, inheritance, and labor. Denial of economic rights marked lesser citizenship, as did refusal at the ballot box."

6. Hanoch Dagan, "Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions" (2004) 84:5 BUL Rev 1139; Dennis Klimchuk, "Unjust Enrichment and Reparations for Slavery" (2004) 84:5 BUL Rev 1257. See also Andrew Kull, "Restitution in Favor of Former Slaves" (2004) 84:5 BUL Rev 1277 (offering an historical overview of restitutionary claims by enslaved people in nineteenth-century United States).

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follows the principle that wrongfully gotten gains must be disgorged.[7] While in civil law unjust enrichment enjoys its own conceptual and doctrinal apparatus as restitution, in common law countries such as the United States and Canada it generally is viewed as a subspecies of torts.[8] For those who favor the corrective justice framework the argument for reparations is based in restitution: there is an irreducible quantum of value that results from enslaved labor that the law of restitution can properly identify and restore to its rightful owner. Others argue that unjust enrichment is inadequate and that a fully blown torts approach will prove more satisfactory.[9] What both of these approaches share is a reliance on the wrongful coercion of enslaved labor, or what we might think of as 'the labor expropriation hypothesis.'[10]

Unjust enrichment scholars have articulated stronger and weaker forms of the labor expropriation hypothesis, based on their measure of the remedy through the disgorgement principle. Most in this corrective justice camp limit their measure of the unjust enrichment to the plaintiffs' losses, or the value to enslaved people of their coerced, wrongly taken labor. In contrast, Hanoch Dagan argues for a more expansive conception of restitution in which the measure of disgorgement includes not only the value of the plaintiffs' lost labor but also the defendant's gain or profits.[11] Dagan's expansion of the disgorgement principle is a provocative extension of his previous work in which he attempts to construct restitution and unjust enrichment as a progressive legal tool.[12] His more "radical" restitutionary approach yields another, fascinating question, about the limits of the disgorgement principle in the context of reparations for slavery.[13]

The range of claims recognized under the restitution doctrine has expanded in the last fifty years. For instance, courts are more willing to order disgorgement of intangible wealth, i.e., trade secrets and business opportunities, a major step forward in restitution law.[14] Applied in the context of reparations for slavery, this expanded analysis might incorporate the massive intangible "benefits" of slavery, beyond the extraordinary wealth generated by uncompensated, forced labor.

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7. Charles Mitchell & William Swadling, *Restatement (Third) of Restitution and Unjust Enrichment* (A&C Black, 2014) at § 3.

8. Hanoch Dagan offers a comprehensive overview and comparison of unjust enrichment. See Hanoch Dagan, *Unjust Enrichment: A Study of Private Law and Public Values* (Cambridge University Press, 1997).

9. Anthony J Sebok, "Two Concepts of Injustice in Restitution for Slavery" (2004) 84:5 BU L Rev 1405. See also Brophy, *supra* note 4. Klimchuk disagrees with Sebok and contends that unjust enrichment gets the expressive dimensions exactly right. Klimchuk, *supra* note 6.

10. See Dagan, *supra* note 6; Klimchuk, *supra* note 6; Sebok, *supra* note 9. See also Verdun, *supra* note 3 (failure to pay for enslaved labor is one of two forms of slavery's harm).

11. Dagan, *supra* note 6.

12. See e.g. Hanoch Dagan, "In Defense of the Good Samaritan" (1999) 97:5 Mich L Rev 1152 (arguing to expand restitution law to include good Samaritan claims for compensation); Dagan, *supra* note 8.

13. Dan B Dobbs, *The Law of Remedies*, 2d ed (West Academic, 1993) at 382 (describing as "radical" measures of restitution that reach defendants' profits).

14. *Ibid* at 562. Dobbs states that "[r]estitution in fact seems to be the tool that allowed law to move from the old medieval world of property and things to the modern world of contracts and intangibles."

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To take one example, one arguable intangible is the value attached to race in the United States, or what scholars call 'whiteness as property'[15] and 'the wages of whiteness.'[16] Harris and Roediger make slightly differing points. Harris's point is about how individual white people leverage their race to their benefit. Roediger's is the opposite—it is about how their collective investment in racial segregation hurts whites as individuals. Still, taken together, these and related concepts foreground the myriad historical and ongoing benefits and value of being white (and non-black)[17] in the United States.[18]

From a reparations perspective, this is a tricky point. On the one hand, one might argue that the property/wages in the whiteness hypothesis is wrong-headed because many of the seeming "benefits" are in fact losses or costs—that is, that racism hurts whites by causing them to accept lower wages or services or pay more for goods in exchange for jobs, residential housing, or political segregation. On the other hand, a premise of many strands of corrective justice is that law ought not interfere with the inherent subjectivity of value. Hence, if whites' "taste for discrimination"[19] leads them to value racial segregation more than higher wages or services, then the law ought not second-guess such assessments. Yet the unjust enrichment analysis then encounters a problem. If we assume that this racial property is a "gain" of slavery and its racial legacy, it is certainly "ill-gotten," but was it taken from blacks in such a way that requires its disgorgement under a restitutionary analysis? In additi, unlike expropriated labor, which can be calculated (even if the value is astronomical),[20] quantifying on these long-standing racial property "rights" and privileges in whiteness based on what whites say they would want in compensation if they had to be black is likely to generate immense controversy. It is doubtful that the legal system could or would take the property/wages in whiteness into account in a restitutionary award, even one that captured intangible benefits.

On the other hand, reparations may be necessary precisely in instances like this one, where the injury and benefit are structural in nature and encompass

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15. Cheryl I Harris, "Whiteness as Property" (1993) 106:8 Harv L Rev 1707 at 1713-14 (demonstrating how being racially white brings access to "economic, political, and social security" and how whiteness's focus on "a right to exclude" functions as a property right).

16. David R Roediger, *The Wages of Whiteness: Race and the Making of the American Working Class* (Verso, 2007) (showing the value that white working-class Americans place on their non-blackness and how this results in racial solidarity at the expense of class solidarity).

17. See e.g. Adrienne D Davis, "Identity Notes Part One: Playing in the Light" (1996) 45:3 Am U L Rev 695 (summarizing nineteenth-century cases that encouraged Native Americans and Chinese Americans to dis-identify with black Americans and penalized them if they did so identify).

18. See e.g. Harris, *supra* note 15 and Peggy McIntosh, "White Privilege: Unpacking the Invisible Knapsack", *Peace and Freedom Magazine* 49:2 (July/August 1989) 10.

19. See Gary S Becker, *The Economics of Discrimination*, 2d ed (University of Chicago Press, 1971) at 16-17.

20. Economists quantify African-American reparations at well over a trillion dollars. See e.g. Richard F America, *The Wealth of Races: The Present Value of Benefits from Past Injustices* (Praeger, 1990); Richard F America, *Paying the Social Debt: What White America Owes Black America* (Praeger, 1993); William A Darity Jr & Dania Frank, "The Economics of Reparations" (2003) 93:2 American Economic Review 326.

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unjust or corrupt nation-states or other legal and political institutions. Reparative discourse exposes the wrongness of orders and regimes, not just of individual actors. One recent example is particularly telling. The Japanese government's efforts to pay reparations to Korean women forced into sexual slavery by raising a 'private relief fund' sparked a contentious debate in reparative discourse. Many victims and their advocates rejected this as insulting, and as inconsistent with the idea of reparations.[21] Dagan's instincts about the stronger form of unjust enrichment meld well with reparative discourse and its focus on group-based injuries.

In addition to the labor expropriation hypothesis, there is a second component to the unjust enrichment framework. Explicitly or implicitly, corrective justice models emphasize the vindication of initial entitlements.[22] As articulated in his now-classic pair of articles about property and law, Wesley Hohfeld conceives a matrix of rights, duties, powers, and liabilities between competing actors.[23] As law resolves these disputes over resources, actions, or bodily integrity, it confers on one party an entitlement—e.g. the right to access, act, exclude, or bar—and thereby confers on the other party a corresponding, or correlative, non-right. Importantly, the law cannot opt-out of this impact; when legal institutions decline to intervene, they, in effect, allocate to the aggrieved party a litany of no-rights, duties, disabilities, and liabilities, and confer the correlative entitlement on the defendant.

Some reparations advocates discount the private law corrective justice approach as too conservative or narrow in its scope.[24] Other critics disdain a litigation approach in favor of a political one. However, the implications of the private law scholars' contributions to the reparations literature runs beyond a doctrinal contribution. In the remainder of this essay I would like to make four brief points about the advantages of corrective justice frameworks, which are discursive in addition to doctrinal.

II.

As I noted at the beginning of this essay, the first two points are interrelated with respect to how corrective justice sheds light on American slavery and on why

21. "'Comfort Women' Fund Winds Down", *Al Jazeera* (2 April 2007), online at www.aljazeera.com [https://perma.cc/F4Q2-AD2Z]. The article states that "many victims rejected the aid because it neither came directly from the Japanese government nor was accompanied by an official government apology."

22. See e.g. Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995); Ernest J Weinrib, "Restitutionary Damages as Corrective Justice" (2001) 1:1 Theor Inq L 1. Hanoch Dagan questions the dichotomy between corrective and distributive justice with regard to setting initial entitlements—see Hanoch Dagan, "The Distributive Foundation of Corrective Justice" (1999) 98:1 Mich L Rev 138 at 154-66.

23. Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23:1 Yale LJ 16 and Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26:8 Yale LJ 710.

24. See e.g. Brophy, *supra* note 4; Alfred L Brophy, "Some Conceptual and Legal Problems in Reparations for Slavery" (2003) 58:4 NYU Ann Surv Am L 497.

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slavery warrants reparations. Although generations of slavery scholars have pioneered even more refined understandings and insights about slavery in the United States, aspects of it remain in need of comprehension, condemnation, and legal as well as moral judgment, including in legal scholarship.

The first point is that, all too often, we miss the ways that plantation slavery comprised a system of forced labor, one that produced much of the emerging nation's vast wealth and compelled unconscionable forms of labor. Pioneering slavery historian David Brion Davis contended that we can differentiate between enslaving economies by paying attention to the proximity and relationship of slavery to the means of production.[25] In other words, how close was the enslaved people's labor to the society's core means of production? This differentiates enslaving economies in which enslaved people functioned primarily as household servants, or as demarcators of personal status (*e.g.* China, Greece); from those in which slavery functioned principally as prostitution or concubinage (*e.g.* the trans-Saharan trade and some Islamic forms); and from those in which prisoners of war were enslaved and were compelled to do some productive labor, but were not the primary source of the society's labor force.

In contrast, in the United States, and in New World African slavery more broadly, people were enslaved to perform the core labor—agricultural production and some skilled work—on which the southern economy survived, and indeed, the national economy of the United States soared from emergent to globally dominant. Importantly, as I and others have explained, slavery's forced labor included not only conventional productive labor, but also coerced sexual labor and a form of reproductive labor that distinguished the U.S. from its sister enslaving New World societies.[26] This sexual and reproductive labor has led me to characterize U.S. slavery as a sexual political economy, one in which Founding Father and President Thomas Jefferson calculated the 'increase to capital' from enslaved women's childbearing and debated with his fellow slaveholders the most effective ways to encourage this reproductive accumulation of capital.[27]

When we turn from the labor expropriation hypothesis to the disgorgement principle, unjust enrichment casts more light, foregrounding the wrongful benefits of slavery to the nation. Sometimes wrongful gain is so obvious that its proof is not crucial to the substantive analysis of the claim. To take one example, if the defendant steals the plaintiff's watch, the fact that she must restore

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25. David Brion Davis, *The Problem of Slavery in Western Culture*, revised ed (Oxford University Press, 1999).

26. See e.g. Jacqueline Jones, *Labor of Love, Labor of Sorrow: Black Women, Work, and the Family, from Slavery to the Present*, 2d ed (Basic Books, 2009); Deborah Gray White, *Ar'n't I a Woman?: Female Slaves in the Plantation South* (WW Norton, 1985); Adrienne D Davis, "'Don't Let Nobody Bother Yo' Principle': The Sexual Economy of American Slavery" in Sharon Harley & the Black Women and Work Collective, eds, *Sister Circle: Black Women and Work* (Rutgers University Press, 2002) 103 [Davis, "The Sexual Economy"]; Adrienne D Davis, "Slavery and the Roots of Sexual Harassment" in Catharine A MacKinnon & Reva B Siegel, eds, *Directions in Sexual Harassment Law* (Yale University Press, 2008) 457.

27. Davis, "The Sexual Economy", *supra* note 26.

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the watch or its value is not really a point in dispute.[28] To allow the defendant to keep the watch would unjustly enrich her while harming the plaintiff. By contrast, the injustice of slavery remains deeply contested.

Most Americans today condemn slavery as morally repugnant: it departs from Enlightenment norms lauding the individual; many religions find it antithetical to contemporary interpretations of their sacred texts; and, perhaps most saliently, it is inconsistent with democratic goals of liberty and equality of citizenship.[29] As noted earlier, there are two components to unjust enrichment, the injury to the plaintiff and the benefit to the defendant. While most thinking people today can comprehend slavery's injury to the enslaved—the legal (if not moral) equivalent of the loss of the watch—slavery's 'benefits' to the nation are more contested.[30] Although scholars continue to debate whether slavery was 'efficient' and the extent to which the nation benefited, or was drained, by its reliance on slave labor, the labor expropriation hypothesis and unjust enrichment's disgorgement principle both highlight the undisputed transfer of value *from* the enslaved *to* slaveholders.[31] Moreover, it directs attention to how, in producing the raw goods necessary for the United States industrial miracle, slavery funded our transformation from struggling colony to world super-power in one short century. This transformation enriched not just long dead individuals but the nation itself.[32] (Of course, the production of the raw agricultural goods crucial to economic development and political expansion in theory could have been done by any workforce; but that does not eclipse the decision to actively repress wage labor in favor of an involuntary, captive workforce.)

The focus of unjust enrichment justice on tracing ill-gotten gains refutes one of the principal objections to black reparations, that the beneficiaries of slavery's wrongs are no longer alive. In the case of slavery, the disgorgement principle traces the value of the expropriated labor beyond individuals into the nation's emerging capitalist infrastructure and extraordinary accumulation of wealth. As political theorist Jenny Nedelsky has contended, when one claims the benefits of citizenship, which typically are inseparable from a nation's political economic history, one also takes on its burdens.[33]

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28. Dobbs, *supra* note 13 at 552.

29. As mentioned above, of course some continue to argue that slavery is not wrong because without slavery descendants would not exist. While a cute philosophical exercise, this argument yields little analytic benefit, and produces immense, and obvious, moral hazards. See e.g. David Horowitz, *Uncivil Wars: The Controversy Over Reparations for Slavery* (Encounter Books, 2003) at 70-83.

30. *Ibid*.

31. The only way to refute this small claim would be to assert that slaves consumed from their masters more than they produced, which, to my knowledge, no one has done.

32. In a longer version of this paper I call this the "Let Bygones Be Bygones" objection. That paper refutes this argument against reparations, along with the two other principal objections: that slavery was perpetuated by only a small number bad actors (Bad Apples objection), and that slavery is only one among many subordinating relations that the modern world condemns (No Different objection).

33. Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, And Law* (Oxford University Press, 2011).

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To recap this first point, the labor expropriation hypothesis emphasizes and amplifies the nation's reliance on this captive workforce, while the disgorgement principle underlying unjust enrichment directs attention to the inequitable effects of wrongful transfers of wealth. Slavery in the U.S. so obviously comprised a system of racial domination and supremacy that its simultaneous operation as a system of labor domination can be obscured and forgotten. It also flattens 'slaves' into historical objects rather than actors who were compelled to transform our early colonial history into one of global super-power success. Corrective justice reinforces the labor aspects, in terms of what was taken from the enslaved, and, equally importantly, what was gained by slaveholders and ultimately the nation.

Next, I would like to make a set of points about how corrective justice vindicates entitlements and the implications of that for one of slavery's ongoing injuries, what I call 'black economic personality.'[34] Slavery in the United States affected black and enslaved political, sexual, criminal, and cultural personality. It deprived not only enslaved people, but also many nominally free African Americans, of the basic political and criminal rights essential to the evolving understanding of American citizenship. Slavery's laws also largely refused to acknowledge family ties and did much to disrupt much of enslaved people's efforts to preserve their African cultures, access mainstream American culture, or create their own, uniquely African-American culture. Both because of the severity of criminal and political depredations, people often overlook slavery's impact on the economic personality of black Americans.

Furthermore, slavery was limited, by law, to those deemed 'black,' or at least non-white.[35]

Its effects on economic personality included the immediate expropriation of productive labor identified by corrective justice to also include the overwhelming refusal to enforce property or contract rights. Law overwhelmingly refused to accord proprietary rights to assets enslaved people acquired through labor, gift, or inheritance. Agreements consensually entered were not enforceable, even when entered with the permission of, or even with, the slaveholder. Taken together, all of these legal denials devastated black economic personality alongside other dimensions of legal personhood. That is not to say that black people did not resist, and sometimes win legal rights. But it is to document the devastating economic effects on the vast majority of black Americans.

In the longer version of this project, I reject corrective justice as the juridical underpinning for black reparations because it is ill equipped to take account of the full breadth and depth of slavery's political and criminal deprivations and exclusions, or even its economic ones. However, as the corrective justice camp has aptly demonstrated, private law can capture one significant injury to black economic personality: slavery's wrongful expropriation of productive labor.

34. See Davis, *supra* note 5.

35. See e.g. Davis, *supra* note 17 (showing how antebellum law cultivated assertions of non-blackness into active legal rights).

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In fact, corrective justice is archetypically Hohfeldian, with its emphasis on rights and duties, obligations and powers, wrongs and injuries in need of restoration and compensation. Unjust enrichment and torts are especially emblematic of this framework. Unlike their cousins, contracts, which often investigate the appropriateness of agreements and transfers, and some aspects of property, unjust enrichment and torts dedicate much of their analytic energy to assessing initial entitlements and allocating rights and duties.[36] The labor expropriation hypothesis rests on the claim that blacks, like all workers, had a right to their labor as part, or as an extension, of their bodily integrity. Reparations styled as corrective justice for forced labor captures one significant injury to black economic personality—how slavery deprived blacks of the fundamental right to the fruits of labor.

Corrective justice is potentially restorative of black economic personality in a second way, as well. One significant injury of slavery's assault on black economic life is a cross-cultural lingering skepticism of blacks as economic actors. Many Americans simply do not believe that blacks can be economically responsible or successful. Sadly, this skepticism is held by many blacks as well as non-blacks. Even many who acknowledge the wrong and harm of slavery balk at the economic thrust of reparative relief. Yet, corrective justice vindicates entitlements largely through monetary compensatory principles. It thus legitimates and normalizes economic relief for injuries inflicted, the flip side of a variant of commodification anxiety that can pervade reparations discourse.[37]

Importantly, this analysis does not turn on the moral desert of the victim. Once wrong-doing and liability are established, corrective justice concerns itself with restoring the prior position, not effecting a moral judgment of the worthiness of the individual. (As an equitable principle, unjust enrichment might take account of a victim's behavior with regard to clean hands, estoppel, laches, etc., but not abstract moral desert in the world.) If I kick and injure you, I owe you compensation. It is no defense for me to observe that you are a drunk, or lazy, or have bad credit, or will squander the money. I cannot seek an exemption from payment based on allegations that you will spend the money on things I do not approve of, say drugs or fancy cars. (Arguably, this could go to whether your money goes into a trust, but not to whether I can avoid liability.) Corrective justice, then, suspends judgment of black desert, instead focusing on vindicating entitlements and righting historic wrongs. This is, of course, at the core of reparative goals.

Hence, the unjust enrichment/torts rubric encourages us to consider and confront injuries specifically to black economic personality in at least two ways. Its focus on vindicating entitlements emphasizes the injury of expropriated labor

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36. But see Dobbs, *supra* note 13 at 559 (one category of unjust enrichment cases focuses on misconduct).

37. Joan Williams, "Is Coverture Dead? Beyond a New Theory of Alimony" (1994) 82:7 Geo LJ 2227 at 2277 (characterizing as "commodification anxiety" resistance to place monetary value on wives' contributions to their husbands' economic assets); Joan Williams, *Unbending Gender: Why Family and Work Conflict and What To Do About It* (Oxford University Press, 1999) (elaborating on the concept of commodification anxiety in context of work/family conflict). See also Margaret Jane Radin, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts, and Other Things* (Harvard University Press, 1996).

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while demurring judgment of victims' desert. In so doing, it foregrounds the economic aspects of slavery's system of subordination, which, I have argued, are frequently under-attended.

Next, with its emphasis on vindicating property entitlements and disgorging ill-gotten gains, the corrective justice lens keeps slavery's vast economic brutalities and deprivations front and center, which is one significant aspect of reparative discourse. To have a meaningful discourse of social justice we desperately need a discourse of economic justice in this country, not just for blacks, but for all Americans. Although corrective justice is often criticized for its conservatism, that is, its concern with restoring initial entitlements, paradoxically, because of its emphasis on the economics of justice, corrective justice may be more susceptible to economic justice than other doctrinal discourses.[38]

This is especially the case when contrasted with corrective justice's conventional alternative, distributive justice. Some have raised the question whether reparations are grounded in vindicating historic wrongs, or in a desire to pursue redistributive policies. In other words, are reparations actually distributive justice masquerading as corrective justice? This leads to my third point—corrective justice discourse sheds light on some of the deficits in efforts to ground black reparations in distributive justice.

Unlike corrective justice, distributive justice is grounded in determining the appropriate distribution of resources in society.[39] Within the distributive justice literature, its proponents then contest whether allocations should be based on formal fairness; need; status-based inquiries, such as citizenship, legal residency, or mere presence; or aspirational goals, such as democracy.[40] Distributive justice resonates with reparations' desire to rectify inequities. Yet, it is conceptually distinct from reparations. Let me say more.

Injury is largely irrelevant in distributive justice discourse. In other words, in many formulations, if one is disabled, it makes no difference whether this was an accident of birth, a result of illness, or because someone was beat to a pulp. Yet part of the point of reparations is to recognize injury or harm stemming from wrongdoing. This may require a different discursive process than distributive justice can provide. In contrast, the analytic power of corrective justice is that it focuses the debate on whether a wrong was committed, whether it was remedied, and whether the entities responsible for that wrong remain legally and morally identifiable. Corrective justice, with its Hohfeldian emphasis on vindicating entitlements, reminds us that justice is due when individuals breach duties and commit wrongs. It thereby grounds reparations as recognizing entitlements and protection of rights, not redistribution.

38. See e.g. Dagan, *supra* note 22.

39. See Aristotle, *Nicomachean Ethics*, translated by Terence Irwin (Hackett, 1985) at 122-25. Some resist the clean dichotomy between distributive and corrective justice. See e.g. Dagan, *supra* note 22.

40. See e.g. Michael Walzer, *Spheres of Justice* (Basic Books, 1983).

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In addition, reparative discourse often seems to devolve into a racial one. Questions of desert, competency, and impact pervade the reparations debate.[41] Lurking in the background are skepticisms about black Americans: that they are constantly looking for a hand-out; that they are not capable of managing economic assets (which accounts in some part for such starkly disparate socioeconomic status statistics on wealth); that markets are meritocratic and blacks simply cannot compete in them. Distributive justice, with its focus on need or equality or status, has little to say about the racial politics of black desert. Corrective justice, on the other hand, has no truck with fears of black damage imagery.

In fact, part of what may be upsetting some leftist critics is that the "wrong" of reparations requires attention to identity that distributive justice does not.[42] In the weak form, some advocates for distributive justice posit it as an alternative to racial remedies. Strong form advocates view distributive justice as an antidote to identity politics. While I do not carry a brief for identity politics generally, in the context of slavery's injury and its legacy, reparations discourse directs attention to the group nature of the wrong and the injury, and the need for group relief.

This is helpful in distinguishing reparations from other legal remedies. Unlike other private law remedies, which are often predicated conceptually on individual entitlement and compensation, reparations are grounded in group injury and compensation.[43] Slavery's assault on blacks was not as individuals; rather, it was designed to constitute blacks as a group, a subordinate race to whites (as a group). Under slavery's laws, only blacks could be enslaved, and it was overwhelmingly whites who benefited. *Recall, whiteness was a defense to enslavement, and increasingly laws tried to construe all blacks as slaves.* In addition, most states restricted the ability of blacks to own slaves. In short, southern law and policy tried to effect a convergence of race and identity in which all blacks were slaves and only whites were free. This convergence of identity and status continued, of course, into Jim Crow. It is the emergence of an identifiable group, interpellated by law and policy, which forms the basis of a group-focused reparations claim. An imperative of reparations discourse it to craft remedies that recognize the group-based injury (and benefit) of the wrong.

Finally, distributive justice typically is pursued through the political branches, frequently the regulatory agencies managing taxation, welfare, and other entitlement policies. In contrast, corrective justice conceived as private law causes of action proceeds through the court system. This distinction is subtle, yet, given the nation's history with racial equity vindicated in the courts, worthy of note.

41. See e.g. Horowitz, *supra* note 29.

42. See e.g. Emily Sherwin, "Reparations and Unjust Enrichment" (2004) 84:5 BUL Rev 1443 at 1447-49 (reparations will generate white resentment).

43. As Dagan observes, there are competing views of private law, corrective justice, and what he characterizes as the "lens of its social, economic, cultural, or political meanings and ramifications"—or the "social values school." See Dagan, *supra* note 22 at 138.

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In my final point, I want to point out that there is something to Hanoch Dagan's argument that corrective justice-based black reparations may transform unjust enrichment and torts itself. The question of whether corrective justice can support black reparations is perhaps not unlike other pivotal moments when tort law had to decide how to doctrinally integrate 'purely economic' injuries that overlapped with identity injuries. For instance, in DES and Dalkon Shield litigation, lawyers and judges struggled over whether juries could take account of the gendered elements of negligence and harm. Similarly, some workplace torts, such as asbestos litigation, have been framed as litigation on behalf of the working class, or perhaps more accurately, as allocating the costs of accidents between workers and corporate owners.[44] And even more significantly, such situations have given voice to a desire to transform private law into something that can take account of systemic injustice. As one treatise author observed, "[u]njust enrichment cannot be precisely defined, and for that very reason has potential for resolving new problems in striking ways."[45] Black reparations, too, may provide an opportunity to re-conceive some strains of unjust enrichment, in keeping with the thrust of the social values school of private law.

III.

In a longer version of this paper, I contend that corrective justice is ultimately inadequate, conceptually and remedially, to the black reparations cause. While superior to distributive justice frameworks, it ultimately does not have the jurisprudential heft to account for and confront and repair slavery's myriad injuries, which I characterize as American racial caste. Yet, as I hope this essay has made clear, advocates of private law and corrective justice models of black reparations are onto something. Even if it is not doctrinally sufficient, the discourse of corrective justice amplifies slavery as a corrupt labor system; vindicates black economic personality; clarifies what we mean by reparations versus other (racial) remedies; and, finally, raises challenging questions about corrective justice and torts itself, including its transformative power.

In the end, the torts and unjust enrichment approach may not succeed as a doctrinal claim in the U.S. courts. Still, as I have contended here, the broader discourse of corrective justice resonates with black reparative goals and makes important conceptual interventions into how we articulate slavery's injustices, into what might constitute a set of potential repairs, and—potentially—into broader questions of law and justice.

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44. Anthony Sebok, "What Do We Talk About When We Talk About Mass Torts?" (2008) 106:6 Mich L Rev 1213.

45. Dobbs, *supra* note 13 at 557.

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