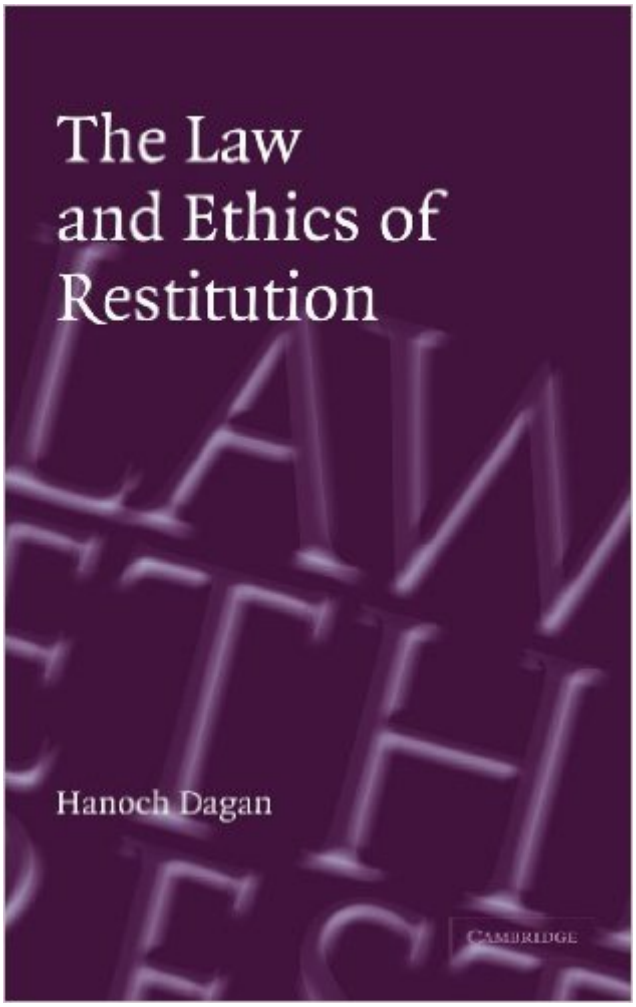
The Law And Ethics Of Restitution



Synopsis

Dagan’s book provides a dynamic and much needed account of the American law of restitution. The book reviews the existing doctrine, including the forthcoming (third) Restatement, using an ethical perspective to expose and examine critically the normative underpinnings of the core categories of restitution. Dagan also discusses some of the most controversial issues in the area, such as cohabitation, improper tax payments, and the role of constructive trusts as trumps in bankruptcy. He further tackles the recent restitution claims of slave laborers (or their descendants) against corporations that benefited from their enslavements, and of governmental bodies against injurious industries. Dagan argues that the concept of unjust enrichment is not an independent reason for restitution but, rather, serves as a loose framework, structuring the contextual application of commitments to autonomy, utility, and community in situations where either the cause of action or the measure of recovery is benefit-based. By integrating doctrinal and ethical analyses of restitution across the spectrum of restitution contexts, the author offers significant and provocative insights on existing law as well as possible reforms.

Book Information

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Customer Reviews

I highly recommend this little book of the least understood subject amongst American lawyers. Lawyers are enculturated to cite precedent for establishing arguments for their clients. Lawyers essentially commit the logical fallacy of "arguing from authority" which is denominated by the innocuous term "stare decisis." Essentially, lawyers cite cases or precedent to show that an appellate court ruled in such and such a way on a similar fact pattern and should, for purposes of

consistency, established judge made public policy and constitutional equal protection rule the same way for his client’s case. Thus, although lawyers argue by analogy, they ultimately relie on arguing from authority: arguing that their clients case is, for the most part, or with regard to relevant points, is the mirror image of a case that involved a ruling that favors their client. However, restitution is fundamentally "doctrinal," not precedential. As in equity, you don’t cite cases for precedent or for authority. Instead, if you cite cases at all, you cite them for useful clarifications of doctrine. Indeed, as in conflict of laws, you cite quite a bit of legal scholarship. The author should have made it clear that "unjust enrichment" and "resitution" are synonyms. Moreover, he failed to distinguish "remedies" from the "substantive." Substantive means establishing that somebody was enriched, and that that enrichment was unjust. The latter predicate is essential without which your client has no case. The remedial element reduces to two: constructive trust (for equitable remedies) or quasi-contract (for "money" or legal remedies). The book also seems shallow with respect to its understanding of the moral foundation for restitution.

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