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Food Stamps, Unjust Enrichment, and Minimum Wage

Candace Kovacic-Fleischer[†]

Introduction

News and social media are full of stories about workers who receive wages so low they qualify for taxpayer-funded governmental benefits, including food stamps.¹ Many of these workers are employed by large retail chains that advertise deep discount prices and have the power to set the wage rate.² Many of these chains pay their low-level employees at or near the federal minimum wage:³ \$7.25 per hour.⁴ Besides paying low wages, many of these retailers limit the number of hours their employees can work to no more than forty.⁵ Employees, therefore, cannot

[†]. Professor of Law, Emerita, American University Washington College of Law; J.D., Northeastern University School of Law; A.B., Wellesley College. This paper grew out of a paper for Russell Weaver's Remedies Discussion Forum in Louisville, Kentucky, December, 2015. I would like to thank the participants, especially Mae Kuykendall and Paul Zweir for their comments and suggestions, and David Fleischer, Billie Jo Kaufmann, Thomas Michl, Jennifer Mueller, Ezra Rosser, Allison Sabo, and Emily Williams for theirs. Special thanks to my husband, Walter Fleischer, for his analytic and editorial assistance with many drafts, and to my Dean's Fellow, Theresa Lau, Class of 2016, for her thorough research.

1. See, e.g., KEN JACOBS, IAN BERRY, & JENIFER MACGILLVAY, *THE HIGH PUBLIC COST OF LOW WAGES* (2015) (analyzing the relationship between low wages and federal and state expenditures); Khushbu Shah, *52 Percent of Fast Food Workers Need Government Assistance to Make Ends Meet*, EATER (Apr. 13, 2015, 1:30 PM), <http://www.eater.com/2015/4/13/8403905/52-percent-fast-food-workers-public-assistance-food-stamps-study> (reviewing the effect of low wages on government expenditures).

2. These chains have monopsony power, i.e. the power to choose a market-wide wage rate. See Paul Krugman, *The Mutability of Wages*, N.Y. TIMES (June 1, 2015), <http://krugman.blogs.nytimes.com/2015/06/11/the-mutability-of-wages/>.

3. See, e.g., Walter Hickey, *The 20 Companies with the Most Low-Wage Workers*, BUSINESS INSIDER (Feb. 3, 2013, 1:31 PM), <http://www.businessinsider.com/the-20-companies-with-the-most-low-wage-workers-2013-2> (listing Wal-Mart Stores and McDonald's Corp. as the first and third largest low-wage employers, respectively).

4. 29 U.S.C. § 206(a)(1) (2012). A number of states and localities have raised their minimum wage. See, e.g., J. Chris Cunningham, *Measuring Wage Inequality Within and Across U.S. Metropolitan Areas, 2003–13*, 138 MONTHLY LAB. REV. 1 (Sept. 2015) (reporting on wage inequality throughout the United States by region); *Minimum Wages By State*, NAT'L CONF. OF STATE LEGISLATURES (July 19, 2016), <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx> (listing the minimum wage in each state).

5. Many employers restrict hours drastically. Charlotte Alexander & Anna

earn “time-and-a-half” overtime pay.⁶ The policy of restricting hourly employees’ hours to less than forty hours per week encourages some salaried managers to require employees to work “off-the-clock,” a practice known as “wage theft.”⁷

In contrast, news and social media carry stories about a growing wage disparity between executives and frontline workers.⁸ Scholars have written about economic problems caused by growing income inequality between the richest and the poorest Americans.⁹ Many low-wage retailers have large disparities between the annual salaries of their executives and low-level workers. For example, the pay ratio of Wal-Mart’s CEO to a full-time Wal-Mart employee has been reported to be 1450:1,¹⁰ with the CEO making \$23.9 million¹¹ while the average earnings of Wal-Mart cashiers ranged from \$17,515 to \$25,094.¹² Similar figures are seen when looking at Target Corp.,¹³ with its CEO receiving compensation of

Haley-Lock, *Not Enough Work Hours in the Day: Work Hours Insecurity and a New Approach to Wage and Hour Regulation* 3 (Ga. State Univ. Coll. of Law, Legal Studies Research Paper No. 2013-24, 2013), <http://ssrn.com/abstract=2367070>.

6. 29 U.S.C. § 207(a)(1) (2012) (“No employer shall employ any of his employees . . . for a workweek longer than forty hours . . . unless such employee receives compensation . . . in excess of [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed.”).

7. Ari Weisbard & Geoffrey Leonard, *Community Lawyering and the Wage Theft Prevention Act of 2014*, 22 GEO. J. POVERTY L. & POL’Y 429, 430–31 (2015).

8. See, e.g., Leslie Patton, *McDonald’s \$8.25 Man and \$8.75 Million CEO Shows Pay Gap*, BLOOMBERG (Dec. 11, 2012, 11:00 PM), <http://www.bloomberg.com/news/articles/2012-12-12/mcdonald-s-8-25-man-and-8-75-million-ceo-shows-pay-gap> (discussing the difference in pay between a twenty-year McDonald’s employee and then-CEO Jim Skinner).

9. See Dimitri B. Papadimitiou, Greg Hannsgen, & Gennaro Zezza, *Back to Business As Usual? Or a Fiscal Bust?*, STRATEGIC ANALYSIS 3 (Apr. 2012) (“[I]ncreasing concentration of income among the very wealthiest tends to slow down economic growth for reasons that vary from the simple to the complex.”).

10. See Orly Lobel, *Big-Box Benefits: The Targeting of Giants in a National Campaign to Raise Work Conditions*, 39 CONN. L. REV. 1685, 1699 (2007) (comparing the ratio of GM’s CEO’s earnings to an assembly line worker’s salary in 1950 (135:1) with that of Wal-Mart’s CEO to a full-time Wal-Mart worker in 2003 (1450:1)); see also *CEO Pay: How Much Do CEOs Make Compared to Their Employees?*, PAYSACLE, <http://www.payscale.com/data-packages/ceo-pay/full-list> (last visited Jan. 10, 2017) (listing Wal-Mart’s CEO’s salary as compared to the median salary of an employee as 209:1).

11. Base pay of \$950,000 with an additional \$23 million in stock awards and incentives. Tom Huddleston, Jr., *A Wal-Mart Worker Making \$9 an Hour Would Have to Work 2.8 Million Hours to Match the CEO’s Pay*, FORTUNE (Feb. 19, 2015, 4:08 PM), <http://fortune.com/2015/02/19/wal-mart-wage-hike-2-million-hours/> (noting an expected hourly raise in 2016).

12. *Average Salary For Cashier at Wal-Mart Stores, Inc.*, PAYSACLE, http://www.payscale.com/research/US/Employer=Wal-Mart_Stores%2c_Inc/Hourly_Rate/Job/Cashier (last visited Jan. 10, 2017).

13. See *CEO Pay*, *supra* note 10 (listing Target’s CEO’s salary as compared to

\$28.2 million¹⁴ and its cashiers earning between \$16,648 to \$22,260.¹⁵ The salaries of many low-level employees remain below the federal poverty level of \$24,257 for a family of four.¹⁶ Wal-Mart recently announced a wage increase to ten dollars per hour.¹⁷ That is not enough, however, to put a family of four above the poverty level, especially if hours are kept to a minimum.¹⁸ Although many large stores that advertise discount prices are paying poverty-level wages, not all do.¹⁹ For example, the wages of Costco's cashiers range from \$19,056 to \$42,093,²⁰ and the CEO-to-worker pay ratio at Costco has been reported to be 48:1.²¹

the median salary of an employee as 99:1).

14. See Tess Stynes, *Target CEO's 2014 Pay Package Totals \$28.2 Million*, WALL ST. J. (Apr. 28, 2015, 9:24 AM), <http://www.wsj.com/articles/target-ceos-2014-pay-package-totals-28-2-million-1430227494>.

15. See *Average Salary for Target Corporation Employees*, PAYSACLE, http://www.payscale.com/research/US/Employer=Target_Corporation/Salary (last visited Jan. 10, 2017).

16. *Poverty Threshold*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-thresholds.html> (last visited Oct. 17, 2016) (follow "2015" hyperlink under "Poverty Thresholds by Size of Family and Number of Children").

17. See Press Release, *More Than One Million Wal-Mart Associates to Receive Pay Increase in 2016* (Jan. 20, 2016), http://corporate.walmart.com/_news/_news-archive/2016/01/20/more-than-one-million-walmart-associates-receive-pay-increase-in-2016.

18. David Cooper, *The Minimum Wage Used to be Enough to Keep Workers Out of Poverty—It's Not Anymore*, ECON. POLY INST. (Dec. 4, 2013), <http://www.epi.org/publication/minimum-wage-workers-poverty-anymore-raising/> (demonstrating that a minimum wage of \$10.10 would lift a family of three above the poverty line, but also explaining that a family of three relying on that salary would still qualify for food stamps and a family of four relying on the same would also inevitably be below the poverty line). According to a statistical analysis published by a research unit of the University of California, Berkeley, if minimum wage were raised from \$7.25 to \$10.10, annual federal spending on food stamps for employed recipients would decrease by about six percent. See Michael Reich & Rachel West, *The Effects of Minimum Wages on Food Stamp Enrollment and Expenditures* 1 (Inst. for Res. on Lab. and Employment, Working Paper No. 112-15, June 2015), <http://www.irl.berkeley.edu/workingpapers/112-15.pdf>; Bourree Lam, *Walmart Workers Get a Raise, but Is That Enough?*, THE ATLANTIC (Jan. 21, 2016), <http://www.theatlantic.com/business/archive/2016/01/walmart-raise-2016/425058> (discussing how wages have been offset by reduced employee hours, but noting the high cost of wage increases and falling stock prices, while Wal-Mart continues to make \$3 billion per quarter).

19. See, e.g., Brad Stone, *Costco CEO Craig Jelinek Leads the Cheapest, Happiest Company in the World*, BLOOMBERG (June 7, 2013, 3:54 PM), <http://www.bloomberg.com/news/articles/2013-06-06/costco-ceo-craig-jelinek-leads-the-cheapest-happiest-company-in-the-world> (comparing the average wages of a Costco employee to the minimum wages received by Wal-Mart employees).

20. See *Average Salary for Costco Wholesale Company Employees*, PAYSACLE, http://www.payscale.com/research/US/Employer=Costco_Wholesale_Company/Salary (last visited Jan. 10, 2017).

21. Kevin Short, *11 Reasons to Love Costco That Have Nothing to Do with*

Different than Wal-Mart and other low-wage retailers, Costco's strategy of providing higher wages for workers prioritizes low turnover.²²

Low wage retailers consider many of their employees who earn so little to be full-time workers.²³ Even so, many full-time workers require government aid.²⁴ The aid comes from a number of programs including housing, child-care, and energy assistance.²⁵ This Article focuses on assistance from the Supplemental Nutrition Assistance Program (SNAP), colloquially known as the food stamp program.²⁶ As its name implies, SNAP enables the working poor to purchase food. States administer the program, but the program is funded with federal tax money.²⁷ To qualify for food stamps, households of four must earn less than \$2,633 per month or \$31,596 per year;²⁸ approximately equal to 130% of the

Shopping, HUFFINGTON POST (Nov. 20, 2013), http://www.huffingtonpost.com/2013/11/19/reasons-love-costco_n_4275774.html.

22. See ANTHONY BIANCO, *THE BULLY OF BENTONVILLE* 194 (2006) ("The key to Costco's new math of discount retailing is an annual turnover rate of just 23 percent, half of Wal-Mart's."); Emily Jane Fox, *Worker Wages: Wendy's vs. Wal-Mart vs. Costco*, CNN MONEY (Aug. 6, 2013, 1:37 PM), <http://money.cnn.com/2013/08/06/news/economy/costco-fast-food-strikes/> (noting that Costco invests in the satisfaction and well-being of its employees).

23. *Fact Sheet—Wages*, MAKING CHANGE AT WAL-MART, <http://makingchangeatwalmart.org/factsheet/walmart-watch-fact-sheets/fact-sheet-wages/> (last visited Sept. 19, 2016) (stating that the average worker has full-time status at thirty-four hours per week).

24. Press Release, House Committee on Education & the Workforce, *Low Wages at a Single Wal-Mart Store Cost Taxpayers about \$1 Million Every Year, Says New Committee Staff Report* (May 30, 2013), <http://democrats-edworkforce.house.gov/media/press-releases/low-wages-at-a-single-wal-mart-store-cost-taxpayers-about-1-million-every-year-says-new-committee-staff-report> (stating that Wal-Mart does not pay its employees enough to afford "the necessities of life").

25. See *id.* ("This taxpayer subsidy calculation also includes programs like subsidized housing assistance, the food-stamp program, child-care subsidies, energy assistance, and reduced school meals."); see also Clare O'Connor, *Walmart Workers Cost Taxpayers \$6.2 Billion in Public Assistance*, FORBES (Apr. 15, 2014, 3:35 PM), <http://www.forbes.com/sites/clareoconnor/2014/04/15/report-walmart-workers-cost-taxpayers-6-2-billion-in-public-assistance/#2d2e0a5e7cd8> (listing food stamps, Medicaid, and subsidized housing among the categories of public assistance Wal-Mart workers seek).

26. 7 U.S.C. § 2035 (2012). The food stamp program no longer issues stamps. It uses Electronic Benefit Transfer (EBT) cards. They work like a debit card; they require a personal identification number (PIN) and can be electronically monitored and tracked. See *Supplemental Nutrition Assistance Program (SNAP)*, USDA FOOD & NUTRITION SERV., <http://www.fns.usda.gov/snap/eligibility> (last updated Oct. 20, 2016). For ease of reading, this paper will refer to the benefits as food stamps.

27. 7 U.S.C. § 2035(b) (2012).

28. See *SNAP*, *supra* note 26; see also 7 C.F.R. § 273.9(a) (2015) (elaborating on how eligibility is determined).

federal poverty line of \$24,257.²⁹ An employee who earns the minimum wage of \$7.25 per hour and works 40 hours per week would make \$290 per week, \$1,060 per four weeks, and \$15,080 per fifty-two weeks, substantially below the poverty line.³⁰ If that employee is the only income-earner in a household of four, the household could receive up to \$649 per month in food stamps.³¹

One reason low-wage retailers pay so little is that the minimum wage, enacted as part of the Fair Labor Standards Act (FLSA), has not been raised from \$7.25 since 2009.³² Thus, any pay rate above \$7.25 is perceived by some as generous.³³ One researcher has calculated that the minimum wage today should be \$18.42³⁴ if it were to match the growth in productivity since 1968, when the minimum wage had its highest purchasing power.³⁵ The latest minimum wage bill introduced in Congress would raise the minimum wage, in stages, to fifteen dollars per hour.³⁶ Because of current partisan gridlock in Congress,³⁷ no new minimum wage has been enacted.³⁸

29. See *Poverty Threshold*, *supra* note 16.

30. Even at \$11.00 per hour, the weekly amount would be \$440; \$1,760 for four weeks; and \$22,880 for fifty-two weeks, still below the poverty line for a family of four and substantially within the \$31,536 cut off for food stamp eligibility. See *id.*

31. See SNAP, *supra* note 26; Memorandum from Lizbeth Silbermann, Director, Program Development Division, United States Department of Agriculture to All Regional Directors, Supplemental Nutrition Assistance Program (Aug. 1, 2014), www.fns.usda.gov/sites/default/files/SNAP_%20FY_2015_Cost_of_Living_Adjustments.pdf.

32. 29 U.S.C. § 206(a)(1)(C) (2012). Not all employees are covered by the wage and hour provisions of the FLSA.

33. See Stone, *supra* note 19 (calling Costco's high median salary "generous" and emphasizing the difference between Costco and Wal-Mart in terms of employee compensation).

34. See David Cooper, *Given the Economy's Growth, the Federal Minimum Wage Could Be Significantly Higher*, ECON. POL'Y INST. (Apr. 14, 2015), <http://www.epi.org/publication/given-the-economys-growth-the-federal-minimum-wage-could-be-significantly-higher/> (defining "rate as growth in productivity" as "the rate at which the average worker can produce income for her employer from each hour of work").

35. According to the Congressional Research Service, the purchasing power of the minimum wage of \$1.60 was the highest in 1968. To match 1968's purchasing power, the minimum wage should be \$10.69 in 2013 dollars. See Craig K. Elwell, *A Fact Sheet: Inflation and the Real Minimum Wage*, CONG. RESEARCH SERV. 1 (Jan. 8, 2014), <https://www.fas.org/sgp/crs/misc/R42973.pdf>.

36. See Pay Workers a Living Wage Act, H.R. 3164, 114th Cong. § 2(a)(1) (2015) (detailing a progressive realization of a higher minimum wage over several years).

37. Phil Andrews, *Goodwill Isn't Enough to Fix Congressional Gridlock*, WASH. POST (Jan. 7, 2016), https://www.washingtonpost.com/opinions/goodwill-isnt-good-enough-to-fix-congressional-gridlock/2016/01/07/c70ceb9c-b4a3-11e5-a76a-0b5145e8679a_story.html.

38. See Sam Levine, *Republicans Refuse to Stand Up and Support Fair Pay*,

Much of the debate about the minimum wage is about jobs. Some argue that increasing wages would harm workers and the economy by causing job loss; others argue to the contrary.³⁹ An increase in the minimum wage, however, affects more than just jobs. It also affects the amount of taxpayer-funded food stamp benefits the government must pay to employees of low-wage employers.⁴⁰ Many scholars have characterized payments from the government to employees of low-wage retailers, computed to be in the billions of dollars, as subsidies from taxpayers to those retailers.⁴¹ These subsidies help retailers keep labor costs low.

Questions arise. Is it unjust for private, low-wage retailers with monopsony power to benefit from taxpayer money? Is it unjust to create a business model that enables few top executives to become wealthy, in part, because low-level employees are paid so little that the government must provide them with food stamps and other assistance? The law of unjust enrichment provides guidance. This Article suggests that the United States federal government could seek restitution from these low-wage retailers and recommends that the debate about minimum wage include analysis of retailers' unjust enrichment from food stamp benefits.⁴²

HUFFINGTON POST (Jan. 20, 2015, 10:14 PM), http://www.huffingtonpost.com/2015/01/20/state-of-the-union-fair-pay_n_6512400.html.

39. See generally JOHN SCHMITT, WHY DOES THE MINIMUM WAGE HAVE NO DISCERNIBLE EFFECT ON EMPLOYMENT, CTR. FOR ECON. POLICY RESEARCH (2013), <http://cepr.net/documents/publications/min-wage-2013-02.pdf> (summarizing economic research on the effect of an increase in the minimum wage on employment); see also Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 7–9 (2010), for a detailed discussion of arguments for and against the minimum wage.

40. RACHEL WEST & MICHAEL REICH, CTR. FOR AM. PROGRESS, THE EFFECTS OF MINIMUM WAGES ON SNAP ENROLLMENT AND EXPENDITURES 17 (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/03/MinimumWage-report.pdf> (finding that raising the federal minimum wage to \$10.10 would reduce program expenditures by \$4.6 billion).

41. See, e.g., Ken Jacobs, *Americans Are Spending \$153 Billion a Year to Subsidize McDonald's and Wal-Mart's Low Wage Workers*, WASH. POST (Apr. 15, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/04/15/we-are-spending-153-billion-a-year-to-subsidize-mcdonalds-and-Wal-Marts-low-wage-workers/> (stating that taxpayers are subsidizing individuals who work full-time because their employers will not pay a living wage); see also WALMART ON TAX DAY: HOW TAXPAYERS SUBSIDIZE AMERICA'S BIGGEST EMPLOYER AND RICHEST FAMILY, AMERICANS FOR TAX FAIRNESS 11 (Apr. 2014), <http://americansfortaxfairness.org/files/Walmart-on-Tax-Day-Americans-for-Tax-Fairness-1.pdf>; O'Connor, *supra* note 25.

42. Small businesses must compete against large, low-wage retailers and are at a competitive disadvantage if the wages they pay their employees deviate far from the low salaries paid by these retailers. Some small businesses go out of business because they cannot compete with the large retailers. Not all businesses considered by some to be small are independently small. For example, some

In framing the unjust enrichment aspect of the minimum wage debate, Part I describes the FLSA. Part II describes the law of unjust enrichment. Part III applies the law of unjust enrichment to the situation of low-wage retailers. Part IV discusses available remedies.

I. The Fair Labor Standards Act (FLSA)

The FLSA was passed in 1938, after the Supreme Court declared its predecessor, the National Industrial Recovery Act (NIRA) of 1934, unconstitutional.⁴³ While there were differences between the two acts, both set a minimum wage for hourly workers and regulated the number of hours an employee could work.⁴⁴ The FLSA set a minimum hourly wage, initially \$0.25 and, since 2009, \$7.25. Importantly, the FLSA provides that those who work more than forty hours per week are entitled to additional compensation, above their typical wage.⁴⁵

The NIRA and the FLSA were passed during President Franklin D. Roosevelt's New Deal and were designed to pull the nation out of the Great Depression, in large part by creating jobs.⁴⁶ From 1929 to 1932, United States' manufacturing decreased by almost half⁴⁷ and national unemployment rose to twenty-five percent.⁴⁸ Those who were fortunate to have jobs frequently

franchisees of large low price chains, such as McDonald's, are nominally owners of their franchise. The National Labor Relations Board, however, can file complaints against McDonald's, USA, LLC and its franchisees as joint employers of the franchisee's employees. See *NLRB Office of the General Counsel Authorizes Complaints Against McDonald's Franchisees and Determines McDonald's, USA, LLC is a Joint Employer*, NATIONAL LABOR RELATIONS BOARD, OFFICE OF PUBLIC RELATIONS (July 29, 2014), <https://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-authorizes-complaints-against-mcdonalds>. The analysis of this article would apply to other chains as well.

43. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1936). Although the Supreme Court struck down many of the early New Deal programs, it upheld many of the later programs. The Court upheld the FLSA against constitutional challenges in *United States v. Darby*, 312 U.S. 100, 125 (1941) (finding that the act was "sufficiently definite" to be constitutional).

44. See ARTHUR M. SCHLESINGER, JR., *THE COMING OF THE NEW DEAL* 87–102 (1959), for a detailed description of the provisions and history of the enactment of the NIRA; see also John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 464–66, 478–87 (1939) (providing an overview of the motivating factors behind the passage of the FLSA, including an overview of critical wage standards).

45. 29 U.S.C. §§ 206(a)(1)(C), 207 (2012).

46. See, e.g., TED MORGAN, *FDR: A BIOGRAPHY* 321–22 (1985) (describing the economic backdrop of the FLSA); SCHLESINGER, *supra* note 44, at 102.

47. SCHLESINGER, *supra* note 44, at 87.

48. MORGAN, *supra* note 46, at 319.

worked sixty hours or more per week for very little pay.⁴⁹ Businesses cut wages to “preserve profits.”⁵⁰ As historian Arthur M. Schlesinger, Jr. described:

[T]he firm which worked its labor longest and paid it least gained the greatest competitive advantage With the worker—and the responsible businessman—thus at the mercy of the greedy, desperate or doctrinaire competitor, standards of wages and hours, attained after so many years of battle and negotiation, began to crumble away.⁵¹

Today, the United States is recovering from the “Great Recession” of 2008. While the economy is improving, salaries have stagnated.⁵² Some describe the economy now, as Schlesinger did then, as being “at the mercy of the greedy.”⁵³ Now, as then, businesses argue that if they raise wages they will not be able to preserve profits.⁵⁴ Also, just as they did during the Great Depression, people debate whether a minimum wage would cause employers to create or cut jobs.⁵⁵ Unlike during the Great Depression, however, employers now know low-wage workers can

49. See NAT'L BUREAU OF ECON. RESEARCH, HOURS OF WORK IN AMERICAN INDUSTRY 1 (1938), <http://www.nber.org/chapters/c4124.pdf> (“From 1890 to 1937, a period during which records of hours of work have tended to become more complete and, on the whole, more reliable, the average length of the work week of factory employees in the United States declined from 60 to probably 42 hours.”).

50. SCHLESINGER, *supra* note 44, at 90.

51. *Id.* The doctrinaire competitor that Schlesinger describes was one who adhered to the principle of orthodox economics that “to maintain wage rates [rather than cut them] increased unemployment.” *Id.*

52. Lawrence Mishel, Elise Gould, & Josh Bivens, *Wage Stagnation in Nine Charts*, ECON. POLY INST. (January 5, 2015), <http://www.epi.org/publication/charting-wage-stagnation/> (explaining that between 1979 and 2013, the hourly wages of middle-wage workers were stagnant, rising just six percent in total and less than 0.2 percent per year).

53. SCHLESINGER, *supra* note 44, at 90. Senator Bernie Sanders, a 2016 presidential candidate, says that corporate greed must end:

Today, millions of Americans are working longer hours for lower wages and median family income is almost \$5,000 less than it was in 1999. Meanwhile, the wealthiest people and the largest corporations are doing phenomenally well. Today, 99 percent of all new income is going to the top 1 percent, while the top one-tenth of 1 percent own almost as much wealth as the bottom 40 percent. In the last two years, the wealthiest 14 people in this country increased their wealth by \$157 billion. That increase is more than is owned by the bottom 130 million Americans—combined.

Sen. Bernie Sanders, *Corporate Greed Must End*, HUFFINGTON POST (June 24, 2015, 9:29 AM), http://www.huffingtonpost.com/rep-bernie-sanders/corporate-greed-must-end_b_7653442.html.

54. BIANCO, *supra* note 22, at 197 (“The consensus in retailing today—as epitomized in Wal-Mart—is that holding hourly wages to a bare minimum is essential to success, if not survival.”).

55. See Pay Workers a Living Wage Act, H.R. 3164, 114th Cong. § 2(a)(1) (2015).

supplement their earnings with government-financed food stamps.⁵⁶

Congress enacted the FLSA based on findings that “labor conditions[,] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers[,]” cause the spread of those detrimental conditions across the country and interfere with the “fair marketing of goods.”⁵⁷ In particular, the minimum wage provision was intended to ensure that people had “minimum standards of living necessary for health and general well-being.”⁵⁸ The FLSA provision limiting overtime was intended not only to protect workers’ standard of living, but also to stimulate commerce, increase earning power, and create jobs.⁵⁹ If an employee worked only forty instead of sixty hours per week, an employer could add an additional employee for the extra twenty hours.⁶⁰ If an employer required one employee to work more than forty hours, that employee would receive his or her wages plus additional compensation.⁶¹ Manufacturing productivity would rise with increased demand from people with more income to spend.⁶² Thus, the economy would improve.⁶³

In passing the FLSA, Congress never intended employers to cut salaries in order to create jobs.⁶⁴ Rather, reducing wages was viewed as harming employment,⁶⁵ because cutting workers’ salaries also cut their spending.⁶⁶ Reduced consumer spending—

56. *See infra* Part III.C.1.

57. 29 U.S.C. § 202(a)(5) (1938). The FLSA was passed pursuant to the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, therefore, it applies to working conditions “that substantially affect interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 560 (1995).

58. 29 U.S.C. § 202(a)–(b) (1938).

59. *Id.*

60. 29 U.S.C. § 207 (1938).

61. *Id.*

62. *See, e.g., Economic Forecast: Strong Consumer Demand Driven by Job Gains*, MFRS. ALLIANCE FOR PRODUCTIVITY & INNOVATION (Nov. 24, 2015), <https://www.mapi.net/blog/2015/11/economic-forecast-strong-consumer-demand-driven-job-gains> (describing the positive correlation between consumer income and manufacturing production).

63. *See, e.g.,* Martin N. Baily, *How Manufacturing Can Lead to Future Economic Prosperity*, BROOKINGS INST. (June 29, 2011), <https://www.brookings.edu/blog/up-front/2011/06/29/how-manufacturing-can-lead-to-future-economic-prosperity> (discussing the aggregate economic benefit of increased manufacturing).

64. Congress clearly stated its intention “to correct and as rapidly as practicable to eliminate the conditions above . . . *without substantially curtailing employment.*” 29 U.S.C. § 202(b) (1938) (emphasis added).

65. *Id.*

66. Indeed, the FLSA was passed in the wake of the Great Depression, a time

because of lower incomes—necessitates cutting production because of diminished demand. A reduction in production in turn necessitates cutting jobs, creating a downward spiral.⁶⁷ Today, one could argue that if cutting wages creates jobs, employers could create twice as many jobs as they have now by paying everyone half of what they are currently making, perhaps as low as four dollars per hour.⁶⁸ Presumably, however, spending for goods and services would decrease dramatically, requiring lay-offs and initiating another downward spiral.⁶⁹ Perhaps in today's stagnant economy, with little or no inflation, poverty wages are not only preventing the creation of an upward spiral, but are also causing stagnation and contributing to continued poverty.

Low-wage retailers claim they are creating jobs.⁷⁰ By not authorizing overtime pay, however, they are effectively cutting wages to create those jobs. For example, if employees work for sixty hours or more per week, as many do, they must work for at least two employers.⁷¹ When employers use the FLSA's overtime requirement to limit the hours of their workers, they are using the Act to work against those very workers the Act was intended to benefit. Workers do not receive the overtime pay for extra hours

in which low earnings had a harmful downward pressure on consumption. As Professor Seth Harris states, "The FLSA ultimately enacted in 1938 sought to redress substandard wages as a means to remedy the under-consumption which President Franklin D. Roosevelt and his allies believed sparked and prolonged the Depression." Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19, 21 (2000).

67. See SCHLESINGER, *supra* note 44, at 173–74 (quoting Donald Richberg, general counsel to National Recovery Board and Roosevelt aide).

68. See DOUGLAS HOLTZ-EAKIN & BEN GITIS, COUNTERPRODUCTIVE: THE EMPLOYMENT AND INCOME EFFECTS OF RAISING AMERICA'S MINIMUM WAGE TO \$12 AND TO \$15 PER HOUR, MANHATTAN INST. FOR POL'Y RES. 2 (July 2015), http://www.manhattan-institute.org/sites/default/files/ib_36.pdf (positing a negative correlation between wages and number of jobs). Just as with raising wages, the Fight for Fifteen campaign could cause firms to cut jobs, and a decrease in wages could lead to job production. *Id.*

69. See, e.g., Larry Elliott, *Pay Low-income Families More to Boost Economic Growth, Says IMF*, THE GUARDIAN (June 15, 2015), <https://www.theguardian.com/business/2015/jun/15/focus-on-low-income-families-to-boost-economic-growth-says-imf-study> (asserting that declining relative wages of poor and middle class families contributed to the global economic collapse). Indeed, there is a positive correlation between the wages of the poorest twenty percent of citizens and aggregate economic growth. *Id.*

70. See RICHARD VEDDER & WENDELL COX, THE WAL-MART REVOLUTION: HOW BIG-BOX STORES BENEFIT CONSUMERS, WORKERS, AND THE ECONOMY 91 (2006).

71. See Lydia Saad, *The "40-Hour" Workweek Is Actually Longer — by Seven Hours*, GALLUP (Aug. 29, 2014), <http://www.gallup.com/poll/175286/hour-workweek-actually-longer-seven-hours.aspx> (finding that nearly one in five Americans work sixty hours or more per week).

of work, contrary to the intent of the FLSA.⁷² In addition, if two employees work sixty hours for two employers, no more jobs are created than if each worked for one employer and was paid for overtime.⁷³ The result is lower pay for both employees.

In addition to not authorizing overtime, low-wage retailers frequently send workers home without pay or do not call them in if business is slow.⁷⁴ Although not illegal, this practice further impoverishes employees.⁷⁵ If the amount of wages earned during the week by effectively part-time employees were divided by forty hours, as contemplated by the FLSA, the retailers would be paying far below the minimum wage per employee. Employers do this knowing that employees can make up the difference with food stamps and other benefits.⁷⁶ By cutting employees' hours without any corresponding raise in wages,⁷⁷ employers are adopting the economic model rejected by Congress during the Great Depression. Employers may keep wages and hours low because they know that their employees have another source of income from governmentally supplied food stamps and other benefits.

72. For example, an employee who works 60 hours at \$7.25 per hour would earn not only the 40 hour pay of \$290, and not only the additional \$145 for the extra 20 hours at \$7.25, but also an extra \$72.50 because of the "time and half" overtime rule. See 29 U.S.C. § 207 (2012). This would total \$507 per week. If, however, an employee was limited to working no more than 30 hours per week and, needing more than \$217.50 per week, worked another 30 hours for another employer, that worker would earn \$435, \$72 less than the employee working for one employer. *Id.*

73. See 29 U.S.C. § 207 (2012).

74. See Alexander & Haley-Lock, *supra* note 5, at 6–11. Not only do employees of low-wage retailers work fewer than 40 hours per week, many work far less and have little or no consistency in their shifts. *Id.*; see also Charlotte Alexander, Anna Haley-Lock, & Nantiya Ruan, *Stabilizing Low-Wage Work*, 50 HARV. C.R.-C.L. L. REV. 1, 2–5 (2015) (describing the just-in-time scheduling phenomenon, whereby low-wage employees' schedules are highly sensitive to market demand).

75. See Alexander, Haley-Lock & Ruan, *supra* note 74, at 10 (demonstrating the harms of variable work schedules on worker mobility).

76. See 29 U.S.C. § 207 (2012).

77. See Thomas R. Michl, *Can Rescheduling Explain the New Jersey Minimum Wage Studies?*, 26 E. ECON. J. 265, 275 (2000) (harmonizing two studies on the effect of increased minimum wage on employment—one finding no job loss, the other finding no job loss but reduction in hours—by concluding that "if the theoretical model which begins the paper is correct . . . the average worker [with a wage increase] will have experienced an increase in leisure time with no change in weekly income" and may even see an increase in both income and leisure). For further information on these opposing studies, see H.R. 3164, *supra* note 36; see also Paul Krugman, *Liberals and Wages*, N.Y. TIMES, July 17, 2015, at A47 (describing study by economists David Card and Alan Kruger demonstrating that raising minimum wage has a positive effect on workers).

II. Unjust Enrichment

The remedial purpose of unjust enrichment law is different from that of tort law or contract law. The purpose of tort law and contract law is to compensate plaintiffs' losses either from an injury or from a breach of contract. Unjust enrichment law, however, does not focus on a plaintiff's loss but, rather, on a defendant's gain.⁷⁸

An opinion written by Lord Mansfield in 1760 in England is often said to have been the genesis of the field of unjust enrichment.⁷⁹ Unjust enrichment was not generally recognized in the United States as a separate field until 1937, when the American Law Institute (ALI) published the Restatement of the Law of Restitution.⁸⁰ In 2011, after approximately ten years of work by Reporter Andrew Kull with advisors and consultants, the ALI published another edition.⁸¹ It was entitled *The Restatement (Third) of Restitution and Unjust Enrichment*.⁸² The term "unjust enrichment" was added to the title because, in the years since the Restatement (First) was published, judicial results became inconsistent and confusing.⁸³ In particular, there was confusion about terminology. Lawyers and judges oftentimes referred to restitution and unjust enrichment synonymously, while at other times as separate theories.⁸⁴ Although one can parse subtle differences between the two terms, for ease of understanding, the Restatement (Third) refers to them as synonyms.⁸⁵

Section 1 of the Restatement (Third) articulates the fundamental premise of the law: "A person who is unjustly enriched at the expense of another is subject to liability in restitution."⁸⁶ While comments to this section caution against applying the principle too broadly, the comments also caution that "cases may arise that fall outside every pattern of unjust

78. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 49, at 176 (AM. LAW INST. 2011) [hereinafter RESTATEMENT (THIRD)].

79. *Moses v. Macferlan* (1760) 2 Bur 1005.

80. RESTATEMENT OF RESTITUTION (AM. LAW INST. 1937).

81. RESTATEMENT (THIRD) § 49.

82. *Id.* A Restatement (Second) of Restitution was begun, but not completed; see also Lance Liebman, *Foreword to RESTATEMENT (THIRD)*, at xiii–xiv (describing the failure to complete Restatement (Second)).

83. See Candace S. Kovacic[Fleischer], *Applying Restitution to Remedy Discriminatory Denial of Partnership*, 34 SYRACUSE L. REV. 743, 761–64 (1983) (noting the under-utilization of restitution by courts and advocating for a clearer lexicon and judicial standard for resolving restitution disputes).

84. *Id.*

85. RESTATEMENT (THIRD) § 1 cmt. c.

86. RESTATEMENT (THIRD) § 1.

enrichment except the rule of [Section 1].”⁸⁷ Scholars disagree as to the scope of the law of unjust enrichment. For purposes of predictability, some view it as having narrow applicability; others see it as evolving depending on the circumstances.⁸⁸ In looking at the issue of taxpayer subsidy gains to low-wage retailers, this Article focuses on unjust enrichment’s broader scope.

III. Unjust Enrichment Applied

The three elements contained in Section 1 of the Restatement (Third) are: (1) enrichment of one party; (2) at expense of another party; and (3) unjustness of the enrichment.

A. Enrichment

1. Saved Expenditures

The concept of benefit is broad. While a benefit can be a monetary gain, it can also be a “saved expenditure.”⁸⁹ Food stamp payments to employees of low-wage retail stores enrich those stores by saving them the cost of having to pay higher wages. Executives of low-wage retailers know that their employees receive food stamps and other benefits. For example, one of Wal-Mart’s executives said in a confidential memorandum acquired by the New York Times that, “Wal-Mart has a significant percentage of Associates and their children on public assistance.”⁹⁰ It would be difficult for low-wage retailers to argue that their executives ignore this knowledge when setting wage scales. The executives allow their “associates” to receive food stamps in order to have a business plan that relies on paying low-level employees poverty wages.

87. RESTATEMENT (THIRD) § 1 cmt. a, at 4.

88. See, e.g., Peter Linzer & Donna L. Huffman, *Unjust Impoverishment: Using Restitution Reasoning in Today’s Mortgage Crisis*, 68 WASH & LEE L. REV. 949 (2011) (discussing the debate between originalists and those in support of an evolving Restatement (Third)).

89. RESTATEMENT (THIRD) § 1 cmt. d, at 7.

90. Steven Greenhouse & Michael Barbaro, *Wal-Mart Memo Suggests Ways to Cut Employee Benefit Costs*, N.Y. TIMES (Oct. 26, 2005), <http://www.nytimes.com/2005/10/26/business/walmart-memo-suggests-ways-to-cut-employee-benefit-costs.html> (quoting *Reviewing and Revising Wal-Mart’s Benefits Strategies*, a confidential memorandum from Susan Chambers to the board of directors in 2005); see also O’Connor, *supra* note 25 (stating that Wal-Mart claimed in 2013 that “the company has captured 18 percent of the SNAP market”).

2. Direct Monetary Gain

Low-wage retailers that sell groceries get a direct monetary benefit when their employees use food stamps where they work, as many most likely do.⁹¹ As a result, employees become conduits for money to pass from the government to those retailers.

B. At Government's Expense

Food stamp payments that benefit low-wage retailers are funded by taxpayers and paid by the government to low-wage retailers' employees.⁹² Although the government has a statutory duty to provide food stamps to those who qualify, it has no duty, nor has it agreed, to subsidize low-wage retailers.⁹³ Low-wage retailers, therefore, are shifting the cost of paying workers a living wage to the government. The result is that the government is effectively subsidizing those retailers.

Some people oppose benefit programs, believing that those programs discourage people from working.⁹⁴ Many of the recipients of the programs are working, however, often at two or more jobs.⁹⁵ Misapprehension about who benefits from safety net programs may cause some to oppose political candidates who support these programs.

91. See, e.g., Wal-Mart, Inc., Annual Report (Form 10-K) (Mar. 21, 2014), <https://www.sec.gov/Archives/edgar/data/104169/000010416914000019/wmtform10-kx13114.htm>, at 7 [hereinafter Wal-Mart 10K] (stating that one of Wal-Mart's "six strategic merchandise units" is "grocery," which "consists of a full line of grocery items, including meat, produce, deli, bakery, dairy, frozen foods, alcoholic and nonalcoholic beverages, floral[,] and dry grocery, as well as consumables such as health and beauty aids, baby products, household chemicals, paper goods and pet supplies"). It is convenient to shop where one works, and employees likely receive discounts. For example, Wal-Mart employees receive a ten percent discount on fresh fruit, vegetables, and regularly priced general merchandise at Wal-Mart stores. See *Working at Walmart*, WAL-MART, <http://corporate.Wal-Mart.com/our-story/working-at-Wal-Mart> (last visited Jan. 10, 2017).

92. 7 U.S.C. §§ 2013–2016, 2027 (1964).

93. See *id.*

94. See, e.g., Ezra Rosser, *Poverty Offsetting*, 6 HARV. L. & POL'Y REV. 179, 195 (2012) (stating that many believe the "myth" that "the poor deserve their poverty").

95. Victoria Smith & Brian Halpin, *Low-wage Work Uncertainty Often Traps Low-wage Workers*, CTR. FOR POVERTY RES., UNIV. OF CAL., DAVIS, <http://poverty.ucdavis.edu/policy-brief/low-wage-work-uncertainty-often-traps-low-wage-workers> (discussing the facts that low wage workers often have multiple jobs).

C. Benefit Retained Unjustly

1. Wrongdoing: Wage Theft

The Restatement (Third) of Restitution and Unjust Enrichment provides: “A person is not permitted to profit by his own wrong.”⁹⁶ Low-wage retailers often have policies that require managers to make sure employees do not work more than forty hours per week.⁹⁷ This policy either encourages the salaried managers, who are not covered by the wage and hour laws,⁹⁸ to do work uncompleted by the hourly employees, or to have the hourly employees work “off-the-clock.”⁹⁹ In the first instance, the salaried employees are working extra hours as if they were hourly employees but without hourly compensation.¹⁰⁰ In the second instance, hourly employees may be uncompensated for their extra hours or must reallocate hours so that their pay cards do not show any forty plus hour weeks. Overtime pay has effectively been stolen from the employees.¹⁰¹ This “wage theft”¹⁰² is said to be endemic.¹⁰³

96. RESTATEMENT (THIRD) § 3.

97. See BIANCO, *supra* note 22, at 97; see also Nelson Lichtenstein, *Why Working at Wal-Mart is Different*, 39 CONN. L. REV. 1649, 1660–61 (2007) (describing hour limitations); *Fact Sheet—Wages*, *supra* note 23 (stating that the average worker has full-time status at thirty-four hours per week).

98. 29 U.S.C. § 213(a)(1) (2012) (providing that “any employee employed in bona fide executive, administrative, or professional capacity” is exempt from its wage and hour provisions; this often includes managers).

99. See, e.g., STEVEN GREENHOUSE, *THE BIG SQUEEZE: TOUGH TIMES FOR THE AMERICAN WORKER* 98–103, 142 (2008) (describing “off-the-clock” practices); Orly Lobel, *supra* note 10, at 1690 (describing lawsuits over wages in which Wal-Mart paid to settle or was found liable for wage and hour violations); Lichtenstein, *supra* note 97.

100. 29 U.S.C. § 213(a)(1) (2012) (“[A]ny employee employed in a bona fide executive, administrative, or professional capacity” is exempt from the wage and hour provision); see also BIANCO, *supra* note 22, at 88, 90–91; Lichtenstein, *supra* note 97, at 1673.

101. See Lichtenstein, *supra* note 97, at 1674.

102. See, e.g., Weisbard & Leonard, *supra* note 7, at 430–32 (describing wage theft cases as including instances where an employer failed to pay minimum wage or prevailing wages, failed to provide mandated sick leave, failed to pay any wages, paid less than promised, forced workers to work “off-the-clock,” and failed to pay or underpaid overtime).

103. See *id.* at 430–31 (describing how the Employment Justice Center handles “prevalent” wage theft and other labor violations for low-wage workers); see also BIANCO, *supra* note 22, at 90 (describing “massive violations of wage-and-hour rules in 128 stores”); CHARLES FISHMAN, *THE WALMART EFFECT* 188 (2006) (same); Nantiya Ruan, *Same Law, Different Day: A Survey of the Last Thirty Years of Wage Litigation and Its Impact on Low-Wage Workers*, 30 HOFSTRA LAB. & EMP. L.J. 355, 363 (2013) (describing “multitudes” of “off-the-clock” lawsuits); Daniel V. Dorris, *Fair Labor Standards Act Preemption of State Wage-and-Hour Law Claims*, 76 U.

The Restatement (Third) addresses theft. First, it provides that “[a] person who obtains a benefit by misappropriating financial assets . . . is liable in restitution to the victim of the wrong.”¹⁰⁴ The Restatement then provides that financial assets can be “in any form, whether tangible or intangible.”¹⁰⁵ Because many of the employees forced to work “off-the-clock” must supplement their income with food stamps, employers who misappropriate their employees’ time therefore also misappropriate taxpayer-funded food stamps.¹⁰⁶

In 2002, Wal-Mart’s hourly employees brought a class action in Pennsylvania state court for wage theft, alleging Wal-Mart had violated Pennsylvania’s Minimum Wage Act.¹⁰⁷ In 2006, the jury awarded the employees \$187,648,589.¹⁰⁸ In 2014, the Pennsylvania Supreme Court affirmed the judgment.¹⁰⁹ Wal-Mart filed a petition for certiorari in the Supreme Court of the United States, arguing that the Court should hold that the class certification violated due process.¹¹⁰ The Supreme Court denied the petition in April of 2016.¹¹¹

Because wage and hour suits require a substantial investment to gather necessary evidence and proceed to trial,¹¹² if a class bringing suit were decertified, it would be infeasible for class members to bring suit individually.¹¹³ An unjust enrichment

CHI. L. REV. 1251, 1251 (2009) (noting that although twelve suits were still pending in 2009, Wal-Mart settled sixty-three class action wage-hour suits).

104. RESTATEMENT (THIRD) § 41.

105. RESTATEMENT (THIRD) § 40 cmt. a.

106. Besides violating the FLSA to keep wages low, low-wage retailers sometimes interfere with unionizing, violating the National Labor Relations Act, 29 U.S.C. §§ 151, 157, 158 (2012). See Ezra Rosser, *Offsetting and the Consumption of Social Responsibility*, 89 WASH. U. L. REV. 27, 87 n.208 (2011); Catherine L. Fisk & Michael M. Oswald, *Preemption and Civic Democracy in the Battle over Wal-Mart*, 92 MINN. L. REV. 1502, 1503–04, 1507 (2008).

107. Braun v. Wal-Mart Stores, Inc., 24 A.3d 875 (Pa. Super. Ct. 2011).

108. *Id.* at 889. The class alleged four counts: (1) Pennsylvania’s Minimum Wage Act, 43 PA. STAT. AND CONS. STAT. ANN. §§ 333.101–.115 (2009); (2) Pennsylvania’s Wage Payment and Collection Act, 43 PA. STAT. AND CONS. STAT. ANN. §§ 260.1–.12 (2009); (3) breach of contract; and, (4) unjust enrichment.

109. Braun v. Wal-Mart Stores, Inc., 106 A.3d 656 (Pa. 2014).

110. Petition for a Writ of Certiorari, Wal-Mart Stores, Inc. v. Braun, 106 A.3d 656 (Pa. 2014), Nos. 14-1123, 14-1124.

111. Wal-Mart Stores, Inc. v. Braun, 106 A.3d 656 (Pa. 2014), *cert. denied*, 136 S. Ct. 1512 (Apr. 4, 2016).

112. *Cf.* Ruan, *supra* note 103, at 382–83.

113. *Cf.* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011) (finding that class certification in a Title VII gender discrimination case was improper because the case used “trial by formula,” in which liability for the whole class was established based on liability after trial of a sample group from the original class).

action brought by the government against low-wage retailers, however, would not need class certification. The government would be suing on its own behalf, not on behalf of a class.¹¹⁴

2. Misrepresentation

Section 13(1) of the Restatement (Third) provides that “[a] transfer induced by fraud or material misrepresentation is subject to . . . restitution. The transferee is liable in restitution as necessary to avoid unjust enrichment.”¹¹⁵

Low-wage employers represent that their retail prices are exceedingly low.¹¹⁶ The retailers seek to attract customers because of their low prices.¹¹⁷ Their ads tout low prices.¹¹⁸ Their public filings typically promote their low prices as their particular business philosophy. For example, in its 10-K for 2014, Wal-Mart said:

Wal-Mart Stores, Inc. . . . helps people around the world save money and live better—anytime and anywhere—in retail stores, online, and through their mobile devices. We earn the trust of our customers every day by providing a broad assortment of quality merchandise and services at everyday low prices (“EDLP”) . . . EDLP is our pricing philosophy under which we price items at a low price every day so our customers trust that our prices will not change under frequent promotional activity.¹¹⁹

While low-wage retailer’s customers, some of whom are their employees or others who may be poor, benefit from low prices, the benefit comes at the expense of the government and taxpayers. Although Wal-Mart’s 10-K claims that its low prices “help[] people around the world save money and live better—anytime and anywhere,”¹²⁰ its employees are not living better, but rather must endure the stigma of having to apply for food stamps.¹²¹

Because many employees receive public assistance as a result of their low earnings, and because public benefits are funded with taxes, customers of low-wage retailers who pay taxes pay more for

114. *Cf.* FED. R. CIV. P. 23.

115. RESTATEMENT (THIRD) § 13(1), at 165.

116. Wal-Mart 10-K, *supra* note 91, at 5.

117. *See id.* at 7 (“We earn the trust of our customers . . . by providing . . . quality merchandise and services at everyday low prices.”).

118. *Id.*

119. *Id.*

120. *Id.*

121. *See* BIANCO, *supra* note 22, at 288–89 (stating that Wal-Mart has the ability to increase living standards by increasing its wages).

goods than sticker prices indicate.¹²² Unlike other governmental benefits given to companies, such as incentives to relocate, food stamp payments are not identified as company benefits, but only as welfare for the poor. As a result, low-wage retailers are misrepresenting the prices of their goods.¹²³

The low-wage retailers know that their prices do not reflect what the customers who pay taxes are actually paying.¹²⁴ This misrepresentation is material because many customers shop at the large chains, relying on representations that the products are among the least costly. In addition, if customers understood the extent of indirect governmental subsidies to large low-wage retailers, customers might choose to shop elsewhere to express their dissatisfaction.¹²⁵

IV. Remedies

As mentioned in Part III, the remedial focus of unjust enrichment is measured by what the defendant gained. The Restatement (Third) provides that “[a] claimant entitled to restitution may obtain a judgment for money in the amount of the defendant’s unjust enrichment.”¹²⁶

A. Comparison with the Tobacco Case

The litigation against tobacco manufacturers suggests a possible approach to remedy unjust enrichment of low-wage retailers.¹²⁷ In 1994, the Mississippi Attorney General brought an unjust enrichment suit against tobacco companies.¹²⁸ The theory was that tobacco companies had been unjustly enriched by not compensating the state for the Medicaid funds it spent to care for

122. See, e.g., Rosser, *supra* note 94, at 184–85 (noting that “poverty-related externalities” such as low wages are not included in the prices of goods).

123. See WILLIAM LLOYD PROSSER & W. PAGE KEETON ON THE LAW OF TORTS § 106, at 737 (5th ed. 1984) (“[D]eceipt . . . may be based upon an active concealment of the truth. Any words or acts which convey a false impression covering up the truth . . .”).

124. See *supra* Part IV.A.1.

125. Cf. Rosser, *supra* note 94, at 179 (“Awareness of the true social costs of consumption hopefully will lead to consumer-demanded improvements [and] provide a . . . mechanism for socially minded consumers to correct for the harms of their consumption.”).

126. RESTATEMENT (THIRD) § 49(1).

127. Cf. Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 GA. L. REV. 847, 848, 852–53 (1999).

128. *Id.* at 848.

the medical needs of people harmed by tobacco products.¹²⁹ Mississippi sought “damages in an amount which is sufficient to provide restitution and re-pay the State for the sums the State has expended on account of the defendants’ wrongful conduct, with said amount to be determined at trial.”¹³⁰ While the tobacco litigation did not result in a court ruling, and although it involved people who were ill and dying as opposed to living in poverty, it did result in a substantial settlement¹³¹ suggesting the possibility of the United States government seeking relief from companies whose impoverishment of employees costs the public money.¹³²

B. Value of Gain from Subsidies

Low-wage retailers who benefit from their employees’ food stamps are costing the government public money—the amount spent on that benefit. In an unjust enrichment action, the amount of a plaintiff’s loss is not necessarily, but can be, the amount of the defendant’s gain. Section 52(1)(e) of the Restatement (Third) describes a situation in which a plaintiff’s gain can be the same as

129. An excerpt of the complaint in the tobacco suit, with deep discounters substituted for tobacco companies is illustrative. The words in capital letters are for a food stamp case; those in brackets, from the complaint:

Many of the State’s citizens who are ON FOOD STAMPS [afflicted with tobacco-related diseases] are poor, undereducated, and unable to EARN MORE THAN POVERTY WAGES [provide for their own medical care]. These citizens rely upon the State to provide FOOD STAMPS [their medical care.] which reliance results in an extreme burden on the taxpayers and the financial resources of this State. Yet, these LOW-WAGE RETAILERS ADVERTISE LOW PRICES FOR THEIR GOODS [very citizens, along with our youth, are targeted by tobacco promotional techniques.] Mississippi taxpayers have thus unofficially expended hundreds of millions of dollars in caring for their fellow citizens who LIVE BELOW THE POVERTY LINE [have and are suffering from lung cancer; cardiovascular disease; emphysema; chronic obstructive pulmonary disease; and a variety of other cancers and diseases that were and are caused by cigarettes.] . . . While the State and its various agencies and institutions are struggling to pay for FOOD STAMPS AND OTHER BENEFITS [the health care costs of tobacco], the LOW-WAGE RETAILERS THAT ADVERTISE LOW PRICES [tobacco cartel] continue[] to reap billions of dollars in profits from THEIR LOW-PRICED GOODS [the sale of cigarettes].

Id. at 853–54 (quoting Compl. ¶¶ 79–80, Moore *ex rel.* Mississippi v. American Tobacco Co. (Miss. Ch. filed May 23, 1994) (No. 94-1429)). This author does not suggest that the actions of deep discounters amount to the fraudulent misrepresentations made by the tobacco companies or their callous disregard for people’s health.

130. Complaint ¶ 83(a), Moore, *ex rel.* Mississippi v. American Tobacco Co., (Miss. Ch. filed May 23, 1994) (No. 94-1429).

131. See Rendleman, *supra* note 127, at 848.

132. Professor Rendleman has criticized the application of restitution to the tobacco litigation. *Id.* at 930.

a defendant's loss. That section provides that a defendant whose conduct is in "bad faith or [is] reprehensible" may be liable in restitution.¹³³ If so, the remedy can be "the value of unrequested benefits."¹³⁴ Although food stamp benefits to employees were not requested by low-wage retailers, the retailers take specific action knowing their workers will receive food stamps. The low-wage retailers' knowingly profiting from the impoverishment of their employees is reprehensible. Therefore, the remedy in restitution can be equal to the amount the government spends to provide food stamps for the employees of low-wage retailers.¹³⁵

In addition, wage theft is in bad faith. If an employer underpays its employees in violation of the FLSA, the employer must repay the lost wages and may have to pay double the amount.¹³⁶ If, however, the employer can show that the underpayment "was in good faith and that [the employer reasonably believed] that his [or her] act . . . was not a violation of the Fair Labor Standards Act," then the employer may be exempt from paying double the lost wages.¹³⁷ In the case of wage theft, an employer is necessarily acting in bad faith or in violation of the Act. Again, the remedy in restitution can be equal to the amount the government spends to provide food stamps for the employees of low-wage retailers.

C. Value of Direct Monetary Gain

Low-wage retailers receive a payment directly from their employees who use their food stamps to shop where they work.¹³⁸ Electronic Benefit Transfer (EBT) cards, which food stamp recipients use, may enable computation of the amount of that payment.¹³⁹ EBT cards likely carry the identity of the recipients,

133. RESTATEMENT (THIRD) § 52(1)(e), at 234.

134. RESTATEMENT (THIRD) § 52(2)(a).

135. There may also be a number of methods to gather data regarding which employees receive food stamp payments and how much they receive. One method would be to cross-reference the identities of employees of the discounters with the identities of food stamp recipients in the area of the discounters. The identity of the employees would be in the discounters' possession; the food stamp recipients, in the government's. Then one would total the amount received by each employee of a particular chain. Since food stamp payments are granted to households instead of individuals, computing the amount for each employee would involve devising a method for allocating the amount of food stamp payments to each member of the household.

136. 29 U.S.C. § 216(b) (2012).

137. 29 U.S.C. § 260 (2012).

138. *See supra* Part III.A.2.

139. *Cf.* Wal-Mart 10-K *supra* note 91, at 22 (discussing the transmission and

the amount of their purchases, and the stores from which the purchases were made, information which could be cross-referenced with the names of employees.¹⁴⁰ At minimum, the government should be able to recover from the retailers the value of food stamps the retailer received from its employees.

Conclusion

Although the public views low-wage retail chains as private companies, not funded by the government, such retailers receive not-so-indirect governmental funding. Many employees of low-wage retailers are eligible for food stamps, and the employees' ability to receive food stamps enables the retailers to keep wages low. The retailers' profitability is therefore in part a result of the government subsidies the retailers receive through food stamp payments to their employees, a program designed to help the poor. It is unjust for the low-wage retailers to profit from such payments.

The law of unjust enrichment provides that one who unjustly gains at another's expense must disgorge the gain. This Article demonstrates that these elements are met in the case of low-wage retailers paying low wages, which should entitle the government to recover their unjust gain. The public argument about the propriety of raising the minimum wage should include not just the effect of the minimum wage on employment, but also focus on whether the government is in effect supplementing the minimum wage.

storage of "cardholder data").

140. *Id.*