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Restitution in America:
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ABSTRACT

In the past generation, restitution law has emerged as global phenomenon. From its Oxbridge home restitution migrated to the rest of the Commonwealth, and ongoing Europeanization projects have brought the common law of restitution into contact with the Romanist concept of unjust enrichment, further internationalizing this movement. In sharp contrast to the Commonwealth, in the United States, scholarly interest in restitution, in terms of books, articles, treatises, symposia and courses on restitution is meager, at best. Similarly, while restitution, equity and tracing cases receive considerable treatment at the highest levels of the English judiciary, U.S. courts do not seem interested in these issues, and unlike Commonwealth courts, rarely produce theory-laden opinions that attract scholarly attention. The situation is particularly curious because restitution is thought to be the invention of late nineteenth century American scholars. Moreover, as late as the 1970's, the vitality of American restitution was favorably contrasted with the dearth of such law and scholarship in England.

This article explains this divergence. I argue that the Commonwealth restitution discourse is largely a product of pre- or anti-realist legal thought which generates skepticism within the American academic-legal establishment. The paper identifies the two dominant camps in American private law thought—the left-leaning redistributionalists and the center-right law and economics movement—and shows that neither has any use for the Commonwealth's discourse. I conclude by analyzing the emerging drafts of the *Restatement of Restitution* and forecast the future of American restitution law.

I. A Brief History of Restitution

All over the world, and especially in commonwealth countries, the law of restitution has virtually taken over the realm of private law theorizing. While the starting date of any movement is inevitably a dicey question, the publication of Peter Birks' *An Introduction to the Law of Restitution* in 1985 has initiated a steady stream, perhaps even a geometric progression, in the growth of restitution law and scholarship. From its Oxbridge home, via the influence and prestige of the BCL degree, restitution has migrated to Canada, Australia, New Zealand, Israel and the rest of the Commonwealth. Ongoing Europeanization projects have also brought the common law of restitution into contact with the Romanist concept of unjust or unjustified enrichment and created a truly

international movement of restitution scholarship.¹ The past twenty-five years have witnessed a global renaissance of restitution reflected in hundreds, perhaps thousands of books and articles, scores of conferences and even a *Restitution Law Review* all dedicated to exploring this growing area of the law.²

The United States remains a notable holdout to this global movement. Since the publication of Birks' watershed volume, I am aware of only one book published on the American law of restitution—a book written by an Israeli law professor and published by an English press (Cambridge), and which contains far more Commonwealth and

¹ See, e.g., UNJUSTIFIED ENRICHMENT: CASEBOOKS ON THE COMMON LAW OF EUROPE SERIES (Beatson and Schrage eds, 2003); UNJUSTIFIED ENRICHMENT: KEY ISSUES IN A COMPARATIVE PERSPECTIVE, (Johnston and Zimmermann eds, 2002); UNJUSTIFIED ENRICHMENT: A COMPARATIVE STUDY ON THE LAW OF RESTITUTION (P.W.L. Russe11, ed., 1996).

² An incomplete and unorganized list of recent 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 RESTITUTION (Cambridge Press, 2004); Jacques Étienne 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). The bibliography in Hanoch Dagan's THE LAW AND ETHICS OF RESTITUTION, offers a bibliography that is complete as of the date of its publication.

international materials than a comparable work on the American law of contracts or torts.³ The lone treatise was written in the 1970's and reflects the scholarly modality of a different era.⁴ No more than two or three, out of more than 170 U.S. law schools, offer a course devoted exclusively to restitution, nor, should a school want to offer such a course, is there an updated restitution casebook to use for the course.⁵ Only a handful of conferences have been dedicated to restitution, and these events are typically dominated by non-U.S.-based scholars.⁶ Finally, leading U.S. contracts casebooks, the place American lawyers are most likely to learn anything about restitution, offer a hesitant, uncertain and (from the Commonwealth perspective) under-rationalized account of unjust enrichment.⁷ In sum, none of the excitement and stimulation that prevails in the rest of the common law world is to be found in the U.S. academy.⁸

This situation is particularly curious, because the modern law of restitution is thought to be an invention of American scholars. Restitution was most likely conceived at Harvard Law School in the late 1880's and early 1890's, and certainly emerged from the womb by the time William Keener published his treatise, *A Treatise on the Law of Quasi-Contracts* in 1893.⁹ The field seemed to be on solid footing by the time the American

³ See Hanoch Dagan, *THE LAW AND ETHICS OF RESTITUTION* (Cambridge, 2004).

⁴ George E. Palmer, *THE LAW OF RESTITUTION* (1978 & Supp 2006). Professor Andrew Kull is of the opinion that though Palmer published his treatise in 1978, the bulk of the work was done in the at least twenty years earlier. (Telephone interview February 2007).

⁵ To the best of my knowledge, the most recent casebook devoted exclusively to restitution is the 1969 edition of Dawson and Palmer's *CASES ON RESTITUTION* (this in a country that at least has numerous casebooks devoted to Art law, Animal law, Elder law, Sports law, etc.). Note that Commonwealth scholars have produced several casebooks for use in courses dedicated exclusively to restitution, see Andrew Burrows and Ewan McKendrick, *CASES AND MATERIALS ON THE LAW OF RESTITUTION* (1997); Sieg Eiselen & Gerrit Pienaar, *UNJUSTIFIED ENRICHMENT: A CASEBOOK* (2nd ed. Durban, Butterworths 1999).

⁶ See *Symposium: Restitution and Unjust Enrichment*, 79 TEX. L. REV. 1763-2197, (2001); *Second Remedies Discussion Forum: Restitution*, 36 LOY. L.A. L. REV. 991 (2003).

⁷ For example, Farnsworth et al., *CONTRACTS: CASES AND MATERIALS* (6th ed. 2001). The casebook contains separate sections for unjust enrichment/quasi contracts, precontractual liability and restitution-based remedies, and makes no serious attempt at connecting the underlying rationales. The same organizational structure dominates Farnsworth's influential three volume treatise, see *FARNSWORTH ON CONTRACTS* (3rd ed. 2004).

⁸ See for example the opening paragraph of Michael Sean Quinn's book review, *Subrogation, Restitution and Indemnity*, 74 TEX. L. REV. 1361 (1996), of Charles Mitchell, *THE LAW OF SUBROGATION* (Oxford 1994). The American author finds it necessary to explain and apologize to his US audience for reviewing a dense analytical English book on the "sleepy" law of subrogation. His explanation: it has bearing on a redistributive topic. See *infra* Part IV.

⁹ The development of the doctrinal field is sketched out in Andrew Kull, *James Barr Ames and the Early Modern History of Unjust Enrichment*, 25 *Oxford Journal of Legal Studies* 297-319 (2005); see also

Law Institute published the first *Restatement of Restitution* in 1937—the publication that gave “restitution” its name—¹⁰and these efforts were further buttressed by several mid-twentieth century works, most notably, Jack Dawson’s *Unjust Enrichment*,¹¹ George Palmer’s treatise, *The Law of Restitution*,¹² and John Wade’s casebook, *Cases and Materials on Restitution*.¹³ Writing in 1973, Joseph Perillo noted that while American scholars generally recognize the conceptual independence of restitution, in England “it is still a mark of legal orthodoxy to deny or ignore the distinction between contract and quasi-contract and say that there are only two categories, contract and tort.”¹⁴ Similarly, as late as 1985, Peter Birks contrasted the relative vitality of American restitution law and scholarship with the dismal state of the law then prevailing in England.¹⁵

Restitution petered out in the U.S. sometime between the release of Robert Goff and Gareth Jones’ first edition of *The Law of Restitution*, in 1966, and Birks’ 1985 publication of *Introduction to the Law of Restitution*. While Gareth Jones reputedly learned his restitution from Dawson at Harvard,¹⁶ ultimately the line of scholarship growing out of Keener, Seavey and Scott failed to convince the majority of the American legal public that restitution is a significant branch of the common law on par with contract and tort. Over the course of the twentieth century, restitution came to be thought of as an uncomfortable appendage to contract,¹⁷ or property,¹⁸ or alternatively, a remedy bundled clumsily together with injunctions, specific performance, declaratory relief,

Duncan Kennedy, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* 177-181; Joseph Perillo, *Restitution in a Contractual Setting*, 73 COLUM. L. REV. 1210 (1973); R. Jackson, *THE HISTORY OF QUASI CONTRACT IN ENGLISH LAW* (1936); James B. Ames, *A History of Assumpsit*, 2 Harv. L. Rev 1 (1888).

¹⁰ Seavey and Scott saw themselves as introducing restitution to the world, see W. Seavey & A. Scott, *Restitution*, 54 L. Q. R. 29, 31 (1938); See also Peter Birks, *A Letter to America: The New Restatement of Restitution*, 3 GLOBAL JURIST FRONTIERS (2003) (discussing the controversy surrounding the name of the First Restatement).

¹¹ John P. Dawson, *UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS* (1951).

¹² George Palmer, *THE LAW OF RESTITUTION* (Little and Brown 1978).

¹³ John W. Wade, *CASES AND MATERIALS ON RESTITUTION*, (1958) & (2nd ed. 1966).

¹⁴ Joseph Perillo, *Restitution in a Contractual Setting*, 73 COLUM. L. REV. 1208, 1210 n.19 (1973).

¹⁵ See Birks, *INTRODUCTION* at 3 (“In America, where lawyers have undoubtedly been more alive to [restitution]. . .”).

¹⁶ See John Langbien, *The Latter History of Restitution*, in *RESTITUTION: PAST PRESENT AND FUTURE* (1998).

¹⁷ See *supra* note _ (Farnsworth casebook).

¹⁸ See James Rogers, *Restitution for Wrongs and the Restatement (Third) of the Law of Restitution*, <http://ssrn.com/abstract=927979> (2006).

damages calculations, punitive damages, and a grab-bag of doctrines that were once known as equity.¹⁹ But the idea of a unified field, combining quasi-contracts, reformation of deeds and constructive trusts, has not quite persevered in American legal thought. Thus, even as U.S. courts episodically rely on the *First Restatement* to supply a rule of decision in a given case, the analytical framing of these decisions typically proceed under the rubric of some codified area of the law (e.g., Federal Bankruptcy Code, UCC, ERISA, insurance regulations),²⁰ or through the lens of contract, tort, property and trust, but most often contract and tort.²¹ The idea, now quite popular in the Commonwealth, that restitution is its own body of law with policies and principles distinct from contract and tort, has not enjoyed similar vitality in American jurisprudence.

While the rebirth of restitution in the Commonwealth has been fueled principally by academic scholarship, this success would be impossible without the receptivity of the courts. Since the early 1990's, the English House of Lords decided several important restitution cases, affording the Oxbridge scholars a chance to argue their views into the law.²² Moreover, at times it seems that the entire block of litigation known as the *Swaps Cases* were essentially an extended session of one of Birks' celebrated Oxford seminars with the Law Lords participating as diligent students. While the English academics initially piqued judicial interest in a rational account of restitution, the enthusiastic involvement of the House of Lords legitimated the enterprise, encouraging further academic discussion. Restitution is a joint enterprise of the bench and the academy.

¹⁹ See, e.g., Laycock, *MODERN AMERICAN REMEDIES* (Third Edition, 2002); Weaver, et al., *REMEDIES: CASES PRACTICAL PROBLEMS AND EXERCISES* (2004); Rendelman, *REMEDIES: CASES AND MATERIALS* (Sixth Edition 1999); Leavell et al., *EQUITABLE REMEDIES, RESTITUTION AND DAMAGES* (7th Ed, 2005).

²⁰ See, e.g. *In re Omegas Group, Inc.*, 16 F.3d 1443 (6th Cir. 1994) (Bankruptcy Code); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, (2002), (ERISA); *First Nat. Bank of Boston v. Fidelity Bank, Nat. Ass'n*, 724 F. Supp. 1168 (E.D.Pa. 1989) (UCC). More generally, UCC Articles 4 and 4A govern cases of mistaken bank payment and wire transfers, the scenarios which Birks treated as the "core" restitution cases.

²¹ See *infra* Part V.

²² The House of Lord's restitution canon contains an unusual number of citations to the scholarship of the English academy. See, e.g., *Woolwich Equitable Building Society v. IRC* [1993] AC 70 (HL) (citing Professor Birks); *In Re Goldcorp Exchange* [1995] 1 AC 74 (citing Professors Goode and Birks); *Westdeutsche Landesbank v. Islington*, [1996] AC 669 (HL) (extensive discussions of Professors Birks and Burrows); *Kleinwort Benson v. Lincoln C.C.* [1998] 3 WLR 1095 (citing Professors Beatson and Burrows); *Foskett v. McKeown* [2001] 1 AC 102 (citing to Professors Hayton and Birks, and interestingly, American scholars Austin Scott and George Palmer).

While restitution, trust, tracing and equity cases all receive considerable treatment at the highest levels of the English judiciary,²³ in the U.S., courts barely seem interested in the matter. To be sure, there are plenty of cases regarding unjust enrichment, quasi contracts, constructive trusts, tracing, reformation of deeds and the refunding of mistaken payments, most often in the context of commercial transactions gone awry. But these cases are rarely presented before the highest courts, and in any event, do not result in theory-laden opinions that attract scholarly attention. The cases are treated summarily, little more than the day-to-day work product of the courts.²⁴ The overall tone and texture of the American cases contrast sharply with the urgency and significance that permeates the leading English cases.

This article explains the divergence in restitution between the U.S. and the Commonwealth. I argue that the Commonwealth restitution discourse is largely a product of pre- or anti-realist legal thought which thus generates skepticism from the mainstream American academic establishment. The paper then identifies the two dominant camps in American private law thought, the left-leaning redistributionalists, and the center-right law and economics movement, showing why neither camp has much use for the Birksean restitution discourse. The paper concludes by analyzing the lone exception to the overall U.S. indifference—the emerging drafts of the *Restatement of Restitution*—and a discussion of the direction of restitution scholarship in America.

II. The Analytic Basis of Commonwealth Restitution

The resurgence of the modern law of restitution is justly credited to the lifelong work of Peter Birks. Though two editions of the Goff and Jones treatise preceded Birks' *Introduction*, Birks was the first Commonwealth scholar to offer a comprehensive and schematic account of the field. Moreover, Birks' reputation as an engaging and admired teacher and scholar drew rising academic stars from around the world to his Oxford

²³ E.g., *Lipkin Gorman*, [1991] 2 AC 458; *Woolwich Equitable Building Society v. IRC* [1993] AC 70 (HL); *In Re Goldcorp Exchange* [1995] 1 AC 74; *Westdeutsche Landesbank v. Islington*, [1996] AC 669 (HL); *Kleinwort Benson v. Lincoln C.C.* [1998] 3 WLR 1095; *Foskett v. McKeown* [2001] 1 AC 102.

²⁴ Compare e.g., *Lackey v. Lackey*, 691 So.2d 990 (Miss. 1997) with *Foskett v. McKeown* [2001] 1 A.C. 102.

seminars, which in many ways is responsible for the global proliferation of restitution.²⁵ Goff and Jones collected cases, but Birks generated the analytical superstructure to justify them.

Though the core substantive elements of restitution have been part of the common law from time immemorial, Birks argued that historical accidents, misunderstandings, unfortunate fictions and mismatched metaphors prevented the central unity of restitution from coming to light, and left restitution scattered about the sea of the common law.²⁶ Birks found many of the doctrines to reside uncomfortably at the margins of contract and property, others simply known as equity, and yet others tucked away in what Birks termed contextual fields: family law, insurance law, securities law and the like.

Birks' *Introduction* sets out to remedy this problem and offer a unified, rationalized and coherent account of restitutionary liability. The thesis is based on differentiating restitution from contract and tort on the one hand, and from proprietary and equitable remedies on the other. Under this scheme, "contract" is defined analytically, in terms of its "causative event," which is the parties' consent (known also as the will theory)²⁷ rather than as a contextual category describing liabilities arising loosely within the framework of an agreement.²⁸ Similarly, the causative event of torts or wrongs is the defendant's breach of a legal duty.²⁹ When these two categories are accurately defined, it becomes clear that the common law contains an additional category premised that is not premised on consent (*e.g.* quasi contract, quantum meruit, duress, incapacity, failure of consideration, mistake, frustration of purpose, illegal contracts, unenforceable contracts, etc.), and which can be explained with greater specificity than

²⁵ E.g., Lionel Smith (Canada); Robert Chambers (Canada); James Edleman (Australia and Oxford); Kit Barker (Australia); Ross Grantham (Australia); Yeo Tiong Min (Singapore); Kelvin Low (Hong Kong); Eoin O'Dell (Ireland). See also Steve Hedley, RESTITUTION: ITS DIVISION AND ORDERING 207-08 (2001).

²⁶ See Peter Birks, INTRODUCTION at 4-5.

²⁷ See Peter Birks, *Private Law* at 5, in LESSONS OF THE SWAPS LITIGATION (Mansfield Press 2000).

²⁸ Birks, *id.* *Private Law* at 5.

²⁹ Peter Birks, *The Concept of a Civil Wrong* in David Owen, THE PHILOSOPHICAL FOUNDATIONS OF TORT LAW 31-51(1995).

simply constituting a breach of a legal duty (*e.g.* cases of disgorgement and certain instances of constructive trust). These doctrines form the body of restitution.³⁰

Having identified the causative event of restitution as unjust enrichment, Birks turns his attention to the way the law remedies unjust enrichment. This led Birks to a daring attempt to establish order in the conceptual minefield of what American lawyers generically refer to as constructive trusts: the hodgepodge of doctrines comprised of bits of property law, trust law, rights *in rem* (or proprietary remedies) and equitable defenses, remedies, liens, and subrogation. Birks claims that proprietary remedies are best understood as the response to correcting certain forms of unjust enrichment. The nettlesome question lies in identifying exactly which forms of unjust enrichment merit an *in rem* remedy and why. While Birks discusses this issue somewhat abstractly—in terms of taxonomy and analytic classification—the issue is of immense practical importance as well. A number of courts have struggled with whether an unjust enrichment claimant (typically the victim of something between mistake and fraud) should be allowed to take priority over unsecured creditors in the event of the defendant’s insolvency.³¹

Birks’ framing brings his assumptions about the nature of both unjust enrichment and property to the fore. Underlying the theory is a view that property rights are created and maintained by rules of law, and a general denial of a court’s power to assign or distribute property rights.³² In Birks’ own words:

³⁰ Over the years, Birks changed his mind on several key points in the analysis of restitution. See *e.g.*, Birks, *Misnomer* in *RESTITUTION PAST PRESENT AND FUTURE*; (retracting the idea that restitution is limited to the legal response to unjust enrichment, and that the sole remedy for unjust enrichment is restitution); Birks *UNJUST ENRICHMENT* (2003) (rejecting the common law “four factors” analysis in favor of civilian “lack of basis” approach). See also Steve Hedley, *RESTITUTION: ITS DIVISION AND ORDERING* (2001) (explaining that Birks attempted to maintain the validity of his thesis by (i) differentiating between unjust enrichment and the law of wrongs, (ii) arguing that fault has only a minimal function in restitution, and (iii) continually reducing the coverage of unjust enrichment as a legal explanation). Despite these not insignificant shifts, Birks’ methodology remained fairly constant throughout his career, and at all points his analysis contrasts sharply with the U.S.-based approach. See *infra* Parts II-IV.

³¹ See *e.g.*, *In Re Goldcorp Exchange* [1995] 1 AC 74; *In re Polly Peck* (No. 2) [1998] A.E.R. 812 (CA); *Fortex Group* [1998] 3 NZLR 17 (NZCA). *In Re Omegas Group*, 16 F.3d 1443 (6th Cir. 1994).

³² See Craig Rotherham, *PROPRIETARY REMEDIES IN CONTEXT* (2001) 33-40 (associating Birks with the “absolutist” view of property).

When the law of property has done its job, on what principle could any court rely on to adjust the result? A single step in that direction would be the beginning of an impossible inquiry, just the kind of impossible inquiry which was once thought to be threatened by the law of unjust enrichment, until it was realised that the law of unjust enrichment was not a discretionary frolic in distributive justice.³³

Thus, when a court awards an *in rem* remedy to certain assets, it is because (and only because) the underlying concepts of unjust enrichment and property mandate such a result. Therefore, every remedial grant must be precisely and exactingly justified in terms of a pre-rationalized basis of liability. This rationalization effort is the central task of unjust enrichment theory.

The goal of Birks' restitution discourse is to bring these related doctrines under a single heading. This will help identify the common legal principles at work, and reframe the sprawling case law in terms of the causative event of unjust enrichment and its legitimate legal responses. Once presented in analytic terms, the concept of unjust enrichment, typified by the core case of a mistaken payment, becomes the basis for further development in hard cases.³⁴ This reconstruction is said to achieve three related goals that are often associated with formal modes of legal analysis: (i) to ensure that like cases are treated alike, (ii) to provide a deductive framework for the analysis of novel questions, moving the system towards its ideal of gaplessness, and (iii) to restrain judicial forays into unbridled redistributive projects. This final goal of judicial restraint, while always important, is particularly necessary in a field where "unjust" serves as the central term in the legal discourse.

To understand the disparity between U.S. and Commonwealth approaches to restitution, it is important to locate the mode of Birks' argument within the family of jurisprudential thought. Birks' writing shares deep affinity with the reconstruction projects of the late nineteenth century—when contract and tort were fashioned out of the

³³ Peter Birks, *The End of the Remedial Constructive Trust?*, 12 TRUST LAW INTERNATIONAL at 208.

³⁴ Birks, UNJUST ENRICHMENT 3-18 (2004).

remnants of the actions of assumpsit and trespass on the case.³⁵ Most obviously, it is a coherentist project, which assumes the underlying (if unrecognized) coherence of the legal rules. Second, the account is conceptual. The rules that comprise restitution are seen to cohere around distinctly analytic principles which are first extracted from existing case law and then relayed back into the case law via deductions from the concept of unjust enrichment. The assumptions of coherence and conceptualism result in the view of law whereby conceptual analysis, when performed by the expert jurist, leads to the correct resolution of even the most difficult of legal disputes.

Birks himself expresses this sentiment quite vividly. In discussing whether a constructive trust should be awarded as a response to unjust enrichment, Birks wrote:

Some legal concepts [property] ought never to be deconstructed. . . .

The question whether a claim deserves priority in insolvency is an impossible question. By contrast, the questions whether the plaintiff has a proprietary interest, and, if so, from what moment that interest takes its priority, are technical conceptual questions, which a lawyer can hope to answer.

. . . Lawyers have no special competence in distributive justice. They cannot be expected to say who deserves what. But, given a decent law library and some time to do the work, a lawyer can be expected to say. . . whether on given facts a proprietary interest has arisen, and, if so, precisely of what kind.³⁶

It is exactly this mode of reasoning (expressed in rather extreme fashion by Birks), that lies at the foundation of the modern restitution enterprise, and which engenders deep skepticism within U.S. academy. Though the legacy of American legal realism is justly debated,³⁷ a recurring feature of the movement is its looming suspicion of categorical divisions between doctrinal headings such as public and private or contract,

³⁵ Birks understood this well, See UNJUST ENRICHMENT at 3 (comparing his project in restitution to the late 19th century projects in contract and tort).

³⁶ Birks, *The End of the Remedial Constructive Trust?* 12 TRUST LAW INTERNATIONAL 202, 214-215 (1998). This passage is cited and critiqued in Craig Rotherham, PROPRIETARY REMEDIES IN CONTEXT, 38-39 (2002).

³⁷ E.g., Hanoch Dagan, *The Realist Conception of Law*, U. TORONTO L. REV. (forthcoming).

tort and restitution.³⁸ This skepticism is a subset of a more general suspicion of the explanatory power of inductive and deductive modes of legal reasoning and argument. In one popular retelling, the key insight of realism was to render the categorical description of the law meaningless since the lines between the doctrinal categories were shown to be permeable and could be made to bend at will.³⁹ Realists similarly doubted that legal reasoning alone could decide which category any given case fit into, or even whether it was possible to provide a consistent description of the legal category itself. As a result, realists began to look for extra-doctrinal justifications for legal outcomes. Explaining the decision via the conceptual analysis of legal rules would no longer do.

More developed iterations of the critique explained that cases defied easy categorization because each decision was subject to conflicting considerations between competing, and in some sense irreconcilable, objectives. Every instance of adjudication presents a localized act of balancing between competing interests that the legal system can neither fully realize nor reconcile.⁴⁰ On this view, the law is effectively a moving average of decisions. Further, because precedents inevitably point in both directions, the search for underlying coherence is bound to end in failure, as ongoing litigation ensures the systematic reproduction of conflicting data points throughout the legal canon. The realists thus understood that while judges inevitably balance these conflicting rules, their decisions cannot be justified via reference to the indeterminate rules or precedents themselves.⁴¹ Moreover, to the extent that legal principles exist, they are the irreconcilable interests that reside at the edge a legal field, rather, than as Birks would have it, at the very center.

³⁸ E.g., Morton Horwitz, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960* at 198-208 (1992).

³⁹ See *id.*

⁴⁰ See Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"* 100 *COLUM. L. REV.* 94 (2000).

⁴¹ The text itself was written by John Gardner in an unpublished 1934 writing titled, *Observations on the Course in Contracts*. While in the first (1947) edition of the Fuller casebook this statement appears in a section titled *The Basis of Contractual Liability* (p. 297-98), in more recent editions this observation secures a prestigious spot in the introduction to the entire course, on page 4. See Fuller and Eisenberg, *BASIC CONTRACT LAW* (8th Edition 2001).

Perhaps one of the clearest statements of this theory, and one particularly relevant to contracts and restitution, appears in the opening chapter of Lon Fuller and Melvin Eisenberg's classic contracts casebook.

The ethical problems involved in the law of contracts result. . . from four elementary ideas. 1. "The Tort idea" [reliance]. . . 2. The bargain idea- [classical contract theory predicated on the will theory]. . . 3. The promissory idea, i.e., that that promises are binding in their own nature and ought be kept in all cases. 4. The Quasi-Contractual Idea, [corresponding to unjust enrichment].

These ideas which at first seem trite and wholly harmonious are in fact profoundly in conflict. The first and the fourth proceed from the premise that justice is to be known after the event. . . The second and the third proceed from the premise that that justice is to be known before the event in transactions voluntarily entered into. . . the conflict between these two standpoints is perennial; it can be traced though the history of the law of contracts and noted in nearly every debatable question; there is no reason to think that it can ever be gotten rid of or to suppose that the present compromises of the issue will be any more permanent than the other compromises that have gone before.

While there was broad agreement amongst the realists that the motivation for legal outcomes is not the doctrinal rules themselves, but something else. Exactly what that something else is has been the concern of most mid-to-late twentieth century legal theory. The proposals differ wildly, from law and economics based efficiency concerns, to moral reasoning, to critical theories from the perspective of class, race, gender and ideological affiliation, to political science and institutional design models, accounts based on historical accidents, public choice theories and so forth. What these movements share, however, is their realist heritage. They agree that the move from cases to broader principles and then back down to a specific decision is neither descriptively accurate of what courts actually do nor a sufficient legitimization of the results. Post-realist American legal thought is an ongoing search for a compelling replacement to traditional doctrinal analysis.⁴²

⁴² Formalism of course exists in the U.S. However, at present it seems to be anchored in a discussion about the role of texts, particularly as related to public law. There seems to be little equivalent to Birks' conceptual mapping of the private law. Even Justice Scalia, America's most celebrated essentialist-

For reasons too complex to outline here, this view of law was never as influential in England and the Commonwealth, as the success of the Birksean restitution project bears proof.⁴³ This is not to suggest that there are no doctrinally skeptical post-realist voices in the English academy.⁴⁴ But this is to suggest that the intellectual climate of the English and Commonwealth academy affords the possibility that pre (or anti-) realist strand of scholarship will find a home in the elite segments of the academy which exerts significant influence over the elite bench and bar. Similarly, I do not mean to suggest that Commonwealth restitution scholarship is monolithic.⁴⁵ Birks' views are far from being unanimous, and in many important respects were far too Romanist for common lawyers, as the Australian experience bears out.⁴⁶ Moreover, several of his theories were loudly rejected by the House of Lords,⁴⁷ and Birks himself notoriously changed his mind regarding several key points of analysis.⁴⁸ Nevertheless, the jurisprudential techniques employed by Birks continue to frame the Commonwealth's restitution scholarship. In short, it was Birks, not Atiyah, who produced graduate students, institutions and a trans-national scholarly movement.

III. Restitution & Realism

formalist maintains a post-realist vision of the common law. See Scalia, *A MATTER OF INTERPRETATION* at 10-14 (1997).

⁴³ The most comprehensive attempt to address this issue remains Patrick Atiyah and Robert Summers, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* (1987); see also Richard Posner, *LAW AND LEGAL THEORY IN THE UK AND USA* (Oxford 1996); see also Neil Duxbury, *Why Is English Jurisprudence Analytical*, 57 *Current Legal Problems* 1 (2004).

⁴⁴ There certainly are, and from this side of the Atlantic, the Birkbeck school appears to lead the field in the U.K.

⁴⁵ See, e.g., Andrew Burrows, *Contract, Tort and Restitution – A Satisfactory Division or Not?* 99 *L.Q.R.* 217 (1983).

⁴⁶ See e.g., *Roxborough v. Rothmans*, [2001] 208 *CLR* 516 at 544 (AU):

Considerations such as these, together with practical experience, suggest caution in judicial acceptance of any all-embracing theory of restitutionary rights and remedies founded upon a notion of "unjust enrichment". To the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the source of the theory may be the writing of jurists not the decisions of judges. However, that is not the way in which a system based on case law develops; over time, general principle is derived from judicial decisions upon particular instances, not the other way around.

See also *id.* at note 112 citing scholarly commentary to the same effect.

⁴⁷ E.g., *Westdeutsche Landesbank v. Islington*, [1996] *AC* 669 (HL).

⁴⁸ *Supra* note __.

While the overall theoretical orientation of legal realism is at odds with Birks' analysis of private law, the realists' deconstruction of contract and property raise particular difficulties for the reception of the Birksean restitution discourse into American legal thought.

A. *The Reliance Interest in Contracts*

No publication has been more influential to American conception of contract law than Lon Fuller's justly celebrated *The Reliance Interest in Contract Damages*.⁴⁹ A number of scholars, including, interestingly, Patrick Atiyah,⁵⁰ have claimed this to be "the best," "the most influential," or "the most important" contracts article ever written.⁵¹ Hyperbole aside, Fuller's analysis has been extraordinarily influential and established the framework for the damages sections in the *Restatement Second of Contracts*.⁵²

Fuller finds that damages in contract cases vindicate three severable interests: (i) the expectation interest, traditionally thought to be predicated on the bargain between the parties; (ii) the tort-like reliance interest, which looks to compensate the plaintiff for losses caused by the defendant; and (iii) the restitution interest, which vindicates defendant's unjust enrichment in favor of the plaintiff.⁵³ These three interests bear more than passing resemblance to Birks' tripartite division between contract, tort and restitution. But whereas Birks saw each as representing a separate and divisible basis of private law liability, Fuller finds that each interest informs the "core" of contract law itself. Similarly, while Birks saw unjust enrichment as generating its own heading of liability, Fuller sees the prevention of unjust enrichment as the most compelling case for recoveries "on the contract."⁵⁴ Reliance presents the next most attractive rationale, while

⁴⁹ 42 YALE L. J. 52 (1936).

⁵⁰ P. Atiyah, *Fuller and the Theory of Contract*, ESSAYS ON CONTRACT 73 (1986).

⁵¹ See Todd Rakoff, *Fuller and Purdue's "The Reliance Interest" as a Work of Legal Scholarship*, 1991 WISCONSIN L. REV. 203, 204n.7 and sources cited therein.

⁵² See RESTATEMENT SECOND CONTRACTS § 344 (outlining the three interests articulated by Fuller), see also Hudec, *Restating the "Reliance Interest,"* 67 CORNELL L. REV. 704 (1982) (documenting influence of Fuller's article on the *Restatement (Second) of Contracts*).

⁵³ Lon Fuller and William Purdue, *The Reliance Interest in Contract Damages*, 46 YALE L. J. 52 (1936).

⁵⁴ *The Reliance Interest* at 56, 67-68.

damages based solely on the parties' expectation, traditionally, the heart of contract damages, offers the least compelling rationale.⁵⁵

Having inverted the traditional hierarchy, Fuller demonstrates that the divisions between the three interests are more imagined than real. Fuller's breakdown of the reliance/restitution distinction presents a key component of the realist aversion to Birks' scheme. Fuller argues:

The inescapable flexibility of the concept of benefit means that drawing the line between reliance and restitution interest is in the end a rather arbitrary affair. By substituting for "benefit" a stricter term like "enrichment" we shift the line in one direction; by substituting a looser term like "performance received by the promisor" we shift it in another. *In view of the fact that the line is set ultimately by a kind of definitional fiat it is remarkable that it should have become customary to think of restitution as a remedy entirely distinct from the usual suit on the contract.* Where "the contract" is regarded as furnishing a kind of conduit for the ordinary suit, it becomes an obstruction in the way of restitution and must be removed by "rescission." That in this legal hydromechanics sight should be lost of the purposes underlying the remedies involved can occasion no wonder.⁵⁶

The realist in Fuller finds the attempt to create sharp boundaries around core legal concepts unsustainable. Restitution is thus collapsed into reliance, and both are then folded into contract. Reliance (tort), contract and unjust enrichment are not three separate causative bases of liability, but are thoroughly enmeshed within the "the law of contract" itself. To American scholars raised in Fuller's tradition, Birks' analytic division between bases of liability is simply a more sophisticated form of the "legal hydromechanics" derided by Fuller. Moreover, in contrast to Birks, reliance (including what Birks calls restitution), rather than mutual agreement, that provides the true explanatory basis of most "on contract" recoveries.⁵⁷ Birks' definition of contract is thus

⁵⁵ *Id.* at 70.

⁵⁶ *Id.* at 72 (emphasis added).

⁵⁷ See for example, the discussion in Joseph Perillo, *Restitution in a Contractual Setting*, 73 COLUM. L. REV. 1210 (1973).

unsustainable. Contract cannot be reduced to a single causative basis, since it reflects an inseparable amalgam of restitution, reliance and expectancy interests.⁵⁸

In the wake of Fuller's analysis, reliance rather than restitution became the primary vehicle through which American scholars analyzed contract liabilities that do not neatly fit under the orthodoxy of the bargain theory. The most famous (if vociferous) expression is undoubtedly Grant Gilmore's *The Death of Contract*. Gilmore highlighted the "schizophrenia"⁵⁹ of the *Restatement of Contracts* by claiming that the reliance interest expressed in § 90 fully undercut the bargain theory articulated in §75.⁶⁰ Subsequent accounts followed suit so that the "reliance" heading became the chief rival to the traditional view of contract.⁶¹ Even John Dawson, arguably the leading mid-century restitution scholar, eventually came to accept the core of Fuller's analysis.⁶² Owing to Fuller's influence, the large theoretical battles over the size and scope of contract law were hashed out in terms of reliance.⁶³ Restitution, as a standalone idea, received only marginal treatment in the contracts literature, typically relegated to a few quantum meruit cases, or as a vehicle for a non-breaching party to recover on a losing contract.⁶⁴

⁵⁸ See supra note ____.

⁵⁹ Grant Gilmore, *THE DEATH OF CONTRACT* at 67 (1974).

⁶⁰ See Gilmore, *THE DEATH OF CONTRACT* at 62 (citing and crediting Fuller's *Reliance Interest* in unsettling the bargain theory of contract), and *id.* at n.147; see also *Restatement Second of Contracts*, which presents reliance under the heading of "Contracts without Consideration" as an alternate to the bargain principle, while restitution is analyzed under the heading of "Remedies" where it resides alongside measurement of damages, injunctions, and specific performance. See also Hudec, *supra*.

⁶¹ See, e.g., E. Allen Farnsworth, *FARNSWORTH ON CONTRACTS*, chapter 2 (and note the relative placement of restitution vs. reliance. Marvin Chirelstein, *CASES AND CONCEPTS IN THE LAW OF CONTRACTS* chapters 2 & 8 (5th Edition 2006); Fuller and Eisenberg, *BASIC CONTRACT LAW* (chapters 1, 2 & 8) (8th Edition 2001); CALAMARI AND PERILLO ON CONTRACTS 5th Edition.

⁶² See Dawson, *Restitution Without Enrichment*, 61 B.U. L. REV. at 577-85 (1981).

⁶³ E.g., Grant Gilmore, *THE DEATH OF CONTRACT*; Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Ian Macneil, *THE NEW SOCIAL CONTRACT* (1980). See also See Farnsworth, *Precontractual Liability*, 87 COLUM. L. REV. 231, 232-33 ("Few courts have entertained claims for restitution of benefits conferred during failed negotiations. . . For this reason, claimants have usually made claims based on contracts implied-in-fact in addition to or instead of demands for restitution, and courts . . . have generally favored the former ground."); see also Duncan Kennedy, *From The Will Theory*, 100 COLUM. L. REV. 94, 144-150 (2000).

⁶⁴ See e.g., E. Allen Farnsworth et al., *CASES AND MATERIALS ON CONTRACTS*, 103-112; 486-88 (6th Ed. 2001).

Similarly, while over the past 50 years, American scholars have produced a voluminous literature devoted to analyzing off-contract remedies predicated on Fuller's reliance interest, one finds little parallel discussion within the Commonwealth canon. While a more complete exploration of this theme is beyond the scope of this article, following Fuller, Dawson and Gilmore, much of what Commonwealth lawyers analyze as restitution, American courts and scholars frame in terms of reliance. Thus, Fuller's view regarding the substantial overlap between two categories is substantially borne out.⁶⁵

B. *Property Rights & Constructive Trusts*

While Birks identifies the causative basis of restitution by contrasting it with the consent theory of contracts, Birks' understanding of restitution's remedial elements is predicated on his traditionalist conception of property. According to Birks, property rights can only be generated and distributed on the basis of formal and rational rules, and not through exercises of judicial discretion.⁶⁶ Thus in a recent book, Craig Rotherham convincingly contrasts this "absolutist" conception of property assumed by leading English scholars, (including Birks), with the realist-inspired "instrumentalist approach to property" that dominates American thought.⁶⁷

Though the evolution of the instrumentalist conception of property in the U.S. is long and complex, important data points no doubt include the Supreme Court's holding in *Euclid v. Ambler*⁶⁸ which, despite its own rhetoric, eroded the public/private distinction by recognizing the dramatic power of the state to alter, create and extinguish property rights. One year later Morris Cohen published his justly famous *Property and Sovereignty*, which furthered this process by demonstrating the degree to which private property depended on the compliance of the state's regulatory apparatus.⁶⁹ More contemporary strands of this analysis include Joseph Singer's *The Reliance Interest in*

⁶⁵ In this regard, see Duncan Kennedy, *From The Will Theory*, 100 COLUM. L. REV. 94, 144-150 (2000).

⁶⁶ See Craig Rotherham, PROPRIETARY REMEDIES IN CONTEXT, 33-40 (2002); Birks, *supra* 12 Trust Law International, at 208.

⁶⁷ Morton Horowitz, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 at 146-167 (1992).

⁶⁸ *Village of Euclid. v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁶⁹ See 13 CORNELL L. Q. 8 (1927).

Property,⁷⁰ as well as Tom Grey's *The Disintegration of Property*,⁷¹ which carry over the breakdown of the contract/tort/reliance distinction into the law of property. The public/private distinction took a further blow as mid-twentieth century courts expanded the definition of property to include rights to government entitlements, a trend exemplified by the Supreme Court's holding in *Goldberg v. Kelley*.⁷² Overall, the prevailing view is that property rights are granted as a function of tradition, policy concerns, exigency and the prevailing equities of a case, rather than by categorical applications of pre-defined legal rules.⁷³

Since American theory assumes (if somewhat uncomfortably), that courts do in fact create and extinguish property rights, the constructive trust—which posed such a difficult theoretical problem for Birks—fails to generate much interest or excitement amongst U.S. theorists. The prevailing “theory” of constructive trusts was stated by Cardozo as far back as 1919: “a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.”⁷⁴ While courts and scholars no doubt disagree over which cases merit this powerful remedy, mainstream scholarship places little stock in a doctrinal account that purports to govern this unwieldy and result-oriented remedy. The tradition of broad discretion afforded to courts “sitting in equity,”⁷⁵ together with the legacy of legal realism, renders most of Birks' theories unnecessary to the American scholar.

Thus the American realist-reductionist approaches the Commonwealth restitution discourse with hesitancy and suspicion. In the realist reading, Birks was concerned with judicial remedies that looked more like unprincipled forays into distributive justice than

⁷⁰ 40 STAN. L. REV. 611 (1988).

⁷¹ Reprinted in PROPERTY: NOMOS XXII 69 (1980)

⁷² 394 U.S. 971 (1969). See also Charles Reich's influential article *The New Property*, 73 YALE L. J. 733 (1964).

⁷³ Morton Horowitz, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 at 163-67 (1992).

⁷⁴ *Beatty v. Guggenheim Exploration Co.* (1919).

⁷⁵ See Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083 (2001) (discussing different definitions of equity).

the application of hard rules of law under a corrective justice framework. Restitution theory, with its learned doctrines and emphasis of precise legalistic taxonomy, is simply a scholarly attempt to reverse-engineer a substantive basis of liability that explains the outcomes delivered by courts.⁷⁶ Despite the linguistic and terminological complexity, the realist finds the goals of the Birksean restitution discourse to be relatively simple: to retroactively legitimate, and proscriptively regulate, the courts' overtly redistributive activities.

IV. Redistributive Restitution

Although U.S. scholars have been notably absent from the Oxonian discourse, a different vision of restitution has generated a significant amount of excitement and controversy within the American academy. This restitution discourse is premised on the core assumptions of legal realism and openly embraces the court's redistributive powers. Restitution is interpreted as a legal framework through which justice concerns precluded by traditional legal doctrine find their expression in the law.⁷⁷ Thus while the Birksean analysis actively suppresses restitution's equitable history,⁷⁸ the redistributive version explicitly keys off the natural law tones that hover over the terms "unjust" and "equity."⁷⁹ A few recent examples demonstrate this point.

To the American scholar, the natural law imagery embedded in the term "*unjust enrichment*" makes it an obvious candidate to address arguably the greatest injustice of the twentieth century, the Nazi Holocaust.⁸⁰ While initial attempts at litigating the

⁷⁶ For example, Birks' theory encounters most difficulty when attempting to explain the law of tracing pursuant to orthodox conceptions of property. Birks was forced to establish an elaborate set metaphysical taxonomy in order to explain why no new property rights are created when a plaintiff traces "his" property though into the defendant's now-present assets. See Birks: *Overview: Tracing, Claiming and Defences* in LAUNDERING AND TRACING. See also Rotherham, *supra*, at 96-106.

⁷⁷ See E. Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 COLORADO L. REV. 711, 713 (2006) (contrasting the vision of unjust enrichment inspired by the legal realists, with a tighter, more analytic view represented by Birks). See also RESTATEMENT THIRD OF RESTITUTION § 1 cmt. b.

⁷⁸ E.g., Birks, *Introduction* at 39.

⁷⁹ See Sherwin, *Restitution and Equity*, *supra*, 79 TEXAS L. REV. (2001) (discussing different views of equity); See also the illuminating contrast of English and American rhetoric surrounding subrogation, in M. Quinn, *Subrogation, Restitution and Indemnity*, 74 TEX. L. REV. 1361, 1373-74 (1996).

⁸⁰ On Holocaust reparations, see generally, *Stefan A. Riesenfeld Symposium on Holocaust Reparations*, 20 BERKELEY J. OF INTERNATIONAL LAW 1-357; *Symposium, Holocaust Restitution*, 25 FORDHAM INTERNATIONAL L. J. 1-493 (2001).

Holocaust in U.S. courts produced little in the way of recovery,⁸¹ in the past decade or so, restitution-styled claims have borne significant results.⁸² Of particular note is the \$1.25 billion settlement between Holocaust victims and a consortium of Swiss banks, one of the largest settlements relating to a historic injustice.⁸³

Restitution, in the technical, Birksian sense had little impact in producing the settlement. The process was intensely political, involving (at times, legally questionable) moves by all levels of the U.S. government designed to press the Swiss banks to settle.⁸⁴ Holocaust litigation however, is obviously about more than restoring “a mistaken payment of a non-existent debt.”⁸⁵ It sets out to redistribute vast amounts of wealth in an attempt to loosely, if incompletely, correct for past injustices of unimaginable magnitude. The restitution rhetoric is employed in order to enable courts to transcend political, temporal, doctrinal and jurisdictional boundaries to achieve substantively just results. In direct contrast to the Commonwealth practice, U.S. discourse values the doctrinal label *restitution* precisely because its natural law underpinnings stress substantive justice over analytic theory.

The recent success of the Holocaust claims has inspired renewed interest in claims for restitution by descendants of African-American slaves.⁸⁶ While this movement has

⁸¹ See, e.g., *Kelberine v. Societe Internationale*, 363 F.2d 989 (D.C. Cir. 1966) (slave labor class action lawsuit by Holocaust survivor dismissed); *Handel v. Artukovic*, 60 F. Supp. 42 (C.D. Cal. 1985) (class action lawsuit brought by Holocaust survivors dismissed); *Princz v. Federal Rep. of Germany*, 26 F.3d 66 (D.C. Cir. 1994); see generally, Michael Bazylar, *Nuremberg in America: Litigating the Holocaust in the United States Courts*, 34 U. RICHMOND L. REV. 1 (2000).

⁸¹ See, e.g., *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 139 (EDNY 2000).

⁸² Michael Bazylar, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. OF INTERNATIONAL LAW 11, 12 (2002).

⁸³ *id.*

⁸⁴ See Bazylar, *Nuremberg in America: Litigating the Holocaust in the United States Courts*, 34 RICHMOND L. REV. at 62-70 (2000).

⁸⁵ This is Birks’ formulation of the core case of restitution. Birks, UNJUST ENRICHMENT 3 (2003) (“The law of unjust enrichment is the law of all events materially identical to the mistaken payment of a non-existent debt.”).

⁸⁶ See *In Re African-American Slave Descendants Litigation*, 304 F.Supp.2d 1027, 1056 (N.D. Ill. 2004) (explaining that the “bulk of this relief centers on plaintiffs’ claim for restitution”); *aff’d in part and reversed in part, In re African-American Slave Descendants Litigation*, 471 F.3d 754 (7th Cir. 2006) (Posner, J.).

had much less success in practice, it has engendered a wide-ranging debate within the legal academy.⁸⁷

While to date, no money has changed hands and a class action lawsuit for reparations has recently been dismissed,⁸⁸ a number of commentators nevertheless note that, to the extent these claims have a chance of success, restitution/unjust enrichment remains that most promising legal avenue. The pliability and natural law overtones of the word “unjust” help plaintiffs get around the fact that slavery was legal under the positive law of the pre-Civil War era. At the more doctrinal level, a suit in restitution obviates the need for a showing of direct injury. Finally, since liability in restitution is strict, plaintiffs are relieved from proving negligence or wrongdoing on the part of the defendants, an obvious advantage where the suits proceed against those who had nothing to do with the actions in question.⁸⁹

Perhaps the farthest-reaching use of restitution rhetoric was the \$350+ billion settlement between tobacco companies and state governments.⁹⁰ Over the twentieth century, the tobacco industry successfully defended tort and product liability claims pursued by smokers and their families.⁹¹ However, presenting the claims in restitution allowed lawyers to structure the suit so that the state rather than the (at fault) smoker was the named plaintiff.⁹² Combining law and economics reasoning with traditional restitution theory, the states claimed that the tobacco companies were unjustly enriched because they did not internalize the costs of the adverse health effects of smoking. Since

⁸⁷ The classic work is Boris Bittker, *THE CASE FOR BLACK REPARATIONS* (1973), and more recently, Randall Robinson, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (1999). See Eric Posner and Adrian Vermule, *Reparations for Slavery and other Historical Injustices*, 103 COLUM. L. REV. 689, 700-03 (2003) (arguing that restitution has several advantages over tort in this context); Bernard Boxhill, *The Morality of Reparation*, in *REVERSE DISCRIMINATION* 270, 275-77 (B. Gross Ed 1977) (unjust enrichment as basis for reparations); Anthony Sebok, *Should Claims Based on African-American Slavery be Litigated in the Courts?*, <http://writ.news.findlaw.com/sebok/20001204.html> (discussing the centrality of unjust enrichment claims in slavery litigation); Hanoch Dagan, *Restitution and Slavery*, 84 B.U.L. REV. 1139 (2004) (expressing openness to the idea that restitution can be used for historic injustices).

⁸⁸ *In Re African-American Slave Descendants Litigation*, 304 F.Supp.2d 1027, 1056 (N.D. Ill. 2004).

⁸⁹ See Emily Sherwin, *The Jurisprudence of Slavery Reparations: Reparations and Unjust Enrichment*, 84 B.U.L. REV. 1443 (2004).

⁹⁰ See Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes* 33 GA. L. REV. 847 (1999); Hanoch Dagan & James White, *Governments, Citizens, and Injurious Industries*, 75 NYU L. REV. 354 (2000).

⁹¹ Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes* 33 GA. L. REV. 847, 848-58 (1999).

⁹² *Id.* at 852-86.

these expenses were ultimately borne by the public, the states claimed restitution from the tobacco industry.⁹³

Though these claims never received judicial sanction, restitution had a hand in producing one of the first major victories against the tobacco companies. Other factors no doubt contributed: the emergence of critical “smoking gun” documents; the testimony of insider whistleblowers; and a general shift in public sentiment. But by naming the state rather than the smoker as the plaintiff, the restitutionary cause of action substantially changed the underlying equities and pushed the tobacco companies towards settlement.

A final source of redistributive restitution relates to the division of property belonging to unmarried cohabitants. Here, Canadian rather than American law offers the most telling examples.⁹⁴ Pushing the law beyond Commonwealth norms,⁹⁵ the Supreme Court of Canada has granted broad remedies to no-longer significant others (typically women claiming rights in a men’s property) under theories sounding in unjust enrichment.⁹⁶ The Canadian experience thus offers a mid-point between U.S. and Commonwealth modes of thought. On the one hand, Canadian doctrine exhibits its North American tendencies, using common law courts to pursue a social agenda through private law litigation.⁹⁷ On the other hand, many scholars who adhere to the restrained, analytic view of restitution argue that the Canadian approach distorts the confined boundaries of unjust enrichment.⁹⁸

⁹³ *Id.* at 853.

⁹⁴ In the U.S. these questions proceed under a variety of statutory and common law principles, most probably this is because restitution is not a compelling enough framework to serve as a doctrinal rallying point for this area of law. A comprehensive summary of cases that demonstrates the lack of any cohering principle in U.S. law can be found at George Blum, *Property Rights Arising from Relationship of Couple Cohabiting without Marriage*, 69 A.L.R. 219 (5th ed. 2004). See also *infra* Part VI.

⁹⁵ See John Mee, *THE PROPERTY RIGHTS OF COHABITEES: An Analysis of Equity’s Response in Five Common Law Jurisdictions* (Oxford: Hart 1999).

⁹⁶ See *Pettkus v. Becker* 117 D.L.R. (3d) 257(1980); *Sorochan v. Sorochan*, 2 S.C.R. 38 (1986) (household work included as enrichment; restitution extends even to property acquired before the couple moves in together); *Peter v. Beblow* 1993 101 DLR 4th 621 (establishing the presumption that domestic service gives rise to claims of unjust enrichment; since plaintiff rendered domestic services under “no obligation” she is entitled to restitution.). See John Mee, *supra* (discussing how these cases extend far beyond commonwealth norms).

⁹⁷ See John Mee, *THE PROPERTY RIGHTS OF COHABITEES* 188 (discussing the impact of the wide ranging U.S.-styled constructive trust on Canadian jurisprudence).

⁹⁸ Not surprisingly, Birks was an early critic. See Birks, *Restitution and Resulting Trusts*, in *EQUITY AND CONTEMPORARY LEGAL DEVELOPMENTS* 372 n.82 (Goldstein ed. 1992) where Birks critiques the *Pettkus/Sorochan* line as giving too broad a definition of unjust enrichment. Others have followed suit,

The competing images of restitution directly impact the structure and texture of the academic restitution discourse. American scholarship eschews the taxonomic and cartographic inquires that typify much of the Commonwealth discourse.⁹⁹ American scholars look to engage directly in the social, economic and moral merits of the restitution efforts.¹⁰⁰ Thus academic writing overwhelmingly focuses on the substantive legitimacy and policy implications of these projects, displaying little concern over the analytic structuring of the doctrine. Not surprisingly, this open-ended redistributive discourse generates opposition from scholars committed to a more doctrinal conception of restitution.¹⁰¹

V. Realism from the Right

The account of legal realism presented so far, particularly the emphasis on redistribution, focuses overwhelmingly on left-leaning scholarly and judicial interpretations of legal realism. This agenda however, is deeply contested, and encounters strong opposition from neo liberal voices, most notably, the law and economics movement. Like Birks the legal economists oppose pursuing redistributive programs under the guise of private law, give far greater credence to the public/private distinction, and generally support the will theory of contract. But while the law and economics interpretation of legal realism is at odds with the left-leaning vision sketched

arguing that as understood by the Canadian court, unjust enrichment bears little resemblance to the commercial law doctrines from which is allegedly is derived. See Patrick Parkinson, *Beyond Pettkus v. Becker*, 43 U. Toronto L. J. 217, 220-23 (1993); E. Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 COLORADO L. REV. 711 (2006). Mee, THE PROPERTY RIGHTS OF COHABITEES.

⁹⁹ Emily L. Sherwin, *Legal Taxonomy*, <http://ssrn.com/abstract=925129> (2006).

¹⁰⁰ This is not to suggest that there is no technical analysis in these cases, but only that the technical analysis does not revolve around the analytics of restitution. Rather, the legalistic analysis focuses on procedural issues: e.g., standing, subject matter jurisdiction, diversity jurisdiction, federal question, *forum non conveniens*, failure to join necessary parties, and a host of discovery related issues. See, e.g., *In Re African-American Slave Descendants Litigation*, 304 F.Supp.2d 1027, 1056 (N.D. Ill. 2004). This seems to be part of a broader division where American courts focus more on procedural doctrines while English and Commonwealth courts expend more energy articulating substantive points. I hope to develop this point further through future research.

¹⁰¹ See Emily Sherwin, *Reparations and Unjust Enrichment*, 84 B.U.L. REV. 1443 (2004); Birks, *Restitution and Resulting Trusts*, in EQUITY AND CONTEMPORARY LEGAL PROBLEMS at 372 n. 82. Andrew Kull (id); Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 COLORADO L. REV. 711 (2006) (opposing restitution between cohabitants).

above, it shares in the skepticism of classical doctrinal reasoning.¹⁰² Therefore, the Commonwealth approach to restitution is (albeit for different reasons) equally unpersuasive to center–right contingent of the American ideological spectrum.

The differences between Birksian and law and economics approaches is best captured by comparing Birks' *Introduction*, with an article published the same year by Saul Levmore, a leading first-generation law and economics figure.¹⁰³ At first glance, the authors share many of the same concerns. Both Birks and Levmore are troubled by the conceptual disarray prevailing within restitution, as well as the lack of any apparent theory guiding judicial decisions.¹⁰⁴ Despite raising similar questions however, the authors employ substantially different methodologies, and a direct comparison of the two writings highlights the incompatibility between these modes of legal analysis.

Consistent with the core insights of law and economics, Levmore assumes that the goal of all private law rules—whether denominated contract, tort or restitution—is to increase efficiency by channeling transactions to the free market. Restitution is initially thought to be problematic because *quasi contract* cases enforce un-bargained for exchanges as if they were conducted on the open market. Levmore argues however, that upon closer examination, the decisions reached by courts in *quasi contract* cases actually incentivize efficient transactions. Restitution doctrine is said to produce efficient outcomes because recovery is granted only when it is likely to “thicken” the private market, *i.e.*, generate markets with many competing buyers and sellers. On the other hand, Levmore finds that restitution is systematically denied where a grant would encourage service providers to obtain their fees by circumventing the market.¹⁰⁵

In this account, restitution has nothing to do with preventing unjust enrichment. Moreover, unjust enrichment has no core analytic structure, no prototypical case, and is not the causative basis of any rights. It is simply an amalgamation of rules whose

¹⁰² See Anthony Kronman, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

¹⁰³ Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65 (1985).

¹⁰⁴ See *id.* at 121-124.

¹⁰⁵ *Id.* at 99, 117. But see Hanoch Dagan, *THE LAW AND ETHICS OF RESTITUTION* at 147 (2004).

contents embody the core goals of all of the private law—promoting efficient transactions. The thinking is thus fully instrumentalist; restitution is granted only when a particular remedy in the case at bar encourages market behavior downstream.¹⁰⁶

In a more recent account, Richard Craswell further demonstrates the irrelevance of traditional legal categories to law and economics.¹⁰⁷ Craswell argues that the goal of any remedial regime (reliance, restitution or expectation) is to produce damage awards whose total economic impact incentivizes the most socially productive behavior. In this view, doctrinal headings traditionally associated with specific measures of damages serve no purpose; they simply distract the law from addressing the underlying empirical question at hand. Rather than fret about the causative basis of liability, Craswell argues that legal analysis should be geared towards identifying which measure of damages will optimize socially productive behavior.¹⁰⁸

The economic analysis presents a mirror image of the Commonwealth reasoning. Under Birks' analysis, contract, tort, and restitution provide the "causative event" which justifies the award of damages.¹⁰⁹ Craswell, by contrast, begins (and ends) his analysis with the amount in damages that should be awarded—the "source of liability" or "causative basis" never even enters the equation. Much the same is true of the law and economics approaches to property. Whereas Birks sees property as a foundational institution predicated on a fixed set of "orthodox principles,"¹¹⁰ Calabresi and Malamed famously argue that property rights should be conceived as freely defeasible interests which are economically equivalent (and fully interchangeable) with rights or duties stemming from contract and tort.¹¹¹ Under this framework, the decision whether to grant a proprietary or personal remedy has nothing to do with the technical (and indeterminate)

¹⁰⁶ 71 VA. L. REV. 79-80 (1985).

¹⁰⁷ Richard Craswell, *Against Fuller and Purdue*, 67 U. CHI. L. REV. 99, 107-111 (2000).

¹⁰⁸ Id.

¹⁰⁹ See, e.g., Birks, UNJUST ENRICHMENT 6-8 (2003).

¹¹⁰ See Birks, *Establishing a Proprietary Base* 1995 RESTITUTION LAW REVIEW 83, 84.

¹¹¹ Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV L. REV. 1089 (1972).

rules of property and/or trust, but depends on which form of relief will actively encourage the parties to bargain towards an efficient resolution.¹¹²

While American courts rarely adopt the most radical formulations found in law and economics scholarship, in diluted form, this method of analysis works its way into U.S. caselaw. Leading examples are cases of mistaken payment, which, per Birks, represent the core rationale for restitution.¹¹³ By framing cases of mistaken payment cases in terms of the payee's unjust enrichment, Birks necessarily assumes that the negligence by the mistaken payor in initiating the transfer is legally irrelevant. As one U.S. state court put it, "[i]f 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."¹¹⁴

Yet in a number of cases dealing with mistaken bank payments, U.S. courts have rejected the unjust enrichment framework and looked instead to the law and economics inspired values of efficiency, certainty and finality of transaction. For example, an influential opinion from New York's highest court denied recovery on account of the transferor's negligence, arguing that it would be more efficient if plaintiff (the cheapest cost avoider) was made to internalize the cost of the mistake.¹¹⁵ A Seventh Circuit opinion, per Judge Easterbrook, pursued a similar line of analysis, allocating responsibility to the party who, ex ante, was in the best position to insure for the mistake or contract around it.¹¹⁶ In line with law and economics principles, these cases reject the unjust enrichment framing and focus instead on the legal rule that encourages the most efficient deployment of precautionary measures or recourse to market-based correctives.

¹¹² Id. More recent expositions of this idea found in Ian Ayres and Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 Yale L J 1027 (1995); Louis Kaplow and Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV L. REV. 713 (1996); James E. Krier and Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 NYU L. REV. 440 (1995).

¹¹³ Birks, UNJUST ENRICHMENT (2003).

¹¹⁴ *Ex Parte AmSouth Mortgage Co.*, 679 So. 2d 251, 255 (Ala. 1996); See also *Restatement (Third) of Restitution, Tentative Draft No.1*, § 5 Cmt f (discussing the role of negligence in restitution claims).

¹¹⁵ See *Banque Worms v. BankAmerica Intl.*, 570 N.E.2d 189, 192 (N.Y. 1991); see also *Credit Lyonnais v. Koval*, 745 So.2d 837 (Miss.1999).

¹¹⁶ *General Electric Capital Corp. v. Central Bank*, 49 F.3d 280 (7th Cir. 1995) (Easterbrook, J.).

VI. Doctrinal Restitution in America: *The Restatement of Restitution*

In recent years, a small group of doctrinally-oriented American scholars have set out to draft a new *Restatement (Third) of Restitution*. In many ways this project follows the trail blazed by Commonwealth scholars, and stands out as a notable exception to the overall lack of interest displayed by American scholars. The *Restatement* presents restitution as a coherent field based on the unifying principle of unjust enrichment,¹¹⁷ and generally resists the expansive, natural law imagery promoted by the post-realist redistribution camp. Thus, the drafts of the *Restatement* claim that “instances of unjustified enrichment are both predictable and objectively determined,” since “the justification is legal not moral.”¹¹⁸ In contrast to both the right and left leaning camps of American scholars, the *Restatement*’s drafters demonstrate faith in the coherence and normative appeal of traditional doctrinal reasoning.¹¹⁹

The differences between the *Restatement* and Commonwealth views are most visible in the context of restitution for unmarried cohabitants and in the *Restatement*’s position on the relationship between restitution and contract. Regarding unmarried cohabitants, the English restitution canon contains little if any discussion of this topic. The question is not addressed in the latest edition of Goff and Jones, nor in Andrew

¹¹⁷ See *Discussion Draft* § 1; At present, the drafts of the Restatement include the Discussion Draft; Restatement (Third) of Restitution and Unjust Enrichment (Tentative Draft No. 1, April 2001); Restatement (Third) of Restitution and Unjust Enrichment (Tentative Draft No. 2, April 2002); Restatement (Third) of Restitution and Unjust Enrichment (Tentative Draft No. 3, March 2004); 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.

Tentative Draft No. 4, *supra*, at i. 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 Probs.* 289, 291 n.10 (2003). See also Chaim Saiman, *Restating Restitution* 53 *VILLA L. REV.* __ (2007).

¹¹⁸ *Discussion Draft*, at § 1 Cmt. b; see also, Saiman, *Restating Restitution*.

¹¹⁹ See, e.g., Andrew Kull, *Unilateral Mistake: The Baseball Card Case*, 70 *WASH. U. L.Q.* 57, 74-77 (1992) (critiquing both left leaning redistributionalists as well as law and economics neo libertarians).

Burrows' *The Law of Restitution*, nor in Steve Hedley's *The Law of Restitution*, nor in Birks' 1985 *Introduction*, nor his last book, *Unjust Enrichment*, nor in Graham Virgo's *The Principles of Restitution*. The English writers telegraph that whatever its substantive merits, the question of unmarried cohabitants is a legislative problem that cannot be solved though private law litigation.¹²⁰

In line with the expansive definition of restitution pursued by the redistributive restitutionists, *Restatement* § 28 supports claims for restitution between unmarried cohabitants.¹²¹ The *Restatement* is fully aware of the tension between the confined image of restitution and the unbounded, equitable flavor of § 28. Thus “fundamental principles of restitution” must be “perceptibly relaxed” to accommodate this recovery within the *Restatement's* overarching conceptual scheme.¹²² In America, even the most doctrinally oriented scholarship cannot avoid employing private law doctrines to structure social policy.

While section 28 reflects incursion of left-leaning equitable restitution into the *Restatement*, what truly distinguishes the *Restatement* from Commonwealth accounts is the influence of the right leaning, contract-centric perspectives of the economic libertarians. This theoretical orientation is most clearly spelled out in the scholarly writings of Andrew Kull, who serves as the principal drafter and leading figure behind the *Restatement*.¹²³ For Kull, the very definition of restitution is framed by contract. Restitution is the law of “non-contractual transfers,”¹²⁴ which makes it an “inevitably a

¹²⁰ See e.g., See Patrick Parkinson, *Beyond Pettkus v. Becker*, 43 U. Toronto L. J. 217, 220-23 (1993); E. Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 COLORADO L. REV. 711 (2006). See also Birks, *Restitution and Resulting Trusts*, in EQUITY AND CONTEMPORARY LEGAL DEVELOPMENTS 372 n.82 (Goldstein ed. 1992).

¹²¹ *Restatement (Third) of Restitution* § 28.

¹²² See *id.* In a more caustic vein, commentators have noted that the authorization of these claims “is inconsistent with the premises of the new *Restatement* and jeopardizes the task of rationalizing and taming the field,” which threatens to “set the field on a dangerous course.” Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 COLORADO L. REV. 711, 718, 732 (2006).

¹²³ Observers have noted that as Reporter, Andrew Kull has been able to exert an unusual amount of influence over the form and substance of the *Restatement*. See Mark Gergen, *The Restatement Third of Restitution and Unjust Enrichment at Midpoint*, 56 Current Legal Problems 289, 291 n.10 (2003).

¹²⁴ Andrew Kull, *Restitution and the Noncontractual Transfer*, 11 Journal of Contract Law 1, 3 (1997).

disfavoured recourse.”¹²⁵ Based on Levmore’s economic analysis, Kull argues that “the law strongly prefers. . . that [] transfers be made pursuant to contract wherever possible.”¹²⁶ “Contract” thus “limits restitution: because contract is incomparably superior to restitution as a means of regulating a given transaction.”¹²⁷ Kull concludes that restitution cases should be analyzed via reference to “the hypothetical contract that might have governed the parties’ transaction.”¹²⁸

Despite considerable diversity amongst Commonwealth scholars, I am unaware of any writer who expresses the primacy of contract over restitution in such stark terms.¹²⁹ The contrast becomes even sharper when comparing what each scholar views as the paradigmatic case in restitution. For Birks, mistaken payment is the “core case” of restitution, such that “the law of unjust enrichment is the law of all events materially identical to the mistaken payment of a non-existent debt.”¹³⁰ On this reading, restitution is the body of law that fills the vacuum created by a transfer that does not quite fit into any other legal category. Kull by contrast, sees restitution as essentially a case of no-contract. Every transfer is therefore evaluated through the lens of the contract the parties could/should have entered into.

These theoretical differences translate into substantive disagreements. For example, in the now (in)famous *Swaps Cases*, the English courts grappled with what to do when interest rate swaps contracts between local governmental units and large European banks were deemed *ultra vires* of the local government’s constitutional power. Following Birks, the English courts held that since the *ultra vires* contracts were void, and thus irrelevant, the swaps contracts were to be analyzed as cases of mistaken

¹²⁵ Id. at 10.

¹²⁶ Id. at 4, (citing Saul Levmore, Explaining Restitution, 71 VA. L. REV. 65 (1985)).

¹²⁷ Id.

¹²⁸ Id. at 9. Kull’s academic analysis works its way into *Restatement’s* section 2 which claims that “transactions that give rise to a liability in restitution . . . take place outside the framework of an enforceable contract or otherwise without the effective consent of one or both of the parties.”

¹²⁹ See Steve Hedley, *Restitution: Contract’s Twin* in FAILURE OF CONTRACTS at 272 n.136 (F.D. Rose ed.1997) (pointing out that Professor Kull, more than almost any other restitution scholar, 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).

¹³⁰ Birks, UNJUST ENRICHMENT 3 (2003).

payments to be reversed because of the unjust enrichment that would occur if each side got to keep the payments made under the contract. The resolution of these cases rested solely on the rules embedded in the law of restitution, as the courts gave no consideration to the intentions of the contracting parties.

The *Restatement* disagrees. Consistent with its theory that restitution is the law of no contract, the *Restatement* resists a resolution where rules of law replace the all-but-formally valid contractual agreement of the parties. Contrary to the English view, the *Restatement* conceptualizes the *ultra vires* swaps as failed contracts to be enforced in a way that most closely approximates the parties' *ex ante* agreement. Thus in cases where both sides fully performed the contract, and even when the contract is later ruled *void ab initio*, the *Restatement* finds no unjust enrichment because each side received the performance its bargained for performance.¹³¹ While this result necessarily diminishes the significance of the *ultra vires* finding—since the contract will in essence be enforced—the *Restatement* is willing to pay this price in order to affirm the centrality of private ordering and contract with the domain of private law.

Despite its strong ties to Commonwealth scholarship, the *Restatement* offers a distinctly American version of restitution. The *Restatement* parts both analytically and substantively from the Commonwealth discourse, and as compared to Commonwealth writing, deemphasized internal analytic coherence in favor of the methods and insights of post-realist U.S. scholarship.

VII. Conclusion

The *Restatement* stakes out a middle position by taking the core of the Birksean frame and modifying it to comport with more realist U.S. sensibilities. For this reason, the *Restatement* represents the most promising attempt to reestablish restitution within U.S. legal consciousness. Thus the *Restatement's* reception into the fabric of American

¹³¹ See RESTATEMENT OF RESTITUTION § 33 cmt g; Mark Gergen, *Restitution and Contract: Reflections on the Third Restatement*, 13 RESTITUTION LAW REVIEW 224 (2004).

legal thought serves as a reasonable proxy for assessing the future of restitution in America more generally.

At one level, the *Restatement* is an unqualified success. It usefully collects and summarizes a number of diffuse and little understood doctrines into a concise, handy compendium. Viewed as a thought-out, clear and up to date treatise on the law of restitution, the *Restatement* is an unqualified success. Therefore, to the extent courts conceptualize their cases as raising restitution issues, they will look to the *Restatement*; especially given the lack of alternate sources of guidance and the overall lack of competence in the field.¹³² But inasmuch as the *Restatement* harbors the broader ambitions of charting out a map of private law that re-conceptualizes an entire field along the English/Birksean model, success is far less likely. The *Restatement* will have difficulty selling the rationalized view of restitution to the American legal public. Restitution issues will likely continue to be interpreted as remedies for breach of contract (looking to the *Restatement Second of Contracts* rather than the *Restatement of Restitution* for guidance), specific doctrines at the margins of property and/or trust law, or questions that depend on (direct or interstitial) interpretation of the U.C.C. (e.g. Article 4A dealing fund transfers between banks) or the Federal Bankruptcy Code.¹³³

Similarly, the influence of the legal economists will likely channel courts towards the values of efficiency and finality and away from rewinding transactions as to correct unjust enrichment. Hard questions will be resolved by placing the risk of loss on the cheapest cost avoider, or by structuring relief so as to incentivize market transactions, so that unjust enrichment barely enters the equation. Crossing over to the other end of the spectrum, it is difficult to imagine that a large scale redistributive project (which

¹³² See Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1195 (1995) (“To put it bluntly, American lawyers today (judges and law professors included) do not know what restitution is. The subject is no longer taught in law schools, and the lawyer who lacks an introduction to its basic principles is unlikely to recognize them in practice. The technical competence of published opinions in straightforward restitution cases has noticeably declined; judges and lawyers sometimes fail to grasp the rudiments of the doctrine even when they know where to find it.”).

¹³³ See *In re Omegas Group, Inc.*, 16 F.3d 1443 (6th Cir. 1994); *Prudential Ins. Co. of Am. v. S.S. American Lancer*, 686 F. Supp. 469 (S.D.N.Y. 1988), *aff'd*, 870 F.2d 867 (2d Cir. 1989).

consciously looks to stretch the limits of exiting doctrine) will be derailed because it does not conformably fit into the *Restatement's* positivized conception of restitution.

Much the same can be said of the American “law of restitution” itself. To the extent that some issues are conceptualized as restitution questions, the law of restitution will exist and perhaps even thrive. And as Lon Fuller pointed out, the moral intuition encapsulated by the term “unjust enrichment” will continue to play a role in working out legal questions no matter what doctrinal heading is formally in play. But I do not foresee that courts will begin to conceptualize contract, bankruptcy, corporate, intellectual property or U.C.C. questions in terms of restitution. The anti-doctrinalism exhibited by both sides of the ideological divide renders the American legal landscape inhospitable to the analytical insights offered by the Commonwealth’s account of restitution.

One final note to drive this point home. Over the past two generations, nearly every American innovation in legal thought has been built on decidedly post-realist foundations. 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.¹³⁴ Unlike restitution, these areas have not arisen because scholars have finally unearthed some central conceptual principle underlying each area of the law. Rather, each is premised on the understanding that important institutions and recurring forms of transactional activity warrant the attention of legal scholars.

Restitution moves in the opposite direction. Instead of framing legal issues in terms of family law, banking law, consumer protection, mass tort litigation, local government law, insurance law, securities regulation, corporate law and others, the law of

¹³⁴ 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 (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 (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). See also Saiman, supra note __.

restitution is framed around the legal-analytical category of unjust enrichment. This organization is more in-line with the classical scheme of the late nineteenth century when law was considered in terms of tort, contract, agency, partnership, bailments, sales, property, equity and trusts; the doctrinal subjects that have fallen far out of scholarly favor in the U.S.

For this reason, it is perhaps not surprising that an informal poll of professors at two of the top five ranked U.S. law schools revealed that roughly half were completely unaware of the ongoing *Restatement of Restitution* project.¹³⁵ There has likewise been little scholarly reaction to the *Restatement* (compared say, to the *Restatement Third of Torts*), and roughly half of the commentary that does exist is anchored, at least in part, outside the U.S.¹³⁶ As I have argued, the Commonwealth approach to restitution is largely predicated on a pre-realist conception of legal thought that overlooks much of twentieth century American legal scholarship, and is therefore unlikely to become of significant interest to American scholars and judges.

¹³⁵ Interestingly, the most recent meeting of the American Association of Law Schools (January 2007), featured a daylong workshop dedicated to remedies. One of the session panels was dedicated to restitution and the emerging *Restatement*. However, despite featuring the leading U.S. restitution scholars (Andrew Kull, Mark Gergen, Emily Sherwin and Candace Kovacic-Fleischer), this session drew an attendance of only approximately 15 people. By contrast, a parallel panel titled “remedies for contract” drew a significantly larger attendance from the American law professoriate.

¹³⁶ To the best of my knowledge, the reviews of the *Restatement Third of Restitution* include, Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 COLORADO L. REV. 711 (2006); Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 Wis. L. Rev. 695; Chaim Saiman, *Restating Restitution*, *supra* note __; James Rogers, *Restitution for Wrongs and the Restatement (Third) of the Law of Restitution*, <http://ssrn.com/abstract=927979> (2006); Mark Gergen, *Restitution and Contract: Reflections on the Third Restatement*, 13 RESTITUTION LAW REVIEW 224 (2004); Mark Gergen, *The Restatement Third of Restitution and Unjust Enrichment at Midpoint*, 56 Current Legal Problems 289 (2003); Perter Birks, *A Letter to America*, GLOBAL JURIST FRONTIER; Hanoch Dagan LAW AND ETHICS OF RESTITUTION (2004).

Of these articles, only four (Sherwin, Saiman, Linzer and Rogers) were written by a U.S.-based scholar and published in a U.S. law journal. Mark Gergen, a professor at University of Texas, published his two reviews of the *Restatement* in English journals. Dagan’s book frequently critiques the *Restatement* but is not a product of American scholarship, nor is the book published by an American press. Birks of course was an English scholar who published his letter in an international journal.