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RESTATING RESTITUTION: A CASE OF CONTEMPORARY COMMON LAW CONCEPTUALISM

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ABSTRACT

The American Law Institute’s Restatement (Third) of Restitution provides one of the most interesting expressions of contemporary legal conceptualism. This paper explores the theory and practice of post-realist conceptualism through a review and critique of the Restatement. At the theoretical level, the paper develops a typology of different forms of conceptualism and shows that the Restatement has more in common with the high formalism of the nineteenth century than with contemporary modes of private law discourse. At the level of substantive doctrine, the paper explains why labels, in fact, make a difference and assesses which recoveries are more (and less) likely under the Restatement’s scheme. The final section returns to consider why the Restatement reprises the jurisprudence of classical formalism. I suggest that the mythos of legal conceptualism is necessary for introducing a new field that claims to reflect foundational principles of the common law’s system of private ordering. Further this mode of discourse helps overcome the dissonance of creating a new field of law in a work that purports to restate existing doctrine.

I. INTRODUCTION

It has been widely observed that many of the so-called core doctrines of the common law are actually the inventions of legal scholars in the late nineteenth century.¹ Before that time, the law was organized around procedures embedded in the medieval forms of action rather than around substantive categories such as contract and tort. Toward the end of the nineteenth century, legal theorists reorganized the existing rules, changing some and providing updated rationales for others, and created a more systemic approach to law based on rationalized legal principles.² This systematization program has had a considerable impact on the structure of

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2. See id.
legal thought as contemporary private law doctrine is still charted largely on nineteenth century coordinates.

Conceptualism is the central analytic tool associated with this period. While the term sustains many definitions, central to all is the idea that numerous lower-level rules (the individual rules of law used to decide cases) are connected to each other through a legal concept that is more general and abstract than the rules themselves. For example, the specific rule against reliance damages in contract reflects the general concept that a contract enforces the agreement between the parties. The doctrine of duress might be explained along similar lines, as it refuses to enforce an agreement whose consent is illusory. Overall, conceptualism is a useful tool for developing a systematic account of law because it shows how a multitude of individual cases can be subsumed under a single organizing principle. Furthermore, the conceptual account portrays law as a series of interrelated decisions that are connected through a common analytical basis. In turn, these concepts are derived through a scientific study of the law's raw material: reported cases.

Conceptualism is also said to promote predictability. Even the most comprehensive legal system cannot have a rule that covers every case, and if tried it would result in hundreds of conflicting and overlapping rules. Conceptualism solves this problem by claiming that the concept, together with rigorous legal analysis, can produce the correct result to every legal question, even if no specific rule had been previously stated. The legal concept is thus greater than the sum of the underlying parts because it ensures that there are no (or very few) gaps in the system. This serves the values of legal determinacy, the rule of law and judicial restraint.

Since the early decades of the twentieth century, however, this version of classical legal thought has been subject to successive rounds of criticism by generations of scholars. Legal realism, conceptualism's chief antagonist, expresses deep suspicion towards interlocking systems of legal rules, arguing that "judges respond primarily to the facts of the case, rather than to the legal rules and reasons." Realists further demonstrated that the concepts were easily manipulated, so that a skillful advocate could deduce a number of conflicting rules from a single general concept. In one way or another, realists believe that the actual bases of legal decisions lie outside the formal boundaries of the law, and that law is far more influenced by economic, political and social factors than the conceptualist vision is willing to admit. In time, the realist position became the orthodoxy in academic circles and classical conceptualism ceased to be a respectable mode of legal argument.

Of late, the common law of restitution, alternately called the law of unjust enrichment, has entered a second wave of conceptualization. If res-

Restitution sounds unfamiliar, fear not. Until a few years ago even Lance Liebman, the former Dean of Columbia Law School and director of the American Law Institute ("ALI"), was not quite sure what it meant either. This lack of awareness is often blamed on the fact that despite some initial efforts, restitution, at least in the United States, was largely forgotten over the latter half of the twentieth century. Thus, despite initial stirrings in the late nineteenth and early twentieth centuries, the field called "restitution" is hardly recognizable within American law.


6. Although proving that something does not exist is difficult, it is quite apparent that restitution has not grabbed the attention of the United States academy. Since 1980, I am aware of only one book published on the American law of restitution—written by an Israeli law professor and published by an English publisher (Cambridge University Press)—which itself contains far more non-U.S. references and materials than a comparative work on torts or contracts. See generally Hanoch Dagan, The Law and Ethics of Restitution (2004). The lone treatise is a product of the 1970s and reflects the scholarly modality of a different era. See generally George E. Palmer, The Law of Restitution (1978). And while a second Restatement of Restitution was started in the mid 1980s, it was aborted after only two drafts were published. See Restatement (Second) of Restitution (Tentative Draft No. 2, 1984); Restatement (Second) of Restitution (Tentative Draft No. 1, 1983).

Furthermore, no more than a handful of the 170+ American law schools offer a course devoted exclusively to restitution, nor, should a school want to offer such a course. Also, there is no current casebook specifically addressing this field.


This output must be compared to the explosion of commonwealth restitution scholarship in the past twenty years. Recent treatises dealing with this subject, all published outside the United States, include: Jack Beatson, The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution (1991); Peter B.
This, however, is changing. Following developments in the Commonwealth and Europe, there is a push for the American common law to recover the field of restitution. Leading this effort is the ALI, through the emerging drafts of the Restatement (Third) of Restitution and Unjust Enrichment. The Restatement's central goal is to reestablish restitution as a doctri-


7. At present, the drafts of the Restatement include the Restatement (Third) of Restitution and Unjust Enrichment (Tentative Draft No. 5, 2007); Restatement (Third) of Restitution and Unjust Enrichment (Tentative Draft No. 4, 2005); Restatement (Third) of Restitution and Unjust Enrichment (Tentative Draft No. 3, 2004); Restatement (Third) of Restitution and Unjust Enrichment (Tentative Draft No. 2, 2002); Restatement (Third) of Restitution and Unjust Enrichment (Tentative Draft No. 1, 2001); and Restatement (Third) of Restitution (Discussion Draft). In each draft, the ALI is careful to note that:

As of the date of publication, this Draft has not been considered by the members of The American Law Institute and does not represent the position of the Institute on any of the issues with which it deals. The action, if any, taken by the members with respect to this Draft may be ascertained by consulting the Annual Proceedings of the Institute, which are published following each Annual Meeting.

RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT 1 (Tentative Draft No. 4). As used in this article, the term "Restatement" represents the views of tentative drafts which have not, as of yet, received the ALI's sanction. Nevertheless, participants at the ALI meetings have noted that Kull's views face little to no opposition from the membership. See Mark Gergen, The Restatement Third, Restitution
nal category like contract and tort; a category that itself can be a source of legal rights and liabilities. According to the Restatement, liability can be said to lie in restitution, much as we currently speak of liability arising in contract and tort.

The Restatement reprises the arguments of the nineteenth century, claiming that while the name might be new, the idea of restitution has existed all along, even if no one quite noticed it. Thus the Restatement claims that a large number of doctrines going by the names of quasi contract, quantum meruit, implied contracts, constructive trusts, equitable liens and equitable subrogation, as well as several others, are in fact unified by a single idea known as unjust enrichment. Going forward, courts should expressly proclaim that they are dealing with restitution issues and decide these cases according to the rules and principles of restitution.

The Restatement project raises several questions. First, how exactly does a group of scholars go about rediscovering a legal field? Where has it been hiding? Second, what does it mean for the law to be conceptualized and rationalized? How is this different than the usual process of grounding decisions in precedent and logical argument? Third, what is the practical impact of the Restatement project? Does conceptualization make any difference, or is it simply a matter of putting a different label on an existing doctrine? Fourth, why do we all of a sudden need to recover restitution now? And finally, why does the law of restitution warrant a return to the mode of legal thinking that has been out of fashion for most of the twentieth century?

This article answers these questions in six parts. Part II reviews the work product of the Restatement and explains how it attempts to transform the mass of seemingly unrelated doctrines into a unified conceptual field. Part III evaluates the Restatement's analysis and explores the assumptions underlying the Restatement's legal conceptualism. Part IV examines the Restatement's jurisprudence in terms of other expressions of post-realist conceptualism. Part V turns to assess the impact of conceptualization on substantive doctrine. Part VI concludes by examining why, after nearly a century in exile, classical legal thought makes a comeback in the Restatement of Restitution.

II. THE RESTATEMENT PROJECT

How does the Restatement go about recovering the law of restitution? A review of the emerging Restatement drafts and the scholarly writings of its principal architect, Professor Andrew Kull, reveals four basic moves. First, restitution is shown to be a body of positive law that accounts for recoveries not captured by traditional contract and tort doctrine. Second, resti-

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8. See Lance Liebman, Forward, RESTATEMENT (THIRD) OF RESTITUTION ix-xi (Discussion Draft).

and Unjust Enrichment at Midpoint, 56 CURRENT LEGAL PROBS. 289, 291 n.10 (2003) [hereinafter Gergen, Restatement at Midpoint].
tution is defined in terms of unjust enrichment, which provides the conceptual underpinning for a large number of existing doctrines. Third, the constituent sub-doctrines are restructured to accord with unjust enrichment principles. Finally, doctrines that cannot be made to conform are expelled from restitution's orbit.

A. Restitution as a Substantive Field

1. Background

While elements of restitution have been around at least since Lord Mansfield's time, its modern incarnation is largely the product of scholarship of the late nineteenth and early-to-mid-twentieth centuries. Although William Keener first published a treatise on the law of quasi contract in 1893, the term "restitution" is generally credited to Professors Warren Seavey and Austin Scott, the authors of the first Restatement on Restitution. Seavey and Scott combined the learning on quasi contracts with the constructive trust and other remedies stemming from equity. They claimed:

In bringing [a number of recurring] situations together under one heading, the [American Law] Institute expresses the conviction that they are all subject to one unitary principle which heretofore has not had general recognition. In this it has recognized the tripartite division of the law into contracts, torts, and restitution, the division being made with reference to the purpose which each subject serves in protecting one of three fundamental interests.

Seavey and Scott further argued that restitution


10. Seavey and Scott seemed aware that they were introducing the term to the world. See Warren A. Seavey & Austin W. Scott, Restatement, 54 L.Q.R. 29, 31 (1938); see also Peter B. Birks, A Letter to America: The New Restatement on Restitution, in Global Jurist Frontier (2003) (discussing naming of First Restatement). But see generally Kull, Ames and Unjust Enrichment, supra note 9 (arguing that Ames deserves primary credit for recognizing unity of restitution law).


12. Seavey & Scott, supra note 10, at 31. In the first Restatement cases are organized under the following headings: Mistake, Coercion, Benefits Conferred at Request, Benefits Voluntarily Conferred Without Mistake, Coercion or Request, Benefits Lawfully Acquired Which Are Not Conferred by the Person Claiming Restitution, and Benefits Tortuously Acquired. See id.
is a third [branch of the common law], sometimes overlapping with the others, but different in its purpose. This third postulate, which underlies the rules assembled in the Restatement under the heading "Restitution," can be expressed as thus: A person has a right to have restored to him a benefit gained at his expense by another, if the retention of the benefit by the other would be unjust.13

Despite the efforts of the first Restatement and those of mid-century American scholars, most notably, John Dawson’s Unjust Enrichment, George Palmer’s treatise, The Law of Restitution and John Wade’s casebook, Cases and Materials on Restitution,14 restitution law and scholarship has largely disappeared from the American scene.15 While the law of quasi contracts and constructive trusts is undeniably part of American law, the idea that restitution is its own body of law with policies and principles that are distinct from contract and tort has faded from the forefront of American jurisprudence.

The modern Restatement looks to revive, and in many ways improve upon, these earlier efforts. Restitution is needed because “orthodox tort” and contract law do not account for a number of established doctrines.16 Unjust enrichment “describes[s] the fundamental grounds [for] liability in restitution,”17 and “restitution (meaning the law of unjust or unjustified enrichment) is itself a source of obligations, analogous in this respect to tort or contract.”18 By using a slight yet important shift in language, however, the new Restatement pushes the conceptual account of restitution one step further. In the first Restatement, “restitution” is used as a concrete noun: “A person who has been unjustly enriched at the expense of another is required to make restitution to the other.”19 Here “restitution” signifies the nature of the payment. The new Restatement, by contrast, uses the term as an abstract noun where restitution is presented as the source of legal liability, thus, “[a] person who is unjustly enriched at the expense of another is liable in restitution to the other.”20

13. Id. at 32.
14. JOHN W. WADE, CASES AND MATERIALS ON RESTITUTION (2d ed. 1966). The first edition of this casebook was published in 1958.
15. See Saiman, supra note 5.
16. See Andrew Kull, Rationalizing Restitution, 83 CAL. L. REV. 1191, 1192-93 (1995) [hereinafter Kull, Rationalizing Restitution]; see also RESTATEMENT (THIRD) OF RESTITUTION § 1 cmt. a (Discussion Draft, 2000).
17. RESTATEMENT (THIRD) OF RESTITUTION § 1 cmt. b (Discussion Draft).
18. Id. § 1 cmt. h.
19. RESTATEMENT (FIRST) OF RESTITUTION § 1 (1937) (emphasis added).
20. RESTATEMENT (THIRD) OF RESTITUTION § 1 (Discussion Draft) (emphasis added). Both of these formulations contrast sharply with the language of the aborted Restatement (Second) of Restitution that read: “A person who receives a benefit by reason of an infringement of another person’s interest, or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent
2. Positivizing the Law

Bringing restitution into the common law fold involves convincing courts that it is a legitimate area of the law with defined rules that can be predictably applied. The Restatement operates both against ignorance and indifference to restitution on the one hand, and ambivalence, or even hostility, on the other. The hostility is predicated on the assumption that restitution is little more than accumulated bits of discretion garbed as doctrine. Despite the Restatement's dismissal, however, this view traces back to the birth of unjust enrichment under Lord Mansfield, who held that “[i]n one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.”21 Inevitably, the association of unjust enrichment with natural law and equity, together with the historical fact that at least parts of the law of restitution trace their origin to courts of equity (and the subsequent mis-association of the equity courts as standardless), generated an aversion to restitution and led to its banishment to the nether regions of the common law.22

The Restatement, by contrast, presents restitution as a positivized, rule-based legal field. Its opening section claims that “instances of unjustified enrichment are both predictable and objectively determined” in part “because the justification in question is not moral but legal.”23 In support, the Restatement points to several morally questionable transactions and, with a tinge of pride, asserts that the law of restitution offers no re-

unjust enrichment.” Restatement (Second) of Restitution § 1 (Tentative Draft No. 1, 1983).

Two important differences emerge. First, the Restatement (Second) envisions restitution as based on plaintiffs' losses rather than the exclusive focus on defendants' gains mandated by the first and third Restatements. Second, the Restatement (Second)'s definition stresses restitution's remedial rather than substantive role. Restitution is described as a remedy to enforce rights generated elsewhere (presumably by tort or contract) rather than as its own source of substantive rights and duties coequal to tort and contract.


22. For example, a recent decision by the Alabama Supreme Court held that: The doctrine of unjust enrichment is an old equitable remedy permitting the court in equity and good conscience to disallow one to be unjustly enriched at the expense of another. . . . A claim for restitution is equitable in nature, and permits a trial court to balance the equities and to take into account competing principles to determine if the defendant was unjustly enriched. Consequently, the success of a claim for unjust enrichment depends on the particular facts and circumstances of each case. Scrushy v. Taylor, No. 1050564, 2006 WL 2458818, at *11 (Ala. Aug. 25, 2006) (internal citations and quotation marks omitted). A scholarly treatment of this issue can be found in Emily Sherwin, Restitution and Equity: An Analysis of the Principle of Unjust Enrichment, 79 Tex. L. Rev. 2083 (2001) (discussing various definitions of "equity" as related to law on unjust enrichment).

23. Restatement (Third) of Restitution § 1 cmt. b (Discussion Draft).
course. Similarly, the Restatement's conceptual formality is designed to ensure that restitution follows precise deductive techniques that restrict the imposition of judicial will on transacting parties.

3. Terminological Clean-Up

For all of the cheerleading for the coherent, positive view of restitution, deep confusion and uncertainty remain. Terminology in this area is notoriously slippery and, considering the Restatement's definition, wildly misleading. In ordinary usage, "restitution" means giving something back. A thief who returns stolen property, money returned when a contract is unwound, and returning money paid by mistake are all acts of restitution: in each case the plaintiff is restored to his original position. The Restatement, however, posits that restitution is defined as unjust enrichment—a principle that focuses exclusively on defendants' unjustified gains rather than on plaintiffs' losses and desire for compensation. Upon further examination, however, "unjust enrichment" is only slightly more precise. The term begs for an external baseline to assess the justness of a given transaction. Indeed the Restatement notes that the favored locution is actually "unjustified enrichment," a term borrowed from Roman law that conveys that the transaction is unjustified as a matter of positive law rather than resting on amorphous notions of morality and policy. Despite good arguments for abandoning this terminology, the Restatement concludes that "restitution" and "unjust enrichment" are too entrenched in the American legal consciousness to be removed at this point.

Terminological reform extends beyond the main subject heading. The Restatement collects numerous doctrines from all over the common law landscape and locates them within the restitution/unjust enrichment framework. By way of example, actions for recovery of payments remitted under a mistake of fact have often been explained in terms of quasi contract and money had and received. Similarly, actions to reform or rewrite property deeds premised on mistakes (i.e. the deed records a different parcel than buyer or seller agreed to exchange) are typically un-

24. See id. § 1 cmt. b ("In reality, the law of restitution is very far from imposing liability for every instance of what might plausibly be called unjust enrichment."); see also id. illus. 1-2.
26. RESTATEMENT (THIRD) OF RESTITUTION § 1 cmt. b (Discussion Draft).
27. Id. This is the term favored by many non-American restitution scholars. See id. § 1 reporter's note b. A more complete account of these terms is available in Francesco Giglio, A Systematic Approach to 'Unjust' and 'Unjustified' Enrichment, 23 OX. J. LEGAL STUD. 455 (2003).
28. See RESTATEMENT (THIRD) OF RESTITUTION § 1 reporter's note b (Discussion Draft). ("The term 'unjust enrichment' is too firmly fixed as the keystone of American restitution to be replaced without harm to the structure. Given a free choice, 'unjustified enrichment' might well be preferable. . . ."); see also Kull, Rationalizing Restitution, supra note 16, at 1212-13.
derstood as "actions in equity" appended to the law of property.30 The *Restatement* resists this unprincipled classification based on the outmoded forms of action or the jurisdictional quirks of the pre-modern common law. Instead, it describes each of these doctrines as the law's response to prevent unjust enrichment that would inevitably occur if no remedy was offered.31

The law of restitution is thus comprised of a litany of doctrines going under various names and guises. These include elements of quasi contract, contract implied-in-law, quantum meruit, assumpsit, constructive trust, replevin, equitable lien and subrogation, recession, reformation and so on.32 While the *Restatement* is quick to jettison this archaic terminology, courts have not quite caught up.33 Most notably in this regard are references to "equity," "quasi contract," "implied contract," "quantum meruit" and "constructive trust," terms that the *Restatement* consciously omits but that remain the operative terminology in most cases presenting unjust enrichment issues.34

Surveying the literature on restitution in 1968, Professor John Wade found that the *American Digest System* (the precursor to the West Key System) had no entry for "unjust enrichment," "quasi contract" or "restitution," and that one had to look to more than twenty-five entries to cobble together the rules that the *Restatement* presents as restitution.35 While in the succeeding years the situation has been somewhat ameliorated, the core of his insight remains intact.

### B. Restitution as Unjust Enrichment

The *Restatement*'s guiding conceptual principle is:

>[T]he law of restitution be defined exclusively in terms of its core idea, the law of unjust enrichment. By this definition it would be axiomatic (i) that no liability could be asserted in restitution other than one referable to the unjust enrichment of the defen-

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31. See Restatement (Third) of Restitution and Unjust Enrichment § 12 cmt. a (Tentative Draft No. 1); see also id. § 6 illus. 2.

32. See, e.g., 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES §§ 4.2-4.3 (2d ed. 1993).


34. See, e.g., PALMER, supra note 6, § 1.1 (Supp. 2006) (citing hundreds of cases displaying terminological and conceptual confusion).

dant, and (ii) that the measure of recovery in restitution must in every case be the extent of the defendant's unjust enrichment.36

The insistence that unjust enrichment provides the basis for restitution is quite exacting. "In the absence of a benefit to the defendant, there can be no liability in restitution; nor can the measure of liability in restitution exceed the measure of the defendant's enrichment."37 Moreover, "cases[ ] inconsistent [with these principles of restitution] will henceforth require either a different rationale or a different result."38

This approach does not have the support of leading scholars.39 Even the first Restatement, in many ways the model for the latest incarnation, takes a less dogmatic view, holding "a person who has been unjustly deprived of his property or its value or the value of his labor may be entitled to maintain an action for restitution against another although the other has not in fact been enriched thereby."40 This formulation has been repeated by several courts41 and affords the possibility of restitution outside of unjust enrichment. Similarly, standard compilations of black letter doctrine define restitution as "compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to, another," which also runs contrary to the Restatement's theory.42

The disconnect between the Restatement and the law it purports to restate extends, however, beyond the term "restitution." Under the unified scheme, quasi contract/quantum meruit present claims for unjust enrich-

36. Kull, Rationalizing Restitution, supra note 16, at 1196; see also RESTATEMENT (THIRD) OF RESTITUTION § 1 (Discussion Draft, 2000) ("A person who is unjustly enriched at the expense of another is liable in restitution to the other."). For a discussion of the evolution of the term "restitution," see supra notes 16-20 and accompanying text.
37. RESTATEMENT (THIRD) OF RESTITUTION § 2 cmt. d (Discussion Draft).
40. RESTATEMENT (FIRST) OF RESTITUTION § 1 cmt. e (1937) (emphasis added).
42. 66 AM. JUR. 2D Restitution § 1 (2004) (emphasis added); see also RESTATEMENT (SECOND) OF RESTITUTION ch. 1, introductory note (Tentative Draft No. 1, 1983) ("The central idea is the conjunction of unjust enrichment on the one side and loss or grievance on the other . . . [T]he liability in restitution depend[s] in part on the wrongful acquisition of gain and in part on [the] harm or loss wrongfully imposed." (emphasis added)).
ment that do not depend on the presence of an actual (express) contract. As several courts have pointed out, however, the very term "quantum meruit" means "as much as he has deserved." This orientation naturally directs the court's thinking towards plaintiff's frustrated expectations rather than defendant's enrichment. Further, the association with implied contracts has led several courts to assert that a claim under quasi contract requires a factual investigation as to whether plaintiff and defendant acted in a manner as to imply a contract; a view at odds with the Restatement's position that unjust enrichment creates obligations mandated by law. The Restatement assumes that these disagreements are only skin-deep; that despite muddled terminology, courts essentially adhere to the principles of restitution as unjust enrichment. As is often the case, however, terminological confusion belies a deeper confusion of ideas.

Leading scholarship is also somewhat skeptical of the Restatement's assumption that restitution can be reduced to precise and positive rules. To many observers, the landscape of restitution is a vast expanse that lacks set boundaries or fixed reference points. One noted scholar has observed that "[r]estitution is an unusually flexible body of case law . . . enabling judges and juries to consider many cases on their merits unhindered by


44. Under Professor Kull's theory, quasi contract is a claim in unjust enrichment that in no way depends on the existence of a contract. Courts, however, often state that quasi contract/quantum meruit permits recovery on the basis of an implied promise to be paid. See, e.g., Great Plains Equip., Inc. v. Nw. Pipeline Corp., 979 P.2d 627, 640 (Idaho 1999). For a particularly muddled locution, see Sack v. Tomlin, 871 P.2d 298, 302 (Nev. 1994) ("The doctrine of quantum meruit generally applies to an action for restitution . . . which is founded on an oral promise on the part of the defendant to pay the plaintiff as much as the plaintiff reasonably deserves . . . "). For further examples regarding the confusion between unjust enrichment and quantum meruit/quasi contract, see PALMER, supra note 6, § 1.1 n.3-4 (Supp. 2006). For a discussion of the Restatement's gerrymandering of benefits in emergency services cases to maintain its conceptual modeling, see infra notes 110-32 and accompanying text.

45. Such is the law in Maine. See Forrest Assoc. v. Passamaquoddy Tribe, 760 A.2d 1041, 1045 (Me. 2000) (stating that existence of quasi contract/quantum meruit is question of fact held to discretion of trial court and reviewed for clear error).

46. A quick perusal of the first fifty pages (the additions to § 1.1) of the latest cumulative supplement to Palmer's The Law of Restitution demonstrates the depth and breadth of the conceptual and terminological confusion surrounding restitution/unjust enrichment. See, e.g., PALMER, supra note 6, § 1.1 (Supp. 2006); id § 1.1 (Supp. No. 2 2007).

47. Professor Doug Rendleman designates this perspective as the "broad view" of restitution, which he contrasts with the narrow view. See Doug Rendleman, Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?, 93 Ga. L. Rev. 847, 887-89 (1999) [hereinafter Rendleman, Mississippi Tobacco Settlement].
doctrine." A leading mid-twentieth century restitution scholar, John Dawson, found that "the most obvious statement about the American law of restitution is that it lacks any kind of system." More contemporary scholars note that "the law of restitution is characterized by a heavy dependence on general principles," and that "unjust enrichment is an indefinable idea in the same way that justice is indefinable." Similarly, casebooks on restitution are really casebooks on remedies whose primary topics are the mechanics and process of injunctions, declaratory judgments, attorney's fees and calculation of damages. This modeling (or lack thereof) cuts against the rationalized conception and reinforces the view that restitution is a remedy imposed by courts as circumstances mandate, rather than a substantive source of rights courts are required to enforce.

C. Restitution and Tort

While nearly all restitution scholars agree that unjust enrichment presents a substantive basis of liability, they disagree as to whether restitution also contains elements that are solely remedial—that is, remedies that piggyback on other sources of common law liability, most typically tort and

49. JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 111 (1951).
50. 1 Dobbs, supra note 32, § 4.1.
51. Palmer, supra note 6, § 1.1.
52. See, e.g., Weaver et al., Remedies: Cases, Practical Problems and Exercises (2004). Restitution is the fifth chapter in this book that discusses injunctions, equitable remedies, declaratory judgment and issues in damages measurement. A similar structure is found in Schoenbrod et al., Remedies: Public and Private (3d ed. 2002). This book's main titles (in order) are: Injunctions, Declaratory Judgments, Criminal and Civil Sanctions, Damages, Restitution, Collection of Money Judgments, and Conduct of the Plaintiff and Attorney's Fees. Interestingly, in their Note on Approaching Restitution Cases, the authors endorse the Restatement's theory that restitution is a branch of the common law. See id. at 724-28. This discussion is relegated, nevertheless, to eighty pages of a roughly thousand page casebook on remedies.

The situation is a bit more balanced in Doug Rendleman, Remedies: Cases and Materials (6th ed. 1999). Rendleman's chapter on "Unjust Enrichment—Restitution," opens with a faithful recitation of the Restatement's orthodoxy, and the book's organization stresses that restitution is a branch of substantive liability. See id. at 313. Nevertheless, the discussion is situated in a casebook devoted to defining remedies delineated by other branches of private law. See id.

53. One can learn a lot about a doctrine from the company it keeps. As implemented at the Harvard Law School Library, the Library of Congress classification system places substantive restitution at KF 1244, between insurance law and tort. But KF 1244 contains only the Restatement and Palmer's treatise on restitution and Dagan's new book. The casebooks on remedies/restitution are classified as remedies casebooks and placed at the tail end of the KF numbering scheme, surrounded by works on attorney's fees, declaratory judgments, garnishments, federal habeas practice and standards of appellate review.
contract.\textsuperscript{54} The \textit{Restatement}'s position is unequivocal: restitution is purely substantive. Anytime the law imposes a restitutorial remedy, the defendant has necessarily been unjustly enriched.

An alternative view is presented by Professor Douglas Laycock. He writes:

Restitution should . . . be defined as that body of law in which (1) substantive liability is based on unjust enrichment, (2) the measure of recovery is based on defendant's gain instead of plaintiff's loss, or (3) the court restores to plaintiff, in kind, his lost property or its proceeds. Restoration in kind includes remedies that reverse transactions, such as rescission.\textsuperscript{55}

For Laycock, restitution is an amalgamation of two distinct legal concepts, one substantive (like contract and tort) and the other remedial (method to recover damages).\textsuperscript{56} "Both usages are part of any complete definition of restitution."\textsuperscript{57} Specific restitution (the remedial element) is "part of the core concept of restitution" that is "conceptually equal to the avoidance of unjust enrichment."\textsuperscript{58}

In Laycock's account, if a thief steals $100 and through shrewd investing converts it into $500, the plaintiff's substantive claim is liability for conversion of the $100 in tort. Because getting back $500 is more attractive than the mere return of the $100, however, plaintiff will opt for restitution as his remedy for the tort. The same is true where plaintiff elects "rescission and restitution" as the remedy for a breach of contract claim. The typical case is where the prospective seller of goods rescinds the contract, only to find that the market value of the goods at the time of trial is lower than when the contract was formed. In this case, the plaintiff will want to rewind the transaction to the \textit{status quo ante} and receive his initial purchase price rather than the price of the now-devalued goods. In these cases restitution has no independent substantive basis, but simply serves as plaintiff's elected remedy for liability generated in tort and contract.

Professor Kull's main criticism of Laycock is that the "core concept" of restitution is comprised of two conceptually incommensurate parts, one substantive and the other remedial, and that Laycock's position "obscures the underlying unity of restitution's reason and function across all of its factual settings."\textsuperscript{59} Rather, Professor Kull argues that every case of conver-

\textsuperscript{54} Compare, e.g., 1 \textsc{Dobbs}, supra note 32, § 4.1(2) (outlining substantive side of restitution), \textit{with id.} § 4.1(4) (describing remedial side of restitution), and \textsc{Peter Birks \& Robert Chambers}, \textsc{The Restitution Research Resource} vii (1994).

\textsuperscript{55} Laycock, \textit{Restitution}, supra note 39, at 1293.

\textsuperscript{56} Subpart (1) is substantive and largely tracks Kull's views. Subpart (3) is remedial and is the source of the Kull/Laycock disagreement. Laycock is unclear as to how subpart (2) fits in. It seems to straddle both categories. \textit{See id.} at 1285-90.

\textsuperscript{57} \textit{Id.} at 1279.

\textsuperscript{58} \textit{Id.} at 1280.

\textsuperscript{59} Kull, \textit{Rationalizing Restitution}, supra note 16, at 1216, 1226.
sion results in the emergence of two separate bases of liability: one in tort and the other in restitution. While the labeling is irrelevant in most cases (since plaintiff gets his $100 back in any event), where disgorgement of further profits is available, plaintiff is actually suing in restitution. The commitment to presenting restitution as a coequal branch of the common law forces Kull to argue that restitution is in play in every conversion case, even though the litigants and courts focus exclusively on tort elements.

The response to Laycock's restitution-as-remedy for contract argument is simpler. The Restatement claims that it is a mistake (facilitated by the imprecision of the term restitution) to assume that the remedy titled "rescission and restitution" has anything to do with the branch of the common law dealing with restitution/unjust enrichment. Returning the purchase price to the non-breaching plaintiff is simply a remedy for contract, just as replevin is a remedy for tort. Because there is no conceptual or analytical connection to unjust enrichment, instances of rescission and restitution are understood as purely contractual remedies. Their inclusion in the Restatement of Restitution is simply a concession to conventional parlance.

D. Restitution and Contract

Fundamentally, restitution's goal of unwinding transactions runs directly counter to the central aim of contract law—the enforcement of promised exchanges. At the theoretical level, one of the Restatement's central goals is to distinguish restitution from contract. In fact, when com-

60. See id. at 1225-26; see also Restatement (Third) of Restitution and Unjust Enrichment ch. 5, introductory note (Tentative Draft No. 4, 2005).
61. See Restatement (Third) of Restitution and Unjust Enrichment ch. 5, introductory note (Tentative Draft No. 4); Kull, Rationalizing Restitution, supra note 16, at 1225.
62. In Kull's own words, "[t]he confusion surrounding the equivocal meanings of the word 'restitution' is at its most dense in the present context." Restatement (Third) of Restitution and Unjust Enrichment ch. 4, topic 2, introductory note (Tentative Draft No. 3, 2004).
63. Despite Professor Kull's rejection of the idea that these contract remedies are related to the "true" law of restitution, as the Reporter to the Restatement (Third) he does not feel comfortable excluding these doctrines, and thus they appear as Sections 37-38 in Tentative Draft No. 3. Their inclusion is ultimately justified by the fact that "readers will look for these rules in a Restatement of Restitution," and a "candid ... acknowledge[ment] that we have inherited an imperfect terminology." Restatement (Third) of Restitution and Unjust Enrichment ch. 4, topic 2, introductory note (Tentative Draft No. 3).
64. See Kull, Rationalizing Restitution, supra note 16, at 1219-22; see also Restatement (Third) of Restitution and Unjust Enrichment ch. 4, introductory note (Tentative Draft No. 3). This view is hardly uncontroversial. See Restatement (Second) of Contracts §§ 344-45, 373 cmt. a (1979); id. at ch. 16, topic 4, introductory note; Andrew Kull, Disgorgement for Breach, the "Restitution Interest", 79 Tex. L. Rev. 2021, 2029-44 (2001) (analyzing disagreement between Professor Kull and Restatement (Second) of Contracts regarding classification of restitution as remedy for breach of contract).
pared to English and other Commonwealth accounts of restitution, the defining feature of the Restatement’s presentation is its effort to distinguish restitution from contract and show how the two bodies of law can coexist and even reinforce each other.65 Thus, the Restatement writes: “Where a benefit is conferred within the framework of a valid and enforceable contract, the recipient’s liability to make compensation is fixed exclusively by the contract.”66 Similarly, “[c]ontract is incomparably superior to restitution as a means of regulating most voluntary transfers because it eliminates, or minimizes, the fundamental difficulty of valuation.”67 Hence, “[c]onsiderations of justice as well as efficiency require, therefore, that voluntary transfers be made pursuant to contract whenever reasonably possible.”68 In the Restatement, unjust enrichment is a backup ground of liability that melts away in the face of a valid contract.

Under the Restatement’s view, contract and restitution are like oil and water. As Professor Kull writes:

[W]here a benefit is conferred pursuant to a valid contract, the presence or absence of unjust enrichment—the starting point of analysis in restitution—can only be determined by reference to the parties’ bargain. Because a voluntary agreement fixes the baseline of enrichment as between the parties, the existence of a valid contract to govern a particular transaction normally establishes a boundary beyond which liability in restitution cannot extend.69

This view works its way into the black letter rule of section two, which finds that “transactions that give rise to liability in restitution...take place outside the framework of an enforceable contract, or otherwise without the effective consent of one or both parties.”70 The Restatement’s solution is a clas-

65. See Mark Gergen, Restitution and Contract: Reflections on the Third Restatement, 13 RESTITUTION L. REV. 224, 224-25 (2004) [hereinafter Gergen, Restitution and Contract] (noting that Restatement’s commitment to independence of contract law and its preference over restitution claims is significantly stronger than position of Peter Birks and other leading commonwealth scholars); Steve Hedley, Restitution: Contract’s Twin, in FAILURE OF CONTRACTS 247, 272 n.136 (Francis Rose ed., 1997) (pointing out that Professor Kull from amongst all restitution scholars insists on primacy of contract over restitution); see also Andrew Kull, Restitution and the Noncontractual Transfer, 11 J. CONT. L. 93 (1997) [hereinafter Kull, Restitution and the Noncontractual Transfer].

66. RESTATEMENT (THIRD) OF RESTITUTION § 2 cmt. c (Discussion Draft, 2000). “[T]he application of restitution principles to contractual exchanges is exclusively to the consequences of performance under ineffective or interrupted agreements.” Id.

67. Id. § 2 cmt. f.

68. Id.


70. RESTATEMENT (THIRD) OF RESTITUTION § 2(2) (Discussion Draft) (emphasis added). Comment c adds:

[The] absence of agreement, or lack of effective consent to the transaction by one or both parties, furnishes the common analytical theme unit-
sic expression of the will theory of contract. Unjust enrichment must be unjust. If the parties agreed (contracted) to the transaction, however, it is by definition just, thus affording plaintiff no claim in restitution.

The Restatement uses the contract/no contract divide to explain a number of results. For example Section 5 (invalidating mistake) presents several scenarios, two of which are repeated here. In Case 1:

A’s life is insured with B Company for $5,000. C is the named beneficiary. The body of a shipwreck victim is officially identified as that of A. Neither B nor C questions the accuracy of the identification. On receipt of formal proof of A’s death, B pays C $5,000. A is later discovered alive. B’s payment is the result of invalidating mistake.

In Case 2:

Same facts as [Case 1], except that B agrees to pay $1,500 now, to be retained by C in any event, with the balance of $3,500 in two years’ time if A has not subsequently reappeared. Shortly after B’s initial payment to C, A is discovered alive. The terms of the transaction constitute an express allocation between the parties of the risk that payment under the policy is not in fact due. B’s payment of $1,500 to C is not the result of invalidating mistake as defined [in the Restatement].

This distinction is justified because in Case 2 “[t]he terms of the transaction constitute an express allocation between the parties of the risk that payment under the policy is in fact not due.” While Case 1 affords B a claim in restitution, the parties’ contracted-for-settlement precludes restitution in Case 2.

Despite the intuitive appeal of this thesis, it is difficult to sustain. It assumes that a clear line demarcates enforceable, “live” contracts—when restitution must take a back seat—from “dead,” frustrated, discharged, or unformed contracts—where restitution applies in full force. The difficulties with this distinction are legion, including nearly every variation of the

71. Id. cmt. c (citations omitted). The will theory of contract is developed and discussed in KENNEDY, supra note 9, at 212-34.
72. See RESTATEMENT (Third) of Restitution § 2 illus. 1 (Discussion Draft).
73. Id. § 5 illus. 3.
74. Id. § 5 illus. 4.
75. Id.
venerable flagpole hypothetical (where A promises B $100 to reach the top of the flagpole).76 Under orthodox contract doctrine, the law assumes that A bargained for B to reach the top of the flagpole, not for B to exert considerable effort on the way up. The recurring question is what happens if A repudiates the contract before B reaches the top. While the facts come in many guises—authors contracted to write books that are never published,77 stonemasons employed to carve statutes that are not completed,78 and architects retained to draw up plans that are never used—recovery is typically allowed.79 Yet, whether these claims are understood as breach of contract, promissory estoppel, reliance, quantum meruit, restitution, implied or constructive contract has never been completely worked out.80 The line between the classic enforceable contract and a host of peripheral contract-like remedies is far blurrier than the Restatement seems willing to admit.81

Perhaps the greatest source of confusion results from trying to distinguish between reliance (based on plaintiff’s loss) and restitution (based on defendant’s unjust gain) claims.82 Both of these theories go under the

76. This view is critiqued in Hedley, supra note 6, at 55-84.


78. See id. at 563, 577, 580-81 (citing Dowling v. McKinney, 124 Mass. 478 (1878)).

79. See id. at 582 & n.51 (citing Hunter v. Vicario, 130 N.Y.S. 625 (1911); Stephen v. Camden and Phila. Soap Co., 75 N.J.L. 648 (1907)).

80. Compare Kull, Rationalizing Restitution, supra note 16, at 1207 (arguing these cases should be understood as contract and reliance claims), with Dawson, supra note 77, at 577-85 (claiming these actions include restitution), and Perillo, Restitution in the Restatement, supra note 39, at 38-41.

81. Similar difficulties are raised in the pre-contractual context. Suppose in the course of negotiating a deal, A discloses an idea or business plan to B, which B then uses to his advantage. Does A have a claim against B? Does it arise in restitution, as a tort for misappropriation of property, or is it a breach of an express or implied contract? Does it matter whether the underlying transaction is ultimately consummated? Whether the idea qualified as a trade secret? Would the result change if the deal was for A to license the idea to B; or whether the parties contemplated a sale of a business division unit employing the designated plan? See E. Allan Farnsworth, Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations, 87 Colum. L. Rev. 217, 225-40 (1987). Mark Gergen touches on these difficulties, but defends the Restatement’s position in Gergen, Restitution and Contract, supra note 65, at 238-40.

82. The Restatement’s discussion of the relationship between these doctrines is fairly limited. A typical expression of the approach is set out in Restatement (Third) of Restitution and Unjust Enrichment § 31 cmt. c (Tentative Draft No. 3, 2004). This note provides in part:

This Section describes a liability based on the unjust enrichment of the recipient of the claimant’s contractual performance. Restitution has sometimes been invoked to award what is more readily understood as a species of reliance damages: compensation for losses incurred in performing (or preparing to perform) an unenforceable contract, notwithstanding the absence of benefit to the defendant as a result of the plaintiff’s expenditure. The more straightforward account of these out-
guise of "quasi contract," a term that itself generates confusion between contracts implied-in-law, which imply restitution, and contracts implied-in-fact, which imply reliance. Ransacking the case law is unlikely to produce a clear dividing line between these two ideas. A less conceptualistic approach would therefore place less emphasis on doctrinal pigeonholes and more frankly discuss how courts routinely eschew doctrinal niceties to obtain just results for the parties. What remains clear, however, is that the line between "dead" and "live" contracts is far too manipulable to be of use in demarcating the bounds between recoveries based on the will of the parties and those based on the will of the state.

III. The Immanent Rationality of Restitution

The Restatement's assumption that law can be made to cohere around a principle of unjust enrichment is a subset of a more general view regarding how contracts are described in terms of promissory liability, not as restitution based on unjust enrichment.

Id.; see also id. reporter's notes; id. § 23, cmt. c; id. § 26 illus. 16 (providing demonstration of practical difference between reliance and restitution claims).

83. Compare, e.g., Ver Brycke v. Ver Brycke, 843 A.2d 758, 772 n.9 (Md. 2004) (noting that promissory estoppel is "quasi contract" claim), with Wingert & Assoc.'s. v. Paramount Apparel Int'l., Inc., No. 03-6451ADMAJB, 2005 WL 1355028, at *5 (D. Minn. June 7, 2005) ("[U]njust enrichment claims are typically 'quasi contract' claims.").

84. Kelly v. Lewandoski contains a typically confusing expression of this approach. There, the court held that:

Even if there is no express contract, a plaintiff may sometimes recover under the theory of unjust enrichment, which is also called quantum meruit, contract implied-in-law, constructive contract, or quasi contract. These theories are legal fictions invented by the common law courts in order to permit recovery where in fact there is no true contract, but where, to avoid unjust enrichment, the courts permit recovery of the value of the services rendered just as if there had been a true contract.


85. See 6 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 2580 (perm. ed., rev. vol. 2004) ("A contract implied in fact requires the same elements as an express contract and differs only in the method of expressing mutual assent.").

86. See Grant Gilmore, The Death of Contract 97 (1995) (noting that quasi contract [restitution] and reliance are "twins" and that "it would seem, as a matter of jurisprudential economy, that both situations could have been dealt with under either slogan, but the legal mind has always preferred multiplication to division"); Linzer, supra note 6, at 699 (arguing that there is no clear line between restitution and reliance).

87. See, e.g., Douglas Laycock, Modern American Remedies: Cases and Materials 634-35 (2002) (suggesting differences between promissory estoppel and restitution, but concluding that all remedies in cases of partially performed putative contracts are contract claims under various labels and should be analyzed as such).

ing the "immanent rationality of the law." This in turn rests on three related assumptions: first, that the law coheres; second, that it coheres around distinctly legal principles; and finally, that the lack of coherent and organizing principles is a defect in the legal regime.

A. Where Do Legal Concepts Come From?

At the heart of conceptualism lies a concept—an idea that both describes the legal field and provides a normative framework for future decisions. Less clear is where this concept comes from and why its proscriptions are binding on future courts. Conceptualists rarely confront this question openly, often relying on a less-than-fully-articulated fusion of descriptive observations and normative claims. Nevertheless, a basic pattern emerges. If scholars can demonstrate that a certain concept is implicit in past decisions (even if the courts were unaware of it), that concept, once articulated, becomes binding on future decisions.

The creation of the Restatement's "principle of unjust enrichment" follows a similar pattern. Legal analysis begins with case law. Courts decide cases under a variety of rationales, some deemed correct (recovery based on unjust enrichment), and some deemed incorrect (recovery based on constructive notice). A review of a line of cases reveals a recurring analytical pattern, often different from the reasoning or language employed by the court itself. Legal scholars, however, recognize that these principles offer a more accurate account of what is "really" going on in decisional law than whatever the courts themselves say. Subsequently, a large number of cases are brought together and made to cohere around these new principles, creating a "field," "body" or "area" of law. At approximately this point, the project becomes normative. Going forward, courts are commended to abandon the old rationales and frame their decisions in terms of the new unifying principles or concepts. Eventually, conceptualist


90. Kull himself says very little on the topic. His views about the origins of the law of restitution are limited to the following:

Disagreement at this basic level about the content of the law of torts or the law of contracts would be unthinkable—not because these subjects have an immanent or ideal form (any more than restitution does), but because they have acquired stable conventional definitions (as restitution has yet to do). The nineteenth-century treatise writers defined bodies of law called "torts" and "contracts" that lawyers came to regard as appropriate, because the subjects as defined lent themselves to fruitful analysis and analogy.

Kull, Rationalizing Restitution, supra note 16, at 1194.

91. See Gordley, supra note 1, at 1817-21 (describing process through which common law concepts are created and applied).

92. See, e.g., Restatement (Third) of Restitution and Unjust Enrichment § 12 reporter's note (Tentative Draft No. 1, 2001) (listing cases where property deeds are reformed based on fictional theory of constructive notice are more correctly described as cases that prevent unjust enrichment).
scholars can point to cases (both past and present) that do not fit analytic schemes and declare them "wrongly decided."

This type of argument, the most classic of the classical legal period, is as intuitive as it is debated. It assumes that somehow, despite the well-documented irrationalities and misunderstandings that beleaguer the law of restitution, a coherent whole—the principle of unjust enrichment—successfully emerges. Neither the misunderstood distinction between law and equity, nor the numerous fictions used to administer the common counts in assumpsit, nor bungling the contract implied-in-law/implied-in-fact distinction, nor the terminological confusion surrounding restitution, unjust enrichment, quantum meruit, quasi contract, constructive contract, constructive trust, etc. were able to prevent the common law's invisible hand from achieving an underlying coherence. Additionally, the conceptualist's merger of descriptive and normative claims generates a tricky chicken-and-egg problem. On the one hand, the concept is derived from the cases. Validity comes from the concept's ability to explain a body of positive case law. On the other hand, once the concept is identified and established, it can be used to critique decided cases and find them wrongly decided. But if the cases generate the concept, how can it be used as a benchmark to accept or reject decided cases?

B. Unitary Concepts

To understand the Restatement’s conceptualism, it is useful to compare its view of restitution with the analysis offered by Professor Laycock. Laycock is undoubtedly a conceptualist, whose avowed purpose is to bring order and coherence to the body of restitution cases. Unlike the Restatement:

93. The literature on its contentiousness is legion. The most famous American critic of the immanent rationality approach is Justice Oliver Wendell Holmes in Oliver Wendell Holmes, Privilege, Malice, and Intent, in COLLECTED LEGAL PAPERS 117 (1920). See also Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457 (1897) (questioning theory of immanent rationality). Jeremy Bentham was probably the most vociferous critic. See GERALD POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 263-301 (1986) (surveying Bentham's criticism of immanent rationality). The anti-conceptualist tradition probably has its roots in the works of Rudolph von Jhering, a leading German conceptualist scholar who turned his back on conceptual jurisprudence and became the first proto-realist. Duncan Kennedy has credited the French philosopher Rene Demegue with pioneering the idea that law is a series of compromises between conflicting social goals (conflicting considerations) rather than a collection of elegant legal concepts. See Duncan Kennedy, From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form", 100 COLUM. L. REV. 94, 111-15 (2000) [hereinafter Kennedy, Will Theory].

As for its intuitive nature, virtually every brief submitted to an appellate court argues that several precedent cases create a "doctrine" or "framework" that applies to the case at bar. For a recent scholarly defense, see generally Stephen A. Smith, Taking Law Seriously, 50 U. TORONTO L.J. 241 (2000) (defending doctrinal and conceptual scholarship).

94. See Laycock, Restitution, supra note 39, at 1277. Laycock writes: This Essay offers a conceptual and practical overview of the field. First, I attempt to define the concept of restitution, its principal subdivisions, and its boundaries with other bodies of law. Second, I attempt to identify
ment, however, Laycock does not assume that the law of restitution must cohere under a single unifying principle. This seemingly technical distinction highlights salient differences in these conflicting views of restitution, and of conceptualism more generally.

According to Laycock, restitution is comprised of several separate bases of liability. In addition to the substantive elements, Laycock finds a purely remedial component. This conceptual framing has its roots in the writings of late nineteenth century theorists and remains a common form of post-realist conceptualism. The classical tort writers, for example, were unable to reconcile the whole of tort law under a single, unitary principle. Instead, they divided the law into “core” and “peripheral” components. Negligence was said to be the core, while strict liability doctrines (that could not fit into the negligence paradigm) were shunted to the periphery. The core/periphery technique advanced two important goals. On the one hand, marginalization of “errant” doctrines made it possible to describe the core of tort law in terms of negligence, ensuring that future development tended towards negligence rather than strict liability. At the same time, however, the peripheral doctrines eliminated the need to shoehorn strict liability holdings into a negligence framework. The peripheral category saved the classical theorists the work of trying to fit a round peg into a square hole, making the overall doctrinal structure less complex and more compelling.

The Restatement’s principle author, Professor Kull, however, finds Laycock’s theory incoherent, claiming that restitution cannot be “an apple and an orange,” consisting of a substantive basis of liability and a group of remedies for other causes of action. Analytically this argument makes good sense, but the insistence on conceptual unity has its costs, as casuistry is the price one pays for analytic coherence. When a thief steals $100, and classify the principal situations in which restitution is of practical and not just theoretical interest.

Id.

95. For a discussion of Laycock’s theory of restitution, see supra notes 55-64 and accompanying text.

96. See Laycock, Restitution, supra note 39, at 1277-78 (discussing components of restitution).


98. See, e.g., Frederick Pollock, The Law of Torts 1-21 (1887). A similar methodology was used by Justice Holmes in The Theory of Torts, 7 AM. L. REV 652 (1879) (attributed to Holmes in 2 MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES 81 (1963), and in OLIVER WENDELL HOLMES, THE COMMON LAW 82-163 (1881)).

99. Thus Pollock avoided having to justify why the common carrier is subject to absolute liability while most other hires are judged under the negligence standard. Pollock simply claims that common carrier liability is anomalous or peripheral to the main line of tort law, i.e. negligence. See Pollock, supra note 98, at 17-21.

100. Kull, Rationalizing Restitution, supra note 16, at 1216.
Professor Kull argues that liability in restitution emerges coequally with liability in tort, even though it has never been thought that conversion has anything to do with unjust enrichment. The purposes of this posited parallel track of restitution are to maintain conceptual unity and to show that restitution will emerge whenever a causative event occurs.

The rejection of the core/ periphery model is closely connected to the justificatory work performed by the conceptual account of liability in restitution. The existence of peripheral doctrines means that the law cannot be fully rationalized in conceptual-analytic terms, a fact that significantly reduces the descriptive and normative strength of the conceptualist’s claim. Descriptively, peripheral doctrines mean that legal concepts do not offer a complete explanation of the case law because factors other than analytic purity, including the common law’s tortured history, precedent, “justice concerns,” and political and economic motivations, all impact legal outcomes. This, in turn, weakens the normative claim. To the extent that every case can be shown to fit into a single doctrinal structure, its normative claim is considerable. Thus, if unjust enrichment explains every restitution case, it is easy to see why non-conforming decisions are thought to be wrongly decided. If unjust enrichment is, however, simply a convenient way to explain many, but not all, restitution cases, then non-conforming rules can simply be described as peripheral. Moreover, the core/ periphery model encourages seemingly irresolvable debates as to what should be characterized as periphery and what should be characterized as core. How should each of these categories be measured? Quantitatively or qualitatively? Finally, at what point does the periphery swallow up the core?

As competing bases proliferate, the normative appeal of the unitary concept becomes proportionally weaker. A conclusion that there are several “headings” of restitution is a conclusion that “restitution” has no analytical content at all. If the case law sustains three headings, what prevents future cases from creating four or five headings, or even as many headings as there are cases? This is the conclusion reached by the classical realists.

101. For a discussion of Kull’s theories, see supra notes 59-61 and accompanying text. Professor Kull goes to great lengths to claim that returning stolen property is unrelated to restitution as unjust enrichment. See, e.g., Kull, Rationalizing Restitution, supra note 16, at 1191-93.

102. For example, Pollock concluded that the strict liability standard governing “torts to possession and property” cannot be explained through any rational or analytic justification but that it is a function of the tortured history of the common law’s writ system. See Pollock, supra note 98, at 14-16.

103. An example is the debate between Mark Gergen and Steve Hedley as to whether the multiplicity of “peripheral” contract doctrines renders its “core” meaningless. See Gergen, Restitution and Contract, supra note 65, at 238-40. The debates surrounding Grant Gilmore’s The Death of Contract offer another pertinent example.

104. In discussing Hoefeld’s critique of classical legal thought, Duncan Kennedy stated several times that once it is admitted that property is a bundle of sever-
C. The Source of Liability

In the conceptualist view, every instance of liability must be justified under a distinct analytical basis. While each basis of liability is theoretically self-contained, in reality, the borders prove to be far more porous and result in multiple overlapping bases. As a result, conceptualist writers expend considerable effort tending the garden of legal concepts, ensuring that each analytic department remains coherent enough to serve its justificatory purpose.

Take, for example, the discussion about the interaction between contract and restitution. The Restatement views these concepts as mutually exclusive and operating in distinct spheres, so that restitution emerges only when the contract fails. But cases where the contract fails because of frustration of purpose or change of circumstances (Restatement Section 34), or when a dispute arises after one party has engaged in partial performance (Restatement Section 35) amply demonstrate that whether the remedy is under “contract” or “restitution” is no simple matter. Are these cases of live, i.e. operative, contracts in need of restructuring and rehabilitation, or are they contracts that died due to disputes regarding performance obligations?²¹

able sticks, the idea that property is a coherent analytic concept is dead. Accord Duncan Kennedy, Private Law Theory, Lecture at Harvard Law School (Spring 2005).

This view is also currently held by Steve Hedley. See Hedley, supra note 65, at 251 (suggesting that restitution has “20 or more heads of liability” and that “the case for the theory to unite restitution has not been made”).

105. See, e.g., Restatement (Third) of Restitution and Unjust Enrichment § 2 cmt. c (Discussion Draft, 2000) (“Where a benefit is conferred within the framework of a valid and enforceable contract, the recipient’s liability to make compensation is fixed exclusively by the contract. . . . [T]he application of restitution principles to contractual exchanges is exclusively to the consequences of performance under ineffective or interrupted agreements.”).

106. For a discussion of restitution and contract, see supra notes 65-88 and accompanying text. See also Restatement (Third) of Restitution and Unjust Enrichment § 34 cmt. a (Tentative Draft No. 3, 2004). The Restatement creates a sharp divide between contract and restitution, noting that in the case of a partially completed contract, “the claimant has conferred a benefit at the request of the defendant, without obtaining the promised exchange; enforcement of the contract is unavailable, in this case, because the parties’ obligations have been discharged. The claimant’s recourse is a claim measured in restitution by the defendant’s net enrichment.” Id. Admittedly, one paragraph earlier the Restatement indicated that both obligations can coexist, stating “[i]f the obligation has been partially or wholly performed, the same challenge to the transaction presents what is simultaneously a question of contract and a question of restitution.” Id. In any event, the overall structure of the Restatement, especially the insistence that restitution arises only when contract fails, leads me to discount this latter remark.

107. See Restatement (Third) of Restitution and Unjust Enrichment ch. 4, topic 2, introductory note (Tentative Draft No. 3) (noting disagreement between Restatement (Third) of Restitution and Restatement (Second) of Contracts regarding relationship between restitution and contract).
The goal, of course, is not to determine when a contract dies and restitution is born. Neither actually happens and the legal imagination is creative enough to issue death and birth certificates at a number of relevant juctions, particularly if enough money rides on the decision. The Restatement's artificial discourse regarding the life cycle of a contract is an inevitable byproduct of its conceptual account.

While the Restatement assumes that remedies ranging from strict enforcement of contractual provisions to those arising under the headings of reliance, estoppel, restitution, unjust enrichment, quasi contract and quantum meruit can be neatly categorized as stemming from contract, reliance or restitution, little in the case law supports this. A more realist account finds an ad hoc process whereby courts use a variety of remedies in an attempt to salvage a relationship gone sour; particularly where disputes arise midstream (as in Section 35). The conceptualist finds such untheorized recoveries unpalatable, as each remedy-granting decision must fit into some larger category of pre-theorized liability.

D. Gerrymandered Concepts

Conceptualism has its advantages. It promises a vision of law that is unified, predictable and rational. It also, however, has its costs. To maintain the precision, the conceptualist must gerrymander a host of sub doctrines to make them fit into the larger theory. While the law's gray areas can be rerouted and repackaged, they cannot be avoided. The promise of clean and precise legal doctrine is never fully realized.

The Restatement's chief objective is to ground restitution in unjust enrichment—defendant's gain rather than plaintiff's loss. But there is more than one way to measure defendant's gain, a fact that has generated considerable complexity. The simplest application of the Restatement's the-

108. See, e.g., Hill v. Waxberg, 237 F.2d 936, 938-39 (9th Cir. 1956) (noting confusion between contract implied in law and implied in fact); see also Farnsworth, supra note 81, at 233 n.51 (noting how restitution and reliance claims are often interchangeable) (citing Burridge v. Ace Storm Window Co., 69 Pa. D. & C. 184, 187 (C.P. 1949), as a pertinent example). In the scholarly literature, the obvious citation is L.L. Fuller and William R. Perdue, Jr., The Reliance Interest in Contract Damages, 46 YALE L.J. 52 (1936). In general, this article is credited with framing off-contract remedies in terms of reliance rather than restitution. See Kennedy, Will Theory, supra note 93, at 156.


We should not be distracted by the manner in which a theory of recovery is titled. ... Whether denominated "acting in reliance" or "restitution" all concur that a promisee who partially performs ... at a promisor's request should be allowed to recover the fair and reasonable value of the performance rendered, regardless of the enforceability of the original agreement.

Id. See generally DOUGLAS LAYCOCK, supra note 87, at 629-37.

ory would apply a single metric across all restitution/unjust enrichment claims. For instance, the approach taken in mistaken benefit cases is rather intuitive; it measures unjust enrichment in terms of the net gain to defendant’s wealth.

Illustration 2 to Section 9 of the Restatement details: A Railroad delivers a carload of coal to $B$ that was intended for $C$. $A$ regularly delivers a similar grade of coal to $B$, so that $B$ is unaware of the mistake. The market value of the coal is $10 per ton, but under a long-term contract, $B$ pays only $8 per ton for all its coal needs. $B$ is liable in restitution to $A$, but only at $8 per ton.111

This case presents a clear demonstration of restitution anchored in defendant’s gain rather than plaintiff’s loss: “Neither market value, nor cost to the provider, reveals the value to the recipient where the transfer is nonconsensual.”112 Taking this theory one step further, the Restatement notes that in a case where the recipient lacks resources or liquidity to purchase the uncontracted-for services, restitution may be assessed at even less than the value of the true enrichment.113 These rules take defendant’s personalized circumstances into account and focus on the precise measure of defendant’s gain, while completely ignoring issues pertaining to plaintiff’s loss. Section 9 Illustration 2 makes a compelling case for restitution as unjust enrichment.

The Restatement’s theory becomes more difficult in other scenarios. Section 20 deals with the provision of emergency medical services. Illustration 1 presents the case of Dr. $A$, who is summoned to aid $B$, an unconscious victim. Although Dr. $A$ performs all necessary medical treatment with due care, $B$ fails to regain consciousness and dies. The Restatement rules that Dr. $A$ is entitled to restitution in the amount of his reasonable customary charge for similar services.114

The Restatement is aware of the shift from actual benefits in Section 9 (the coal case) to a fictional presumption about benefits in Section 20 (the doctor’s case), noting that “[s]ervices that are medically necessary are presumed to be beneficial without regard to the ultimate outcome”115 and, further, that “the measure of benefit to the recipient . . . is the reasonable and customary charge for such services.”116 But framing this decision in terms of the patient’s unjust enrichment is simply unconvincing.117 First,

113. See id.
114. See Restatement (Third) of Restitution and Unjust Enrichment § 20 illus. 1 (Tentative Draft No. 2, 2002).
115. Id. § 20 cmt. c (emphasis added).
116. Id.
117. Professor Kull defends this rule in his scholarly writings, but the explanation there is hardly more convincing. See Kull, Rationalizing Restitution, supra note 114.
as in nearly every quantum meruit scenario, benefit is measured in terms of Dr. A's charge rather than B's gain. Moreover, since B never regained consciousness, it is difficult to determine what benefit was received. Commentators have described the benefit in this case as "fictional," as benefit moves from an individualized inquiry into the realm of legal presumptions. But in order to square this result with the theory of restitution as unjust enrichment, the Restatement must gerrymander the definition of benefit to encompass Dr. A's failed rescue attempt.

Beyond relying on fictional assumptions, the Restatement's insistence on the unified theory requires the Restatement to gerrymander the traditional borders of restitution. Frustration of purpose cases provide another example.

The coronation cases, which dealt with the fallout from the cancellation of coronation ceremonies for King Edward VII in 1904, offer textbook examples of frustration of purpose. The central question was whether persons who had rented rooms and barges at coronation-only rates along the processional path would be required to pay the contract price to watch a parade that would not occur. While some of the original cases found for the vendors, the modern American consensus assumes that the purpose of the contract has been frustrated and therefore sides with the renters. Frustration cases are traditionally understood to offer plaintiff restitution because unjust enrichment would result if defendant retained the contract price when the purpose of the contract has been frustrated.

16, at 1201 n.27. Kull argues that because a conscious patient would agree to pay the fee for the services regardless of the outcome, the same assumption should be made for the unconscious patient. Thus, to the extent that unjust enrichment is valued at what defendant would have paid had the transaction been voluntary, the doctor should receive his customary fee. This explanation begs the underlying question of why plaintiff's customary fee is the appropriate measure of defendant's unjust enrichment—a position at odds with the rules in the mistaken improvement context. Quite to the contrary, the more one looks to plaintiff's side of the transaction, the less compelling the unjust enrichment theory becomes.

118. See Christopher Wonnell, Replacing the Unitary Principle of Unjust Enrichment, 45 EMORY L.J. 153, 170 (1996) ("If the rescue effort failed, it is very hard to see the benefit to a defendant who was beyond medical hope and never regained consciousness. The defendant's welfare was not increased, nor was her estate augmented by the plaintiff's services.").

119. An alternate resolution can be found in Daganz, supra note 6, at 210-59.

121. See, e.g., Chandler v. Webster, 1 K.B. 493, 499-500 (1904) (finding for vendors rather than renters).

122. See Restatement (Second) of Contracts § 265 (1981); Palmer, supra note 6, § 7.1 (emphasizing renters' expectations on renting room along coronation procession path).

123. See, e.g., Palmer, supra note 6, § 7.1.
The Reporter finds this explanation untenable. Because the justness of an agreement pursuant to a contract is defined solely by the terms of the contract, there can be no unjust enrichment as long as the contract is in force. For this reason, the "rationalized (enrichment-based) law of restitution has no independent role as a remedy for disputes arising out of the breach or frustration of a valid contract." That courts have traditionally decided these cases under the restitution framework is of no concern; it is simply a smokescreen used "because judges [are] unwilling to acknowledge they [are] making contracts for the parties."

What, then, explains frustrated contract claims? While it is insisted that they sound in contract, I am unaware of any explanation offered by the Reporter as to why contract law allocates the risk to the vendor rather than the renter. Perhaps recognizing this flaw, the Restatement creates a legal category even more ambiguous than restitution, claiming that "[d]ecisions [allocating loss to the vendor] may be more candidly explained . . . as authority for the court's power to apportion losses in an appropriate case," or alternatively, that it is a "device to reallocate casually loss that the payment term of the parties' contract would have distributed inappropriately."

This answer is hardly satisfactory. The traditional approach counsels that it is simply unjust for the vendor to retain the coronation-only rental prices in absence of a coronation—a classic justification for restitution. Because this threatens to destroy the conceptual unity of unjust enrichment, however, and inject unprincipled "equity" thinking into unjust enrichment, the Restatement expels frustration cases into the common law's black hole. Unfortunately, the desire to put one doctrinal household in order creates anarchy in another. While frustration cases are said to sound in contract, there is no effort to explain how these doctrines cohere within a rationalized view of contract law: the problem is simply shifted down one level. While under "pre-rationalized" law, restitution/quasi contract/constructive trust/unjust enrichment was the catch-all heading for "equitable" doctrines straddling contract, tort and property, the theorized

124. For a discussion of restitution and contract law, see supra notes 65-88 and accompanying text.
126. Id. at 1210.
127. See id. at 1208 ("The conventional way to describe this alternative is to say that the court can either deny or allow an action in restitution. Yet, either course of action turns out to be a form of second-order contract interpretation.").
129. Id. § 34 reporter's note to cmt. d. In still another place, Professor Kull seems to totally throw up his hands suggesting that these rules are simply "something else." See Kull, Rationalizing Restitution, supra note 16, at 1204 (discussing application of restitution without unjust enrichment).
130. See Palmer, supra note 6, § 7.1 (discussing theory of restitution in cases of impossibility or frustration of contract).
version rejects this description. To account for doctrines that fail to com-
port with the theoretical model, however, an even more amorphous doc-
trinal dumping ground is created. The Restatement does not even attempt
to justify this category, simply declaring that the transaction can be un-
wound pursuant to the court's inherent power to "apportion losses."¹³¹

This discussion shows how legal doctrine is subject to a law of conser-
vation of untidiness. To use a house-cleaning metaphor, each legal
method has a different way of dealing with doctrinal disorganization. The
realist simply assumes the law is messy and makes no attempt to clean it
up. Post-realistic conceptualists use core/periphery techniques to shunt the
mess over to one side of the room. A more pedantic conceptualist cannot
tolerate even a lone messy corner. But the Restatement can no more avoid
the mess than the unreconstructed realist. The dust pile is either moved
to another room (contract), hidden under the carpet (benefit—hiding
the mess there), or just thrown out the window and ignored (courts' 
power to apportion losses). Doctrinal sloppiness can be moved, pushed
aside, relabeled or walled off in a closet. No matter what the tactic, how-
ever, it cannot be eliminated.¹³²

E. The Necessity of Conceptual Justification

A final characteristic of the Restatement's conceptualism is the degree
to which it assumes that a rationalized analytic schema of the law is neces-
sary. What degree of coherence is required? Can a legal rule just sit alone
in the sea of the common law rules, or does every rule have to fit within a
larger, conceptual ordering?

Again, the Restatement is premised on surprisingly strong conceptualis-
tic assumptions. Professor Kull maintains that "[a] complete account of
civil liability . . . requires the inclusion of restitution . . . because there are
important instances of liability that contract and tort, conventionally de-
dined, cannot adequately explain."¹³³ Further, restitution cases that can-
not be squared with the unitary principles "require either a different
rational or a different result."¹³⁴

This feature of the analysis ties together the other proclivities. Be-
cause the law is inherently rational, legitimate (read, "correct") exercises
of legal authority must fit into the law's rational structure. The unitary
conceptual basis strengthens this approach because each legal field is
dominated by a single idea that is internally coherent and distinct from
alternative sources of rights and duties, and allows the law to finally break

¹³¹. See Restatement (Third) of Restitution and Unjust Enrichment § 34
Thoughts on Section 383, 36 Tax L. W. 9, 11 (1982-1983) ("[T]he Law of Conserva-
tion of Ambiguity tells us that the draftsman can control and select what will be left
ambiguous, but he cannot banish or control the aggregate amount of ambiguity.").
¹³⁴. Id. at 1197.
from the holdover terminology of the pre-modern common law. This conceptualization is further aided by metaphors envisioning each field as having fixed and defined boundaries, distinguishable both in practice and theory from neighboring doctrines and concepts. Ultimately, however, the integrity and unity of the conceptual system is maintained only by gerrymandering the rules until they fit the theory.

IV. Post-Realist Conceptualism

In a broad sense, the Restatement’s analytics fit into a larger movement of neoformalism or neoconceptualism. This movement is generally understood to be composed of conservative reactions to the excesses of Warren Court jurisprudence. While the Restatement may share many of the underlying political motivations with neoformalist jurisprudence, the Restatement tends towards a more classical version of formalist thought.

A. Neo and Classical Formalism

The “neo” in neoformalism suggests that it takes at least partial account of the realist critique. Thus, neoformalism is generally predicated on the belief that legal concepts are devices used to reach optimal social (or democratic) results. The justifications for neoformalism are expressed in terms of the practical and political benefits of formalist adjudication and less in inherentist terms about the objective truth, necessity or coherence of the conceptual account of law. While Professor Kull ex-


137. See Cass R. Sunstein, Must Formalism be Defended Empirically?, 66 U. Chi. L. Rev. 636, 642 (1999) (analyzing contemporary formalism and hypothesizing that “it is the disagreement over the underlying empirical issues—not over large concepts of any kind—that principally separates formalists and nonformalists”).


Without such a system of binding abstractions, it would be extraordinarily difficult for even a single judicial law-giver to be confident of consistency in his many ad hoc judgments; and it would be utterly impossible to oper-
Explicitly rejects the idea that restitution has an ideal, platonic form, the Restatement's analysis pulls in the opposite direction. To take but one example, the insistence on the unitary conception of restitution has little to do with obtaining specific results in actual cases. It is rather motivated by the view that restitution, as a concept, will be rendered meaningless if it is comprised of both remedial and substantive components.

The distinction between two shades of formalism accounts for some of the differences between the Restatement and other accounts of unjust enrichment. So long as courts reach consistent and predictable results, neoformalists are unlikely to express a preference as to whether the court formally relies on quasi contract, reliance, restitution, unjust enrichment, quantum meruit, express contract, implied contract or any other doctrinal heading. But this is exactly the point to which Professor Kull's project is addressed. He emphasizes that "[t]he argument here, it bears repeating, is not about what judges do, merely about the most useful way to describe what they do." This thinking recurs in the Restatement's insistence that, while it is often the case that restitution and contract produce the same results, the two categories are "distinguishable in concept."

Finally, from the functionalist perspective, there is no reason to insist on a single analytic construct to account for the entire law of restitution. Two or three, perhaps even four or five elements would do just as well. In fact, several restitution scholars view the doctrine of restitution as encompassing several independent analytical bases of liability. As long as the doctrinal heading facilitates the law's functional purpose, there is no reason to force a square peg into a round hole. If the law does not frustrate

\footnotesize

139. See Kull, Rationalizing Restitution, supra note 16, at 1194.
140. For example, Professor Kull writes:
   No legal topic can long survive this degree of professional neglect. Unless the means are found to revive it, restitution in this country may effectively revert to its pre-Restatement status, in which problems of unjust enrichment were treated in isolation, classified only by transactional or remedial setting: Mistake, Indemnity, Trustees, Subrogation. The loss to American law, measured in terms of its ability to yield coherent and reasoned adjudication, has already been very great, and the outlook is not encouraging.

141. Id. at 1196.
142. See Restatement (Third) of Restitution and Unjust Enrichment § 33 cmt. d (Tentative Draft No. 3, 2004) ("[W]here the contract price of the benefit conferred is the same as the value of the benefit as determined by the court, the recipient's liability in restitution—while distinguishable in concept—may be identical in extent to a liability on the invalid contract." (emphasis added)).
143. Professor Laycock offers three separate bases, while Professor Wonnell offers four separate bases. Compare Laycock, Restitution, supra note 39, at 1279-81, with Wonnell, supra note 118, at 191.
settled expectations, does it really matter whether restitution is said to be made up of three sub-doctrines? The need for precise legal boundaries, the inability to accept a core and periphery model and the need to gerrymander and exclude nonconforming doctrines are all expressions of the Restatement's interest in the conceptual structure of restitution.

B. Legal and Pre-Legal Categories

The conceptualism of the Restatement's perspective on restitution contrasts with nearly every innovation in legal thought and scholarship in the past two generations. Maturing and emerging fields include: animal law, art law, health care law, child law, elder law, various forms of cyber and computer law, disability law, environmental law, Indian law, natural resource law, lawyering for the President, terrorism and the law and WTO law, to name but a few.144 But in contrast to restitution, these areas have not arisen because scholars have finally unearthed some central conceptual principle underlying each area of the law. Quite to the contrary, they are based on the perceived significance of the relevant social/political institutions, or on the understanding that recurring patterns of transaction and organization warrant the law's attention. Thus, while under a more traditional arrangement, sports law breaks down into the law of contracts, anti-trust, agency, remedies, labor and employment, Title IX, business organizations, agency, local government law, torts, health and disability and intellectual property law, fusing these rules into sports law gives primacy to the social rather than legal classification.

The Restatement moves in the opposite direction. Instead of framing restitution in terms of family law, banking law, consumer protection, mass tort litigation, local government law, trust and estates, insurance law, securities regulation, corporate law and others, the Restatement adopts the legal-analytical category of unjust enrichment. This is more in accord with the classical scheme of legal thought when law was considered in terms of tort, contract, agency, partnership, bailments, property, equity and trusts—the doctrinal subjects that have largely fallen out of scholarly favor.

This tendency is echoed in the debate of whether and how restitution fits into the law school curriculum, where the legitimacy of offering a law school course on restitution seems entirely dependant on whether one accepts the conceptual account of the field.145 Those who argue that res-

144. These fields of law were obtained from the 2006 Harvard Law School course catalogue. For example, with respect to animal law, see Harvard Law School, News, http://www.law.harvard.edu/news/2001/06/13_animals.php (announcing Harvard Law School's receipt of endowment to support teaching and research in emerging field of animal rights law); University of Michigan Law School, Course Description, http://cgi2.www.law.umich.edu/~ClassSchedule/aboutCourse.asp?crse_id=041258 (last visited Jan. 18, 2007) (describing University of Michigan Law School's course in animal law); see also, e.g., ANIMAL RIGHTS (Cass Sunstein and Martha Nussbaum eds., 2004).

145. See Michael B. Kelly, It's Not My Job!, 36 LOY. L.A. L. REV. 887 (2002) (describing debate as to whether and where restitution fits in law school curricu-
Restitution forms an important heading of liability, backing up contract and tort, typically lament restitution's (non)status in the law school curriculum. Conversely, scholars who assume the "law of restitution" to be illusory typically resist calls to devote curricular space to doctrines spelling out quasi contractual and equitable liability. As a point of contrast, it is hard to imagine how the rise or fall of sports law would have anything to do with the coherence of the central principles underlying sports law. Similarly, constitutional law is taught and studied not because it has a conceptual core, but because the doctrines collected under that heading are of foundational importance to American law. So while Professor Laurence Tribe recently concluded that he can no longer identify any unifying principles in constitutional law, no one expects constitutional law to disappear from law school course offerings.146 In a variety of ways, the legitimacy of restitution is entirely bound up in the debate regarding the conceptual coherence of the proposed analytic category.

C. Contrast: The Restatement (Third) of Torts

A final dimension of the Restatement's conceptualism is highlighted by comparing the Restatement of Restitution with the Restatement (Third) of Torts, a work that struggles to present a conceptual account of tort law. While the first two tort restatements collected all of tort law into a single work, the most recent project divides torts into three separate areas. The ALI first issued the Restatement (Third) of Torts: Apportionment of Liability and Restatement (Third) of Torts: Products Liability. The initial plan was to balance the doctrinal fragmentation of tort law by issuing a third work titled Restatement (Third) of Torts: General Principles.147 This project was to focus on the conceptual core of tort law, reaffirming the unifying themes in an area that had come to require three separate projects.

When the ALI began writing the General Principles drafts, there was little consensus as to what the core of tort law is, or whether such a concept even existed.148 Initial drafts assumed the core or model tort was a negligent accident between two strangers resulting in physical harm. This decision, however, invited scholarly criticism. Some scholars questioned

146. See Laurence H. Tribe, The Treade Power, 8 Green Bag 2d 291 (2005) (arguing that constitutional law is too incoherent to warrant publication of new treatise).


why these "stranger accidents" should be considered the model tort, and why cases such as professional malpractice lay outside mainstream tort law. Others questioned why tort law should be limited to physical harm at all, advocating the inclusion of emotional and economic harm into the core of torts. Unable to resolve these issues, the ALI revised the scope and goals of its project. Successive Restatement (Third) of Torts drafts abandoned the hope of coming up with general principles of tort law. An intermediate draft bears a more modest title: Restatement (Third) of the Law of Torts: Liability for Physical Harm (Basic Principles), while the most recent draft drops the pretense of generality altogether, bearing the title, Restatement (Third) of the Law of Torts: Liability for Physical Harm. This latest draft apparently assumes that there is no "core" of tort law and that rules governing physical harm cannot claim priority over the Apportionment and Products Liability projects. The failure to develop any mutually agreeable general principles of tort raises questions as to whether the category "tort" has any substantive content.

Unlike the Restatement of Restitution, the Restatement of Torts expresses anxiety over the explanatory powers of legal doctrine. One of the most debated issues in the drafts was the role of duty, long understood as one of the doctrinal pillars of tort law. The drafts exhibit deep skepticism over the operative impact of duty, and present negligence as a three-element tort (negligence, causation and damages) shorn of the traditional duty inquiry. Duty, as described in the Restatement of Torts, is only to be considered in "unusual" cases, and ordinarily, "is . . . a

149. See John C. P. Goldberg & Benjamin C. Zipursky, The Restatement (Third) and the Place of Duty in Negligence Law, 54 Vand. L. Rev. 657 (2001) (analyzing requirement of duty element in some instances and not others).


151. See Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles) (Tentative Draft No. 1, 2001); see also Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles) (Tentative Draft No. 4, 2004); Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles) (Tentative Draft No. 3, 2003); Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles) (Tentative Draft No. 2, 2002).


154. See Restatement (Third) of Torts: General Principles § 3 (Discussion Draft, 1999) (neglecting to include duty as element of tort).

155. See id. § 6. The black letter section states in full:

Even if the defendant's negligent conduct is the legal cause of the plaintiff's physical harm, the plaintiff is not liable for that harm if the court determines that the defendant owes no duty to the plaintiff. Findings of no duty are unusual, and are based on judicial recognition of special problems of principle or policy that justify the withholding of liability.

Id. (emphasis added).
nonissue. Overall, the Restatement of Torts presents a more functional account of legal doctrine. Rather than gerrymander doctrines into a single conceptual framework, the Restatement of Torts is willing to alter or discard longstanding doctrine, and conclude that no single idea unifies the entirety of tort law.

Finally, there are significant differences in the political economy of the private legislatures responsible for producing these two projects. By nearly all accounts, the development of the Restatement of Torts has been a deeply political affair. Debates within ALI meetings have largely mirrored tort-reform debates in public legislative bodies, where academics supporting competing industry and consumer interests vie for influence over the final product. This invariably frames the discussions in terms of outcomes and sustainable compromises, correlatively deemphasizing doctrinal elegance and analytic coherence. The meetings and debates surrounding the Restatement of Restitution have, by contrast, been far more academic affairs. There has been little, if any, interest group participation, and the Reporter has been given an unusual amount of freedom to pursue his vision of restitution. Participants note that the meetings have focused more on coherence, elegance and analytics while interest group and industry politics have been marginal.

156. Id. § 6 cmt. a.

   The Restatement (Third) of Torts: Products Liability project should have resulted in an academic and scholarly product, reflective of the lofty standards to which the ALI previously subscribed. . . . However, this project, infected as it was with . . . improper influence, has produced nothing more than a position paper reflecting the views of special interests groups with whom the selected reporters are aligned.

Id.; see also Monroe H. Freedman, Caveat Lector: Conflicts of Interest of ALI Members in Drafting the Restatements, 26 Hofstra L. Rev. 641 (1998) (outlining and decrying politicization trend in drafting of restatements).


159. See Gergen, Restatement at Midpoint, supra note 7, at 291 n.10 (noting unusual degree of deference and autonomy given to Reporter of Restatement). Colleen Murphy, a member of the Consultative Group to the Restatement, also noted the lack of interest group participation and the doctrinal nature of discussion, particularly as compared to other restatement meetings. Interview with Colleen Murphy, Member, Consultative Group, Restatement (Third) of Restitution and Unjust Enrichment, in Bristol, R.I. (Oct. 3, 2005).
VILLANOVA LAW REVIEW [Vol. 52: p. 487

V. Why Do Concepts Matter?

Does the conceptualization of restitution actually make a difference? Does playing around with doctrinal labels and headings lead to different results? What are the stakes of the Restatement project?

The stakes of the Restatement's doctrinal restructuring are not immediately apparent. The circular relationship between the conceptual underpinning and the actual case law means that the Restatement cannot demand a broad shift in overall results because if too many cases turn out to be "wrongly decided," it becomes unclear whether the concept, rather than the cases, require reconsideration. Moreover, the Restatement project has a descriptive rather than normative emphasis, and in most cases it seeks to explain why judges do what they do rather than argue for a different set of results.

On its own terms, the Restatement is silent on this issue. While it vigorously argues for a renewed understanding of restitution, we learn little about what is in the Restatement that is not included in the restatements of contracts, torts, trusts and property. Nor is the Restatement specific as to what is practically to be gained by arranging the existing rules under the framework of restitution/unjust enrichment.

Finally, the foundational questions are fairly well settled and beyond reproach. Neither the Restatement's version of restitution, nor any competing framework is likely to challenge the central holdings, at least not in a project that purports to restate existing law. The differences in result, therefore, lie at the margins of existing case law, usually where one of two innocent parties must bear a loss caused by a judgment-proof third party who is actually at fault. The chief contribution of rationalized restitution is to display a stronger preference for rewinding transactions, and to give less weight to the countervailing considerations of finality of transaction or to shifting the loss to the party at fault. In theoretical terms, a nudge in the direction of categoric reasoning and a shift away from the instrumentalism that lies at the heart of cost-benefit analysis.

A. Restitution and Bankruptcy

One difference between theorized and untheorized restitution comes to light by considering the intersection of federal bankruptcy law and common (state) law doctrines of constructive trust, which the Restatement classifies as restitution. A constructive trust declares that money or property in B's hands really belongs to A, and that B must turn it over to A. For example, suppose that through a geological survey, A determines that Blackacre sits atop a valuable gold mine. To finance the purchase of Blackacre, A seeks a loan from B, telling B of Blackacre's potential value. B denies the loan and proceeds to buy Blackacre for himself. Courts will find that B holds the property in constructive trust for A's benefit, typically demanding that both land and profits be turned over to A.
The hard question is what happens if B goes into bankruptcy. In addition to A, B is likely to have a long line of creditors demanding satisfaction from B's assets, including the mine. Is the mine A's property, so that he gets to pull it out of the bankruptcy estate and be repaid in full? Or must A wait in line and likely get only a small percentage of the mine's value? This is where restitution theory comes in.

The untheorized view is likely behind the Sixth Circuit's decision finding that A must wait in line with the other creditors. That court claimed that unlike a real trust (which is certainly outside the bankrupt's estate), "[a] constructive trust is a legal fiction, a common-law remedy in equity that may only exist by the grace of judicial action." Since the constructive trust is a remedy given as justice demands, it creates no "real" or "hard" rights in the property. While this palm-tree justice might be appropriate as between A and B, the court found that when the policies of federal bankruptcy law are at stake, discretion must give way to law. Therefore, a court must "necessarily act very cautiously in exercising such a relatively undefined equitable power in favor of one group of potential creditors at the expense of other creditors, for ratable distribution among all creditors is one of the strongest policies behind the bankruptcy laws."

Not surprisingly, the conceptualized view finds much fault in this analysis. In re Omegas fails to recognize that "[r]estitution is the body of law that settles a property dispute between the claimant and the offending debtor and, at a secondary level, between the claimant and the creditors." Far from seeing a conflict, Professor Kull argues that restitution (along with contract, tort and property) forms the baseline rules against which the Bankruptcy Code is written. Courts must address state law ownership questions first, only afterwards moving on to the distribution policies enacted in the Code. Since A owns the mine, neither B, nor its creditors, have any claims to A's property.

B. Mistaken Payments

A lack of respect for the law of restitution is demonstrated in a variety of transactional patterns involving wire transfers. An oft-debated New

160. See In re Omegas Group, Inc., 16 F.3d 1443 (6th Cir. 1994).
161. Id. at 1449.
162. See id. at 1453.
163. Id. at 1453 (quoting In re North American Coin & Currency, Ltd., 767 F.2d 1573, 1575 (9th Cir. 1985)).
165. Id. at 286.
166. See, e.g., id. at 266-70.
York case provides a simple illustration.\(^{168}\) Company \(A\) tells its bank, \(B\), to wire one million dollars over to creditor \(C\). The message gets garbled so that \(B\) sends one million dollars over to \(C\), but sends another million to a different creditor, \(C_2\). \(B\) then asks for the money back from \(C_2\), who refuses and argues that a debt is due. \(A\) then becomes insolvent, so that \(B\)'s only recourse is against \(C_2\).

Restitution starts with a presumption that transfers based on mistake are voidable and that \(B\) ought to prevail, unless \(C_2\) can show some reliance on the funds, known more technically as a “change of position” defense.\(^{169}\) In policy terms, restitution scholars argue that as between \(B\) and \(C_2\), \(C_2\) has assumed the credit risk of \(A\)'s insolvency, while \(B\) was only paid a few hundred dollars to wire over the money.\(^{170}\)

The New York court reached the opposite conclusion, holding that \(C_2\) can retain the money, thereby placing the loss on \(B\).\(^{171}\) Each of the court's arguments is premised on a law-and-economics analysis which is in tension with the central aims of restitution. First, the court held that in the world of instantaneous high finance wire transfers, “efficiency, certainty . . . and finality” are paramount values so that courts must be exceptionally reluctant to rewind a completed transaction.\(^{172}\) Second, taking a page from tort law, the court found that since \(B\) was the cheapest cost avoider of this mistake, in order to encourage precaution in the future, the loss should lie with the bank, \(B\). In a case raising similar issues, Judge Easterbrook argued that the bank is in a better position to contract around this result by seeking indemnities of distribution of wire transfers gone awry.\(^{173}\)

Professor Kull's diagnosis of the differences between a restitution-based analysis and the view offered by these courts is on the mark:

The goal of finality emphasizes the undesirable effects that will flow from the mere possibility of reopening a completed transaction. Restitution starts from a contrary perception: that . . . the avoidance of unjust enrichment justifies not only the cost of judicial intervention to reopen a transaction that would otherwise be over and done with, but also the cost of the additional uncertainty inevitably resulting from the mere possibility of such intervention.\(^{174}\)

Lacking a formalized “law of restitution,” the courts saw this case through the eyes of tort and contract that, as understood by law-and-econo-

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168. See Banque Worms, 570 N.E.2d at 191-96.
169. See Kull, Defenses to Restitution, supra note 6, at 929-30.
170. See id. at 922.
171. See Banque Worms, 570 N.E.2d at 196.
172. See id. at 195.
nomics scholars, emphasize the cheapest cost avoider and display the overall preferences for transactional efficiency and finality. As a body of law, restitution brings the opposite polices to the fore. "If all persons who negligently confer an economic benefit ... are disqualified from ... relief because of their negligence, then the law of restitution, which was conceived in order to prevent unjust enrichment, would be of little or no value." While simply declaring that a case is decided under the law of restitution does not answer any hard policy questions, restitution is less impressed by arguments of finality and efficiency and, over the run of cases, will likely reverse a greater number of transactions than under competing methodological frameworks.

C. Tobacco Litigation

The preceding examples present restitution in fairly confined terms, limited to the technical field of commercial transactions. Whether intended by the Restatement or not (and probably not), adoption of the Restatement is likely to give plaintiffs’ lawyers broader ambitions and, in a way that seems unique to American lawyering, afford them the opportunity to employ restitution to embark on large scale social policymaking.

A compelling analysis of restitution’s role in the Mississippi tobacco litigation is offered by Professor Doug Rendleman. For years, the tobacco industry successfully defended against tort and product liability claims pursued by smokers and their families. Eventually, plaintiffs changed tactics, making the plaintiff the states rather than the smokers, and making the legal theory restitution, rather than tort. Combining law-and-economics thinking with classical restitution, the plaintiff-states claimed that the tobacco companies were unjustly enriched because they did not internalize the costs of the adverse health effects endured by the smokers. According to the states, since the public paid for these expenses through Medicare and related programs, the states were entitled to restitution from the tobacco companies.

Rendleman finds the dispute between the states and the tobacco industry to be about the characterization of the legal claims. The states’ goal was to show that restitution was an independent basis of substantive liability having nothing to do with tort, making the industry’s long string of wins under tort law irrelevant to a claim under restitution. By contrast, the tobacco companies argued that restitution could not provide a remedy

175. Ex parte AmSouth Mortgage Co., 679 So. 2d 251, 255 (Ala. 1996); see also Restatement (Third) of Restitution and Unjust Enrichment § 5 reporter’s note f (Tentative Draft No. 1, 2001) (discussing role of negligence in restitution claims).
176. See generally Rendleman, Mississippi Tobacco Settlement, supra note 47.
177. See id. at 848-58.
178. See id. at 852-86.
179. See id. at 853.
180. See id.
unless there was a wrong in tort and that the states were simply presenting old (and losing) claims under a new dress.

Though the restitution theory was never sanctioned by a court, it played a role in producing one of the first major victories against the tobacco companies. While even academic sympathizers found the states’ claims beyond the pale, the tobacco bar recognized that substantive restitution claims significantly changed the dynamics of tobacco litigation. The industry folded its cards and recorded its first major loss.

The tobacco case demonstrates why legal categories matter. If an “area” of the law called restitution exists, lawyers will expect it to contain some substantive content—a set of doctrines unique to restitution. Because restitution clusters at the margins of contract and tort, it is likely to become a repository for claims that fail under the orthodox conceptions of tort and contract. Restitution has the potential for making new land available for lawyers that is populated with innovative theories of recovery, while the resulting growth will nudge the balance of the private law rules towards those seeking more expansive recoveries.

D. Is Restitution Pro-Plaintiff?

Two important qualifications must be added to the previous discussion. First, under the Restatement, restitution is not simply a glorified label for helping out the little guy. In a number of transactional patterns, the strong restitution ethic that is embedded in the Restatement clearly accrues to the benefit of large commercial interests. Consider a case where an insurance company pays out a life insurance policy on the basis of the company’s incorrect interpretation of the policy’s terms. Although under a line of cases dating back to 1858 (and supported by a leading treatise), the insurance company is deemed to have waived any claims based on contract interpretation, the Restatement interprets this as a paradigmatic

181. This is not to deny other factors in reaching the decision, e.g., the fact that the states rather than the smokers were the plaintiffs, the resources amassed by the plaintiffs and the shifting attitudes towards the industry’s responsibility. It is, of course, impossible to claim that the same result would not have been reached under an indemnity theory or by finding a new duty in tort. Nevertheless, the legal topology offered by restitution makes this result easier to reach and contributed to the new paradigm of successful tobacco litigation.


183. See id. at 864-74.


mistaken payment case and grants the insurance company a claim in restitution.186

The second reservation addresses whether plaintiffs maintain a greater or lesser chance of recovery under the Restatement's concept-driven framework. While the Restatement's formalization of doctrines is at the margins of contract, tort and property, and is likely to increase recovery, the Restatement's strict adherence to the classical theory of contract pulls in the opposite direction.

Under the Restatement's scheme, many of the "soft" doctrines of contract (mistake, fraud, duress and undue influence) are taken out of contract and reclassified as providing restitution for unjust enrichment. This move allows the Restatement to simultaneously account for the doctrines that falsify the classical ideal of contract, while at the same time reaffirming the classical version of contract and its primacy in a system of private ordering.187 When denuded of its corrective measures, contract law is recast in its classical mode and requires strict and unequivocating adherence to the terms of the supposed bargain.

The consequences of this view can be seen in cases of unilateral mistake. Under the typical fact pattern, a seller drastically undervalues the property offered for sale, while the buyer, who is aware of the true value, is eager to make the deal. Although the Restatement asserts a broad conception of "mistake" within the law of restitution, it also asserts that the contract sets the baseline of unjust enrichment. The contract is therefore ostensibly valid and enforceable, and the seller must fulfill his obligation under the contract.188 While this approach is consistent with the Resta-
ment's analytic premises as well as nineteenth century contract doctrine,\textsuperscript{189} it is at odds with developments reflected in the \textit{Restatement (Second) of Contracts},\textsuperscript{190} and the leading restitution treatise.\textsuperscript{191} These later authorities offer a muddier distinction between restitution and contract, which allows the seller to back out of the sale on an undifferentiated contract-restitution theory. By contrast, by expelling mistake from the law of contract, and insisting on a sharp conceptual separation between contract and restitution, the \textit{Restatement (Third) of Restitution} would seem to require performance in these cases.\textsuperscript{192}

\section{VI. The Continuing Resonance of Classical Legal Thought}

The preceding sections demonstrate how the \textit{Restatement} relies on a classical variant of legal argument that harkens back to the scholarship of the late nineteenth century. This concluding section explores why the \textit{Restatement} looks to reprise a method of legal scholarship that has been out of fashion for nearly one hundred years.\textsuperscript{193}

At the most basic level, the \textit{Restatement}'s posture is grounded in the need to assuage fears that restitution will generate new avenues of liability in areas deliberately foreclosed by existing contract, tort and property doctrines.\textsuperscript{194} Such fears are not wholly unwarranted, as restitution is comprised mainly of "soft," and potentially redistributive, doctrines which historically have teetered at the margins of contract, property and equity. By pulling these doctrines out of the traditional fields, the \textit{Restatement} offers a conception of contract and property that are untainted by soft law. Moreover, the conceptualized and rulified account of unjust enrichment shows how even soft law belongs to a formalized body of law based on the predictable application of legal rules.

Though this positivization thesis goes some distance, it fails to adequately explain deeper connections to classical formalism presented in the \textit{Restatement}. A classic law-and-economics styled treatment of remedies, or a post-realist description stressing rule-of-law-concerns, would likely accomplish a similar result.\textsuperscript{195}

\begin{itemize}
  \item \textsuperscript{189} See, e.g., Laidlaw \textit{v.} Organ, 15 U.S. (2 Wheat.) 178 (1817) (refusing to rescind contract for sale of tobacco where seller knew that British naval blockade would be lifted due to signing of Treaty of Ghent and prices would rise sharply while buyer was unaware).
  \item \textsuperscript{190} See \textit{Restatement (Second) of Contracts} § 153 (1981).
  \item \textsuperscript{191} See \textit{Palmer}, \textit{supra} note 6, § 12.3.
  \item \textsuperscript{192} Compare \textit{Restatement (Third) of Restitution and Unjust Enrichment} § 34 illus. 23-24 (Tentative Draft No. 3), \textit{with Restatement (Second) Contracts} § 153; see also Kull, \textit{Unilateral Mistake, supra} note 188, at 74-77.
  \item \textsuperscript{193} See generally Kennedy, \textit{Will Theory, supra} note 93.
  \item \textsuperscript{194} For a discussion of the potential creation of new avenues of liability, see supra notes 160-75 and accompanying text.
  \item \textsuperscript{195} See generally Dagan, \textit{supra} note 6 (providing less conceptually adamant account of restitution); Laycock, \textit{Restitution, supra} note 39 (same); Wonnell, \textit{supra}
The attraction of classical formalism, however, extends beyond rule-based predictability. Conceptual jurisprudence allows the Restatement to overcome its major hurdle—recovering a legal field under the guise of “this is what courts have been doing all along.” This posture is especially important in the case of the Restatement (Third) of Restitution and Unjust Enrichment, which, by its own argument, looks to reframe existing doctrines under a more coherent framework.

It is important to recall the differences between restitution and the legal innovations spawned by new governmental regulation (ERISA law), technology (internet law) and the increasing visibility of certain industries (sports law). Unlike these new areas of law, the principle cases discussed in the Restatement are quite dated; many of its illustrations have a quaint texture to them. Furthermore, the Restatement scarcely takes into account the interventions of the regulatory state and little thought is given to how securities and banking regulations, or even the UCC, impact principles of restitution.\footnote{196} Many of the Restatement’s rules are already accounted for in other restatements,\footnote{197} and finally, the differences between the Restatement (Third) and its seventy-year-old predecessor are more terminological than substantive.\footnote{198}

It is precisely the tension between the newness and oldness of the Restatement that makes the conceptual framing particularly useful. It allows the Restatement to explain why, even though its contents are rather old, overt discussions of restitution and unjust enrichment have largely been absent from both legal opinions and scholarly discourse.\footnote{199}

\footnote{118} (same). A more law-and-economics approach can be found in Saul Levmore, Explaining Restitution, 71 Va. L. Rev. 65 (1985).

\footnote{196} See Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. g (Discussion Draft, 2000).

\footnote{197} See, e.g., Restatement (Third) of Restitution and Unjust Enrichment § 31 cmt. b (Tentative Draft No. 3) (“The rules stated in this Section are consistent with the treatment of the same subject in Restatement Second, Contracts § 375 and Restatement of Contracts § 355. The authorization of restitution in connection with oral trusts . . . is consistent with Restatement Third, of Trusts § 24.”); id. § 34 cmt. a. Comment a states:

The underlying contract principles to which this Section refers are set forth in Restatement Second, Contracts §§ 151-157 (mistake) and §§ 261-271 (impracticability of performance and frustration of purpose). The restitution claim described by this Section is the same as that referred to in Restatement Second, Contracts §§ 158, 272, 376, and 377. This Restatement presents a substantially different organization of this common material, without altering specific outcomes.

\footnote{198} See Hedley, supra note 6, at 201-03 (commenting on Goff & Jones, supra note 6).

\footnote{199} See, e.g., Birks, Introduction to Restitution, supra note 6, at 3 (comparing late development of administrative law and restitution). Birks noted that: restitution is the more remarkable of the backward pair . . . because, while the case-law of Administrative Law might be said to have been called into existence only by the increasingly assertive role of the modern state, restitution is a central concern of ordinary private law and has been
ism answers that while the presentation of the theory might be new, the underlying concept of unjust enrichment has been directing judicial decision-making all along. Thus, despite the absence of the unjust enrichment theory in the case reports, the Restatement's exposition can be said to present an accurate restatement of American law. Even more important are the substantive implications of this argument. Conceptualized restitution neither expands entitlements, nor redistributes rights, in contract or in property; rather, it simply offers a more sophisticated explanation of existing judicial practices.

A related impulse stems from the Restatement's ambitions to not only restate, but also reenergize an entire field of common law. Given the current aversion to judicial (or even worse, scholarly) legislation, the more restitution can be shown to be connected, integral and inherent to the law, the greater the chances of its acceptance and integration into the legal landscape. Classical formalism adds a degree of naturalness and immanence that is lacking in the more pragmatic strands of neoformalism and puts forward the image of the law's three gears interlocking in some master mechanism.

Finally, we might consider the perceived differences regarding both the origin and legitimacy of restitution. The case for ERISA, disability law and most other new areas of law is fairly straightforward. Each body of law is the product of a specific act of regulation that has little to do with the coherence, elegance or even justness of enacted rules. ERISA rests solely on positivist grounding: It is binding and legitimate because Congress has said so.

When directed at the law of restitution, the same question proves far more difficult to answer. While the debate has been raging for centuries, a consistent strand of thought anchors the legitimacy of private law in the justness, coherence and even naturalness of its principles. At least at the level of rhetoric, private law is also understood as foundational law, i.e. the legal principles that serve as the basis for more specialized areas of

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the subject of litigation for as long as the common law has been developing.

Id.

200. This idea is quite common amongst civilian scholars, who for centuries have given analytical preference to “real” law—that is law derived from Justinian’s Institutes, as opposed to the native and legislated law of the jurisdiction. This distinction holds, even though the legislated social law is of far greater importance in practice. See John Henry Merryman, The Civil Law Tradition: Europe, Latin America and East Asia 7 (1969); Alan Watson, Legal Transplants: An Approach to Comparative Law 36-43 (2d ed., Univ. of Ga. Press 1993) (1974). Unjust enrichment was a core category of the Roman law and hints of this approach resonate throughout the entirety of the restitution literature. In the contemporary common law discourse, Ernest Weinrib's The Idea of Private Law, is probably the clearest expression of this thesis. See generally Ernest J. Weinrib, The Idea of Private Law (1995).
law. This likely explains their presence in the first year law school curriculum. No statute imposes the law of restitution and no social/technological development demands its intervention. Therefore, its legitimacy and relevance relies substantially on a sense of coherence and authenticity. For this reason, an account that elegantly binds seemingly disparate and conflicting rules on the basis of conceptual formality, logical order and principled reason is particularly attractive to the law of restitution.

In the post-realist landscape, American legal thought has generally been skeptical of conceptualist legal arguments. The charge of "transcendental nonsense" is the knee-jerk response to an argument predicated on the authority and coherence of the legal category, and since Holmes, eleganti juris is more of an epithet than a compliment. Yet, as the Restatement project demonstrates, classical conceptualism continues to hold a powerful sway over contemporary legal imagination.

Writing in the opening decades of the twentieth century, legal historian F.W. Maitland claimed that while "[t]he forms of action we have buried... they still rule us from their graves." Duncan Kennedy has argued that much the same applies to classical legal thought, which continues to provide the structure of private law jurisprudence. Despite nearly a century of unrelenting criticism, the classical model of a coherent and integrated private law field continues to provide the baseline through which restitution is constructed and evaluated. Classical legal thought may have long lost its original justification and explanatory plausibility, but like many theological and ritual motifs, it remains etched into the lawyer’s mind as the most basic paradigm of legal thought and still provides a sense of security, authenticity and continuity.

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203. See Waldron, supra note 202, at 17-18 & n.13 (noting that, while Cohen’s article is seventy-second most cited work ever published in law reviews, in seventy years since its publication, it has never been subjected to thorough critique); Oliver Wendell Holmes, Common Carriers and the Common Law, 13 AM. L. REV. 609, 631 (1879) (critiquing jurisprudence of elegance).


205. Accord Duncan Kennedy, Private Law Theory, Lecture at Harvard Law School (Spring 2005); see also Gordley, supra note 1, at 1820.