

## *Working Paper Series*

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Villanova University Charles Widger School of Law

*Year 2006*

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# The Reemergence of Restitution: Theory and Practice in the Restatement (Third) of Restitution

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**The Reemergence of Restitution:  
Theory and Practice in the *Restatement (Third) of Restitution***

Chaim Saiman\*

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## **Abstract**

The ALI'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.

## **Introduction**

It has been widely observed that many of the so-called core doctrines of the common law are actually the inventions legal scholars in the late nineteenth century.<sup>1</sup> Before that time, the law was organized around the procedures embedded in the medieval forms of action rather than around substantive categories such as contract and tort. Towards 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.<sup>2</sup> This systematization program has had considerable impact on the structure of legal thought, and contemporary private law doctrine is still charted largely on nineteenth-century coordinates.

Conceptualism is the central analytic tools associated with this period. While the term sustains many definitions, central to all is 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

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<sup>1</sup> See, e.g., James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CAL. L. REV. 1815, 1817-21 (2000).

<sup>2</sup> *Id.*

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 (concept). Further, the conceptual account portrays law as a series 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 was 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 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 nearly every generation of scholars. Legal realism, conceptualism's chief antagonist, expresses deep suspicion towards interlocking systems of legal rules, arguing, "judges respond primarily to the facts of the case, rather than to the legal rules and reasons."<sup>3</sup> Further, realists 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 basis of legal decisions lie outside of the formal boundaries of the law, and that law is far more influenced by economic political and social factors that the conceptualist vision admits. In time, the realist position became the orthodoxy in academic circles and classical conceptualism ceased to be a respectable mode of legal argument.

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<sup>3</sup> BRIAN LEITER, *American Legal Realism*, in *THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY* 50, (W. Edmundson & M. Golding eds., 2004) (describing the "core claim" of legal realism).

Of late, the common law of restitution, alternately called the law of unjust enrichment, has entered a second wave of conceptualization. If restitution sounds unfamiliar, fear not. Until a few years ago even the former dean of Columbia Law School and director of the American Law Institute (“ALI”) was not quite sure what it meant either.<sup>4</sup> This lack of awareness is often blamed on the fact that despite some initial efforts, the late nineteenth century theorists essentially ‘forgot’ about restitution as they went about creating contract and tort.<sup>5</sup> Despite some initial stirrings surrounding the publication of the first *Restatement on Restitution*, one can credibly argue that restitution does not exist in American law.<sup>6</sup>

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<sup>4</sup> See Lance Liebman *Forward*, RESTATEMENT (THIRD) OF RESTITUTION, ix-xi (Discussion Draft, 2000).

<sup>5</sup> See James Gordley, *The Common Law in the Twentieth Century*, 88 CAL. L. REV. 1815, 1870 (2000). While the degree of 19th and early 20th century neglect should not be overstated, see, e.g. Joseph Perillo, *Restitution in a Contractual Context*, 73 COLUM. L. REV. 1208 (1973), restitution was never understood to be a core legal category in the manner of contract and tort.

<sup>6</sup> Although proving that something does not exist is difficult, it’s quite apparent that restitution has not grabbed the US academy. Since 1980, I am aware of only one book published on the American law of restitution—one written by an Israeli law professor and published by an English publisher (Cambridge Univ. Press), which itself contains for more non-US references and materials than a comparative work on torts or contracts. Hanoch Dagan, *THE LAW AND ETHICS OF RESTITUTION*. The lone treatise is a product of the 1970’s and reflects the scholarly modality of a different era. George Palmer, *THE LAW OF RESTITUTION* (1978). And while a second *Restatement of Restitution* was begun in the mid 1980’s but was aborted after only two drafts were published. See RESTATEMENT (SECOND) OF RESTITUTION (Tentative Draft No. 1, 1983); RESTATEMENT (SECOND) OF RESTITUTION (Tentative Draft No. 2, 1984). Further, I am not aware of a single course in the 170+ US law schools devoted to restitution, nor, should a school want to offer such a course, is there any current casebook specifically addressing this field. Further, searching for articles with the title words “restitution,” “unjust enrichment,” “change of position” “quasi contract” and “constructive trust” in the law reviews of first and second tiered schools since 01/01/2000 (and throwing out articles dealing with restitution in the criminal law sense) produced the following: Andrew Kull, *Restitution’s Outlaws*, 78 CHI.-KENT L. REV. 17, (2003); Mark Gergen, *Symposium: A Tribute to Professor Joseph M. Perillo Restitution as a Bridge Over Troubled Contractual Water*, 71 FORDHAM L. REV. 709, (2002); Colleen Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, (2002); Andrew Kull, *Defenses to Restitution: The Bona Fide Creditor*, 81 BU. L. REV. 919 (2001) Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695, (2001) (which is actually a critique of the Birks-Kull model of restitution, and 3 book reviews of Hanoch Dagan’s recent book. (Sherwin, Wienrib and Gergen). In addition there have been two symposia dedicated to restitution as understood by Professor Kull. In the first, *Symposium: Restitution and Unjust Enrichment*, 79 TEX. L. REV. 1763-2197, (2001) only 3 of the 12 articles were written by US-based law professors. In the second, *Second Remedies Discussion Forum: Restitution*, 36 LOY. L.A. L. REV. 991 (2003), the numbers more balanced (9/14 papers by US-based scholars).

In any event this rather meager output should be compared with the explosion of commonwealth restitution scholarship in the past twenty years. An incomplete and unorganized list recent of books includes, *UNDERSTANDING UNJUST ENRICHMENT* (Hart Oxford 2004); *RESTITUTION, PAST, PRESENT AND FUTURE; ESSAYS IN HONOR OF GARETH JONES* (Hart Oxford (1998) (Cornish ed.); *IN SEARCH OF PRINCIPLE: ESSAYS IN HONOR OF LORD GOFF OF CHIEVELEY* (Oxford 1999) (Swadling ed.); *RESTITUTION* (Lionel D. Smith ed.) (Aldershot: Ashgate 2000); Andrew Burrows, *THE LAW OF RESTITUTION*, (Butterworths: London 2.ed, 2002; 1.d ed. (1993); Robert Stevens, *RESTITUTION IN PRIVATE INTERNATIONAL LAW* (Oxford University Press, 2003); Hanoch Dagan, *THE LAW AND ETHICS OF*

This is, however, changing. Following developments in the Commonwealth and Europe, there is a push for the American common law to recognize the field of restitution. Leading this effort is the ALI, and the emerging drafts of the *Restatement (Third) of Restitution and Unjust Enrichment*.<sup>7</sup> The *Restatement's* central goal is to

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RESTITUTION (Cambridge Press, 2004); Jacques Etienne du Plessis, *COMPULSION AND RESTITUTION: A HISTORICAL AND COMPARATIVE STUDY OF THE TREATMENT OF COMPULSION IN SCOTTISH PRIVATE LAW WITH PARTICULAR EMPHASIS ON ITS RELEVANCE TO THE LAW OF RESTITUTION AND UNJUSTIFIED ENRICHMENT* (Edinburgh Stair Society, 2004); *UNJUSTIFIED ENRICHMENT: A COMPARATIVE STUDY OF THE LAW OF RESTITUTION* (P.W.L. Russell, ed.) (Amsterdam VU University Press, 1996); George B. Klippert, *UNJUST ENRICHMENT* (Toronto Butterworths, 1983); *UNJUST ENRICHMENT: THE COMPARATIVE LEGAL HISTORY OF THE LAW OF RESTITUTION* (Eltjo J.H. Schrage ed.) (Berlin Duncker & Humblot, 1995); Mitchell McInnes, *RESTITUTION: DEVELOPMENTS IN UNJUST ENRICHMENT* (Deakin Law School, Legal Resources Project, 1996); Andrew Burrows and Ewan McKendrick *CASES AND MATERIALS ON THE LAW OF RESTITUTION* (Oxford University Press, 1997); *THE RESTITUTION RESEARCH RESOURCE* (Oxford, England Mansfield Press, 1994); Peter Birks, *AN INTRODUCTION TO THE LAW OF RESTITUTION* (Oxford: Clarendon Press, 1985); Jack Beatson, *THE USE AND ABUSE OF UNJUST ENRICHMENT: ESSAYS ON THE LAW OF RESTITUTION* (Oxford: Clarendon Press, 1991); *LAW COMMISSION [OF GREAT BRITAIN], RESTITUTION OF PAYMENTS MADE UNDER A MISTAKE OF LAW* (London: H.M.S.O. 1991); Peter Birks, *RESTITUTION: THE FUTURE* (Annandale, New South Wales: Federation Press, 1992.); New South Wales Law Reform Commission, *RESTITUTION OF BENEFITS CONFERRED UNDER MISTAKE OF LAW* (Sydney: New South Wales Law Reform Comm. 1987); Scottish Law Commission, *RECOVERY OF BENEFITS CONFERRED UNDER ERROR OF LAW* (Edinburgh: Scottish Law Commission, 1993). *RESTITUTION AND BANKING LAW* (Francis D. Rose, eds.) (Oxford: Mansfield Press, 1998); *RESTITUTION AND INSOLVENCY* (Francis Rose ed.) (Mansfield Press 2000) Andrew Skelton, *RESTITUTION AND CONTRACT* (Oxford: Mansfield Press, 1998); Ian McNeil Jackman, *THE VARIETIES OF RESTITUTION* (Sydney, Federation Press, 1998); Goff and Jones, *THE LAW OF RESTITUTION*, (London, Sweet and Maxwell 1998) (now in its fifth edition); Peter Birks, *UNJUST ENRICHMENT* (Oxford, 2005) (second edition); Lionel Smith, *THE LAW OF TRACING* (Oxford 1997); Craig Rotherham, *PROPRIETARY REMEDIES IN CONTEXT* (Hart Pub. Oxford 2002); Steve Hedley, *RESTITUTION: ITS DIVISION AND ORDERING* (London Sweet & Maxwell 2001); *THE LAW OF RESTITUTION* (Hedely & Halliwell eds.) (Butterworths 2002).

<sup>7</sup> At present, the drafts of the *Restatement Third* include, *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* (Discussion Draft, March 2000) [hereinafter *Discussion Draft*]; *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* (Tentative Draft No. 1, April 2001 [hereinafter *Tentative Draft No. 1*]); *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* (Tentative Draft No. 2, April 2002) [hereinafter *Tentative Draft No. 2*]; *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* (Tentative Draft No. 3, March 2004) (hereinafter "*Tentative Draft No. 3*"); *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* (Tentative Draft No. 4, April 2005) [hereinafter *Tentative Draft No. 4*]. 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.

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 of Restitution and Unjust Enrichment at Midpoint*, 56 *Current Legal Problems* 289, 291 n.10 (2003).

convince the American legal public that restitution is a doctrinal category like contract and tort which itself can be a source of legal rights and liabilities.<sup>8</sup> 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* makes its case by arguing that while the name might be new, the idea of restitution has existed all along, even if no one quite noticed it. Taking a page from the conceptualism of the classical legal theorists, 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 and others, are in fact unified by a single idea known as unjust enrichment. Going forward, courts are to expressly proclaim that they are dealing with restitution issues and decide these cases according to the rules and principles of restitution.

The *Restatement's* project raises several questions. How exactly does a group of scholars go about “inventing” a new legal field? Can law just be made up; And will anyone listen? 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, if restitution, like contract and tort is really a fundamental basis of liability, how come no one has ever heard of it? And why do we all of a sudden need it now? 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 five Parts. Part I reviews the work product of the *Restatement* and explains how the it transforms the mass of seemingly unrelated doctrines into a unified conceptual field. Part II evaluates the *Restatement's* analysis and explores the assumptions underlying the *Restatement's* legal conceptualism. Part III

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<sup>8</sup> See Lance Liebman *Forward*, RESTATEMENT (THIRD) OF RESTITUTION, ix-xi (Discussion Draft, 2000).

examines the *Restatement*'s jurisprudence in terms of other expressions of post-realist conceptualism. Part IV turns to assess the impact of conceptualization on substantive doctrine. Part V concludes examining why, after nearly a century in exile, does classical legal thought makes a comeback in the *Restatement of Restitution*.

## I. The *Restatement* Project

How is a legal field created? A review of the *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, restitution 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.<sup>9</sup> 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,<sup>10</sup> 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.<sup>11</sup>

They claimed:

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<sup>9</sup> The history of the development of the law of quasi-contracts is charted out in DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* 177-181.

<sup>10</sup> Seavey and Scott seemed aware that they were introducing it to the world, see W. Seavey & A. Scott, *Restitution*, 54 L. Q. R. 29, 31 (1938) See also Peter Birks, *A Letter to America*, GLOBAL JURIST FRONTIER discussing the naming of the First Restatement.

<sup>11</sup> See *RESTATEMENT ON RESTITUTION: QUASI CONTRACT AND CONSTRUCTIVE TRUST* (1937).



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.<sup>12</sup>

Seavey and Scott further argued that restitution:

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.<sup>13</sup>

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*,<sup>14</sup> restitution law and scholarship has largely disappeared from the American scene. 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 not caught on in 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.<sup>15</sup> Unjust enrichment “describes[s] the fundamental basis for liability in restitution,”<sup>16</sup> and “restitution (meaning the law of

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<sup>12</sup> W. Seavey & A. Scott, *Restitution*, 54 L. Q. R. 29, 31 (1938). In the first *Restatement* these 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. *Id.*

<sup>13</sup> *Id.* at 32.

<sup>14</sup> First edition 1958, Second edition 1966.

<sup>15</sup> Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1192-93 (1995) [hereinafter *Rationalizing*]; see also *Discussion Draft* §1 Cmt.a (“Restitution is a coordinate basis of liability that, taken together with principles of contract and torts complete the account of civil obligations in our legal system.”)

<sup>16</sup> *Discussion Draft*, *supra* note 8, § 1 at 3.

unjust or unjustified enrichment) is itself the source of obligations, analogous in this respect to tort or contract.”<sup>17</sup> However, by using a slight yet important shift in language, 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.” Here, ‘restitution’ signifies the nature of the payment.<sup>18</sup> 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 has been unjustly enriched at the expense of another is **liable in restitution** to the other.”<sup>19</sup>

## 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 are predictably applied. The *Restatement* is operating both against ignorance and indifference to restitution on the one hand and ambivalence, or even hostility on the other. The hostility is predicated on assuming that restitution is little more than accumulated bits of discretion garbed as doctrine. Despite the *Restatement*’s dismissal, this view traces back to the birth of unjust enrichment under Lord Mansfield, who held “[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.”<sup>20</sup> 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-

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<sup>17</sup> *Discussion Draft, supra* note 8, § 1 at 12-13.

<sup>18</sup> RESTATEMENT (FIRST) OF RESTITUTION § 1 (1938) (emphasis added).

<sup>19</sup> RESTATEMENT (THIRD) OF RESTITUTION § 1 (Discussion Draft, 2000) (emphasis added). Both of these formulations contrast sharply with the language of the aborted RESTATEMENT (SECOND) OF RESTITUTION §1, which reads, “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 unjust enrichment.”

Two important differences emerge. First, the *Restatement(Second)* envisions restitution as based on plaintiff’s loss rather than the exclusive focus on defendant’s gain that is 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.

<sup>20</sup> 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760) (capitalization modernized).

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.<sup>21</sup>

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 is legal not moral.”<sup>22</sup> In support, the *Restatement* points to several morally questionable transactions and, (with apparent pride), asserts that the law of restitution offers no recourse.<sup>23</sup> 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, assuming 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.<sup>24</sup> The *Restatement* however, posits that restitution is defined as unjust enrichment—a principle that focuses exclusively on defendant’s unjustified gain rather than on plaintiff’s loss and desire for compensation. Upon further examination however, “unjust enrichment” is only slightly more precise.<sup>25</sup> 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,”<sup>26</sup> a term conveying that the transaction is unjustified as a matter

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<sup>21</sup> See Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083 (discussing various definitions of the term “equity as it relates to the law on unjust enrichment).

<sup>22</sup> *Discussion Draft*, *supra* note 8, at § 1 Cmt. b.

<sup>23</sup> *Discussion Draft*, *supra* note 8, § 1, Illustration 1 & 2.

<sup>24</sup> See *Rationalizing*, *supra* note 16, at 1191-92.

<sup>25</sup> *Discussion Draft*, *supra* note 8, § 1 at 2-4.

<sup>26</sup> *Discussion Draft*, *supra* note 8, § 1 at 1-4. This is the term favored by many non-American restitution scholars. See *Reporters notes* to § 1 Cmt. b. at 13. A more complete account of these terms is available in

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.<sup>27</sup>

Terminological reform extends beyond the main subject heading. The *Restatement* sets out to collect numerous doctrines from all over the common law landscape and locate them within 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.<sup>28</sup> 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 understood as “actions in equity” appended to the law of property.<sup>29</sup> 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.<sup>30</sup>

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.<sup>31</sup> While the *Restatement* is quick to jettison this archaic terminology, courts have not quite caught up.<sup>32</sup> Most notably in this

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Francesco Giglio, *A Systematic Approach to “Unjust” and “Unjustified” Enrichment*, 23 OX. J. LEG. STUD. 455 (2003).

<sup>27</sup> See *Discussion Draft*, *supra* note 8, § 1 *Reporters notes* to Cmt. b. at 13. (“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 *Rationalizing*, *supra* note 16, at 1212-13.

<sup>28</sup> See *Banque Worms v. BankAmerica Intl.*, 570 N.E.2d 189, 192 (N.Y. 1991).

<sup>29</sup> *E.g.*, *Worley v. White Tire of Tenn., Inc.*, 182 S.W.3d 306 (Tenn. Ct. App., 2005); *Wright v. Sampson*, 830 N.E.2d 1022, (Ind. App., 2005); See also *Tentative Draft No. 1*, § 12, *Reporter’s Notes* to Cmt. at p.171.

<sup>30</sup> See *Tentative Draft No. 1*, *supra* note 8, § 12 Cmt a. See *id.* § 6 Illustration 2.

<sup>31</sup> See *e.g.*, Dan B. Dobbs, *DOBBS LAW OF REMEDIES* § 4.2-4.3 (2d ed. 1993).

<sup>32</sup> Looking only at the more unusual terminology, see, *e.g.*, *Jantzen Beach Assocs., LLC v. Jantzen Dynamic Corp.* 200 Or. App. 458, 115 P.3d 943, 2005 WL 1580248 (Or. App., July 26 2005) (Property

regard are references to “equity,” “quasi contract,” “implied contract,” *quantum meruit*” and “constructive trust,” terms that the *Restatement* consciously omits but which remain the operative terminology in nearly every case presenting unjust enrichment issues.<sup>33</sup>

Surveying the literature on restitution in 1968, Professor Wade found that the American Digest System (West) had no entry for “unjust enrichment, restitution, or quasi contract,” and that one had to look to more than twenty-five entries to cobble together the rules that the *Restatement* presents as restitution.<sup>34</sup> 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 defendant, and (ii) that the measure of recovery in restitution must in every case be the extent of the defendant’s unjust enrichment.<sup>35</sup>

The insistence that unjust enrichment provide the basis for restitution is quite exacting. “In the absence of benefit, there can be no liability in restitution; nor can the measure of liability in restitution exceed the measure of the defendant’s enrichment.”<sup>36</sup>

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owner brought action for assumpsit against neighboring owner arising from defendants’ violation of a restrictive covenant); *Morfin v. Estate of Martinez*, 831 N.E.2d 791, 2005 WL 1734987 (Ind. App., July 26, 2005) (action regarding constructive trust on life insurance proceeds and pension benefits); *Carthaginian Financial Corp. v. Skinner, Inc.* Slip Copy, 2005 WL 1388689 (D.Vt., June 3, 2005) (breach of contract and replevin actions regarding sale of artwork); *Chorman v. McCormick* 172 S.W.3d 22, 2005 WL 1634014 (Tex. App. July 12, 2005) (former father-in-law seeks equitable lien on former daughter-in-law’s one-half interest in real property); *Federal Ins Co. v. Hartford Steam Boiler Inspection & Ins Co.*, 415 F.3d 487, 2005 WL 1594354 (6th Cir. July 8, 2005) (insurer brought suit as equitable subrogee against second insurer, seeking to recoup payment on basis that loss resulting from mechanical breakdown of leased equipment).

<sup>33</sup> See, e.g. 1 *Palmer* §1.1 (Supp 2006) (citing hundreds of cases displaying the terminological and conceptual confusion).

<sup>34</sup> See John Wade, *The Literature of Restitution*, 19 HASTINGS. L.J. 1087, 1097 (1968).

<sup>35</sup> *Rationalizing*, *supra* note 16, at 1196. See also the blackletter rule of *Discussion Draft* § 1 which states: “A person who is unjustly enriched at the expense of another person is liable in restitution to the other.” See *supra* note 20 discussing the evolution of the term restitution.

<sup>36</sup> *Discussion Draft*, *supra* note 8, § 2 Cmt.d at 17.

Moreover, “cases inconsistent [with these principles of restitution] will henceforth require either a different rationale or a different result.”<sup>37</sup>

This approach does not have the support of leading scholars.<sup>38</sup> 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*.”<sup>39</sup> This formulation has been repeated by several courts,<sup>40</sup> and affords the possibility of restitution outside of unjust enrichment. Similarly, standard compilations of blackletter 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.<sup>41</sup>

The disjunct 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 enrichment that do not depend on the presence of an actual (express) contract. However, as several courts have pointed out, the very term “*quantum meruit*” means “as much as he deserved.”<sup>42</sup> This orientation naturally

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<sup>37</sup> *Rationalizing*, *supra* note 16, at 1196-97.

<sup>38</sup> *See, e.g.*, Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277 (1989); H. DAGAN, *THE LAW AND ETHICS OF RESTITUTION* (Cambridge University Press 2004); Joseph Perillo, *Restitution in a Contractual Setting*, 73 COLUM. L. REV. 1208 (1973); Perillo, *Restitution in the Restatement of Contracts*, 81 COLUM. L. REV. (1981). In a different vein of disagreement, *see* PETER BIRKS, *Misnomer*, in *RESTITUTION: PAST, PRESENT AND FUTURE*, (W.R. Cornish et al. eds., 1998). *See also* Peter Birks, *Unjust Enrichment and Wrongful Enrichment*, 79 TEX. L. REV. 1767, 1700 (2001) (citing Graham Virgo, *THE PRINCIPLES OF THE LAW OF RESTITUTION* 6-16 (1999) and I.M. Jackman, *THE VARIETIES OF RESTITUTION* (1998) as disagreeing with the unitary model).

<sup>39</sup> RESTATEMENT (FIRST) OF RESTITUTION § 1 Cmt.e. (emphasis added).

<sup>40</sup> *See, e.g.*, *Schwartz v. Gregori*, 45 F.3d 1017 (6th Cir. 1995); *Russell v. Northrop Grumman Corp.* 921 F.Supp. 143 E.D.N.Y., 1996.

<sup>41</sup> 66 Am. Jur 2d. *Restitution* § 1. (emphasis added) (2004). *See also* Introductory Note, titled “Underlying Principles of Restitution” to the *Restatement (Second)* which states “The central idea is the conjunction of unjust enrichment on the one side and a loss or grievance on the other. . . [L]iability in restitution depend[s] in part on the wrongful acquisition of gain **and in part on [the] harm or loss wrongfully imposed.**” (emphasis added).

<sup>42</sup> BLACK’S LAW DICTIONARY 1255 (7th ed.1999). For cases *see, e.g.*, *City of Mishawaka v. Kvale*, 810 N.E.2d 1129 (Ind. App. 2004); *Kashani v. Tsann Kuen China Enter. Co., Ltd.*, 118 Cal. App. 4th 531, (Cal.

directs the court's thinking towards plaintiff's frustrated expectations rather than defendant's enrichment.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup>

Leading scholarship is also somewhat skeptical of the *Restatement's* assumption that restitution can be reduced to precise and positive rules. To many, the landscape of restitution is a vast expanse that lacks set boundaries or fixed reference points.<sup>46</sup> Noted scholars observe that “[r]estitution is an unusually flexible body of case law. . . enabling judges and juries to consider many cases on their merits unhampered by doctrine.”<sup>47</sup> The leading mid-twentieth century restitution scholar found that “the most obvious statement about the American law of restitution is that it lacks any kind of system.”<sup>48</sup> More contemporary scholars note “the law of restitution is characterized by a heavy

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App. 2 Dist. 2004); *Nextel South Corp. v. R.A. Clark Consulting, Ltd.*, 596 S.E.2d 416, (Ga. App. 2004); *Ellerin & Assocs. v. Brawley*, 589 S.E.2d 626 (Ga. App. 2003).

<sup>43</sup> 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 the quasi contract/*quantum meruit* permits recovery on the basis of an implied promise to be paid. *See, e.g.*, *Great Plains Equip., Inc. v. Northwest Pipeline Corp.* 979 P.2d 627 (Idaho 1999). For a particularly muddled locution, *see Sack v. Tomlin*, 871 P.2d 298 (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. . .”). Further examples regarding the confusion between unjust enrichment and quantum meruit/ quasi-contract are cited in G. Palmer, *THE LAW OF RESTITUTION*, § 1.1 n.3&4 (Supplement 2006) *See also infra* at section II.D (discussing the *Restatement's* gerrymandering of benefits in emergency services cases to maintain its conceptual modeling).

<sup>44</sup> Such is the law in Maine. *See Forrest Assocs. v. Passamaquoddy Tribe*, 760 A.2d 1041 (Me. 2000) (existence of quasi contract/*quantum meruit* is a question of fact held to the discretion of the trial court and reviewed for clear error).

<sup>45</sup> A quick perusal of the first 50 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.

<sup>46</sup> Professor Doug Rendleman designates this 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* 33 GA. L. REV. 847, 887-89 (1999).

<sup>47</sup> Stewart Macaulay, *Comment, Restitution in Context*, 107 U. PA. L. REV. 1133, 1135 (1959).

<sup>48</sup> JOHN P. DAWSON, *UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS* 111 (1951).

dependence on general principles,”<sup>49</sup> and that “unjust enrichment is an indefinable idea in the same way that justice is indefinable.”<sup>50</sup> 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.<sup>51</sup> This modeling (or the lack thereof) cuts against the rationalized conception and reinforces the view that restitution is a remedy imposed by courts as circumstances require, rather than a substantive source of rights courts are required to enforce.<sup>52</sup>

### C. *Restitution and Tort*

Nearly all restitution scholars agree that unjust enrichment presents a substantive basis of liability. They disagree however, about 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 contract.<sup>53</sup> The *Restatement’s* position is unequivocal: restitution is purely substantive. Anytime the law imposes a restitutionary remedy, the defendant has necessarily been unjustly enriched.

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

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<sup>49</sup> Dan B. Dobbs, DOBBS LAW OF REMEDIES § 4.1 (2d ed. 1993).

<sup>50</sup> George E. Palmer, THE LAW OF RESTITUTION § 1.1 (1978).

<sup>51</sup> See, e.g., Weaver, Partlett, Lively, and Kelly, REMEDIES: CASES PRACTICAL PROBLEM 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, Macbeth, Levine and Jung, REMEDIES: PUBLIC AND PRIVATE (3<sup>rd</sup> ed. 2002). This book’s main titles (in order) are: Injunctions, Criminal and Civil Sanctions, Damages, Restitution, Collection of Money Judgments, Conduct of the Plaintiff and Attorney’s Fees. Interestingly, in their *Note on Approaching Restitution Cases* (724-28), the authors endorse the *Restatement’s* theory that restitution is a branch of the common law. Nevertheless this discussion is relegated to 80 pages of a roughly 1000-page casebook on remedies.

The situation is a bit more balanced in Doug Rendelman, REMEDIES: CASES AND MATERIALS: (6<sup>th</sup> ed. 1999). Rendelman’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. Nevertheless, the discussion is situated in a casebook devoted to defining remedies delineated by other branches of private law.

<sup>52</sup> 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 H. 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.

<sup>53</sup> Compare e.g., Dan B. Dobbs, DOBBS LAW OF REMEDIES § 4.1(2) (2d ed. 1993) (the substantive side of restitution) with *id.* § 4.1(4) (remedial side of restitution); GEORGE E. PALMER, THE LAW OF RESTITUTION § ?? (Little 1978); PETER BIRKS & ROBERT CHAMBERS, THE RESTITUTION RESEARCH RESOURCE, vii (1994).



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.<sup>54</sup>

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).<sup>55</sup> “Both usages are part of any complete definition of restitution.” Specific restitution (the remedial element) is “part of the core concept of restitution” that is “conceptually equal to the avoidance of unjust enrichment.”<sup>56</sup>

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. However, because getting back \$500 is more attractive than the mere return of the \$100, plaintiff will opt for restitution as his *remedy* for his 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 on 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 *status quo ante* and receive his initial purchase price rather than 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 respectively.

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

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<sup>54</sup> Douglass Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV 1277, 1293 (1989). [hereinafter Laycock, *Restitution*].

<sup>55</sup> 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. See Laycock, *Restitution* at 1285-90.

<sup>56</sup> *Id.* at 1279-80.

restitution's reason and function across all of its factual settings.”<sup>57</sup> Rather, Professor Kull argues that every case of conversion results in the emergence of two separate bases of liability; one in tort and the other in restitution.<sup>58</sup> And while in most cases the labeling is irrelevant (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.<sup>59</sup>

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)<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup>

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<sup>57</sup> *Rationalizing*, *supra* note 16, at 1216, 1226.

<sup>58</sup> *Id.* at 1225-26; *See also Tentative Draft No. 4, Introductory Note to Chapter 5* (§§ 40-44) at 38.

<sup>59</sup> *See Rationalizing* at 1225; *Tentative Draft No. 4, Introductory Note to Chapter 5* (§§ 40-44) at 38-39, and Reporter's note.

<sup>60</sup> 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.” *Tentative Draft No. 3, supra* note 8, “Introductory Note to Restitutionary Remedies for Breach of An Enforceable Contract” (§ 37 & 38) at 296.

<sup>61</sup> 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 §§ 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 acknowledgment” “that we have inherited an imperfect terminology.” *See Tentative Draft No. 3* “Introductory Note to Restitutionary Remedies for Breach of An Enforceable Contract” (§ 37 & 38).

<sup>62</sup> *Rationalizing*, *supra* note 16, 1219-1222; *see also* the extended and apologetic Introductory Note addressing this issue. *Tentative Draft No. 3*, “Introductory Note to Restitutionary Remedies for Breach of An Enforceable Contract” (§ 37 & 38). This view is hardly uncontroversial. *See* RESTATEMENT (SECOND) CONTRACTS § 344-45, 373 at Cmt. a, and *id.* Introductory Note to Chapter 16 Topic 4; Andrew Kull, *Disgorgement for Breach, the “Restitution Interest”* 79 TEX. L. REV. 2021, 2029-44 (2001) (analyzing disagreement between Professor Kull and second *Restatement of Contract* regarding classification of restitution as a remedy for breach of contract).

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. Thus from the perspective of theory, one of the central goals of the *Restatement's* is to distinguish restitution from contract. In fact, when compared 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 are coexist and reinforce each other.<sup>63</sup> Thus the *Restatement* writes, “when a benefit is conferred within the framework of a valid and enforceable contract, the recipient's ability to make compensation is fixed exclusively by the contract.”<sup>64</sup> 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.”<sup>65</sup> Hence, “considerations of justice and efficiency require, therefore, that voluntary transfers be made pursuant to contract whenever reasonably possible.”<sup>66</sup> In the *Restatement* unjust enrichment is a backup ground of liability which 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:

where 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

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<sup>63</sup> See Steve Hedley, *Restitution: Contract's Twin* in FAILURE OF CONTRACTS at 272 n.136 (F.D. Rose ed. Oxford Hart 1997) (pointing out that Professor Kull from amongst all the restitution scholars insists on the primacy of contract over restitution); Mark Gergen, *Restitution and Contract: Reflections on the Third Restatement*, 13 RESTITUTION LAW REVIEW 224 (2004) (noting that the *Restatement's* commitment to the independence of contract law and its preference over restitution claims is significantly stronger than the position of Peter Birks and other leading commonwealth scholars). See also Andrew Kull, *Restitution and the Noncontractual Transfer*, 11 Journal of Contract Law 1 (1997).

<sup>64</sup> *Discussion Draft*, *supra* note 8, § 2 Cmt. c at 16. See also *id.* (“The application of restitution principles to contractual exchanges is exclusively to the consequences of performance under ineffective, or interrupted agreements.”).

<sup>65</sup> *Discussion Draft*, *supra* note 8, § 2 Cmt. f at 21-22.

<sup>66</sup> *Discussion Draft*, *supra* note 8, § 2 Cmt. f at 21-22.

contract to govern a particular transaction normally establishes a boundary beyond which liability in restitution cannot extend.<sup>67</sup>

This view works its way into the blackletter rule of § 2, 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.”<sup>68</sup> The *Restatement’s* solution is a classic expression of the will theory of contract.<sup>69</sup> Unjust enrichment must be . . . unjust. But if the parties agreed (contracted) to the transaction, it is by definition just, and plaintiff has no claim in restitution.<sup>70</sup>

The *Restatement* uses the contract/no contract divide to explain a number of results. For example § 5 (invalidating mistake) presents the following two scenarios:

Case 1

A’s life is insured by B for \$5000, with C as the beneficiary. The body of a shipwrecked victim is officially identified as A, and C is tendered the policy amount. Later, A is discovered alive. C is liable in restitution to B.<sup>71</sup>

Case 2

Same facts as case 1, except B agrees to pay half the policy now, to be retained in any event, and the remainder if A does not reappear within two years. C is entitled to retain the tendered payment.<sup>72</sup>

This distinction is justified because in Case 2 “the terms of the transaction constitute an express allocation between the parties of the risk that payment under the

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<sup>67</sup> *Rationalizing, supra* note 16, at 1200.

<sup>68</sup> *Discussion Draft, supra* note 8, § 2(2) (blackletter section) (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 uniting the principal headings of liability in restitution. . . . 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. These are transactions in which the defendant’s liability to pay for a performance actually received has not been specified by a contract that is both valid and enforceable.

<sup>69</sup> The will theory of contract is developed and discussed in Duncan Kennedy, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* 212-34 (unpublished 1998) *available at* <http://www.duncankennedy.net>.

<sup>70</sup> *See Discussion Draft* § 2 Illustration 1.

<sup>71</sup> *See id.*, § 5 Illustration 3.

<sup>72</sup> *Id.* Illustration 4.

policy is in fact not due.”<sup>73</sup> 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 just about every variation of the venerable flagpole hypothetical (where A promises B \$100 to reach the top of the flagpole).<sup>74</sup> 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,<sup>75</sup> stonemasons employed to carve statutes that are not completed,<sup>76</sup> and architects retained to draw up plans that are never used—recovery is typically allowed.<sup>77</sup> Yet whether these claims are understood as breach of contract, promissory estoppel, reliance, *quantum meruit*, restitution, implied or constructive contract, has never quite been worked out.<sup>78</sup> The line between the classic enforceable contract and a host of peripheral contract-like remedies is far blurrier than the *Restatement* is willing to admit.<sup>79</sup>

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<sup>73</sup> *Discussion Draft*, *supra* note 8, § 5 Illustration 4 at 40.

<sup>74</sup> This view is critiqued in STEVE HEDLEY, *RESTITUTION: ITS DIVISION AND ORDERING*, (pages...) (2001).

<sup>75</sup> *Planche v. Colburn*, 131 Eng. Rep. 305 (1831); Dawson, *Restitution Without Enrichment*, 61 B.U. L. REV. 563, 578-80 (1981).

<sup>76</sup> *Dowling v. McKinney*, 124 Mass. 478 (1878). See John P. Dawson, *Restitution Without Enrichment*, 61 B.U. L. REV. 563, 577 (1981). *Id.* at 580-81.

<sup>77</sup> *Stephen v. Camden & Phila. Soap Co.*, 75 N.J. L. 648 (1907); *Hunter v. Vicario*, 130 N.Y.S. 625 (1911); John P. Dawson, *Restitution Without Enrichment*, 61 B.U. L. REV. 563, 582 (1981).

<sup>78</sup> *Compare, Rationalizing*, *supra* note 16, at 1207 (arguing these cases should be understood as contract and reliance claims), with Dawson, *Restitution Without Enrichment*, 61 B.U. L. REV. at 577-85 (claiming these actions include restitution) and Perillo, *Restitution in the Second Restatement of Contracts*, 81 COLUM. L. REV. 38 (1981).

<sup>79</sup> 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

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.<sup>80</sup> Both of these theories go under the guise of "quasi contract,"<sup>81</sup> a term that itself generates confusion between contracts implied-in-law, which tend towards restitution,<sup>82</sup> and contracts implied-in-fact, which tend towards reliance,<sup>83</sup> and ransacking the case law is unlikely to produce a clear dividing line between these two ideas.<sup>84</sup> A less conceptualistic approach, would therefore decrease the emphasis placed on doctrinal pigeonholes and more frankly discuss how courts routinely eschew doctrinal niceties to obtain justice between the parties.<sup>85</sup> What remains clear however, is that the

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defends the Restatement's position in, *Restitution and Contract*, 13 RESTITUTION LAW REVIEW, 238-240 (2004).

<sup>80</sup> The *Restatement's* discussion of the relationship between these doctrines is fairly limited. A typical expression of the approach is set out at *Tentative Draft No. 3* §31 Cmt. c., titled *Restitution and Reliance*, which provides:

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 outcomes describes them in terms of promissory liability, not as restitution based on unjust enrichment.

See also Reporter's notes to this comment and to § 23 Cmt c. Finally, see § 26 Illustration 16 for a demonstration of the practical difference between reliance and restitution claims.

<sup>81</sup> Compare, e.g., *Ver Brycke v. Ver Brycke*, 843 A.2d 758, 772 n. 9 (Md. 2004) (noting that promissory estoppel is a "quasi contract" claim) with *Wingert and Assocs., Inc. v. Paramount Apparel Intern., Inc.*, 2005 WL 1355028 (D. Minn. 2005) ("unjust enrichment claims are typically 'quasi contract' claims").

<sup>82</sup> A typically confusing expression of this approach can be found in *Kelly v. Levandoski*, 825 N.E.2d 850, 860 (Ind. App. 2005). ("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.") (citations and internal quotations omitted).

<sup>83</sup> See RICHARD A. LORD, WILLISTON ON CONTRACTS § 1:6 (4th ed.2004) ("A contract implied in fact requires the same elements as an express contract and differs only in the method of expressing mutual assent.").

<sup>84</sup> See Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695 (2001) (arguing that there is no clear line between restitution and reliance); GRANT GILMORE, THE DEATH OF CONTRACT 97 (1995) (quasi contract [restitution] and reliance are "twins"; noting 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.")

<sup>85</sup> See, e.g., DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 634-35 (2002) (suggesting a difference 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).

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.<sup>86</sup>

## II. 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 the “immanent rationality of the law.”<sup>87</sup> This in turn rests on three related assumptions: first, that the law coheres; second, that it coheres around distinctly legal principles; 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.<sup>88</sup> Nevertheless, a basic pattern emerges. If scholars can show that a certain concept is implicit in past decisions (even if the courts were unaware of it), once articulated, the concept becomes binding on future decisions.<sup>89</sup>

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<sup>86</sup> See STEVE HEDLEY, *Restitution: Contract’s Twin* in FAILURE OF CONTRACTS 250-59 (F.D. Rose ed. Oxford Hart 1997) (critiquing mainstream restitution scholarship for adopting a “Victorian” model of contract law); but see Gergen, *supra* note 66 at 238-40.

<sup>87</sup> See Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

<sup>88</sup> 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.

*Rationalizing*, *supra* note 16, at 1194.

<sup>89</sup> See generally, James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CAL L. REV. 1815, 1817-21 (2000) (describing the process through which common law concepts are created and applied).

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), while others incorrect (recovery based on constructive notice).<sup>90</sup> 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 about 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 scholars can point to cases (both past and present) that do not fit analytic schema and declare them “wrongly decided.”

This type of argument, the most classic of the classical legal period, is as intuitive as it is debated.<sup>91</sup> 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

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<sup>90</sup> See for example, *Tentative Draft No. 1*, § 12 Reporters Note to comment (cases where property deeds are reformed based on a fictional theory of constructive notice are more correctly described as cases that prevent unjust enrichment).

<sup>91</sup> The literature on its contentiousness is legion. The most famous American critic of the immanent rationality approach is of course Justice Holmes in, Oliver Wendell Holmes, *Privilege, Malice, and Intent*, in COLLECTED LEGAL PAPERS 117 (1920); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897). Jeremy Bentham was probably the most vociferous critic. See GERALD POSTEMA, BENTHAM AND THE COMMON LAW TRADITION, 263-301 (1986). 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 identified the French philosopher Rene Demogue as 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).

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 scholarly defense, see Stephen A. Smith, *Taking Law Seriously*, 50 U. TORONTO L.J. 241 (2000) (defending doctrinal and conceptual scholarship).



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.<sup>92</sup> But unlike the *Restatement*, Laycock does not assume that the law of restitution must cohere under a single unifying principle.<sup>93</sup> This seemingly technical point highlights salient differences in their view 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.<sup>94</sup> This conceptual framing has its roots in the writings of late nineteenth-century theorists and remains a common form of post-realist conceptualism.<sup>95</sup> The classical tort writers, for example, were unable to reconcile the whole of tort law under a

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<sup>92</sup> See 67 TEX. L. REV. at 1277. ("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 and classify the principal situations in which restitution is of practical and not just theoretical interest.")

<sup>93</sup> See *supra* notes 57-65 and text.

<sup>94</sup> *Supra id.*

<sup>95</sup> See Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, 628-30 (1984) (describing core/periphery modality as a type of formalism that takes account of realist critiques).

single, unitary principle.<sup>96</sup> 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.<sup>97</sup>

The *Restatement*’s principle author, however, finds Laycock’s theory incoherent, claiming that restitution cannot be “an apple and an orange,”<sup>98</sup> consisting of a substantive basis of liability and a group of remedies for other causes of action. Analytically, there is much good sense in this argument, but the insistence on conceptual unity has its costs, as casuistry is the price one pays for analytic coherence. When a thief steals \$100, Professor Kull’s argument is that liability in restitution emerges coequally with tort; even though it has never been thought that conversion has anything to do with unjust enrichment.<sup>99</sup> The sole purpose of this posited parallel track of restitution is to maintain conceptual unity, and to show that restitution will emerge whenever is 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

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<sup>96</sup> See for example, Frederick Pollock’s discussion in the introduction to his treatise on torts. 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 (1873) (attributed to Holmes by M. DeWolfe Howe in M. Howe, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS* 64 (1963)), and in *THE COMMON LAW* at 82-163.

<sup>97</sup> 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. Frederick Pollock, *THE LAW OF TORTS* 17-21.

<sup>98</sup> *Rationalizing*, *supra* note 16, at 1216.

<sup>99</sup> See *supra* notes 61-62 and text. Moreover, Professor Kull goes to great lengths to claim that returning stolen property is unrelated to restitution as unjust enrichment. See *Rationalizing*, *supra* note 16, at 1191-92.

peripheral doctrines mean 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," political and economic motivations all impact legal outcomes.<sup>100</sup> This in turn weakens the normative claim. To the extent *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 held wrongly decided. But if unjust enrichment is simply a convenient way to explain many, but not all, restitution cases, then non-conforming rules can simply be described as peripheral. Moreover it encourages seemingly unresolvable debates as to what should be characterized as periphery and core; and just how to measure each of these categories; whether quantitatively or qualitatively? Finally, at what point does the periphery swallow up the core?<sup>101</sup>

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, five—or as many headings as there are cases? (The conclusion reached by the classical realists.)<sup>102</sup>

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<sup>100</sup> 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 FREDERICK POLLOCK, *THE LAW OF TORTS* 14-16 (1887).

<sup>101</sup> See for example the debate between Mark Gergen and Steve Hedley as to whether the multiplicity of "peripheral" contract doctrines render its "core" meaningless. See Mark Gergen, *Restitution and Contract*, at 238-40. The debates surrounding Grant Gilmore's *THE DEATH OF CONTRACT* offer another pertinent example.

<sup>102</sup> 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 severable sticks, the idea that property is a coherent analytic concept is dead. As related in Private Law Theory Class, *delivered at HLS Spring 2005*.

This view is currently held by, STEVE HEDLEY, *Restitution: Contract's Twin in FAILURE OF CONTRACTS* at 251 (F.D. Rose ed., Oxford Hart 1997) (suggesting that restitution has "20 or more heads of liability" and that the "case for the theory to unite restitution has not been made.")

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 severable sticks, the idea that property is a coherent analytic concept is dead. As related in Private Law Theory Class, *delivered at HLS Spring 2005*.

C. *The Source of Liability*

In the conceptualist view, every instance of liability must be justified under a distinct analytical basis. While in theory each basis of liability is 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.<sup>103</sup> But cases where the contract fails because of frustration of purpose or change of circumstances (*Restatement* § 34), or when a dispute arises after one party has engaged in partial performance (*Restatement* § 35) amply demonstrate that whether the remedy is under “contract” or “restitution” is no simple matter.<sup>104</sup> 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?<sup>105</sup>

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<sup>103</sup> See for example, *Discussion Draft* § 2 Cmt. c. (“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.”).

<sup>104</sup> See *supra* section I.D. See also *Tentative Draft No. 3*, *supra* note 8, § 34 Cmt. a at 211. 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.” 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.” 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.

<sup>105</sup> See *Tentative Draft No. 3*, “Introductory Note to Restitutionary Remedies for Breach of An Enforceable Contract” (§ 37 & 38) (noting the disagreement between the *Restatement (Third) of Restitution* and the *Restatement (Second) of Contracts* regarding the relationship between restitution and contract).

The goal of course is not to figure out when 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 junctures, particularly if enough money rides on the decision. The important point is that this artificial discourse regarding the lifecycle of a contract is a product of the *Restatement's* conceptualized 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;<sup>106</sup> especially where disputes arise midstream (as in § 35).<sup>107</sup> The conceptualist finds such untheorized recoveries are unpalatable, as each remedy-granting decision must fit into some larger category of pre-theorized liability.

#### D. *Gerrymandered Concepts*

There is no doubt that conceptualism has its advantages. It promises a vision of law that is unified, predictable and rational. But conceptualism 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 grey areas can be re-routed and repackaged,

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<sup>106</sup> See, e.g. *Hill v. Waxberg*, 237 F.2d 936, 938 (9th Cir. 1956) (noting confusion between contract implied in law and implied in fact). See also E. A. Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 233 n.17 (1987) (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 Fuller and Perdue, *The Reliance Interest in Contract*. In general, this article is credited with framing off-contract remedies in terms of reliance rather than restitution. See Kennedy, *Lon Fuller's Consideration and Form*, 2000 COLUM. L. REV. 94, 147-49, 156 (2000).

<sup>107</sup> See e.g. *Farash v. Sykes Datatronics, Inc.*, 452 N.E.2d 1245 (N.Y. 1983) (“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.”); see also Laycock, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 629-37 (2002).

they cannot be avoided. Conceptualism's promise of clean and precise legal doctrine is never fully realized.

The *Restatement's* chief objective is to ground restitution in unjust enrichment—meaning defendant's gain rather than plaintiff's loss. But there is more than one way to measure defendant's gain, a fact that generated considerable complexity.<sup>108</sup> The simplest application of the *Restatement's* theory 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.

*Restatement* § 9 Illustration 2 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.<sup>109</sup>

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."<sup>110</sup> Taking this theory one step further, the *Restatement* notes 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.<sup>111</sup> These rules take defendant's personalized circumstances into account and focus on the precise measure of defendant's gain, completely ignoring issues pertaining to plaintiff's loss. Section 9 Illustration 2 makes a compelling case for restitution as unjust enrichment.

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<sup>108</sup> See, e.g., Doug Rendleman, *Quantum Meruit for the Subcontractor: Has Restitution Jumped Off Dawson's Dock?* 79 TEX. L. REV. 2055, 2076-79 (2001) (presenting at least four different ways to measure unjust enrichment).

<sup>109</sup> *Discussion Draft, supra* note 8, § 9 Illustration 2 at 106-07. This illustration is based on Michigan Cent. R. Co. v. State, 155 N. E. 50 (1927).

<sup>110</sup> *Tentative Draft No. 1, supra* note 8, § 9 Cmt. d.

<sup>111</sup> *Id.*

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 doctor 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 restitution in the amount of his reasonable customary charge for similar services.<sup>112</sup>

The *Restatement* is aware of the shift from actual benefits in § 9 (the coal case), to a fictional presumption about benefits in § 20 (the Dr. case), noting, “[s]ervices that are medically necessary are *presumed* to be beneficial without regard to the ultimate outcome,”<sup>113</sup> and further, “the measure of benefit to the recipient . . . is the reasonable and customary charge for such services.”<sup>114</sup> But framing this decision in terms of the patient’s unjust enrichment is simply unconvincing.<sup>115</sup> First, as in nearly every *quantum meruit* scenario, benefit is measured in terms of A’s charge rather than B’s gain. Moreover, since B never regained consciousness, it is difficult to see what benefit was received. Commentators have described the benefit in this case as “fictional,”<sup>116</sup> 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 as to encompass Dr. A’s failed rescue attempt.<sup>117</sup>

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<sup>112</sup> *Tentative Draft No. 2*, *supra* note 8, § 20 Illustration 1 at 24.

<sup>113</sup> *Tentative Draft No. 2*, *supra* note 8, § 20 Cmt. c at 26 (emphasis added).

<sup>114</sup> *Id.*

<sup>115</sup> Professor Kull defends this rule in his scholarly writings, but the explanation there is hardly more convincing. See *Rationalizing*, *supra* note 16, at 1201 note 27. Kull argues that since 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 just 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.

<sup>116</sup> 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.”).

<sup>117</sup> Further, arguments claiming that the overall class of B’s will be benefited by this regime are unconvincing. The case in § 9 clearly shows that restitution is concerned with specific facts of the particular plaintiff, not overall class of persons in plaintiff’s position.

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 deal with the fallout from the cancellation of coronation ceremonies for King Edward VII in 1904, offer the textbook examples of frustration of purpose cases. 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,<sup>118</sup> the modern American consensus assumes that the purpose of the contract has been frustrated and sides with the renters.<sup>119</sup> Frustration cases are traditionally understood to offer plaintiff restitution, since it would result in unjust enrichment for defendant to retain the contract price when the purpose of the contract has been frustrated.<sup>120</sup>

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.<sup>121</sup> For this reason, the “rationalized (enrichment-based) law of restitution has no independent role as a remedy for disputes arising out of the breach of frustration of a valid contract.”<sup>122</sup> 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.”<sup>123</sup>

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<sup>118</sup> *Chandler v. Webster*, 1 K.B. at 499-500 (1904).

<sup>119</sup> *See* RESTATEMENT (SECOND) CONTRACTS § 265; 3 George E. Palmer, *THE LAW OF RESTITUTION* § 7.1 (1978).

<sup>120</sup> *See e.g.*, 3 George E. Palmer, *THE LAW OF RESTITUTION* § 7.1 (1978).

<sup>121</sup> *See supra* section I.D.

<sup>122</sup> *Rationalizing, supra* note 16, at 1209.

<sup>123</sup> *Id.* at 1210.



What, then, explains frustrated contract claims? While it is insisted that they sound in contract,<sup>124</sup> I am not aware that the Reporter explain 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,”<sup>125</sup> or alternatively, that it is a “device to reallocate causality loss that the payment terms of the parties contract would have distributed inappropriately.”<sup>126</sup>

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,<sup>127</sup> but because this threatens to destroy the conceptual unity of unjust enrichment and inject unprincipled “equity” thinking into unjust enrichment, the *Restatement* expels frustration cases into the common law’s black hole. But 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 version rejects this description. But to account for doctrines that fail to comport with the theoretical model, an even more amorphous doctrinal dumping ground is created. The *Restatement* does not even attempt to justify this category, simply declaring that the transaction can be unwound pursuant to the court’s inherent “power to apportion losses.”<sup>128</sup>

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<sup>124</sup> *Rationalizing*, *supra* note 16, 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.”).

<sup>125</sup> *Tentative Draft 3*, *supra* note 8, § 34, Cmt.d at 222.

<sup>126</sup> *Tentative Draft 3*, *supra* note 8, § 34, *Reporter’s notes* to Cmt. d. at 223. In yet another place Professor Kull seems to totally throw up his hands suggesting that these rules are simply “something else.” *See Rationalizing*, *supra* note 16, at 1204.

<sup>127</sup> 3 George E. Palmer, *THE LAW OF RESTITUTION* § 7.1 (1978).

<sup>128</sup> *Tentative Draft 3*, *supra* note 8, § 34, Cmt.d.

This discussion shows how legal doctrine is subject to a law of conservation 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 attempts to clean it up. Post-realist 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. But no matter what the tactic, it cannot be eliminated.

*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 necessary. What degree of coherence is required? Can a legal rule just hang out 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 conceptualistic 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 defined, cannot adequately explain.”<sup>129</sup> Further, restitution cases that cannot be squared with the unitary principles “require either a different rationale or a different result.”<sup>130</sup>

This feature of the analysis ties together the other proclivities. Because 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

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<sup>129</sup> *Rationalizing, supra* note 16, at 1192.

<sup>130</sup> *Rationalizing, supra* note 16, at 1997.

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 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.

### III. Post-realist Conceptualism

In a broad sense, the *Restatement's* analytics fit into a larger movement of neoformalism or neoconceptualism.<sup>131</sup> This movement is generally understood as conservative reactions to the excesses of Warren Court jurisprudence. But 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.<sup>132</sup>

#### 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.<sup>133</sup> The

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<sup>131</sup> In private law, the classical works are CHARLES FRIED, *CONTRACTS AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (Harvard University Press 1980) and Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 259 (1986).

<sup>132</sup> The leading (if unpublished) account of neoformalism is Thomas C. Grey, *The New Formalism*, Stanford Public Law and Legal Theory Working Paper Series, (Sept. 6, 1999), available at [http://papers.ssrn.com/paper.taf?abstract\\_id=200732](http://papers.ssrn.com/paper.taf?abstract_id=200732) 4-5. Grey argues that the new formalism flows from realist, rather than classical formalist, premises. Another typology of contemporary formalism is offered in Richard Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607 (1999). The larger project of articulating more exact definitions for various strands of formalism and conceptualism is beyond the scope of this paper. For now, see Duncan Kennedy, *Legal Formalism*, THE INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 8634 (2001).

<sup>133</sup> See for example Cass 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.").

justifications for neo-formalism 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.<sup>134</sup> While Professor Kull explicitly rejects the idea that restitution has an ideal, platonic form,<sup>135</sup> 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.<sup>136</sup>

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, "[t]he argument here, it bears repeating, is not about what judges do, merely about the most useful way to describe what they do."<sup>137</sup> This thinking recurs in the

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<sup>134</sup> See, e.g., Antonin Scalia, *The Rule of Law as the Law of Rules* 56 U. CHI. L. REV. 1175 (1989). Other elements of Justice Scalia's approach are outlined in Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 589 (1990) (describing legal concepts as "fictional", but then arguing that "[w]ithout 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 operate a hierarchical judicial system, in which many individual judges are supposed to produce equal protection of the laws.")

<sup>135</sup> Kull, *Rationalizing*, *supra* note 16, at 1194.

<sup>136</sup> 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.

*Rationalizing*, *supra* note 16, at 1196.

<sup>137</sup> *Rationalizing*, *supra* note 16, at 1224. See also *id.* at 1222 ("The distinction [between Professors Kull and Laycock] moreover, is of no immediate practical significance.")

*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.”<sup>138</sup>

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.<sup>139</sup> As long as the doctrinal heading facilitates the law's functional purpose, there is no reason to force a square peg into a rounded hole. And, if the law does not frustrate 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 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, WTO law—to name but a few.<sup>140</sup> But in contrast to restitution, these areas have not

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<sup>138</sup> “[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.*”) *Tentative Draft No. 3* § 33 Cmt.d, at 186 (emphasis added).

<sup>139</sup> Professor Laycock offers three separate bases, see Douglass Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV 1277, 1279-81 (1989), while Professor Wonnell offers four separate bases, see Christopher Wonnell, *Replacing the Unitary Principle of Unjust Enrichment*, 45 EMORY L.J. 153, 191 (1996).

<sup>140</sup> Taken from the Harvard Law School course catalogue (2006). For example, with respect to animal law see [www.law.harvard.edu/news/2001/06/13\\_animals.php](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 the emerging field of animal rights law.); [www.law.umich.edu/\\_ClassSchedule/aboutCourse.asp?crse\\_id=038599](http://www.law.umich.edu/_ClassSchedule/aboutCourse.asp?crse_id=038599) (describing University of Michigan Law School’s course in animal law); see also, e.g., ANIMAL RIGHTS (Cass Sunstein and Martha Nussbaum eds.) (Oxford University Press 2004).

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 line with the classical scheme of legal thought when law was considered in terms of tort contract, agency, partnership, bailments sales, property, equity, and trusts; the doctrinal subjects that have largely have 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.<sup>141</sup> Those who argue that 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

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<sup>141</sup> See, Michael Kelley, *It's Not My Job*, 36 LOY. L.A. L. REV. 887 (2002) (describing debate as to whether and where restitution fits in the law school curriculum); *Rationalizing*, *supra* note 16, at 1196 (arguing that restitution can be saved from obliteration by framing it in terms of a core idea of unjust enrichment); see also STEVE HEDLEY, *Restitution: Contract's Twin* in FAILURE OF CONTRACTS at 260 (F.D. Rose ed., Oxford Hart 1997) (noting that restitution is "being sold to its potential audience *purely* on the strength of a theory said to lie behind its materials").

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 Larry Tribe recently concluded that he can no longer identify any unifying principles in constitutional law, no expects constitutional law to disappear from law school course offerings.<sup>142</sup> 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 *Restatements of Tort* collected all of tort law into a single work, the most recent project divide 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*.<sup>143</sup> 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 got down to 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.<sup>144</sup> Initial drafts assumed the core or model tort was a negligent accident between two strangers resulting in physical harm. But this decision invited scholarly criticism. Some scholars questioned why these “stranger accidents” should be considered the model tort,

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<sup>142</sup> See Larry Tribe, *The Treatise Power*, 8 GREEN BAG 2D 291 (2005).

<sup>143</sup> See Harvey Perlman and Gary Schwartz, *Overview by the ALI Reporter, General Principles*, 10 FALL KAN J. LAW AND PUBLIC POLICY 8 (2000); see also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM, *Reporter's Introduction* (Proposed Final Draft 2005).

<sup>144</sup> See generally *Symposium: The John W. Wade Conference on the Third Restatement of Torts*, 54 VAND. L. REV. 639-1467 (2001).

and why cases such as professional malpractice lay outside mainstream tort law.<sup>145</sup> 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.<sup>146</sup> 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)*,<sup>147</sup> 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*.<sup>148</sup> 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 come up with 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* express 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.<sup>149</sup> 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.<sup>150</sup> Duty, per the *Restatement of Torts*, is only to be considered in “unusual”<sup>151</sup> cases, and ordinarily, “is . . . a nonissue.”<sup>152</sup> Overall, the *Restatement of*

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<sup>145</sup> See John C. Goldberg and Benjamin C. Zipursky, *Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 639 (2001).

<sup>146</sup> See Martha Chamallas, *Removing Emotional Harm from the Core of Tort Law*, 54 VAND. L. REV. 751 (2001).

<sup>147</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) (Tentative Draft No. 1 March 28, 2001); See also Tentative Drafts No. 2 (March 2002), Tentative Draft No. 3 (April 7, 2003, and Tentative Draft No. 4 (April 2004), which all bear the same title.

<sup>148</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (Proposed Final Draft 2005).

<sup>149</sup> See John C. Goldberg and Benjamin C. Zipursky, *Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 639 (2001); David Owen, *Duty Rules* 54 VAND. L. REV. 767 (2001); Robert Rabin, *Duty Concept in Negligence Law: A Comment*, 54 VAND. L. REV. 787 (2001).

<sup>150</sup> See RESTATEMENT OF THE LAW (THIRD) TORTS: *General Principles* § 3 (Discussion Draft 1999).

<sup>151</sup> See RESTATEMENT OF THE LAW (THIRD) TORTS: *General Principles* § 6 (Discussion Draft 1999). The blackletter 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



*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 *Restatement of Torts* has been a deeply political affair.<sup>153</sup> Debates within the 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.<sup>154</sup> 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.<sup>155</sup>

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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.* (emphasis added).

<sup>152</sup> *Id.* at § 6 cmt.

<sup>153</sup> See, e.g., Patrick Lavelle, *Crashing into Proof of a Reasonable Alternative Design: The Fallacy of the Restatement (Third) of Torts: Products Liability*, 38 DUQ. L. REV. 1059, 1067 (2000) (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.”); 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 the drafting of restatements).

<sup>154</sup> For a general discussion of the political economy of Restatement projects, see Allan Schwartz and Robert Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995), see also *id.* at 648-50, for a discussion of the Restatement of Products Liability (discussing the various interest groups involved in the torts restatement projects).

<sup>155</sup> See Mark Gergen, *The Restatement Third of Restitution and Unjust Enrichment at Midpoint*, 56 Current Legal Problems 289, 291 n.10 (2003). (noting the unusual degree of deference and autonomy given to the Reporter of the Restatement) I have also interviewed spoken at length with Colleen Murphy (October 2005) a member of the Consultative Group to the *Restatement* who noted the lack of interest group participation and the doctrinal nature of discussion, particularly as compared to other restatement meetings).

#### IV. 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* version of 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, since, if too many cases turn out to be “wrongly decided,” it becomes unclear whether the concept, rather than the cases, require reconsideration.<sup>156</sup> 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 pretty much 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 caselaw, 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

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<sup>156</sup> See *supra* note \_\_.

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.

B. *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 geological survey A determines that some 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 the Blackacre for himself. Courts will find that B holds the property as constructive trust for A, typically demanding both land and profits to be turned over to A.

The hard question is what 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, mine included. 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 like, and likely get only a small percentage of the mine's value. This is where the 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.<sup>157</sup> The 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."<sup>158</sup> 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

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<sup>157</sup> *In re Omegas Group, Inc.*, 16 F.3d 1443 (6<sup>th</sup> Cir. 1994).

<sup>158</sup> *Id.* at 1449.

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.”<sup>159</sup>

Not surprisingly, the conceptualized view, finds much fault in this analysis.<sup>160</sup> *In re Omegas* fails to recognize that “restitution 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.”<sup>161</sup> Far from seeing a conflict, pro-restitution scholars argue that restitution, (along with contract, tort and property) forms the baseline rules against which the federal bankruptcy code is written.<sup>162</sup> 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.

### C. *Mistaken Payments*

A lack of respect for the *law* of restitution is demonstrated in a variety of transactional patterns involving wire transfers.<sup>163</sup> An oft-debated New York case provides a simple illustration.<sup>164</sup> Company A tells its Bank, B, to wire \$1M over to creditor C. The message gets garbled so that B sends \$1M over C but sends another million to a different creditor, C<sub>2</sub>. B then asks for the money back from C<sub>2</sub> who refuses, arguing that a debt was due. A then becomes insolvent, so that B’s only recourse is against C<sub>2</sub>.

Restitution starts with a presumption that transfers based on mistake are voidable and that B bank ought to prevail, unless C<sub>2</sub> can show some reliance on the funds, known more technically as a “change of position” defense.<sup>165</sup> In policy terms, restitution

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<sup>159</sup> *Id.* at 1453 (citing *In re North American Coin & Currency, Ltd.*, 767 F.2d 1573, 1575 (9<sup>th</sup> Cir. 1985)).

<sup>160</sup> *E.g.*, Andrew Kull, *Restitution in Bankruptcy: Reclamation and Constructive Trust*, 72 AM. BANKR. L.J. 265 (1998).

<sup>161</sup> *Id.* at 286.

<sup>162</sup> *See, e.g., id.* at 266-70.

<sup>163</sup> *See, e.g.*, *Banque Worms v. BankAmerica Intl.*, 570 N.E.2d 189 (N.Y. 1991); *General Electric Capital Corp. v. Central Bank*, 49 F.3d 280 (7<sup>th</sup> Cir. 1995) (Easterbrook, J.); *Credit Lyonnais v. Koval*, 745 So.2d 837 (Miss.1999).

<sup>164</sup> *See Banque Worms, id.*

<sup>165</sup> *See Andrew Kull, Defenses to Restitution: The Bona Fide Creditor*, 81 B.U. L. REV. 919 (2001).

scholars argue that as between B and C<sub>2</sub>, C<sub>2</sub> has assumed the credit risk of A's insolvency, while B was only paid a few hundred dollars to wire over the money.<sup>166</sup>

The New York court reached the opposite conclusion, holding that C<sub>2</sub> can retain the money, and thereby placing the loss on B.<sup>167</sup> Each of the court's arguments is premised on a law-and-economics analysis which is in tension with the central aims restitution. First, the court held that in the world of the instantaneous high finance wire transfers, "efficiency, certainty and finality" are paramount values so that courts must be exceptionally reluctant to rewind a completed transaction.<sup>168</sup> 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.<sup>169</sup>

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.<sup>170</sup>

Lacking a formalized "law of restitution," the courts saw this case through the eyes of tort and contract which, (as understood by law and economics 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 policies to the

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<sup>166</sup> *Id.*

<sup>167</sup> *Banque Worms*, 570 N.E.2d. at 196.

<sup>168</sup> *Id.* at \_\_.

<sup>169</sup> *General Electric*, 49 F.3d at 284-85.

<sup>170</sup> *Rationalizing*, *supra* note 16, at 1234.

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.”<sup>171</sup> 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.

D. *Tobacco Litigation*

The preceding examples present restitution in fairly confined terms, limited to the technical field of commercial transactions. However, 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, counsel will employ restitution to embark on large-scaled social policy making.

A compelling analysis of restitution’s role in the Mississippi tobacco litigation is offered by Professor Doug Rendleman.<sup>172</sup> For years, the tobacco industry successfully defended against tort and product liability claims pursued by smokers and their families.<sup>173</sup> Eventually, plaintiffs changed tactics, making the plaintiff the state rather than the smoker, and the legal theory restitution rather than tort.<sup>174</sup> 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 fisc paid for these expenses through Medicare and related programs, the States were entitled to restitution from the tobacco companies.<sup>175</sup>

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<sup>171</sup> *Ex Parte AmSouth Mortgage Co.*, 679 So. 2d 251, 255 (Ala. 1996); See also *Tentative Draft No.1*, , *supra* note 8, § 5 Cmt (discussing the role of negligence in restitution claims).

<sup>172</sup> See Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes* 33 GA. L. REV. 847 (1999).

<sup>173</sup> *Id.* at 848-58.

<sup>174</sup> *Id.* at 852-86.

<sup>175</sup> *Id.* at 853.

Rendleman finds the dispute between the States and the tobacco industry to be about the characterization of the legal claims.<sup>176</sup> 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 a claim under restitution. By contrast, the tobacco companies argued that restitution could not provide a remedy 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.<sup>177</sup> While, even academic sympathizers found the States' claims beyond the pale,<sup>178</sup> 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.<sup>179</sup>

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. Since restitution clusters at the margins of contract and tort, it is likely to become a repository for claims that fail under the orthodox conception of tort and contract. Restitution has the potential of making new land available for lawyers populate with innovative theories of recovery, and the resulting growth nudges the balance of the private law rules towards those seeking more expansive recoveries.<sup>180</sup>

E. *Is restitution pro-plaintiff?*

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<sup>176</sup> *See id.*

<sup>177</sup> This is not to deny other factors in reaching the decision, *e.g.*, the fact that the state rather than the smoker was plaintiff, 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.

<sup>178</sup> *See id.*

<sup>179</sup> *Id.* at 864-74.

<sup>180</sup> Two immediate examples are claims for holocaust and slavery reparations based on restitution theories, *see (cites).*

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 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. While 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,<sup>181</sup> the *Restatement* however, interprets this as a paradigmatic mistaken payment case and grants the insurance company a claim in restitution.<sup>182</sup>

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 at the margins of contract, tort and property and is likely to increase recovery, the *Restatement's* strict adherence to the classical will theory of contract pulls in the opposite direction.

Under the *Restatement's* scheme many of the "soft" doctrines of contract (mistake, fraud, duress, 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 reaffirm the classical version of contract and its primacy in a system of

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<sup>181</sup> *Mutual Life Insurance Co v. Wager*, 27 Barb. (NY) 354 (Sup. Ct. 1858) (when an insurance company pays a claim, it "must be deemed, by the payment, to have settled, or waived all questions of law or fact as to the validity of the original contract. . . which they had the means of raising before they paid the loss"). See also Palmer, § 14.14. This basic view was affirmed more recently, in *Universal Acupuncture Pain Services v. State Farm*, 196 F.Supp.2d 378 (SDNY 2002), which denied restitution to the insurance company for payments made to an acupuncture clinic that was unlicensed, and therefore not entitled to insurance payments under state law. ("[Payee] may not have been eligible for the benefits in the first place, but good conscience entitles it to retain the money paid for services rendered."). Under the *Restatement's* view, this result can be explained under the bona fide creditor rule. See *Tentative Draft No. 1* § 6 comment (i) and Illustration 35.

<sup>182</sup> See *Tentative Draft No. supra* note 8, 134-35, § 6 Illustrations 22-23 & 25. Of course, even under the *Restatement's* formulation, a liberal view of change of position will result in the insurance company sustaining the loss. Nevertheless a *prima facie* case of restitution is available.



private ordering.<sup>183</sup> 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 consequence 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. Despite the *Restatement's* fairly capacious conception of mistake *within* the law of restitution, since the contract is ostensibly valid and in force, per the *Restatement's* view that the contract set the baseline of unjust enrichment, the seller must fulfill his bargain.<sup>184</sup> While this approach is consistent with the *Restatement's* analytic premises as well as nineteenth-century contract doctrine,<sup>185</sup> it is at odds with developments reflected in the *Restatement (Second) of Contracts*,<sup>186</sup> and the leading restitution treatise.<sup>187</sup> 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 *Restatement* would seem to require performance in these cases.<sup>188</sup>

## V. The Continuing Resonance of Classical Legal Thought

The preceding sections demonstrate how the *Restatement* relies on a classical variant of legal argument that harkens back to the scholarship of the late nineteenth

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<sup>183</sup> This move is made most clearly in Kull, 11 JOURNAL OF CONTRACT LAW.

<sup>184</sup> *Tentative Draft No. 3*, *supra* note 8, § 34, Illustrations 23 & 24. See also Andrew Kull, *Unilateral Mistake: The Baseball Card Case*, 70 WASH. U. L.Q. 57, 74-77 (1992).

<sup>185</sup> See e.g., *Laidlaw v. Organ*, 2 Wheat. 15 US 178 (1817 (Marshall, C.J.) court refused to rescind contract for sale of tobacco where seller knew that British naval blockade would be lifted due to the signing of Treaty of Ghent and prices would rise sharply while buyer was unaware).

<sup>186</sup> See, RESTATEMENT (SECOND) OF CONTRACTS §153;

<sup>187</sup> 2 Palmer § 12.3 at 554-56.

<sup>188</sup> Compare *Tentative Draft No. 3*, *supra* note 8, § 34 Illustrations 23 & 24 with *Restatement (Second) Contracts* § 153; more explicitly, see Andrew Kull, *Unilateral Mistake: The Baseball Card Case* 70 WASH. U. L.Q. 57, 74-77 (1992).

century. The conclusion explores why the *Restatement* looks to reprise a method legal scholarship that has been out of fashion for nearly one hundred years.<sup>189</sup>

At the most basic level, the *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 doctrine.<sup>190</sup> 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 and property. By pulling these doctrines out of the traditional fields, the *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 *Restatement*. A classic law-and-economics styled treatment of remedies, or a post-realist description stressing rule-of-law-concerns would likely accomplish much the same result.<sup>191</sup>

The attraction of classical formalism, however, extends beyond rule-based predictability. Conceptual jurisprudence allows the *Restatement* to overcome its major hurdle—introducing a new theory under the guise of “this is what courts have been doing all along.” This posture is especially important in the case of the *Restatement of Restitution*, which by its own argument, looks to reframe existing doctrines under a new theory.

It is important to recall the difference between restitution and legal innovations spawned by new governmental regulation (ERISA law), technology (internet law), or the

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<sup>189</sup> See Duncan Kennedy, *Consideration and Form*, 100 COLUM. L. REV. 94 (2000).

<sup>190</sup> See *supra* Section IV.

<sup>191</sup> Some examples of less conceptually adamant accounts of restitution include, Laycock, *Restitution*; Christopher Wonnell, *Replacing the Unitary Principle of Unjust Enrichment*, 45 EMORY L.J. 153, 170 (1996); HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* (Cambridge University Press 2004). A more law and economics approach can be found in Saul Levmore, *Explaining Restitution*, 71 Va. L. Rev. 65 (1985).

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 having a quaint texture to them. Further, 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 restitutionary principles. Many of the *Restatement's* rules are already accounted for in other restatements,<sup>192</sup> and finally, the differences between the *Third Restatement* and its seventy year-old predecessor are more terminological than substantive.<sup>193</sup>

It is precisely the tension between the newness and oldness of the *Restatement* 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 heretofore been largely absent from both legal opinions and scholarly discourse.<sup>194</sup> Conceptualism answers that while the presentation of the theory might be new, the underlying concept of unjust enrichment has been directing judicial decisionmaking all along. Thus, despite the absence of the unjust enrichment theory in the case reports, the *Restatement's* exposition is 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 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 recreate an entire field of common law. Though a “field” is little more than a collection of doctrines, the idea that a new area of common law can be created *ex nihilo*

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<sup>192</sup> Cite sections that are duplicative of the Restatement (Second) Contracts.

<sup>193</sup> See Hedley, RESTITUTION: ITS DIVISION AND ORDERING (2001) (commenting on the Goff and Jones Treatise) (final chapters)..

<sup>194</sup> See for example PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 3 (Clarendon Press 1985) (Comparing the late development of administrative law and restitution, noting that “restitution is the more remarkable of the backwards pair. . . because while the caselaw 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 the subject of litigation for as long as the common law has been developing”).

creates anxieties in a way that tweaking or restating or pre-existing law does not. 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 acceptance. Again, classical formalism adds a degree of naturalness and immanence lacking in the more pragmatic strands of neoformalism, and puts forward the imagery 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 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.<sup>195</sup> 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 law.<sup>196</sup> (This likely explains their presence in the first year 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

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<sup>195</sup> 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 ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 36-43 (2d Ed. 1993); J.H. MERRYMAN, *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA AND EAST ASIA* 7 (Michie Co. 1969). 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, E. Weinrib’s *THE IDEA OF PRIVATE LAW* is probably the clearest expression of this thesis.

<sup>196</sup> See Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, *NYU J. OF INTERNATIONAL LAW* (discussing how contemporary transnational institutions that are not connected to a sovereign state frequently make recourse to private law reasoning and the legitimization technicians of rational coherence and conceptual ordering); See Christian Joerges, *The Science of Private Law and the Nation-State* (European University Institute 1998) (discussing the role of conceptualist private law though in the creation of nation states).

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.<sup>197</sup>

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In the post-realist landscape, American legal thought has generally been skeptical of conceptualist legal argument. 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, *elegantia juris* is more of an epithet than a compliment.<sup>198</sup> Yet, as the *Restatement* project demonstrates, classical conceptualism continues to hold powerful sway over the contemporary legal imagination.

Writing in the opening decades of the twentieth century, the legal historian F.W. Maitland claimed that while “[t]he forms of action we have buried . . . they still rule us from their graves.”<sup>199</sup> Duncan Kennedy has argued that much the same applies to classical legal thought, which continues to provide the structure of private law jurisprudence.<sup>200</sup> 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 still provides a sense of security, authenticity and continuity.

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<sup>197</sup> See Jeremy Waldron, “*Transcendental Nonsense*” and *System in the Law*, 100 COLUM. L. REV. 16, 31-36 (2000); (discussing the attraction of systemic accounts of the law); Daniella Caruso, *supra* note \_\_\_\_.

<sup>198</sup> See Jeremy Waldron, “*Transcendental Nonsense*” and *System in the Law*, 100 COLUM. L. REV. 16, 17-18 at n.13 (2000) (noting that while Cohen’s article is the 72nd most cited work ever published in a law review, in the seventy years since its publication, it has never been subjected to thorough critique); Oliver Wendell Holmes, *Common Carriers and the Common Law*, 13 AM. U. L. REV. 609, 631(1879) (critiquing the jurisprudence of elegance).

<sup>199</sup> F.W. Maitland, *The Forms of Action at Common Law: A Course of Lectures* 2 (A.H. Chaytor & W.J. Whittaker, eds., 1936).

<sup>200</sup> As related in Private Law Theory Class, *delivered at Harvard Law School*, Spring 2005; *see also* James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CAL L. REV. 1815, 1820 (2000).