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Restitution and the Production of Legal Doctrine

Chaim Saiman*

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I. Introduction

Legal doctrine, particularly of the common law or judge-made variety, has long been the source of critique and ridicule.[1] In the eyes of many legal historians, doctrinal evolution is a process whereby the law's initial rationale

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* Assistant Professor of Law, Villanova Law School. I would like to thank the participants of the Restitution Roundtable, held at Washington and Lee Law School, as well as members of the Villanova Junior Faculty Scholarship series. In particular, I would like to thank Doug Rendleman, Tony Duggan, Caprice Roberts, Kevin Walsh, Greg Magarian, James Lee, Richard Booth, and Penny Pether for their helpful comments to this draft.

1. Jeremy Bentham was arguably the most famous of these critics. GERALD POSTEMA, BENTHAM AND THE COMMON LAW TRADITION, 272–79 (1986). Another critique may be found in THOMAS HOBBES, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND 77–100 (Joseph Cropsey ed., 1971). Lawyers from the civil law tradition similarly maintain longstanding claims against judge-made law. *See, e.g.*, R.C. VAN CAENEGEM, JUDGES, LEGISLATORS AND PROFESSORS: CHAPTERS IN EUROPEAN LEGAL HISTORY 48–52, 127–57 (1987) (noting the debates between common and civil lawyers).

becomes subverted by further refinement and where lawyers cannot help but get lost in the morass of self-inflicted wounds.[2] More structural critiques focus on how judge-made doctrine subverts the popular will and on how, under the guise of legal interpretation, the caste of lawyers extracts large sums of money from other members of society.[3] Defenders, by contrast, note that if cases are to be decided on the basis of legal principles rather than by judicial fiat, legal doctrine must be sufficiently nuanced to account for the complexity of human affairs.[4]

Amid this longstanding debate regarding the nature of judge-made law, the common law of restitution presents an interesting case study. Viewed from the ground up, restitution is the law that governs transactions gone awry on account of payments made or services rendered in honest mistake, outright fraud, or somewhere in between. The recent history of restitution, however, reveals some rather stark differences in the way these cases are conceptualized in England and the United States. Whereas in American legal discourse restitution sits at the backwaters of the academic and judicial consciousness, in recent years, English and Commonwealth courts have expended considerable energy to articulate and develop this substantive area of law.[5] Moreover, within the English bench, bar, and academy, the principles of restitution are debated with great care and sophistication and have (improbably) become the *avant*

2. S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 6 (2d ed. 1981); *see also* S.F.C. Milsom, *Reason in the Development of the Common Law*, 81 L.Q.R. 496, 498–505 (1965) (discussing the creation of contract and tort doctrines from earlier methods of civil process).

3. POSTEMA, *supra* note 1, at 273; *see also* FRED RODELL, WOE UNTO YOU, LAWYERS! 16 (2d ed. 1957) (comparing the practice of law to a high-class racket); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Law*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 9–18 (Amy Gutmann ed., 1997) (explaining how the common law works contrarily to democratic principles).

4. In recent years, David Strauss has been a vigorous defender of judge-made doctrine. *See, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 884–91 (1996) (advocating a common law interpretation of the Constitution over a textualism or originalism approach); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1469–75 (2001) (discussing the constitutional changes that occur through means outside of amendments); David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1729–31 (2003) (arguing that a common law approach to constitutional interpretation is critical to the development of key constitutional issues); David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 860–79 (2007) (arguing that the Warren Court belongs in the common law tradition of constitutional interpretation).

5. *Infra* Part III. Commonwealth is used to mean common law countries other than the U.S. Principally, this means England and Wales, Canada, Australia, New Zealand, and Ireland. Some smaller jurisdictions include Singapore and Hong Kong.

garde of private law theory.[6] As a result, in English law, restitutionary principles have been employed to resolve such pressing questions as the availability of tax refunds from the government,[7] the financial consequences of public contracts that overstep the government's constitutional authority,[8] the fallout of large-scale commercial transactions gone awry,[9] the recovery of funds from fraudsters and swindlers,[10] and the dissolution of non-marital romantic relationships.[11] Meanwhile, on American shores, restitution fails to generate much excitement. Instead, these factual scenarios are framed either as questions of statutory interpretation, judicial procedure, and jurisdictional competence or as questions of contract law and remedial relief.[12]

To better illustrate the problem, consider the following fact pattern. A State government enacts a tax scheme that is more favorable to domestic than foreign businesses. Plaintiff, a foreign corporation, pays the tax. Later, a similarly situated taxpayer challenges the constitutionality of the tax on the basis of the disparate treatment between domestic and foreign corporations. The reviewing court finds the tax unconstitutional and holds for the taxpayer. Rather than specify the remedy, the court instructs the domestic courts to grant plaintiffs the same remedy that would be available for illegally collected taxes under domestic law. Plaintiff seeks return of the unconstitutional tax.

In recent litigation, these facts generated a book-length symposium on the law of restitution in the English courts.[13] Specifically, the courts pondered

6. *See* Chaim Saiman, *Restitution in America: Why the US Refuses to Join the Global Restitution Party*, 28 OXFORD J. LEGAL STUD. 99, 103 (2008) (documenting the rise of restitution law and scholarship in England and the Commonwealth); Steve Hedley, *Looking Outward or Looking Inward? Obligations Scholarship in the Early 21st Century* (forthcoming) (on file with the Washington and Lee Law Review) (discussing the divide between internal and external approaches to obligation scholarship).

7. Deutsche Morgan Grenfell Group Plc v. Inland Rev. Comm'rs, [2007] 1 A.C. 558 (H.L.) (U.K.).

8. Westdeustche Landesbank Girozentrale v. Islington London Borough Council, [1996] A.C. 669 (U.K.).

9. *Id.*

10. Foskett v. McKeown, [2001] A.C. 102 (U.K.).

11. *See* Pettkus v. Becker, [1980] 2 S.C.R. 834 (C.A.) (explaining unjust enrichment principles used to establish requirements for constructive trusts in the dissolution of a nonmarital common law relationship).

12. *Compare, e.g.*, Deutsche Morgan Grenfell Group Plc v. Inland Revenue Comm'rs, [2007] 1 A.C. 558 (H.L) (U.K.) (showing restitution at the heart of a tax recovery claim), *with* United States v. Dalm, 494 U.S. 596, 608–11 (1990) (deciding the case on issues of jurisdiction and sovereign immunity, but not addressing underlying restitution claim).

13. *See Deutsche Morgan Grenfell Group Plc*, [2007] 1 A.C. at 558 (providing 177 paragraphs of in-depth analysis on the issue). In addition to the 177 paragraphs of the House of Lords' opinion, the Court of Appeals expounded on these issues for nearly 300 densely

whether plaintiffs could circumvent the ordinary statute of limitations for recovery of improper tax assessments by bringing a restitution claim whose limitation period would not begin until the mistake was discovered, and thus a substantial portion of the argument turned on the particulars of restitution law.[14] For example, does English law recognize a common law restitution claim for taxes paid under mistake of law? When a business pays a tax pursuant to a valid statute, in what way can it be said to be operating "under mistake of law?" And at what point is the business deemed to have discovered its mistake? Does notification of a lawsuit (brought by a third party) challenging the legality of the tax vitiate plaintiff's claim of mistake? Can the government claim that paying a tax which is subject to litigation is equivalent to settling a claim (thereby foreclosing a claim based on mistake)? Moreover, on some accounts, resolution of the case depends on a highly abstract academic debate regarding the fundamental basis of restitution law.[15] Particularly, does restitutionary liability arise only when plaintiff can identify an "unjust factor" as traditionally maintained by common law scholars, or is liability for unjust enrichment better

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reasoned paragraphs. Deutsche Morgan Grenfell Group Plc v. Inland Revenue Comm'rs [2006] Ch. 243 (U.K.).

14. *See Deutsche Morgan Grenfell*, [2007] 1 A.C. at 564 ("The main point in this appeal concerns the period of limitation applicable to such claims. But that in turn raises some fundamental questions about the cause of action on which the claimants rely.").

15. Perhaps, feeling that the case was much ado about nothing, Lord Walker began his discussion with the following note:

> The issues summarised above may appear fairly narrow and very technical, and on one possible view this appeal could be disposed of as a relatively short point of construction on section 32(1)(c) of the Limitation Act 1980. But it has produced some complex and sophisticated arguments from counsel. The decisions of Park J and the Court of Appeal have also led to some stimulating and far-reaching comments from legal scholars, including Professor Andrew Burrows, "Restitution in respect of Mistakenly Paid Tax", (2005) 121 LQR 540, Professor Steve Hedley, "Tax Wrongly Paid—Basis of Recovery—Limitation" [2005] CLJ 296, Robert Stevens, "Justified Enrichment" (2005) 5 OUCLJ 141, Graham Virgo, "*Deutsche Morgan Grenfell*: The Right to Restitution of Tax Paid by Mistake Rejected" [2005] BTR 281, Sir Jack Beatson, Chapter 9 ("Unlawful Statutes and Mistake of Law") in Burrows and Rodger (Eds), *Mapping the Law* (to be published shortly) and two articles by Dr James Edelman, "Limitation Periods and the Theory of Unjust Enrichment" (2005) 68 MLR 848 and "The Meaning of 'Unjust' in the English Law of Unjust Enrichment" (2006) 3 ERPL 309. I shall return to some of these at a later stage in this opinion, but I wish to acknowledge at once my debt to these commentators and to other academic writers, including of course the most recent work of the late Professor Peter Birks.

Id. at 594.

conceptualized as arising any time there is an absence of a legal basis for the transfer, as argued by several civil law theorists?[16]

By contrast, when similar issues are raised in American courts, restitution is barely mentioned. While state taxes collected in violation of federal law must generally be refunded to the taxpayer,[17] subject to the ordinary concerns of post-deprivation due process, the Supreme Court has left it up to the states to craft appropriate remedies.[18] Thus in federal courts, a plaintiff who seeks remedies for payment of illegal taxes speaks in the language of constitutional due process rather than the substantive law of restitution.[19] Even at the state level, however, where the claims for illegally collected taxes are best understood as sounding in restitution,[20] courts rarely engage in the extended conceptual analysis undertaken by the English House of Lords. Rather, these cases are frequently decided in the procedural language of statutory compliance and the exhaustion of administrative remedies;[21] and even cases that squarely

16. *See id.* at 611–13 (outlining the continuing debate over the continued use of "unjust factors" as a basis for restitutionary liability); *see also* Saiman, *supra* note 6, at 122 (outlining the debate over "unjust factors" versus "absence of legal basis").

17. *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 100–01 (1993) (holding that federal law requires that Virginia provide relief to taxpayers consistent with federal due process principles).

18. *See* McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 36–41 (1990) ("The State is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined."); *see also* Am. Trucking Ass'ns v. Scheiner, 483 U.S. 266, 297–98 (1987) (remanding the case to the state supreme court to consider whether the Court's ruling should be applied retroactively and to decide other remedial issues); Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 251–53 (1987) (noting that the invalidation of the state taxing scheme raised remedial issues that are better addressed by the state supreme court on remand); Williams v. Vermont, 472 U.S. 14, 28 (1985) (remanding the case and expressing no opinion as to the appropriate remedy in the case); Bacchus Imports Ltd. v. Dias, 468 U.S. 263, 277 (1984) (expressing a reluctance to address the resolution of the remedial issue in the case).

19. *See, e.g.*, Reich v. Collins, 513 U.S. 106, 113–14 (1994) (noting that Georgia is free to reconfigure its remedial scheme within the bounds of federal due process); *Harper*, 509 U.S. at 101–02 (stating that Virginia was free to provide any from of relief as long as it satisfied the minimum requirements of federal due process); McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 51 (1985) ("[F]ederal due process principles long recognized by our cases require the State's postdeprivation procedure to provide a 'clear and certain remedy.'").

20. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 19 cmt. c (2001) (explaining why a taxpayer's payment of tax in excess of her legal liability results in a claim to restitution).

21. *See* John F. Coverdale, *Remedies for Unconstitutional State Taxes*, 32 CONN. L. REV. 73, 116–18 (2000) (discussing the administrative requirements taxpayers must satisfy to recover improperly paid taxes in state courts). This is true even though most states hold that statutory remedies do not preempt common law claims based on restitution. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 19 statutory note ("Refund statutes are usually held to be nonexclusive, meaning that a remedy based on common-law restitution may still be

consider restitution or other equitable claims to the funds often circumvent the difficult doctrinal questions raised by the House of Lords. Instead, American cases are more likely to address the issues in terms of the policy calculus involved in "balancing of equities" between the certainty of the public finances and the claimant's rights to illegally collected taxes.[22] In sum, where English lawyers see restitution issues, American lawyers see something entirely different. Yet, as demonstrated below, the differences lay not in the facts themselves, but in the way the legal regime understands relevance to the specific facts corresponding to legal doctrines.

The historical and conceptual similarities shared by Anglo-American law make comparative observation of the two systems particularly instructive. The terminology of common law restitution is mostly of English origin, and even a cursory comparison of the leading English treatises with the drafts of the *Restatement (Third) of Restitution* shows that the blackletter rules are substantially similar. The differences thus lay less in the verbal formulation of the rules, and more in how the systems' interpretative assumptions assign different operative meanings to a common set of terminology.

Broadly speaking, the divergence between American and English restitution law stems from three intertwined factors. The first relates to the role of academic lawyers in forming legal doctrines and constructing legal categories. In a previous writing, I have addressed the relationship between the reception of legal realism within the English and American academy and the relative interest and attractiveness of the modern law of restitution.[23] A second factor examines this question in terms of the structure of post-New Deal American law, which has shifted its energy away from traditional private law and increasingly speaks in the bureaucratic language of jurisdiction and procedure. Future writing will address this structural factor in greater detail.

The third factor, which is the subject of this paper, deals with motivations that trigger the production of legal doctrine. English law assumes that private law remedies must be justified in terms of the underlying set of substantive legal rights. Restitution thus emerges as the body of legal norms that connects

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available where the requirements of the statute have not been met.").

22. *See, e.g.*, Brookside Memorials, Inc. v. Barre City, 702 A.2d 47, 50–51 (Vt. 1997) (finding for taxpayer and briefly disposing the issues of mistake and voluntary payment); Heileman Brewing Co. v. City of La Crosse, 312 N.W.2d 875, 880 (Wis. Ct. App. 1981) (denying plaintiff's claim of restitution on the basis of public policy and balancing of the equities). This approach is similarly promoted by the *Restatement*. *See generally*, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 19. For a comment and critique, see HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 74–80 (2004).

23. *See generally* Saiman, *supra* note 6.

remedies with a correlative set of legal rights.[24] As compared to their English counterparts, American courts use various shades of the term "equity" to conceptually sever the substantive discourse of adjudicating rights from the "merely" remedial process of crafting remedies. While in the rights phase, courts are required to speak in the normative language of legal rules and doctrinal categories; in the remedial phase, the broad discretionary powers afforded to courts sublimate the production of restitution law.

Prior to delving into the specifics of restitution, Part II of this paper turns to investigate the role of the law/fact distinction in the historical process of common law doctrinal development. Parts III and IV then explore how different conceptions of law and fact lead English restitutionists to argue that "equity" and "constructive trusts" are best thought of as legal rights, while American jurists conceptualize them as remedies. Part V moves to explore the relationship between this right/remedy debate and the production of restitution law.

II. The Production of Legal Doctrine

In elaborating on the development of the common law, Justice Holmes famously observed that "a page of history is worth a volume of logic."[25] Thus, before discussing what causes judges to articulate the law of restitution, it pays to briefly recall the general trends that have accounted for common law development.

Historians of the common law are often asked to explain why there does not seem to be much in the way of contract or tort law until well into the seventeenth century.[26] There is little doubt that Englishmen were contracting and torting from time immemorial, and the historical records even suggest that writs were available for these claims as early as the end of the thirteenth century.[27] Yet it took the common law several hundred years before it began to

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24. *See* Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, *in* 1 THEORETICAL INQUIRIES IN LAW 1, 1 (2000) ("[R]estitutionary damages ought to be available only insofar as they correspond to a constituent element in the injustice that the defendant has done to the plaintiff.").

25. N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

26. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 361 (3d ed. 1990) (suggesting the nature of pleading and the commitment to jury verdicts as explanations for the minimal law on torts and contracts until the 1600s).

27. *See id.* at 361, 365 (explaining predecessors to contract actions, e.g., action of covenant and debt); *id.* at 456–59 (explaining predecessors to tort actions, e.g., *trespass vi et armis* and negligence).

ask the most basic questions of contract and tort law,[28] and lawyers did not even begin discussing offer and acceptance, mistake, frustration and damages in contract law until the seventeenth and eighteenth centuries.[29] Similarly, it took until the eighteenth and nineteenth centuries for the tort doctrines of negligence, res ipsa loquitur and strict liability to emerge.[30] Where was the common law hiding for all those centuries?

The answer, as historians S.F.C. Milsom and John Baker explain, is that what lawyers now call "law" was buried under the blanket denials litigants entered at pleading.[31] Suppose for example, that parties contracted for the delivery of ten barrels of wine. The seller delivers, but the buyer withholds payment under a claim that the wine was diluted with water. When the seller brought suit against the buyer in the King's Court in Westminster, the buyer simply entered a blanket denial which sent the matter to be resolved in the county where the events at issue took place.[32] There, a judge would gather a jury of town elders (bearing greater resemblance to a legislative town meeting than the modern jury) in an Assize to decide on the issue of liability.[33] After the jury reached its decision, a spare notification of the verdict was sent back to the judges at Westminster, and the case was closed.[34]

Because there was little distinction between questions of law and fact, these procedures afforded little opportunity for the development of substantive rules of law.[35] Virtually all of the issues in the case were settled by the jury through a combination of factual investigation (was the wine diluted?), local custom (what did we do last time this came up?) and normative reasoning (what should we do in these cases?).[36] Under this system, law—in the sense that one

28. *Id.* at 361.

29. *Id.* at 400.

30. *See id.* at 459–77.

31. *See* S.F.C. MILSOM, A NATURAL HISTORY OF THE COMMON LAW 11–12 (2003) (providing an example of early common law pleadings); BAKER, *supra* note 26, at 90–91 ("The defendant had merely to deny ('defend') everything in the count to reach the proof stage. Alternatively he could take 'exception' to the count for insufficiency, or variance from the writ . . . . Neither the general defense nor the exception raised substantive points of law.").

32. *See* BAKER, *supra* note 26, at 90–96 (noting that reaching the issue was the end and object of pleading and the way to get to the county where the answer would be found by a commission of justices).

33. *Id.* at 24–25.

34. *Id.* at 25.

35. S.F.C. Milsom, *The Past and the Future of Judge-Made Law*, 8 MONASH U. L. REV. 1, 7–8 (1981–1982).

36. *See id.* at 11–12 (pointing out that law stated in terms such as the reasonable man standard left room for juries to apply their own standards).

party won and the other lost—was certainly being applied. But since there was no record of the reasoning employed by the jury, from the perspective of the "law" being created by the courts in London, the substantive rules were invisible.[37] It was not until this procedure began to change via the special verdict in the seventeenth century that contract disputes were considered "questions of law" for submission to the judges.[38]

More generally, in common law systems that distinguish between law and fact, the amount of law thought to exist on any topic correlates inversely with the degree to which issues are conceptualized as being factual rather than legal.[39] Thus, when factual issues are decided by a judge or jury operating under a deferential standard of review, they stand outside the process of judicial law production.[40] By contrast, when an issue is classified as "law" it becomes subjected to de novo appellate review, and lawyers invite the judges to analyze these issues through the normative discourse of legal rules, doctrinal categories and multi-part tests.[41] Difficult boundary-line cases inevitably arise, resulting in recurring sets of sub-rules and ever finer doctrinal categories.[42] Together, these developments result in there being a substantial amount of "law" on the topic.[43]

The correlation between the law/fact distinction and the production of legal doctrine is similarly apparent in a number of areas in contemporary American law. One prime example is the doctrine of qualified immunity, the body of judge-made law that grants state officials immunity from tort suits pursuant to § 1983. As the scope of qualified immunity expanded to cover a larger proportion of governmental conduct, the Supreme Court was required to create a dense network of doctrinal categories and articulate a specialized set of legal terminology.[44] This decisional structure then becomes self-reinforcing.

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37. *Id.*

38. *See* BAKER, *supra* note 26, at 361 ("[E]veryone knew that contracts ought to be performed, and no more law than that was needed. In the royal courts—that is, at common law—the answer was governed by the writ system.").

39. Milsom, *supra* note 35, at 11–13.

40. *Id.* at 10–11.

41. *See id.* at 11 ("Today's judge, however, has a book which lists all the things that his predecessors have decided the reasonable man does or does not do, and the details upon which he now picks will add to the list, add another little rule to the law.").

42. *See, e.g.*, Duncan Kennedy, *The Stages in the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1350–52 (1982) (explaining why legal distinctions tend to generate the need for further distinctions).

43. *Id.*

44. *See* Chaim Saiman, *Interpreting Immunity*, 7 U. PA. J. CONST. L. 1155, 1155 n.2 (2005) (discussing the cases in which the Supreme Court has addressed the definition, administration or application of qualified immunity). Other examples include the line of cases

Thus, (i) conflicting cases require courts to pull an issue out of the "fact" box and recast it as a refined version of the governing rule; but (ii) as legal rules begin to cover more of the relevant terrain, the doctrinal structure inevitably becomes more intricate; (iii) the increased doctrinal nuances afford lawyers further opportunities to identify (or manufacture) ambiguities and inconsistencies between them; however, (iv) resolving these ambiguities requires yet another round of doctrinal refinement. And so the legal wheel turns round and round.[45]

The ability of legal issues to migrate between the categories of law and fact is central to understanding the relative dearth of American restitution law. Most American courts maintain that the terrain governed by the law of restitution—particularly the areas associated with equity and constructive trusts—raises concerns that are best decided in a common sense manner by the decisionmaker sitting closest to the facts who is protected from appellate scrutiny by deferential standards of review.[46] Since there is little that one case can teach the next, the language of technical legal doctrine is best ignored, as it can only distract the judge from perceiving the underlying equities of the case. English lawyers by contrast, conceptualize the same terrain as being inhabited by legal issues. These cases are decided by appellate tribunals that specialize in transforming case-specific facts into the more abstract language of generally

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where the Supreme Court has determined as a matter of law when a reasonable person is free to break off the contact with police officers. *See, e.g.*, Florida v. Bostick, 501 U.S. 429, 439 (1991) (determining the appropriate test for an on-bus search is whether a reasonable passenger, under all of the circumstances, felt free to decline the search request and terminate the encounter); *see also* California v. Hodari D., 499 U.S. 621, 628 (1991) (posing inquiry as whether a reasonable person could "disregard police and go about business"). Justice Scalia has expressed similar reservations along these lines. *See* Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175, 1186 (1989) (noting that within the search and seizure context, a large number of fact patterns can emerge). Justice Scalia would prefer to set out a general principle and leave the factual determinations to lower courts:

> We certainly take, on certiorari, a number of Fourth Amendment cases in which the question seems to me of no more general interest than whether, in this particular fact situation, pattern 3,445, the search and seizure was reasonable. It is my inclination—once we have taken the law as far as it can go, once there is no general principle that will make this particular search valid or invalid, once there is nothing left to be done but determine from the totality of the circumstances whether this search and seizure was "reasonable"—to leave that essentially factual determination to the lower courts.

Id.

45. *See, e.g.*, George E. Dix, *Subjective "Intent" as a Component of Fourth Amendment Reasonableness*, 76 MISS. L.J. 373, 379 (2006) (noting the "explosion" of Fourth Amendment law after *Mapp v. Ohio*, 367 U.S. 643 (1961)).

46. *See infra* Part III.

applicable law.[47] As the rules announced in one case are applied downstream, the law of restitution emerges in the wake.

III. Tracing Law into Equity

The differences between Anglo and American approaches to restitution are best demonstrated by contrasting a series of cases pitting the interests of competing claimants to a limited pool of assets. While English courts find these cases to raise a series of knotty legal issues at the borders of contract, trusts, property, equity, restitution and tracing law, American courts assume that there is little to be gained by thinking through these questions within a matrix of analytic legal rules. These questions are thus relegated to the least prestigious quadrants of the legal system where nobody other than the losing party is concerned with the court's reasoning.

For example, the House of Lords' decision in *Foskett v. McKeown*[48] relates a story of Murphy, a fraudster who embezzled funds from persons who entrusted him with money to be used for real estate investments.[49] Murphy used a portion of the embezzled funds to make payments on his life insurance policy.[50] Several years later, Murphy committed suicide, and the policy paid out £1M to his estate.[51] To somewhat simplify the facts, assume that of the five annual payments made by Murphy (£10,000 each), the first three payments were paid from Murphy's own account, while the final two payments came from the stolen funds.[52]

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47. For some examples of appellate tribunals abstracting widely applicable law from case-specific facts, see Sempra Metals v. IRC, [2008] 1 A.C. 561 (H.L.) (U.K.); Deutsche Morgan Grenfell Group Plc v. Inland Revenue Comm'rs, [2007] 1 A.C. 558 (H.L.) (U.K.); Foskett v. McKeown, [2001] 1 A.C. 102 (U.K.); Kleinwort Benson v. Lincoln [1999] 2 A.C. 349 (U.K.); *In re* Polly Peck Int'l [1998] 3 Eng. Rep. 812 (A.C.) (U.K.); Westdeutsche Landesbank Girozentrale v. Islington London Borough Council, [1996] A.C. 669 (U.K.); Boscawen v. Bajwa [1996] 1 W.L.R. 328 (C.A.) (U.K.); *In re* Goldcorp Exch. Ltd., [1995] 1 A.C. 74 (U.K.); Lipkin Gorman v. Karpnale Ltd., [1991] 2 A.C. 548 (U.K.); Bank Tejerat v. Hong Kong & Shanghai Banking Corp., [1995] 1 Lloyd's Rep. 239 (Q.B.) (U.K.); El Ajou v. Dollar Land Holdings, [1994] B.C.C. 143; Agip (Africa) Ltd. v. Jackson, [1990] Ch. 265 (U.K.); Fortex Group Ltd. v. Macintosh, [1998] 3 NZLR 171 (NZCR); Garland v. Consumers' Gas Co., [2004] 1 S.C.R. 629 (Can.).

48. *See* Foskett v. McKeown, [2001] 1 A.C. 102, 145 (H.L.) (U.K.) (holding that insurance money from a policy that was funded with stolen funds should be allocated in accordance with the proportion of premiums paid with the stolen funds).

49. *Id.* at 107.

50. *Id.*

51. *Id.*

52. This falls closely in line with the facts of the case. *Id.*

The victims of Murphy's fraud claimed that since they could trace their money into the premium payments, they were entitled to two-fifths (£400,000) of the policy's proceeds.[53] Murphy's heirs on the other hand, claimed that the victims could recover only the £20,000 paid into the policy from the stolen funds, and that the rest of the money rightfully belonged to the heirs.[54]

Reduced to its essence, this case is about which of two innocent parties is entitled to an insurance payout.[55] Yet, this case caused a great deal of difficulty for England's lower courts, and even at the House of Lords resulted in a fractured 3–2 decision.[56] In the view of Lords Browne-Wilkinson and Millett of the majority, the court had to locate the precise ownership interests of each party at every link in the transactional chain, and then, pursuant to the rules of tracing, contract and property, determine the relative proprietary interest of the victims and heirs.[57]

Lord Browne-Wilkinson began his analysis by discussing the nature and scope of the questions at issue as follows:

> [T]he critical question is whether the assets now subject to the express trusts of the purchasers trust deed comprise any part of the policy moneys, a question which depends on the rules of tracing. If, as a result of tracing, it can be said that certain of the policy moneys are what now represent part of the assets subject to the trusts of the purchasers trust deed, then as a matter of English property law the purchasers have an absolute interest in such moneys. There is no discretion vested in the court. There is no room for any consideration whether, in the circumstances of this particular case, it is in a moral sense "equitable" for the purchasers to be so entitled. The rules establishing equitable proprietary interests and their enforceability against certain parties have been developed over the centuries and are an integral part of the property law of England. It is a fundamental error to think that, because certain property rights are equitable rather than legal, such rights are in some way discretionary. This case does not depend on whether it is fair, just and reasonable to give the purchasers an interest as a result of which the court in its discretion provides a remedy. It is a case of hard-nosed property rights.[58]

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53. *Id.* at 108.

54. *Id.*

55. *See id.* at 106 ("[T]here are many cases in which the court has to decide which of two innocent parties is to suffer from the activities of a fraudster. This case, unusually, raises the converse question: which of two innocent parties is to benefit from the activities of the fraudster.").

56. *Id.* at 102–03.

57. *Id.* at 108–09.

58. *Id.* at 109.

Lord Millett's opinion expresses a similar disposition, finding this case to present "a textbook example of tracing through mixed substitutions."[59] Based on the scholarship of leading Commonwealth academics, Millett explores the differences between the legal operations of tracing, following and claiming,[60] and then articulates what he called the "substantive legal basis of the law of tracing."[61] The opinion goes on to a similarly detailed discussion regarding the precise nature of the relationship between a bank and its accountholder, the nature of legal rights to an unmatured life insurance policy, and a discussion of tracing into a chose in action.[62]

Sensing that there are others who would happily dispense with the exhaustive analysis of technical arcania and simply apportion the money on the basis of rough justice considerations, Lord Millett issued the following warning in the penultimate paragraph of his opinion:

> It is, of course, always open to the parties in any case to dispense with complex calculations and agree upon a simpler method of apportionment. But in my opinion the court ought not to do so without the parties' consent. If it does, anomalies and inconsistencies will inevitably follow . . . . There is an enormous variety of financial instruments. For present purposes they form a seamless web. Cutting corners in the interest of simplicity is tempting, but in my opinion the temptation ought to be resisted.[63]

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59. *Id.* at 126.

60. *Id.* at 127–29.

61. *Id.* at 127–29 (citing Professor Lionel Smith's theoretically oriented *The Law of Tracing* (1997)).

62. *Id.* at 133–34. An interesting contrast comes from the 2007 decision of *Allen v. United of Omaha Life Insurance Co.*, 236 S.W.3d 315 (Tex. Ct. App. 2007). The Texas Appeals Court agreed with Millett's ruling, holding that "some Texas cases describe a beneficiary's right to receive life insurance proceeds payable at a future but uncertain date as 'property' in the nature of an unmatured chose in action." *Id.* at 320. However, the court correctly assumed that the reader would have no idea what a chose in action is. The court thus dropped a footnote to a definition supplied by Black's Law Dictionary. *See id.* at 320 n.3 ("A chose in action is a right to bring an action to recover a debt, money, or thing.").

More recently, in *Sprint Commc'ns Co. v. APCC Services*, 128 S. Ct. 2531 (2008), the Supreme Court followed the same path. The Court opened its substantive analysis regarding the assignability of a legal claim with a citation from Blackstone. *Id.* at 2536. In its original form the citation reads, a "chose in action could not be transferred to another person by the strict rules of the common law." WILLIAM BLACKSTONE, 2 COMMENTARIES *442. Yet, writing in the early 21st century, the Supreme Court recognized its audience is probably not familiar with the terminology employed by Blackstone. Thus, the Court interjected an explanatory note into its citation on Blackstone, defining a chose in action as "interest in property not immediately reducible to possession, (which over time came to include a financial interest such as debt, a legal claim for money, or a contractual right)." *Sprint Commc'ns*, 128 S. Ct. at 2536.

63. Foskett v. McKeown, [2001] 1 A.C. 102, 145 (H.L.) (U.K.).

It is difficult to overstate the gap between the English and American approaches to the questions at issue in *Foskett*. The English courts conceptualize these cases as raising quintessentially legal questions. Given the premium English judges place on uniformity and predictability in commercial law,[64] it is hardly surprising that the country's prestigious courts, barristers, and scholars linger over these fine distinctions in order to set standards for future decisionmaking. Together, these efforts result in the perception that there is quite a bit of "law" on these issues.

The reaction from American courts is substantially different. Here, the more visible a court the *less likely* it is to engage in the conceptual analysis of private law concepts found in the English restitution/equity/property canon.[65] Owing to the lack of prestige of commercial law in America, American courts, whether state or federal, cannot imagine wading knee deep into these private law questions that recall the hoary past of equity and the forsaken backwaters of the common law.[66] The lack of experience and interest in debates regarding the intersection of property, contract, trust and unjust enrichment leads courts to push these questions down to the lowest levels of the judiciary and submerge them under a broad standard of review. As a result, large portions of the law of unjust enrichment never see the light of day.

The contrast is amply demonstrated by comparing the House of Lords' decision in *Foskett* with *Lackey v. Lackey*,[67] a 1997 decision on nearly identical facts issued by the Mississippi Supreme Court.[68] *Lackey*'s eight pages (including a dissent) provide a far simpler and shorter route to a result as compared with the

64. *See, e.g.*, Golden Strait Corp. v. Nippon Yusen Kubishika Kaisha, [2007] 2 A.C. 353, 378 (H.L.) (U.K.) ("The importance of certainty and predictability in commercial transactions has been a constant theme of English commercial law at any rate since the judgment of Lord Mansfield CJ in *Vallejo v Wheeler*."); Shogun Finance v. Hudson, [2004] A.C. 919, 944 (H.L.) (U.K.) ("This rule [barring extrinsic evidence in contract interpretation] is one of the great strengths of English commercial law and is one of the main reasons for the international success of English law in preference to laxer systems which do not provide the same certainty.").

65. *See, e.g.*, Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 364–66 (2006) (providing Chief Justice Roberts's entire discussion of tracing, which consists of recitations of blackletter law from a few well-known hornbooks).

66. *See, e.g.*, Larry Garvin, *The Strange Death of Academic Commercial Law*, 68 OHIO ST. L.J. 403, 406–09 (2007) (using the decreasing number of AALS professors specializing in commercial law over the past forty years as a representation of the waning interest in the same field).

67. Lackey v. Lackey, 691 So. 2d 990, 996 (Miss. 1997) (holding that the beneficiaries of insurance proceeds bore the burden of proving the extent to which the policy premiums were or were not paid with stolen trust funds). The Mississippi Supreme Court also held that the trust beneficiary was entitled to the imposition of a constructive trust on policy proceeds to the extent that stolen trust funds were used to purchase the policy. *Id.*

68. *Id.* at 991–93.

forty-three pages of dense analysis offered in *Foskett*. In a few short paragraphs, *Lackey* finds that when one party commits fraud, the burden shifts to the innocent heirs to show that the insurance policy was not purchased with stolen trust assets.[69]

Lackey offers a near textbook example of how American courts deal with questions of restitution, tracing and trust.[70] The court does not consult academic scholarship,[71] nor make reference to the age-old debates about the nature of property, nor the ancient rules on commingling. Rather, the entire atmosphere of the case is an ordinary, hum-drum and routine case and a far cry from the urgency and grandiosity running through *Foskett*. Rather than

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69. *Id.* at 993.

70. Other examples can be seen in comparing the House of Lords' decision in *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548 (U.K.) with *Simpson v. Brooks*, 189 S.W.2d 364, 364 (Ark. 1945). Similarly, the way cases of mistaken bank payments are dealt with by U.S. courts in *Banque Worms v. BankAmerica International*, 570 N.E.2d 189 (N.Y. 1991), and *Credit Lyonnais New York Branch v. Koval*, 745 So. 2d 837 (Miss. 1999) can be compared to the English cases and analysis discussed in Peter Birks, *Persistent Problems in Misdirected Money: A Quintet*, [1993] LMCLQ 218. In this regard it is interesting to compare the detailed analysis of tracing and trust law provided by the English Chancery court in *Agip (Africa) Ltd. v. Jackson*, [1991] Ch. 547, 563–70 (C.A.) (U.K.) with the *Restatement*'s view of the case which finds that it is "simpler to acknowledge that one asset is properly regarded as a substitute for another than to insist that the replacement asset be identified as the traceable product of the first." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 58 cmt. f, illus. 20 (Tentative Draft No. 6, 2008).

Yet another set of similar conclusions can be drawn from contrasting *In re Goldcorp Exchange*, [1995] 1 A.C. 74 (P.C.) (U.K.) with *In re North American Coin & Currency, Ltd.*, 767 F.2d 1573 (9th Cir. 1985) and *In re Bullion Reserve*, 922 F.2d 544 (9th Cir. 1991). The comparison can also be made by comparing *Attorney-General for Hong Kong v. Reid*, [1994] 1 A.C. 324 (P.C.) (U.K.) with *State v. Strickland*, 400 A.2d 451 (Md. Ct. Spec. App. 1979).

More generally, American courts tend to elide many of the technical and conceptual issues that occupy the English courts by reframing tracing questions into factual and evidentiary terms. *See, e.g.*, Chiu v. Wong, 16 F.3d 306, 310–11 (8th Cir. 1994) (finding that proceeds were sufficiently traced); St. Paul Fire & Marine Ins. Co. v. Seafare Corp., 831 F.2d 57, 58 (4th Cir. 1987) (finding that proceeds were capable of being traced and that, therefore, the lower court erred in granting summary judgment against a party seeking a constructive trust); *In re* Goldberg, 158 B.R. 188, 194 (Bankr. E.D. Cal. 1993) (stating that California law requires a party seeking a constructive trust to establish tracing through clear and convincing evidence); Crestar Bank v. Williams, 462 S.E.2d 333, 335–36 (Va. 1995) (requiring clear and convincing evidence directly tracing the investor's money in order to find a constructive trust); Stevens v. Nagel, 831 N.E.2d 935, 939 (Mass. App. Ct. 2005) (determining that the claim was sufficient with the bare allegations it contained and that it was enough to raise the question of whether a constructive trust should have been imposed).

71. Conventional wisdom has been that American courts are far *more* likely to rely on academic scholarship than their English counterparts. PATRICK ATIYAH & ROBERT SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 401–02 (1987). While this traditional understanding is arguably true with regards to public law issues, it is certainly no longer the case with respect to restitutionary questions.

undertake an extended analytic discussion about the law of tracing and property, *Lackey* asserts that the court must "impos[e] a constructive trust" on the insurance proceeds because "neither equity nor the law" should allow the thief to credit insurance payments to his own funds at the expense of his innocent victims.[72]

Despite reaching the conclusion that plaintiff is entitled to a pro rata share of the proceeds, *Lackey* nonetheless attempts to limit a plaintiff's recovery to the total amount of funds the defendant embezzled from the plaintiff.[73] To reach this result, the court simply quotes the special master's finding that "requiring [the embezzler's heirs] to share the policy proceeds with [plaintiff] would be 'unusually harsh and punitive to . . . [the embezzler's heirs] and [] would have the effect of creating a windfall for [plaintiff].'"[74] On the basis of this reasoning, Mississippi's highest court reduced the award from a proportional share of the proceeds to "no more of the insurance proceeds than is required to make [plaintiff] whole, including her expenses in litigating the present controversy."[75] The complex issues analyzed by the House of Lords in *Foskett* are resolved by a few short citations to the special master's findings.[76]

The origins of *Lackey*'s reasoning can be traced back to the U.S. Supreme Court's holding in the original Ponzi scheme case, *Cunningham v. Brown*.[77] There the Court held that courts could disregard the rules of restitution and tracing to arrive at an "equitable" answer where numerous fraud victims traced their stolen funds into a common pool of assets.[78] Under the influence of cases such as *Cunningham*, over the course of the twentieth century, American courts have invested less effort in working through technical questions of title to property and are happy to allow the district court to sort it all out under a

72. *Lackey*, 691 So. 2d at 995.

73. *Id.* at 996.

74. *Id.* at 996; *see also* G & M Motor Co. v. Thompson, 567 P.2d 80, 84 (Okla. 1977) (basing the allocation of funds substantially on the trial court's balancing of the equities of the case).

75. Lackey v. Lackey, 691 So. 2d 990, 996 (Miss. 1997).

76. This mode of reasoning is not unique to *Lackey* or the Supreme Court of Mississippi. The current *Restatement* similarly elides the conceptual discussion presented in *Foskett* and would leave resolution of this case to the "equitable discretion of the court." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 58 cmt. d, illus. 12; *see also* Holmes v. Gilman, 34 N.E. 205, 205 (N.Y. 1893) (deferring without analysis to the referee's finding of facts on the tracing issue).

77. Cunningham v. Brown, 265 U.S. 1, 12 (1924) (holding that the rule in *Clayton's Case* has no application to Ponzi scheme cases). The development of American tracing law prior to *Cunningham* is sketched out in the reporter's notes to Sections 58–59 of the *Restatement (Third) of Restitution and Unjust Enrichment*.

78. *Id.* at 11–12.

deferential standard of review. For this reason, questions of tracing, trust and property are less likely to emerge to the fore.

The justification for this hands-off approach is accomplished through a syllogism that plays on the conflation of three different shades of the term "equity."[79] Presently, in American law, equity seems to mean an amalgamation of: (i) the description given to the process of crafting remedies that do something other than award monetary damages to the plaintiff as compensation for proven losses,[80] (ii) a set of doctrines that attempts to approximate what courts of equity did in the days when the common law was organized around the jurisdiction of writs rather than theories of rights,[81] and (iii) a formula that, when properly incanted, affords the court the flexibility to derogate from the rules of law as justice demands.[82]

United States v. Durham,[83] a Fifth Circuit case dealing with commercial fraud, presents an excellent example of how "equity" is understood:

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79. For a general overview of equity in American courts, see DOUGLASS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE (1991) and Richard Maloy, *Expansive Equity Jurisprudence: A Court Divided,* 40 SUFFOLK U. L. REV. 641 (2007) (reviewing the debate between Supreme Court justices regarding the usage and definition of "equity"). Owing to this confusion, the plan of the new *Restatement of Restitution* is to discuss restitutionary remedies without recourse to the term "equity."

80. *See, e.g.*, State *ex rel.* Wright v. Weyandt, 363 N.E.2d 1387, 1390 (Ohio 1977) (describing the test for equity jurisdiction as when the legal remedy of damages is inadequate); Mantell v. Int'l Plastic Harmonica Corp., 55 A.2d 250, 256 (N.J. 1947) (same).

81. *See, e.g.*, Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209–20 (2002) (discussing whether restitution and mandamus were legal or equitable); Curtis v. Loether, 415 U.S. 189, 193–97 (1974) (finding that for 7th Amendment purposes courts must determine whether a contemporary cause of action is more similar to cases traditionally conceptualized as "legal" or "equitable"); *see also* John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trial of Error in* Russell, Mertens, *and* Great-West, 103 COLUM. L. REV. 1317, 1338–60 (2003) (discussing how the courts misunderstand this historical inquiry); Colleen P. Murphy, *Misclassifying Monetary Restitution,* 55 SMU L. REV. 1577, 1616–23 (2002) (critiquing the equitable versus legal analysis in *Great-West*); Tracy A. Thomas, *Justice Scalia Reinvents Restitution,* 36 LOY. L.A. L. REV. 1063, 1071–86 (2003) (critiquing Justice Scalia's definition of equitable relief in *Great-West*).

82. *See* United States v. Durham, 86 F.3d 70, 73 (5th Cir. 1996) (invoking the term "equity" to overcome common law rules of tracing and determining that the distribution of funds from a fraudulent loan brokerage scheme on a pro rata basis was not an abuse of the district court's discretion); *see also* Emily Sherwin, *Restitution as Equity: An Analysis of the Principle of Unjust Enrichment,* 79 TEX. L. REV. 2083, 2088–89 (2001) (cataloging different meanings of the term "equity"); Jason Neyers, *Is There an Oppression Remedy Showstopper,* 33 CAN. BUS. L. J. 447, 453 (2000) (discussing different shades of the term equity in Canadian law).

83. United States v. Durham, 86 F.3d 70, 73 (5th Cir. 1996) (holding that distributing funds involved in fraudulent scheme to victims pro rata, rather than imposing constructive trust on funds that could be traced to individual victim, was not an abuse of discretion).

When fashioning a restitution order or imposing a constructive trust, the district court is acting pursuant to its inherent equitable powers. In entering a restitution order, adherence to specific equitable principles, including rules concerning tracing analysis are "subject to the equitable discretion of the court." Accordingly, we will review the lower court's imposition of an equitable remedy for abuse of discretion.[84]

Based on these premises, the *Durham* court deferred to the lower court's determinations:

Sitting in equity, the district court is a "court of conscience." Acting on that conscience, the lower court in the instant case rationally considered the positions of the victims and held that following the tracing principle would be inequitable. [Claimant's] frustration with the lower court's ruling is understandable but the court was not required to impose a constructive trust in Claimant's favor. Because the court used its discretion in a logical way to divide the money, the court committed no error requiring our intervention.[85]

Similar ideas are to be found in scores of other cases,[86] and much the same arguments are made regarding the distribution of funds in bankruptcy and in receivership proceedings.[87] Some of the most baroque language comes from a recent decision by a federal district court discussing the distribution of assets in receivership:

District courts sit as courts of equity in federal receivership proceedings. As courts of equity, district courts have "broad powers and wide discretion" to

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84. *Id.* at 73 (internal citation omitted).

85. *Id.* (internal citation omitted).

86. *See, e.g.*, Am. Metal Forming Corp. v. Pittman, 52 F.3d 504, 508 (4th Cir. 1995) (finding that the imposition of a constructive trust is an equitable remedy which courts have the discretion to grant or deny); *In re* B.L. Jennings, Inc., 373 B.R. 742, 765 (Bankr. M.D. Fla. 2007) (determining that under California law the principle circumstances under which a constructive trust is imposed is codified and the propriety of imposing a constructive trust is left to the sound discretion of the court); *In re* MJK Clearing, Inc., 286 B.R. 109, 126 (Bankr. D. Minn. 2002) (noting that under Minnesota law the imposition of a constructive trust is an equitable remedy that the court has the discretion to grant or deny); *In re* Dynamic Techs. Corp., 106 B.R. 994, 1007 (Bankr. D. Minn. 1989) (same); *see also* Stornawaye Props., Inc. v. O'Brien, 891 A.2d 123, 127 (Conn. App. Ct. 2006) (stating that under Connecticut law a court's decision to impose a constructive trust cannot be overturned unless there is a clear abuse of discretion).

87. Commodity Futures Trading Comm'n v. Topworth Int'l., Ltd., 205 F.3d 1107, 1115 (9th Cir. 1999) (granting "broad deference" to the district court's equitable determinations); *see also* Marcia S. Krieger, *"The Bankruptcy Court as a Court of Equity": What does that Mean?*, 50 S.C. L. REV. 275, 301–07 (1999) (recognizing that while bankruptcy decisions often deviate from common law rules, that bankruptcy courts are not, in any meaningful sense "courts of equity").

fashion appropriate relief in federal receivership proceedings. In ruling on a plan of distribution, the standard is simply that the district court must "use [ ] its discretion in a logical way to divide the money."

> It is well within the district court's discretion to reject equitable principles of tracing, restitution, reclamation, etc. and order a pro rata distribution to treat all defrauded investors equally in proportion to their losses. The use of a pro rata distribution plan is especially appropriate for fraud victims of a Ponzi scheme, in which earlier investors' returns are generated by the influx of fresh capital from unwitting newcomers rather than through legitimate investment activity. As the Supreme Court explained in the litigation that gave the Ponzi scheme its name, "equality is equity" as among "equally innocent victims."[88]

While it is clear that American and English courts start out with very different assumptions regarding the relative role of law and discretion in limited fund cases, the long history of comparative law scholarship cautions against relying solely on differences of rhetoric, as systems can reach similar results by employing different terminology. For this reason, a recent line of cases in which the English courts adopt (what is purported to be) the *North American* approach is particularly instructive.

Beginning with *Barlow Clowes*,[89] English courts have used the *North American* approach to distribute assets in Ponzi schemes.[90] *Barlow Clowes* and its progeny, in turn rely on early-to-mid twentieth century American cases[91] for the proposition that a court can ignore the rule of *Clayton's Case* (adopting the first-in first-out method of tracing) and apportion funds to defrauded parties on a pro rata basis.[92] Thus, even as these cases demonstrate that English law is not categorically opposed to doing rough justice in lieu of the tracing/restitution rules, significant differences between the English and American approaches nevertheless remain.

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88. Quilling v. Trade Partners, Inc., No. 1:03-CV-236, 2007 WL 107669, at *1–2 (W.D. Mich. Jan. 9, 2007) (internal citations omitted).

89. Barlow Clowes Int'l, Ltd. v. Vaughan, [1992] 4 Eng. Rep. 22, 35, 44 (A.C.) (U.K.) (deciding, based on arguments of the parties, that courts can ignore first-in first-out tracing methods in favor of pro rata apportionment to defrauded parties).

90. *See* Susan Barkehall Thomas, Clayton's Case *and the "Common Pool" Exception*, 15 J. BANK. & FIN. LAW & PRAC. 177, 180 (2004) (describing how Commonwealth courts have used the North American approach).

91. *See Barlow*, [1992] 4 Eng. Rep. at 35, 44 (A.C.) (U.K.) (citing Judge Learned Hand in *In re Walter J. Schmidt & Co.*, 298 F. 314, 316 (S.D.N.Y. 1923)); *see also* Commerzbank AG v. IMB Morgan Plc, [2005] 1 Lloyd's Rep. 298, 305 (Ch.) (U.K.) (same).

92. Thomas, *supra* note 90, at 180.

For example, in the recent case of *Commerzbank Aktiengesellschaft v. IMB Morgan*,[93] the Chancery Division of the High Court applied the North American rule to deal with the aftermath of the famous Nigerian email frauds.[94] *Commerzbank* rests on the court's findings that the victim's funds were hopelessly commingled, and that the sheer number of relevant transactions made efforts to achieve a precise forensic accounting all but impossible.[95] Nevertheless, the court did not simply lump all the claimants' assets together and divide them pro rata. Rather, *Commerzbank* was careful to distinguish between claimants who were defrauded in dollars (dollar claimants) and claimants defrauded in pounds sterling (sterling claimants).[96] While the court gave no indication that one class was more deserving than the other, based on the sheer fortuity of which funds the criminals dissipated, sterling claimants recovered roughly 46% of their initial investment while the dollar claimants were forced to settle for less than 10%.[97] Had *Commerzbank* operated under American-styled equity standards, it certainly would not have distinguished between the claimants on the basis of which currency was used to transfer funds to the criminals. But in light of the adamant warnings regarding property rights issued by Lords Millett and Browne-Wilkinson in *Foskett*, *Commerzbank* was well advised to stick to the "hard" law of tracing and property.

The decision in *Commerzbank* lies in sharp contrast to the use of equity-as-equality reasoning found in American decisions. Some U.S. courts have awarded pro rata distributions even where it is clear that monies moving through various bank accounts all stem from an easily identifiable source.[98] Other courts go even further, ignoring tracing- and property-based claims in favor of pro rata distribution even when the property consists of identifiable shares of stock rather than electrons moving through the banking system.[99] A few cases have even gone so far as to deny a claimant's right to trace even where the funds were deposited in segregated accounts and were never

93. *Commerzbank*, 1 Lloyd's Rep. at 306 (holding that claimants are entitled to trace their moneys into accounts in proportion to their claims).

94. *Id.*

95. *See id.* at 304 ("The claims far exceed the amounts in the Accounts, and an investigation of the claims ranging beyond the documentation available to the Court would have been impracticable and disproportionate.").

96. *Id.* at 306.

97. *Id.*

98. *See, e.g.*, United States v. Durham, 86 F.3d 70, 73 (5th Cir. 1996) ("No one can dispute that tracing would have been permissible under the circumstances of this case. Claremont identified its funds and had a right to seek imposition of a constructive trust on the traced funds. The government in fact suggested that Claremont receive the traced funds.").

99. SEC v. Credit Bancorp, Ltd., 290 F.3d 80, 88–89 (2d Cir. 2002).

commingled.[100] Under English conceptualizations of equity, tracing, and property, each of these cases would have undoubtedly reached a different resolution.

From a theoretical perspective, however, the differences between these cases lie less in the contrasting results and more in the competing visions of how such cases ought to be resolved. Even in the English cases that deviate from the tracing rules of *Clayton's Case*, the justification for the pro rata alternative sounds in private law and relates to the substantive limitations of the first-in first-out rule.[101] The English cases rarely address the degree of discretion afforded to the chancery court, and the term "standard of review" (or its analogues) does not even appear in the *Commerzbank* or *Barlow Clowes* decisions. And while it is hard to prove an argument from silence, *Barlow Clowes* and others suggest that it may have been reversible error for the *Commerzbank* court *not* to have departed from the rule of *Clayton's Case*.[102] Rather than relying on the discretionary powers of a court "in equity," *Commerzbank* engages in a traditional inquiry focusing on the scope and limitations of the various precedents. Whatever the exact rule under English law, the debate over the metes and bounds of *Clayton's Case* is conceptualized as an inherently legal question regarding the law of tracing, equity, property and trust, rather than as a question of the trial court's discretion.[103]

By contrast, the justifications found in the American courts have very little to do with the law of tracing and property and much more to do with the court's "equitable powers" or the trial court's authority to make factual determinations.[104] In fact, a number of cases have expressed near-total agnosticism regarding the results, candidly stating that the district court would be within its rights to apportion the funds using either the "tracing fictions" or pro rata method, so long as the net result was reasonable.[105] Therefore, instead

100. SEC v. Forex Asset Mgmt., LLC, 242 F.3d 325, 331–32 (5th Cir. 2001).

101. Interestingly, the leading tracing scholar does not even consider these results as deviating from the ordinary laws of tracing. *See* LIONEL D. SMITH, THE LAW OF TRACING 189–94 (1997) (attempting to rationalize and distinguish *Clayton's Case* from subsequent cases).

102. Telephone interview with Craig Rotherham, Professor of Law, University of Nottingham, (Dec. 2007). Professor Rotherham is a leading expert in the field of proprietary remedies.

103. *See, e.g.*, SMITH, *supra* note 101, at 185–94 (arguing that the rule in *Clayton's Case* is not a tracing rule); Thomas, *supra* note 90, at 178–81 (discussing *Clayton's Case* in the context of tracing).

104. *See, e.g.*, Corp. of Pres. of Church of Jesus Christ of Latter-Day Saints v. Jolley, 467 P.2d 984, 985 (Utah 1970) (finding that the trial court had a reasonable basis to believe defendant's assets were paid for by money embezzled from plaintiff).

105. *Forex*, 242 F.3d at 331 (noting that the lower court could have used tracing rules but did not abuse its discretion in opting for pro rata distribution); United States v. Durham, 86 F.3d

of presenting arguments for specific distribution plans on the basis of the law of restitution, these cases argue for a hands-off standard of review. As a result, the analytic heavy lifting and virtually all the citation of legal authorities relate to the law of the standard of review rather than to the law of restitution. To the extent there is any "law" in these cases, it is the law governing when a court is within its rights to exercise its discretion.

IV. Deconstructing Constructive Trusts[106]

The cases presenting divergent approaches to tracing suggest yet a broader set of differences regarding the relationship between rights and remedies within the two legal cultures. Viewed comparatively, American courts employ the terminology of equity and constructive trust to establish a "remedial phase" of the litigation. In this remedial phase, the court is able to craft remedies on the basis of its fact-gathering and discretionary authority rather than through a chain of precise legal reasoning. English law, by contrast, tends to conceptualize remedial grants as questions of law, requiring remedial awards to be justified in terms of infringed legal rights. This theme, which is critically important to understanding the differences between American and English views on restitution, is illustrated by a pair of cases involving secret-selling spies.

Snepp v. United States[107] tells the story of a former CIA agent who published a memoir detailing some of the CIA's activities in Vietnam.[108] The Supreme Court ruled that publication violated an express condition of Agent Snepp's employment agreement which barred Snepp from publishing material without obtaining pre-publication approval from the CIA.[109] Because the government conceded that the book contained no classified information, the case rested exclusively on a breach of contract theory.[110]

70, 72–73 (5th Cir. 1996) (same).

106. The title to this section is shamelessly borrowed from Andrew Kull's reaction to Lionel Smith's Anglo-centric discussion of constructive trust doctrine entitled *Deconstructing the Constructive Trust*, 40 CAN. BUS. L.J. 358, 358 (2004).

107. Snepp v. United States, 444 U.S. 507, 515–16 (1980) (holding that a former agent breached his fiduciary obligation by failing to submit material concerning the CIA for pre-publication review and that the proceeds of the former agent's breach were impressed with a constructive trust).

108. *Id.* at 507–08.

109. *Id.* at 508.

110. *Id.* at 511–12.

The Court awarded the government a constructive trust over all of Snepp's profits on the theory that the government would be irreparably harmed by the book's publication.[111] The per curiam opinion, however, seemed wholly unconcerned with whether a constructive trust was available as a remedy for breach of contract.[112] In fact, the court did not cite a single case in the text of its opinion in support of awarding this drastic remedy.[113] The brief opinion simply assumed the legitimacy of the constructive trust remedy:

> [A constructive trust] deals fairly with both parties by conforming relief to the dimensions of the wrong. If the agent secures prepublication clearance, he can publish with no fear of liability. If the agent publishes unreviewed material in violation of his fiduciary and contractual obligation, the trust remedy simply requires him to disgorge the benefits of his faithlessness. Since the remedy is swift and sure, it is tailored to deter those who would place sensitive information at risk.[114]

The reasoning in *Snepp* contrasts sharply with the House of Lords' opinion in *Attorney General v. Blake*,[115] which involved a former member of the British Secret Intelligence Service found guilty of divulging state secrets to the USSR.[116] Agent Blake was imprisoned for his crimes and then escaped to Moscow where he remained a fugitive from law.[117] While in exile, Blake authored a memoir detailing his life's experiences in the Cold War spy game.[118] Upon learning of the sizable advance that a British publisher was due to pay Blake, the Crown initiated a breach of contract action.[119] As was the case in

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111. *Id.* at 514–16.

112. *Id.* at 515–16.

113. In a footnote, the court cites to the *Restatement of Agency* and Scott's Treatise on Trusts, but then concludes that because this is a contract action the common law of trusts/agents is irrelevant. *Id.* at 515 n.11. However, in dissent, Justice Stevens points out that since the contract does not specify a remedy, the common law is obviously relevant to this case. *Id.* at 517–18 n.4. The majority also cites (but does not analyze) a few cases affirming that the CIA has the power to curtail employee activities even in the absence of a contract. *Id.* at 509 n.3. Additionally, the majority cites to a few cases holding that the CIA bears the burden to obtain an injunction against publication. *Id.* at 513 n.8.

114. *Id.* at 515. The dissent was slightly more interested in this question, though it also hung its hat on First Amendment principles. Justice Stevens argued that since the information was concededly not confidential, Snepp could not be held to be a fiduciary of the CIA. *Id.* at 518–19. Similarly, the dissent bases itself on the rule that equitable remedies are not available when legal remedies are adequate. *Id.* at 526.

115. Att'y Gen. v. Blake, [2001] 1 A.C. 268, 288 (H.L.) (U.K.) (granting damages to the Crown in the amount of royalty payments promised to Blake).

116. *Id.* at 268.

117. *Id.* at 275.

118. *Id.*

119. *Id.*

Snepp, the Crown conceded the book contained no classified information, such that the suit relied solely on its breach of contract claim.[120] In a four-to-one decision, the House granted the Crown damages in the amount of the royalty payments the publisher promised to Blake.[121]

Blake opens with a discussion of how in trespass to real property cases, remedies are often measured in terms of defendant's gain rather than plaintiff's loss.[122] Further, equity courts have historically issued injunctions, disgorged profits, and even awarded plaintiffs money for ongoing and anticipated wrongs.[123] Similarly, in contract cases, courts had effectively awarded defendant's profits to plaintiff—though often under different labels. Basing itself on a number of traditional private law precedents, the House held that in exceptional cases (and *Blake* was exceptional), English law permits disgorgement for breach of contract.[124]

While the facts, and even the results, of these cases are similar, the analytic structures of the opinions could not be more different. The House of Lords had to justify its decision with fifteen pages of careful and learned analysis setting the issues within the context of remedies traditionally available for trespass and breach of contract.[125] In *Snepp,* however, the Supreme Court was able to short-circuit this doctrinal analysis by simply incanting the formula of "constructive trust."[126] This pattern repeats itself in a broader range of more prosaic commercial cases where American courts use the term constructive trust

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120. *Id.* at 276.

121. *Id.* at 288.

122. *See id.* at 278 ("A trespasser who enters another's land may cause the landowner no financial loss. In such a case damages are measured by the benefit received by the trespasser, namely, by his use of the land.").

123. For example, in *Battishill v. Reed,* 18 C.B. 696 (1856) (U.K.), which *Blake* cites, a plaintiff was awarded monetary compensation for defendant's continued maintenance of eaves and gutter eaves that wrongfully overhung plaintiff's property. *Id.* at 696. The court in *Battishill* found that the ongoing loss was limited to the damages accrued up until the commencement of the action. *Id.*

124. For example, *Blake* cites *Lake v. Bayliss*, [1974] 1 W.L.R. 1073, 1076 (Ch.) (U.K.) to demonstrate that a seller who sold land twice over was forced to surrender the profits of a second sale to the original buyer. Att'y Gen. v. Blake, [2001] 1 A.C. 268, 274 (H.L.) (U.K.). Similarly, the *Blake* court cites a case concerning a railroad that breached its contract to transmit telegraphs exclusively for one company and held that the company was a trustee as to the profits earned from breaching the agreement. *Id.* at 273 (citing Reid-Newfoundland v. Anglo-American Telegraph, [1912] A.C. 555 (P.C.) (U.K.)). It also cites a case where a breach of contract award effectively stripped the wrongdoer of profits made from selling cars on the black market. *Id.* at 272 (citing British Motor Trade v. Gilbert, [1951] 2 T.L.R 514, [1951] 2 Eng. Rep. 641 (Ch.) (U.K.)).

125. *Id.* at 275–90.

126. Snepp v. United States, 444 U.S. 507, 515–16 (1980).

to quickly dispose of the issues that English courts labor over in terms of restitution law.

A. Constructive Trusts in U.S. Law

The American doctrine of constructive trusts is notoriously unwieldy.[127] But to the extent that there is an animating theory of the law, it undoubtedly traces to the poetic rhetoric penned by Justice Cardozo in *Beatty v. Guggenheim Exploration Co.*:[128]

> 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 .... A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of the relief.[129]

Despite the fact that Cardozo's inspiring language is *obiter dicta*, as *Beatty* denied the imposition of a constructive trust, (a fact that few, if any, of the citing courts or scholars mention), this language has been cited in close to 500 state and federal cases making *Beatty* one of the leading authorities on constructive trust law.[130]

Subsequent courts have built on Cardozo's merger of equity-as-jurisdiction and equity-as-fairness, issuing a staggering number of overlapping, inconsistent and incompatible definitions of constructive trust. While the sheer diversity of opinions makes a general description of this remedy difficult, certain patterns emerge from the cases and commentators.

First, courts in virtually every American jurisdiction have issued broad language declaring that the constructive trust is an all-purpose remedy to correct just about any problem relating to specific assets or defendant's ill-

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127. The most nuanced discussions of American constructive trust law can be found in DAGAN, *supra* note 22, at 297–327; Emily Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. ILL. L. REV. 297, 313–29; and Andrew Kull, *Restitution in Bankruptcy: Reclamation and Constructive Trust*, 72 AM. BANKR. L.J. 265, 265–302 (1998). *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 54–59 (Tentative Draft No. 6, 2008) (providing points of discussion of American constructive trust law).

128. Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 381 (N.Y. 1919) (holding that consent to waive or amend a contract, though oral, gives protection to the agent and acquits him of a breach of contract).

129. *Id.* at 386, 389.

130. H. Jefferson Powell, *"Cardozo's Foot": The Chancellor's Conscience and Constructive Trusts*, 56 LAW & CONTEMP. SOC. PROBS. 7, 15–20 (1993).

gotten gains.[131] One common definition provides an example of such broad language:

> [A] constructive trust arises contrary to intention and in invitum, against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy.[132]

Similarly, "[a] constructive trust is not limited to situations involving fraud or other wrongdoing, but may be imposed when there is clear and convincing evidence that it would be 'morally wrong for the property holder to retain' the property."[133]

Second, while historically constructive trusts emerged as equity's response to correct wrongdoing by the holder of specific property, the modern constructive trust has shorn its association with equity jurisdiction and is often conceptualized as "a remedial device aimed at preventing unjust enrichment."[134] Some courts suggest that unjust enrichment is the "touchstone for"[135] and "lies at the heart"[136] of the constructive trust remedy, and many courts list unjust enrichment as an element for stating a claim for a constructive trust.[137]

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131. *See* Kull, *supra* note 106, at 361 (outlining a concise listing of the various uses).

132. Jaser v. Fischer, 783 A.2d 28, 35 (Conn. App. Ct. 2001). Substantially similar language has been adopted by a number of other states. *See, e.g.*, *In re* Morris, 260 F.3d 654, 667 (6th Cir. 2001) (providing the definition under Ohio law); Turley v. Ethington, 146 P.3d 1282, 1285 (Ariz. Ct. App. 2006) (providing the Arizona definition of a constructive trust); Snoddy v. Snoddy, 791 So. 2d 333, 343 (Miss. Ct. App. 2001) (providing the definition under Mississippi law); Meadows v. Bierschwale, 516 S.W.2d 125, 131 (Tex. 1974) ("Constructive trusts, being remedial in character, have the very broad function of redressing wrong or unjust enrichment in keeping with basic principles of equity and justice."). *See generally* GEORGE E. PALMER, THE LAW OF RESTITUTION § 1.3 & Supp. 2008.

133. Estate of Savich, 671 N.W.2d 746, 751 (Minn. Ct. App. 2003). One of the more entertaining articulations comes from the Wyoming Supreme Court which holds that, for a constructive trust to arise, "[t]here must be *some or all* the following elements: a promise, either express or implied, a transfer made in reliance of that promise, and unjust enrichment." Rossel v. Miller, 26 P.3d 1025, 1028 (Wyo. 2001) (emphasis added). It is difficult to recall any other areas of law whose legal standard is articulated using the formulation of "some or all."

134. PALMER, *supra* note 132, § 1.3; *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55(3) cmt. b ("It is commonly repeated that a constructive trust is 'not a real trust' since it is 'only a remedy.' One might go further and explain that the term 'constructive trust,' used correctly to designate a remedy for unjust enrichment, is only a manner of speaking.").

135. SEC v. Antar, 120 F. Supp. 2d 431, 437 (D.N.J. 2000).

136. A. Brod, Inc. v. SK&I Co., 998 F. Supp. 314, 328 (S.D.N.Y. 1998).

137. *See* Sharp v. Kosmalski, 351 N.E.2d 721, 723 (N.Y. 1976) (stating that the requirements for the invocation of the equitable remedy of a constructive trust are: (1) a

Hand in hand with understanding the constructive trust as a remedy for unjust enrichment, a number of courts hold that a claimant does not need to prove fraud or misrepresentation to be awarded a constructive trust.[138] Likewise, since in most states the constructive trust has been freed from any association with trust law, proof of a confidential or fiduciary relationship is no longer required.[139] A constructive trust "may be based on any form of legal or equitable wrong such as conversion, fraud, duress, undue influence, abuse of confidence or unjust gain as the product of a mistake."[140]

Moreover, American courts maintain fairly liberal standards of proof for showing how stolen funds can be traced into defendant's present assets. For example, when confronted with persons who are "financially embarrassed"[141] or

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confidential or fiduciary relation; (2) a promise; (3) a transfer in reliance thereon; and (4) unjust enrichment). Whether a constructive trust is a remedy for unjust enrichment is hotly debated. *See, e.g.*, P.J. Millett, *Restitution and Constructive Trusts*, 114 L.Q.R. 399, 407 (1998) ("The development of an unified and comprehensive restitutionary response to unjust enrichment is far from complete.").

138. Ferguson v. Owens, 459 N.E.2d 1293, 1295–96 (Ohio 1984); Simonds v. Simonds, 380 N.E.2d 189, 194 (N.Y. 1978). The Minnesota Supreme Court in *Knox v. Knox*, 25 N.W.2d 225 (Minn. 1946) similarly set a lower bar for unjust enrichment:

> The nature of a constructive trust can best be comprehended by keeping clearly in mind that it is not, in its true sense, a trust at all, but purely a creation of equity designed to provide a remedy for the prevention of unjust enrichment where a person holding property is under a duty to convey it to another to whom it justly belongs.

Id. at 228. Additionally, in *Abell v. City of St. Louis*, 129 S.W.3d 877 (Mo. Ct. App. 2004), the Missouri Court of Appeals explained that a court was not limited to instances of real or constructive fraud when imposing a constructive trust:

> Constructive trusts are equitable remedies employed in a variety of circumstances to set aside wrongful ownership gained through real or constructive fraud. However, real fraud and constructive fraud are not the only grounds for imposing a constructive trust. Some instances where constructive trusts have been used include suits alleging undue influence, breach of a confidential relationship, and unjust enrichment.

Id. at 881.

139. PALMER, *supra* note 132, § 1.3; RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 and reporter's notes to cmt. a; *see also* BLACK'S LAW DICTIONARY 1547 (8th ed. 1990) ("[D]espite its name, [a constructive trust] is not a trust at all [but is] an equitable remedy that a court imposes against one who has obtained property by wrongdoing.").

140. PALMER, *supra* note 132, § 1.3. Some states, such as New York, retain the traditional "confidential relationship" prong as a required element. *E.g.* Leire v. Anderson-Leire, 802 N.Y.S.2d 762, 763 (N.Y. App. Div. 2005); Eickler v. Pecora, 785 N.Y.S.2d 126, 127–28 (N.Y. App. Div. 2004). However, at least one influential commentator finds this statement of New York law to be "false and misleading" in light of the courts' actual decisions. *See* PALMER, *supra* note 132, § 1.3 (citing cases).

141. Neb. Nat'l Bank v. Johnson, 71 N.W. 294, 295 (Neb. 1897).

look "like tramps"[142] living in a "two-room shanty in an oil field"[143] that purchase assets with suspect funds, American courts forgo the niceties of tracing through substitutions and rely on circumstantial evidence to establish the "transactional nexus"[144] between the embezzled funds and the acquired assets.[145] Some courts have gone so far as to place the burden of proof on the defendant to show that the newly acquired assets are *not* traceable to the stolen proceeds.[146] Unlike *Foskett*, these cases do not even make the slightest attempt to prove that plaintiff maintained any consistent set of rights throughout the various transactions, but simply assert that plaintiff is entitled to gain recovery from defendant's property. Similarly, while traditional doctrine holds that the claimant must identify a specific *res* to the trust,[147] this is not always the case. In a contest between a first and second wife over life insurance proceeds of a deceased husband, New York's highest court, per then-Judge Kay (later to become the Chief Justice of New York) relaxed the tracing requirements stating:

> [O]ne who possesses equity in an asset is entitled to restitution of the asset by a subsequent title holder who paid no value even if the latter had no knowledge of the predecessor's equitable interest. In general, it is necessary to trace one's equitable interest to identifiable property in the hands of the purported constructive trustee. But in view of equity's goal of softening where appropriate the harsh consequences of legal formalisms, in limited situations the tracing requirement may be relaxed.[148]

Finally, the designation that a constructive trust is "equitable" affords trial courts with a deferential standard of review, commonly abuse of discretion.[149]

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142. Costell v. First Nat'l Bank of Mobile, 150 So. 2d 683, 685 (Ala. 1963).

143. *Id.*

144. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 58 cmt. d, illus. 16 & 17, cmt. f.

145. *See id.* cmt. e, illus. 16 & 17, cmt. f.

146. *Id.* cmt. e, reporter's notes.

147. *See* Sherwin, *supra* note 127, at 307 ("To obtain relief, the plaintiff must establish a connection between her right to restitution and the particular property she claims.").

148. Rogers v. Rogers, 63 N.Y.2d 582, 586 (1984) (internal citations omitted); *see also* Simonds v. Simonds, 380 N.E.2d 189, 193 (N.Y. 1978) ("[I]nability to trace plaintiff's equitable rights precisely should not require that they not be recognized."). It should be noted, however, that this view of tracing is too amorphous for the *Restatement*, which criticizes the reasoning (but not the result) of these cases. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 48 cmt. d(4), reporter's notes; *id.* at § 58 cmt. e, reporter's notes.

149. Am. Metal Forming Corp. v. Pittman, 52 F.3d 504, 508 (4th Cir. 1995) (stating that a constructive trust is an equitable remedy and the district court's imposition of such a remedy will be reviewed for abuse of discretion); *see also* David Welch Co. v. Erskine & Tulley, 203 Cal. App. 3d 884, 894 (Cal. Ct. App. 1998) ("The propriety of granting equitable relief by way

And even while some courts maintain that "the imposition of a constructive trust requires clear and convincing evidence of the necessary facts,"[150] these same courts find that "the test on review is not whether we are convinced that there is clear and convincing evidence to support the trial court's findings but whether we can say that the trial court's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous."[151] In short, the sum total of the rhetoric surrounding the constructive has lead an influential writer to simply conclude that "[c]onstructive trust is the name we give to [the] decision, not the reason for it. It is convenient to use the constructive trust terminology to stand for one or more of the potential effects, but the term has no mystical significance."[152]

Furthermore, the relative formlessness of American constructive trust law is both facilitated and exacerbated by the perception of equity lying in the dark recesses of American private law. Unlike in the Commonwealth,[153] no American scholar has undertaken to produce a contemporary monograph looking to rationalize constructive trust law. Few professors on American law faculties (with the notable exception of the *Restatement*'s drafters and advisors) claim much competence in this field, and even fewer have endeavored to bring conceptual coherence to the mass of conflicting statements strewn about American case law.[154] While the blackletter rules regarding constructive trusts

of imposition of a constructive trust generally rests upon the sound discretion of the trial court."); Rosebud Sioux Tribe v. Strain, 432 N.W.2d 259, 265 (S.D. 1988) ("This court may not substitute its judgment of factual questions for that of the trial court unless the findings of fact are clearly erroneous.").

150. *See, e.g.*, Davis v. Combes, 294 F.3d 931, 936 (7th Cir. 2002) ("Each element of the wrongdoing giving rise to the constructive trust must be established by clear and convincing evidence."); SEC v. Credit Bancorp, Ltd., 138 F. Supp. 2d 512, 536 (S.D.N.Y. 2001) (requiring the clear and convincing evidence standard); Demeyers v. Demeyers, 742 So. 2d 165 (Miss. 1999) (same). *But see* 5 SCOTT, TRUSTS § 462.6 (3d ed. 1967) (endorsing a preponderance of the evidence standard); *see also* Page v. Clark, 592 P.2d 792, 799 (Colo. 1979) (advocating the preponderance of the evidence standard for constructive trusts); MacKenzie v. Fritzinger, 121 N.W.2d 410, 414 (Mich. 1963) (same); Cornwell v. Cornwell, 356 A.2d 683, 686 (N.H. 1976) (same).

151. Tripp v. C.L. Miller, 105 S.W.3d 804, 809 (Ark. Ct. App. 2003); Nichols v. Wray, 925 S.W.2d 785, 789 (Ark. 1996); *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 58 cmt. e (noting the inconsistency found in the decisional law regarding the degree of proof required to trace from one asset to another).

152. DAN B. DOBBS, LAW OF REMEDIES, § 4.3(2) (2d ed. 1993).

153. *See generally* ROBERT CHAMBERS, RESULTING TRUST (1997); DAVID WRIGHT, THE REMEDIAL CONSTRUCTIVE TRUST (1998); G. ELIAS, EXPLAINING CONSTRUCTIVE TRUSTS (1990); M. COPE, CONSTRUCTIVE TRUSTS (1992).

154. This is in no way meant to minimize the efforts of scholars such as Kull, Sherwin and Dagan, all cited at note 127, but to point out how lonely these voices are within the broader American academy.

can be found in George Palmer's *The Law of Restitution*, Dan Dobb's treatise on Remedies, and chapters tucked away in the back of the leading trusts treatises,[155] the architecture of these works was set out quite some time ago, and they are hardly considered the leading edge of American legal scholarship. Similarly, while remedies and trusts and property casebooks (and teachers) wave their hands at the topic, few law schools offer much in the way of systematic instruction or theory regarding the scope of this powerful remedy.[156]

The main exception to the general lack of interest in constructive trusts law arises, not surprisingly, precisely when it matters most—in bankruptcy.[157] Because the constructive trust removes specific assets from the bankruptcy estate, when defendant is bankrupt, the constructive trust operates against the defendant's remaining creditors rather than against the property interests of the defendant himself. Thus, to prevent unwarranted favoritism, a number of courts and scholars have generated a substantial amount of legal doctrine that limits the availability of constructive trusts in this context.[158] Yet even though the Bankruptcy Code draws its definitions of property from state common law, more often than not, judicial discussions of this issue are carried out under the aegis of statutory interpretation and the policy of the Bankruptcy Code, rather than in the language of the substantive law of restitution.[159] Thus, even when

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155. SCOTT, *supra* note 150, at §§ 461–552; BOGERT ON TRUSTS §§ 471–510 (2d ed. 1978 & 2007 Supp.).

156. Remedies casebooks that average roughly 800 pages in length rarely devote more than twenty pages to the topic. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES, 585–98 (3d ed. 2002); ROBERT THOMSON ET AL., REMEDIES: DAMAGES, EQUITY AND RESTITUTION, 544–65 (3d ed. 2002); DAVID LEVINE ET AL., REMEDIES: PUBLIC AND PRIVATE, 753, 755–56, 795–805, 822 (4th ed. 2006); *see also* Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV, 1191, 1191–1241 (1995) (critiquing the overall lack of knowledge of basic restitution law).

157. *See In re* Morris, 260 F.3d 654, 665–69 (6th Cir. 2001) (providing in-depth analysis on whether the court should impose a constructive trust); *In re* Newpower, 233 F.3d 922, 929–31 (6th Cir. 2000) (same); *In re* Omegas, 16 F.3d 1443, 1447–53 (6th Cir. 1994) (same); *see also* Sherwin, *supra* note 127, at 313–29 (analyzing how bankruptcy courts apply the constructive trust doctrine); Kull, *supra* note 127, at 269–77 (same); DAGAN, *supra* note 22, at 297–327 (discussing the important role of restitution in bankruptcy). *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 58 cmts. b–f (providing a discussion and examples of how the provisions apply in the context of bankruptcy).

158. *See* sources cited *supra* note 157 (providing in-depth analysis on the availability of constructive trusts within the bankruptcy context).

159. *See* Kull, *supra* note 127, at 266 (noting and decrying this state of affairs); *see also In re* North Am. Coin & Currency, Ltd., 767 F.2d 1573, 1575 (9th Cir. 1985) ("[W]e held that, because of countervailing policies behind the Bankruptcy Act, state law could not be permitted to impose a trust on commingled property of a bankrupt's estate."); DAGAN, *supra* note 22, at 304–06 (providing a discussion of several critics of the arbitrariness of the results reached through transactional tracing with regards to constructive trusts).

the stakes are high and the judicial attention is focused on the issue, American courts refuse the invitation to articulate substantive restitution law.

B. Constructive Trusts in English Law

In contrast to the American practice, cases raising these issues are routinely heard in elite English and Commonwealth tribunals[160] and garner significant attention from the leading scholars in the English/Commonwealth Academy.[161]

A large part of the difference is traceable to the different meanings that attached to the term "equity." Although the English Judicature Act completed the merger of the law and equity courts in 1875, (a full sixty years before a similar merger was accomplished by the Federal Rules of Civil Procedure in the 1930s) in English law, the term "equity" retains a more technical and specific definition than in the United States.[162] In certain classes of cases, English law continues to treat law and equity as somewhat distinct systems, and in a manner foreign to American lawyers, opinions are frequently divided into discrete "law" and "equity" sections.[163] The two-tracked analysis is more than simply

160. *See supra* note 47 and accompanying text (citing cases from the highest courts in England, Canada and New Zealand analyzing constructive trusts).

161. *See generally* BURROWS, THE LAW OF RESTITUTION 60–104 (2d ed. 2002); Millett, *supra* note 137, at 402–18; DONOVAN WATERS, THE CONSTRUCTIVE TRUST; CHAMBERS, *supra* note 153; DAVID WRIGHT, THE REMEDIAL CONSTRUCTIVE TRUST (1998); SMITH, *supra* note 101; G. ELIAS, EXPLAINING THE CONSTRUCTIVE TRUST (1990); Peter Millett, *Bribes and Secret Commissions*, [1993] RESTITUTION L. REV. 7; Michael Bryan, *Unraveling Proprietary Remedies: An Australian Perspective*, 40 CAN. BUS. L.J. 339 (2004); Simon Gardner, *The Element of Discretion*, *in* 2 THE FRONTIERS OF LIABILITY 186, (1994); Anthony Duggan, *Constructive Trust Law From a Law and Economics Perspective*, 55 U. TORONTO L.J. 217 (2005). For an early work comparing English and American approaches to constructive trusts (though from a time when American restitution law was more developed than its English counterpart), see Donovan Waters, *The English Constructive Trust: A Look into the Future*, 19 VAND. L. REV. 1215 (1965–1966).

162. A review of the latter history of equity in the Commonwealth is undertaken by the Chief Justice of Australia, in Anthony Mason, *Equity's Role in the Twentieth Century*, 8 KING'S C. L.J. 1, 1–22 (1997–1998).

On the American side, I leave aside the rather unique set of cases requiring courts to investigate the law/equity distinction for purposes of determining whether plaintiff has a constitutional right to a jury under the Seventh Amendment. *See, e.g.*, Curtis v. Loether, 415 U.S. 189, 195 (1974) (basing the right to a jury trial on whether a plaintiff's analogous claim would have been brought in law or equity).

163. *See, e.g.*, El Ajou v. Dollar Land Holdings, [1993] 3 Eng. Rep. 717, 738 (Ch.) (U.K.) (dividing the discussion between the equitable claim of knowing receipt, and the common law claim of money had and received); Agip (Africa) Ltd. v. Jackson, [1990] Ch. 265, 282–89 (U.K.) (dividing the analysis of restitution into distinct "common law" and "equity" sections).

cosmetic and in a number of cases, the English courts reached substantively different conclusions than under the integrated American system.[164] More recently, attempts to complete the combination or "fusion" of law and equity have generated a significant amount of judicial and academic debate on the matter.[165]

Because English trust law clings to its traditional association with equity,[166] English law contains two limitations that substantially narrow the scope of constructive trust remedies. First, it can only arise where there has been some prior confidential or fiduciary relationship between the parties,[167] and secondly, the receiver of the property must have knowledge of the tainted source of the assets at the time he enters into possession.[168] In practice, these

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164. *E.g.*, Westdeutche Landesbank Girozentrale v. Islington London Borough Council, [1996] A.C. 669, 682–86 (H.L.) (U.K.) (discussing the case in terms of a proprietary claim in restitution and equitable proprietary claims). This distinction may be perhaps less important after the House's decision in *Sempra Metals*. On the American side, the most important exception to this trend is found in Delaware, which continues to maintain separate Chancery courts. For a defense of this practice, see William T. Quillen, *Constitutional Equity and the Innovating Tradition*, 56 LAW & CONTEMP. SOC. PROBS. 29, 30 (1993) (defending Delaware's practice of maintaining separate law and equity jurisdictions).

165. *See* Andrew Burrows, *We Do This at Common Law but That in Equity*, 22 OXFORD J. LEGAL STUD. 1, 4–5 (2002) (arguing that lawyers are not doing enough to do away with the needless differences in terminology and the substantive inconsistencies between common law and equity); Peter Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, 26 UNIV. WEST. AUSTL. L. REV. 1, 1–25 (1996) (setting the need for and obstacles to a better taxonomy for common law and equity terms). "Fusion" in general, and the theory of unjust enrichment (which is premised on the fusion of law and equity) in particular, is most hotly debated in Australia. *See, e.g.*, Harris v. Digital Pulse Pty, 197 A.L.R. 625 ¶¶ 1–63 (NSWCA 2003) (Austl.) (characterizing the ability of a remedy to exist in law and equity as a "fusion fallacy"); Farah Constructions Pty, Ltd. v. Say-Dee Pty, Ltd., [2007] H.C.A. 22, 154 (Austl.) (favoring the common law's jurisdictionally oriented doctrinal structure over the conceptually oriented unjust enrichment terminology derived from the Roman law); Roxborough v. Rothmans, [2001] 208 C.L.R. 516, 545 n.112 (Austl.) (citing legal scholarship addressing whether Australia courts should fuse the equitable doctrine of unjust enrichment into the common law); *see also* RODERICK MEAGHER ET AL., EQUITY, DOCTRINES AND REMEDIES ¶¶ 201–34 (3d ed. 1993) (discussing the intention of the draftsmen of the Judicature Act and the use of the word fusion in the discussion of the time).

166. WATERS, *supra* note 161, at 2.

167. *See, e.g.*, *In re* Polly Peck, [1998] 3 Eng. Rep. 812, 824 (A.C.) (U.K.) (citing *El Ajou v. Dollar Land Holdings Plc*, [1993] 3 Eng. Rep. 806, 826–27 for the requirement of a fiduciary relationship in order to find a right to trace in equity); *In re* Diplock [1948] Ch. 465, 520 (U.K.) (explaining that the starting point for an equitable remedy is "the existence of a fiduciary or quasi-fiduciary relationship").

168. *See* Westdeutsche Landesbank Girozentrale v. Islington London Borough Council, [1996] A.C. 669, 705 (U.K.) (Lord Browne-Wilkinson, dissenting) ("[A] constructive trust [is] imposed on a person who dishonestly assists in a breach of trust who may come under fiduciary duties even if he does not receive identifiable trust property."). *But see* BURROWS, *supra* note 161, at 73 (critiquing this reasoning).

limitations suggest that a constructive trust cannot be awarded on account of mistake or in cases of unjust enrichment where there is no showing of fault on the part of the recipient. And while there is some debate regarding the degree to which these strictures continue to hold, by all accounts, English law offers a substantially more constricted version of constructive trust law than the mainstream American conception.[169]

Most relevant for our purposes however, is the insistence by a number of influential English judges and scholars that a constructive trust is not a remedy awarded post-hoc by the court, but a set of legal entitlements that arise almost naturally upon a violation of a correlative set of rights.[170] To sustain this view, English and Commonwealth scholars tend to divide what American courts generically refer to as constructive trusts into several sub-categories including institutional (sometimes also called substantive) constructive trusts and remedial constructive trusts;[171] and some writers take this a step further by

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169. *See* Peter Birks, *The End of the Remedial Constructive Trust*, 12 TR. L. INT'L 202, 204 (1998) (quoting Lord Browne-Wilkinson stating that the remedial trust had gained no foothold in England even though it was already part of the law in the United States); Peter Birks, *Proprietary Rights as Remedies*, *in* 2 THE FRONTIERS OF LEGAL LIABILITY 214, 214–21 (1994) (calling for a more proper and restrictive use of constructive trusts). *But see* David Wright, *Professor Birks and the Demise of the Remedial Constructive Trust*, 7 RESTITUTION L. REV. 128 (1999) (critiquing the Birksean approach as too restrictive); Simon Evans, *Defending Discretionary Remedialism*, 23 SYDNEY L. REV. 463, 464–500 (2001) (attacking Birks's analysis); *see also* BURROWS, *supra* note 161, at 60–75 (summarizing the debates in English law on this topic).

170. *See Westdeutsche*, [1996] A.C. at 714 (Lord Browne-Wilkinson, dissenting) ("Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it."); Chase Manhattan Bank v. Israel-British Bank, [1981] Ch. 105, 124 (U.K.) (stating that rights and remedies are "indissolubly connected" and the distinction between them is "idle"). This view, of course, is far from unanimous. *See, e.g.*, Millett, *supra* note 161, at 10 (explaining that whether a constructive trust is institutional or remedial is a controversial issue); CRAIG ROTHERHAM, PROPRIETARY REMEDIES IN CONTEXT 26–31 (2002) (discussing whether a trust can arise automatically); Donavan Waters, *Liability and Remedy: An Adjustable Relationship*, 64 SASK. L. REV. 429, 447–53 (2001) (outlining under what circumstances a court should find a trust); Gardner, *supra* note 161, at 187 ("[O]ne sometimes encounters a suggestion that remedial constructive trusts are different from institutional constructive trusts in that they can arise where there is no fiduciary relationship, whilst institutional constructive trusts cannot."); Evans, *supra* note 169, at 464–74 (providing trenchant critiques of the Birksean orthodoxy). An examination of these critiques, however, simply strengthens the central claim of this section—the greater the insistence that remedies arise by operation of law, the greater the need for the law of restitution.

171. Interestingly, these categories were first articulated by Roscoe Pound, in *The Progress of Law*, 33 HARV. L. REV. 420, 420–21 (1920), yet, these distinctions have had greater salience in English than American discourse. *See, e.g.*, Robert Chambers, *Constructive Trusts in Canada*, 37 ALBERTA. L. REV. 173, 216–18 (1999) (discussing the American and Canadian distinctions between constructive and resulting trusts); Robert Chambers, *Resulting Trusts in Canada*, 38 ALBERTA. L. REV. 378, 379–92 (providing a discussion of the development of the

dividing the "institutional" category into "implied" and "resulting" trusts.[172] Whatever the labels, when compared to American law, it becomes clear that the goal of these various headings is to minimize the number of cases where courts award remedies as a matter of discretion, and to enlarge those instances where the remedy is said to arise automatically "by operation of law."[173]

In *Westdeutche*, Lord Browne-Wilkinson had occasion to consider the differences between the American and English perspectives:

> In the present context, that distinction [between the institutional constructive trust and the remedial constructive trust] is of fundamental importance. Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the possibly unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court. Thus for the law of New York to hold that there is a remedial constructive trust where a payment has been made under a void contract gives rise to different consequences from holding that an institutional constructive trust arises in English law.[174]

The distinction articulated by Browne-Wilkinson has been elaborated on by Peter Birks who—not coincidentally—is the father of the modern English restitution movement.[175] According to Birks, much of the conceptual confusion

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resulting trust).

172. *See* Millett, *supra* note 137, at 399–400 ("In its institutional sense, a constructive trust is one of the two kinds of implied trust which arise by operation of law. The other is the resulting trust."); *see also* CHAMBERS, *supra* note 153, at 2–5 (providing a taxonomy for trusts).

173. While on occasion U.S. courts talk about the differences between constructive and resulting trusts, *In re* Valentine, 360 F.3d 256, 262–63 (1st Cir. 2004); *In re* Admin. of Estate of Abernathy, 778 So. 2d 123, 127–28 (Miss. 2001), the distinctions between them are muddled, inconsistent and overlapping. Overall, American courts pay less attention to these categories than the Commonwealth, and most often all forms of "resulting" or "equitable" trusts are rolled up into the "constructive trust" label. *See, e.g.*, *In re* Estate of Nichols, 856 S.W.2d 397, 401 (Tenn. 1993) (merging standards often used for constructive trust with resulting trust); Saddler v. Saddler, 59 S.W.3d 96, 98 (Tenn. Ct. App. 2000) (same).

174. Westdeutche Landesbank Girozentrale v. Islington London Borough Council [1996] A.C. 669, 714–15 (U.K.).

175. In fact, Birks's views on the relationship between rights and remedies seem to have grown out of his theorizing about the substantive basis of restitution. Peter Birks, *Rights, Wrongs and Remedies*, 20 OXFORD J. LEGAL STUD. 1, 9–17 (2000). *See also* Evans, *supra* note 169, at 464–67 (explaining Birks's view on remedies and his criticism of discretionary remedialism).

regarding constructive trust arises from misunderstanding the term "remedy."[176] Instead of thinking about remedies as after-the-fact conclusions reached by the courts, Birks maintains that remedies arise by operation of law "as the events happen." Thus, from the moment a plaintiff's entitlement arises, "one component of that entitlement [is] the right to that judgment."[177] Because remedies arise by operation of law and do not depend on the graces of the court, this "weak sense" of the term "remedy" "adds nothing interesting to 'right' and must never be allowed to create a distinct category."[178] Moreover, even though some remedies were historically administered by courts of equity, they "should not be immune to the law's ordinary concerns for certainty."[179] Thus, remedies awarded under the headings of (resulting, implied or institutional) constructive trust, equitable charges and liens, disgorgement and account inhere "in the individuals independently of judicial pronouncements"[180] and in no way are the subjects of discretion.[181]

In contrast to the large category of remedies (according to Birks, more accurately described as rights) described above, Birks recognizes a far more limited class of remedies that are "discretionary judicial pronouncements which, if they confer rights on an individual, do so by their own virtue and not merely by way of declaration or realization of pre-existing entitlements

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176. *See* Birks, *supra* note 175, at 17–19 (providing a discussion of constructive trusts in the context of the five meanings of "remedy").

177. Birks, *Proprietary Rights*, *supra* note 169, at 217.

178. *Id.* at 216.

179. *Id.*

180. *Id.* at 217.

181. These views are hardly unanimous. See, for example, *Hussey v. Palmer* [1972] 1 W.L.R. 1286, 1290 (C.A.) (U.K.) (Lord Denning), which stated the following:

> By whatever name [a constructive trust] is described, it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded upon large principles of equity, to be applied in cases where the legal owner cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or the benefit of it or a share in it.

Id. at 1290; *see also* DAVID WRIGHT, THE REMEDIAL CONSTRUCTIVE TRUST 136–43 (1998) (discussing case law and scholarship noting the application of discretion in regards to constructive trusts); ROTHERHAM, *supra* note 170, at 27–31 (discussing the ongoing debate between institutional and remedial trusts); Waters, *supra* note 170, at 436–42 (detailing three different perspectives on the amount of discretion courts should have in determining whether to award equitable relief); Evans, *supra* note 169, at 480–500 (countering Birks's objections to discretion in remedialism); Kit Barker, *Rescuing Remedialism in Unjust Enrichment Law: Why Remedies are Right*, 57 CAMBRIDGE L.J. 301, 317 (1998) ("The intervention of a discretion does not necessarily signal the end of all certainty and stability in the law . . . . This is because . . . the exercise of discretions can be more or less constrained by rules . . . .").

(remedies)."[182] Instances of these true remedies however, are few and limited to "judicial review of administrative actions or Mareva injunctions" and the "modern equivalents of writs of certiorari, mandamus and prohibition . . . ."[183] Finally, because these remedies are awarded at the discretion of the court,[184] they are rightly seen as "object[s] of suspicion."[185]

The "remedial" constructive trust is just the sort of judicially generated remedy which raises the ire and suspicion of English judges and theorists. In Birks' colorful language, were it "not wrapped in the impenetrable language of 'remedial constructive trust,' it would instantly reveal itself as ugly, repugnant alike to legal certainty, the sanctity of property and the rule of law."[186] Writing extra-judicially (though less colorfully), Lord Peter Millett expressed a similar sentiment, arguing that "proprietary remedies should be granted only in defined circumstances and then ordinarily as a matter of course, so that rights of property may be fixed and ascertainable in advance."[187] And speaking from the Bench, Lord Browne-Wilkinson casts serious doubts as to whether remedial constructive trusts were even cognizable under English law.[188]

C. Restitution and Constructive Trusts

Taken together, these arguments point to the correlation between restitution and property law which can be summarized by the following chain

182. Birks, *Proprietary Rights*, *supra* note 169, at 217.

183. *Id.*

184. Peter Birks, *Property and Unjust Enrichment: Categorical Truths*, 1997 NEW ZEALAND L. REV. 623, 641 (1997).

185. Birks, *Proprietary Rights*, *supra* note 169, at 217; *see also* Millett, *supra* note 137, at 399 (advancing a similar argument).

186. Birks, *Categorical Truths*, *supra* note 184, at 641; *see also* ROTHERHAM, *supra* note 170, at 28–29 (quoting Birks).

187. Millett, *supra* note 137, at 399.

188. *See* Westdeustche Landesbank Girozentrale v. Islington London Borough Council, [1996] A.C. 669, 714 (U.K.) (Lord Browne-Wilkinson). In commenting on the lower court's equation between New York and English constructive trust law, Lord Browne-Wilkinson commented "the judge found that the law of England and that of New York were in substance the same. I find this a surprising conclusion since the New York law of constructive trusts has for a long time been influenced by the concept of a *remedial* constructive trust, whereas hitherto English law has for the most part only recognized an institutional constructive trust." *Id. See also In re* Polly Peck, [1998] 3 Eng. Rep. 812, 823 (finding the issue of whether the court should impose a constructive trust "seriously arguable in English law"); Halifax Bldg. Soc'y v. Thomas [1996] Ch. 217, 229 (questioning the scope of the law of constructive trusts). *But see* sources cited in *supra* note 181 (noting substantial stability in constructive trust law despite some degree of adjudicative discretion).

of argument: (i) rights, particularly property rights, ought be treated as sacred and cannot be reassigned on the basis of judicial whim; (ii) therefore remedies are said to arise by operation of law and must be described as a pre-defined and rationalized set of rules and entitlements; (iii) the constructive trust, however, has little to no analytic content and is simply the label used to grant courts authority to redistribute property rights; therefore (iv) to the extent that English law recognizes the remedial constructive trust, instances of its application should be extremely limited and closely monitored.

Despite the attractiveness of this theory, all observers of the common law concede that under the guise of legal fictions and the mysterious terminology of equity (tracing, constructive remedial, resulting, institutional, and substantive trusts, quasi contract, *quantum meruit*, subrogation, equitable liens, account, etc.), courts have long found ways to transfer assets initially held by A into the hands of B even if they could not quite articulate which "operations of law" generate these remedies.[189] The goal of law of restitution, together with the newly rationalized law of tracing[190] and various subcategories of equitable/resulting/constructive trusts,[191] is to fill this breach and describe the pre-rationalized body of "law" that normatively justifies the remedies delivered by courts.

Despite the caustic tone of the previous paragraphs, even restitution's most ardent supporters present substantially the same argument—though rephrased in more polite terms. For example, Warren Seavey and Austin Scott, the reporters to the *Restatement (First) of Restitution* who are credited with "discovering" the field of restitution[192] claimed, "that because of the way in which English law developed, a group of situations having distinct unity has never been dealt with

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189. *See* PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 7–16 (1985) (discussing five refinements to the definition of restitution); Anthony Duggan, *Constructive Trust from a Law and Economics Perspective,* 55 U. TORONTO L.J. 217, 220–44 (2005) (analyzing five cases from Canada, Australia and England to demonstrate different rationales the courts use in imposing constructive trusts).

190. *See, e.g.*, SMITH, *supra* note 101, at 1 ("[T]racing should be regulated by principles which make sense, and which are supported not just by reasons of authority, but by the authority of reason. It should not be regulated by irrational fictions.").

191. CHAMBERS, *supra* note 153, at 2–5 (providing a taxonomy for trusts). Note that both Smith and Chambers were doctoral students of Peter Birks and continued his method to the neighboring fields of tracing and trust.

192. *See* Andrew Kull, *Restitution and Reform,* 32 S. ILL. U. L.J. 83, 88 n.17 (2007) (citing sources crediting Seavey and Scott with creating restitution); Chaim Saiman, *Restating Restitution: A Case of Contemporary Common Law Conceptualism*, 52 VILL. L. REV. 487, 492 (2007) ("[T]he term 'restitution' is generally credited to Professors Warren Seavey and Austin Scott, the authors of the first *Restatement* on Restitution.").

as a unit," and thus has "never received adequate treatment."[193] "In bringing these situations together under one heading,"[194] Seavey and Scott wrote, the ALI "expresses the conviction that they are all subject to one unitary principle which heretofore has not had general recognition."[195]

Similarly, Andrew Kull, the leading contemporary American restitution scholar and Reporter to the *Restatement (Third) of Restitution*, finds that the great accomplishment of unjust enrichment law is to show that "a range of seemingly disparate rights and remedies could in fact be explained . . . in terms of the common objective of preventing unjust enrichment."[196] "Not only quasi-contract and constructive trust," writes Kull, "but a host of other remedial possibilities, including indemnity, contribution, subrogation, and equitable liens, could be seen to share this fundamental rationale."[197] Moreover, Peter Birks, restitution's chief English advocate, began his first major work on restitution claiming that "since equity was conceived to be a series of appendices or glosses on different parts of the common law . . . [m]any restitutionary obligations were covertly recognised [sic] by treating people as trustees who were not trustees,"[198] which together with the legal fiction of quasi-contract, resulted in the law of restitution being fragmented across various doctrines of the common law.[199] Finally, following Birks, Robert Chambers, one of the leading Commonwealth authorities on the law of resulting trusts writes, "[r]estitution is the label given to a variety of legal and equitable responses to unjust enrichment gained at the expense of another, which cause that enrichment to be given up to that other."[200]

V. Rights, Remedies, and Restitution

The relationship between rights, remedies and restitution makes it clear why Peter Birks, the godfather of the modern English restitution movement, led the charge against the discretionary conception of the constructive trust. Because the need for restitution law is inversely correlated with the degree of

193. Warren A. Seavy & Austin W. Scott, *Restitution*, 54 L.Q.R. 29, 31 (1938).

194. *Id.*

195. *Id.*

196. Kull, *supra* note 156, at 1192.

197. *Id.*

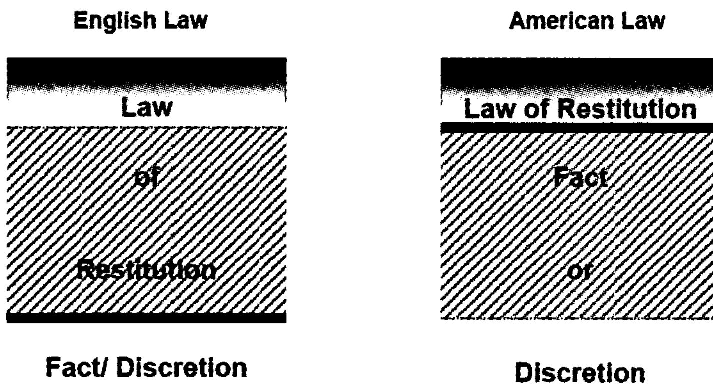
198. BIRKS, *supra* note 189, at 4–5.

199. *Id.*; *see* CHAMBERS, *supra* note 153, at 93–110 (providing an overview of Birks's definition of restitution). *See generally* Saiman, *supra* note 192, at 487.

200. CHAMBERS, *supra* note 153, at 93.

discretionary remedial authority allotted to the lower courts, the broad discretion embedded in American constructive trust law eliminates the need for a well developed law of restitution. By contrast, the limited zone of remedial discretion maintained by the English courts results in the doctrinal and narrative elaboration of English restitution law.

The relationship can be diagrammed as below. While both systems assume that restitution cases present a range of both factual and legal issues, they display different assumptions about where the line should be drawn. In English law, the law/fact line is drawn much closer to the facts so that most of the terrain is conceptualized as law. In American law, by contrast, the bar is set



higher and the majority of the terrain is the subject of discretionary reasoning. The shaded area represents the differential between the amount of American and English restitution law.

These competing conceptualizations of restitution emerge because, compared to their English counterparts, American lawyers are less outraged by the idea that courts have substantial authority to craft appropriate remedies.[201] Rather than rely on the law of restitution, American jurisprudence uses the somewhat empty labels "courts of equity"[202] and "constructive trust" to establish a domain of discretion (or as Birks railed against, a separate category)

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201. The degree to which these differences are connected to the different fates of the American and English civil jury remains to be explored.

202. Krieger, *supra* note 87, at 275 ("'The bankruptcy court is a court of equity.' The statement is ubiquitous. Parties routinely open their courtroom arguments with the observation. Published bankruptcy decisions of both trial and appellate courts are salted with the reference, and scholars regularly debate the scope of the bankruptcy court's equitable powers and jurisdiction.").

where disputes between ex-lovers, squabbles over the unwinding of loosely documented family businesses, and cases of large scale commercial mistake and fraud obtain common-sense solutions unhampered by the rigidity of the rules of property, tracing, trust, and restitution.[203] Thus, much as was the case of the late medieval law of contract, the deference afforded to the court closest to the facts places the law of restitution behind a carefully constructed veil. Hiding under headings such as "equitable remedies," restitution becomes an area that few appellate courts are interested in either charting or challenging.

The connection between rights and remedies highlights the stakes in the Anglo and American law regarding whether restitution and constructive trusts are remedial or substantive.[204] Since English law sees restitution as a substantive matter touching on quintessentially legal issues, the difficult questions are worked out in public view by the most prominent lawyers and judges in the jurisdiction. Similarly, because the coherence and stability of English commercial law rests on being able to justify remedies in terms of an orthodox conception of legal rights, the Anglo restitution project is suffused with rhetoric typical of the jurisprudence of certainty: hard law, conceptual

203. While Delaware courts have been known to examine the conceptual basis of what are known as rescissory damages—defined as "the monetary equivalent of rescission . . . which will . . . equal the increment in value that . . . [the majority stockholder] enjoyed as a result of acquiring and holding the stock . . . in issue," Strassburger v. Early, 752 A.2d 557, 579–80 (Del. Ch. 2000)—courts typically rely more heavily on the analytical framework of corporate law rather than the categories of property, trusts, tracing and restitution. Thus *Lynch v. Vickers Energy Corp.*, 429 A.2d 497 (Del. 1981), found that a majority shareholder's tender offer was misleading and a breach of the parent corporation's fiduciary duty of loyalty. *Id.* at 500–01. On this basis, the Delaware Supreme Court held that the shareholders would be entitled to rescissory damages measured by the value of the tendered shares as of the date of the trial on damages. *Id.* at 503. Similarly, while courts have referenced unjust enrichment as one of the conceptual basis for rescissory damages, Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1134, 1145–46 (Del. Ch. 1994), the court held that rescissory damages should never be awarded as a remedy solely for a breach of a corporate director's duty of care. *Id.* at 1154. In order to be equitably appropriate, "rescissory damages must redress an adjudicated breach of the duty of loyalty, specifically, cases that involve self dealing or where the board puts its conflicting personal interests ahead of the interests of the shareholders." *Strassburger*, 752 A.2d at 581.

204. *See* Saiman, *supra* note 192, at 499–500 ("While nearly all restitution scholars agree that unjust enrichment presents a substantive basis of liability, they disagree as to whether restitution also contains elements that are solely remedial—that is, remedies that piggyback on other sources of common law liability, most typically tort and contract."). *Compare* Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1283–92 (1989) (discussing restitution as both a source of liability and a measure of recovery), *and* DOBBS, *supra* note 152, at §§ 4.1(2), 4.1(4) (arguing that restitution has a "substantive" and "remedial" component), *with* Birks, *Proprietary Rights*, *supra* note 169, at 216, (arguing that there is a clear opposition between remedy and substantive right), *and* Millett, *supra* note 137, at 415 ("The thesis of this article is that restitution is always a response to unjust enrichment."), *and* Kull, *supra* note 156, at 1216, 1226 (denying these claims categorically).

clarity, analytic precision, generally applicable rules and uniformity of outcomes.[205] As a result, the House of Lords has invested considerable resources in conducting a public dialogue over the finer points of restitution law.[206] The English academy has similarly fulfilled its mandate, generating classificatory taxonomies and analytic theories to guide and critique the judicial deliberations.[207]

By contrast, compared to the English conception, the American understanding of restitutionary remedial relief rests on a nearly opposing set of images. Once the difficult questions of liability have been determined pursuant to hard rules of law, courts conceptualize a separate phase where the remedy is determined in light of the specific facts of the case.[208] In this remedial zone, hard rules of law give way to soft standards of balancing and discretion. As a result, the remedies are often worked out by the court closest to the facts but farthest from the visible discourse of norm articulation and doctrinal production. Moreover, since the operative legal standard is abuse of discretion, even appellate court decisions tend to speak in the language of "how the district court should have applied its discretion" rather than in the terminology of substantive restitution law.[209]

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205. *See* Peter Birks, *supra* note 165, at 22–25 (arguing that equity should not seek to be reasonable and fair, but should instead flow from sure and settled principles); Peter Millett, *Restitution and Constructive Trusts*, 114 L.Q.R. 399, 407 (1998) ("The development of a unified and comprehensive restitutionary response to unjust enrichment is far from complete. The continuing confusion caused by the ambiguities inherent in terminology makes the task unnecessarily difficult."); Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 734–35 (2006) ("Determinate rules, consistently applied, settle potential controversies within the range of their application.").

206. *See, e.g.*, Foskett v. McKeown, [2001] 1 A.C. 102, 145 (H.L.) (U.K.) (discussing allocation of insurance proceeds from a policy purchased with embezzled funds); Att'y Gen. v. Blake, [2001] 1 A.C. 268, 275–90 (H.L.) (U.K.) (discussing traditional remedies for trespass and breach of contract in the context of an action against a secret service agent for divulging state secrets).

207. BIRKS, *supra* note 189, at 7–16.

208. At least in the public law context, some scholars have affirmatively advocated disconnecting the rights from the remedy. *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1293–94 (1976) ("At this point, right and remedy are pretty thoroughly disconnected. The form of relief does not flow ineluctably from the liability determination, but is fashioned ad hoc. In the process, moreover, right and remedy have been to some extent transmuted."). This approach of course has not been without its detractors. *See* LAYCOCK, *supra* note 156, at 279–82 (critiquing this freewheeling conception of remedies). In some sense, the project of the Rehnquist and Roberts Courts has been to dismantle this legacy of federal court activism.

209. *See* Tripp v. C.L. Miller, 105 S.W.3d 804, 810 (Ark. Ct. App. 2003) (deferring to the factual findings of the trial court and affirming the denial of a constructive trust on largely factual grounds); David Welch Co. v. Erskine & Tulley, 250 Cal. Rptr. 339, 349 (Cal. Ct. App. 1988) (relying on lower court's determination to sustain a constructive trust); *In re* Estate of

The implications of the substantive/remedial distinction are neatly demonstrated by contrasting a group of well-known English cases known as the *Swaps Cases* and a recent Eighth Circuit decision on what appears to be a similar legal issue. The *Swaps* ordeal began when a number of English municipalities (borough counsels) sought to evade Parliamentary regulation of their borrowing capacity by entering into large, high dollar value interest rate swaps contracts with European banks.[210] Per the terms of the contracts, the banks were to front the municipalities a portion of the overall value of the transaction, and the amount remaining in the municipalities' hands would be adjusted over time as the interest rates fluctuated.[211] In a decision that surprised

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Savich, 671 N.W.2d 746, 752 (Minn. Ct. App. 2003) (employing a constructive trust because "clear and convincing evidence [leads the court to conclude] that it would be unjust or morally wrong for respondents to continue to hold property that they had an equitable duty to convey to decedent"); Eickler v. Pecora, 785 N.Y.S.2d 126, 127–28 (N.Y. App. Div. 2004) (relying on lower court's determination to sustain a constructive trust); Rosebud Sioux Tribe v. Strain, 432 N.W.2d 259, 264–65 (S.D. 1988) (relying on lower court's determination to sustain a constructive trust); Rossel v. Miller, 26 P.3d 1025, 1028 (Wyo. 2001) (reviewing the validity of the lower court's constructive trust determination primarily on the basis that "[t]his court gives deference to the trial court's opportunity to assess the witnesses' credibility"); *see also* Wendell Corp. Tr. v. Thurston, 680 A.2d 1314, 1320 (Conn. 1996) (finding that a constructive trust should be imposed as a matter of law, but leaving the difficult distributional questions regarding the scope of the trust to the discretion of the trial court).

Even when reviewing courts overturn the constructive trust determinations of the lower courts, they tend to focus on factual rather than normative issues. *See, e.g.*, Chiu v. Wong, 16 F.3d 306, 310 (8th Cir. 1994) (reversing the district court's denial of a remedy because plaintiff provided evidence sufficient to trace the proceeds of his partnership property into defendant's homestead); *In re* Goldberg, 158 B.R. 188, 193–95 (Bankr. E.D. Cal. 1993) (relying on burden of proof issues to resolve tracing questions); Crestar Bank v. Williams, 462 S.E.2d 333, 336 (Va. 1995) (reversing a grant of a constructive trust because "the record is devoid of proof, by clear and convincing evidence, distinctly tracing the investors' money into any of the properties that are the subject of the constructive trust").

Finally, even on those occasions when American courts do invest considerable energy in questions of tracing, trust and restitution, they tend to avoid the sort of conceptual-doctrinal puzzles elaborated upon by the Commonwealth courts. *See, e.g.*, *In re* Columbia Gas Sys. Inc., 997 F.2d 1039, 1051–64 (3rd Cir. 1993) (avoiding the archaic language and various subcategories of trust law); State *ex rel.* Ins. Comm'r v. Blue Cross & Blue Shield, 638 S.E.2d 144, 159 (W. Va. 2006) ("In this proceeding [plaintiff union] was able to open Blue Cross' 'bank vault' and find seven investment instruments valued at one million dollars each. [The union] needed to do no more, for it had traced the investment of its one million dollars."). In this way, these cases contrast substantially with their commonwealth counterparts. *See, e.g.*, *In re* Goldcorp Exch. Ltd., [1995] 1 A.C. 74 100–10 (U.K.) (analyzing the precise nature of trust interest created by the commercial sale of gold bullion).

210. Westdeutsche Landesbank Girozentrale v. Islington London Borough Council, [1996] A.C. 669, 669 (H.L) (U.K).

211. *Id.* at 672.

many observers,[212] the House of Lords declared these contracts *void ab initio* because they were *ultra vires* of the localities' legal capacity.[213]

As a result, the English courts had to sort out the financial consequences of the *ultra vires* holding. By the time the first case reached the House of Lords, it was common ground that the banks were entitled to get their money back: The sole issue on appeal was whether the banks could demand compound or simple interest on the monies fronted to the municipalities.[214] Framed this way, to an American audience, this question is conceptualized as merely "remedial" and, therefore, generates little interest from the appellate courts or the broader legal intelligentsia. Yet, pursuant to the English insistence that a remedy must stand in perfect correlation with the underlying rights ("arise by operation of law") this minor question regarding interest calculations metastasized into a debate over the conceptual classification of contract, restitution and property law.[215]

The result was a series of opinions of astounding length and complexity. As presented to the House of Lords, the question was whether the *ultra vires* ruling created equitable (resulting in compound interest), or legal (resulting in simple interest) title to the monies transferred by the banks to the localities. To resolve this issue, the eighty-plus page opinion had to address a host of substantive private law doctrines including: whether the *ultra vires* contracts suffered from failure or absence of consideration (and if it was failure of consideration, was it total or only partial);[216] whether a commercial transaction can create a trust leading to an equitable proprietary restitution claim;[217] which party holds the legal and equitable title of the transferred funds;[218] whether such

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212. *See* STEVE HEDLEY, RESTITUTION: ITS DIVISION AND ORDERING 8 (2001) (noting that most individuals believed that the transactions at issue were perfectly valid).

213. Hazell v. Hammersmith & Fulham London Borough Council, [1992] 2 A.C. 1, 39–44 (U.K.).

214. *Westdeutsche*, [1996] A.C. at 719.

215. Peter Birks explained the significance of the Swaps litigation as follows:

> There are many angles [to the swaps litigation] story . . . . But this book [collecting papers delivered at a conference titled 'The Lessons of the Swaps Litigation'] *could not but be primarily concerned with the implications of the swaps litigation for private law.* What has it told us about void contracts? What precisely are the grounds forth restitution which has been ordered in every single case? What have we learned from their impotence in all these cases about the defences to restitutionary claims? The swaps saga has been a test-bed for the rapidly maturing law relating to restitution and unjust enrichment.

Peter Birks, *Private Law*, *in* LESSONS OF THE SWAPS LITIGATION 3 (2000) (emphasis added).

216. *Westdeutsche*, [1996] A.C. 669, 682–83 (H.L.) (U.K.).

217. *Id.* at 683–84.

218. *Id.* at 706–07.

payments sever legal from equitable title;[219] whether mistaken payments can be traced into the general assets of the payee;[220] whether one can disaffirm an ultra vires contract,[221] and whether the ability to disaffirm depends on whether performance has been completed or merely commenced;[222] whether parties can avoid future litigation by contracting to commit an unlawful act;[223] whether a mistake as to the basis of the contract vitiates consideration;[224] and whether pursuant to common law principles, courts maintain the discretion to award compound rather than simple interest.[225] Not surprisingly, nearly fifteen years later, many of these questions are still being sorted out by the House of Lords.[226]

There are many reasons why the *Swaps Cases* would be handled differently in the Supreme Court, and not all of them relate to the law of restitution. A comparable case, however, would most likely pit the rights of a state against those of the federal government and generate significant anxiety over the theories of intergovernmental relationships, principles of federalism and (with any luck) methods of constitutional interpretation. But it is difficult imaging the courts transforming these questions into a disquisition on private law remedies. To the extent the hypothetical Supreme Court ruling required some transactional clean-up, it would remand that issue back to the district court.[227] Further attempts to review the district court's decision would be met with language affirming the district court's "broad discretion in fashioning equitable remedies," such that even reversals would be framed in terms of how discretionary factors should have been considered and balanced.[228] Either way,

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219. *Id.*

220. *Id.* at 714–15.

221. Hazell v. Hammersmith & Fulham London Borough Council, [1992] 2 A.C. 1, 17 (H.L) (U.K.).

222. Guiness Mahon & Co. Ltd. v. Kensington & Chelsea Royal London Borough Council, [1999] Q.B. 215, 230 (C.A.) (U.K.).

223. *Hazell*, [1992] 2 A.C. at 38–39.

224. Westdeutsche Landesbank Girozentrale v. Islington London Borough Council, [1996] A.C. 669, 708–09 (H.L.) (U.K.).

225. *Id.* at 684.

226. *See, e.g.*, Sempra Metals v. IRC, [2008] 1 A.C. 561, 580 (H.L.) (U.K.) ("The question then is whether the calculation of the award that is required by Community law in these circumstances should be effected on the basis of compound interest as the appellants contend, or of simple interest as is contended for by the revenue.").

227. *See, e.g.*, Lemon v. Kurtzman, 411 U.S. 192, 194–209 (1973) (recognizing that, "[i]n shaping equity decrees, the trial court is vested with broad discretionary power . . . [and] appellate review is correspondingly narrow").

228. These observations are not limited to the federal court context. *See, e.g.*, Summa

the restitution issues that dominated the English courts' attention would rarely be subjected to intense scrutiny.

In this context, the Eighth Circuit's recent decision in *Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*,[229] is instructive. The case concerns a series of contracts between the State of Iowa (through its Department of Corrections) and an Evangelical Christian group named Prison Ministries for the operation of a special program inside the Iowa correctional facility.[230] Prison Ministries' program ("the Program") had an overtly Christian orientation, as its brochures described a "24-hour-day, Christ-centered, biblically based program that promotes personal transformation of prisoners through the power of the Gospel."[231] Thus, "the application of biblical principles is not an agenda item—it is the agenda."[232]

Over the years, Prison Ministries and the State entered into a number of contracts whereby the State would pay to run the Program inside its prison.[233] Though the precise details of the arrangement changed, the net effect was that the State paid for roughly 30–40% of the Program's operating costs.[234] When Americans United for the Separation of Church and State, an interest group advocating strict separation between church and state sued, the district court found the program unconstitutional and ordered all monies paid to Prison

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Corp. v. Trans World Airlines, Inc., 540 A.2d 403, 409 (Del. 1988) ("While the legal rate of interest has historically been the benchmark for pre-judgment interest, a court of equity has broad discretion, subject to principles of fairness, in fixing the rate to be applied. In the Court of Chancery the legal rate is a mere guide, not an inflexible rule.") (citations omitted). In *ONTI, Inc. v. Integra Bank*, 751 A.2d 904, 929 (Del. Ch. 1999), the court indicated:

> In point of fact, very few, if any, appraisal trials provide a record on which the trial judge may base his compound versus simple interest decision. The parties usually fail (or refuse) to address this miniscule issue. That should not be surprising. After spending days, or even weeks, in a trial, wading through swarms of hired experts and hours of excruciating testimony, the trial judge, the parties, and counsel are determined to get it over as quickly as possible—which means no one wants to prolong the trial by even a minute in order to have yet more testimony on an issue like simple or compound interest. After two or three weeks of trial, it is inhumane to expect the trial judge to plead for yet another bucket of water to be added to the ocean.

Id. at 919 n.103.

229. Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc., 509 F.3d 406, 428 (8th Cir. 2007) (finding that the district court abused its discretion in granting recoupment for services rendered).

230. *Id.* at 413–14.

231. *Id.* at 418 (quoting the brochure).

232. *Id.* at 414.

233. *Id.* at 416.

234. *Id.* at 418.

Ministries over the course of the relationship returned to the State. An appeal followed.[235]

In both *Americans United* and the *Swaps Cases*, a governmental unit entered into contracts with private parties later found to be beyond the government's constitutional authority, and in each case the courts were asked to determine the status of funds transferred pursuant to these contracts. Based on the English approach reflected in the *Swaps Cases*, *Americans United* should have investigated the nature of the contracts; the precise effect of the contract being declared to violate the constitution; the rules governing *ultra vires* and unconstitutional contracts; the degree to which the parties were mistaken as to governing law when entering into the contracts; whether the State can trace its monies into the hands of Prison Ministries; and other constituent questions of restitution law. Yet neither the district court nor the Eighth Circuit even *raised*, much less analyzed, these issues. Instead, the court framed the case as turning on whether Americans United had standing to bring the suit;[236] whether the issues were moot;[237] whether Prison Ministries' personnel are considered state actors;[238] and whether the financing of Prison Ministries violated the First Amendment.[239]

Exemplifying the American perspective on private law remedies, *American United* opens its remedial analysis stating, "[i]n shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow."[240] Thus, even the Eighth Circuit's reversal is expressed in the language of discretionary balancing rather than the private law of restitution. In a few short sentences the appellate court criticized the district court for failing to: (i) give weight to the presumption of constitutionality that attaches to the actions of the Iowa officials, (ii) defer to the opinion of prison administrators in management of internal prison affairs, and (iii) credit the testimony of State officials who found the contract of great benefit to the State.[241] Finally, *American United* notes that since plaintiffs did not pursue interim injunctive relief to prevent the State from making payments to Prison Ministries, defendant's reliance on the funds was legitimate.[242]

235. *Id.* at 428.
236. *Id.* at 419–20.
237. *Id.* at 420–21.
238. *Id.* at 421–23.
239. *Id.* at 423–26.
240. *Id.* at 426 (quoting Lemon v. Kurtzman, 411 U.S. 192, 200 (1973)).
241. *Id.* at 426–28.
242. *Id.*

Despite *Americans United*'s sophisticated analysis of the jurisdictional and constitutional questions, the court seems to have run out of steam by the time it reached the remedial question—the issue that was putatively the subject of the appeal. Remedies are not even broached until page twenty-five of the twenty-eight page opinion,[243] (it similarly took the district court in *Americans United* seventy-four out of a total of seventy-six pages to speak to the remedy),[244] and in stark contrast to the *Swaps Cases*, *Americans United* does not cite a *single* case relating to the law of contracts, restitution, unjust enrichment or constructive trusts. Thus, even as *Americans United* presented the Eighth Circuit with a clear opportunity to weigh in on some difficult questions of unjust enrichment theory (e.g., how is enrichment measured when the greater the benefit defendant conferred upon the State, the more problematic the arrangement from a constitutional perspective? Or how does the unjust enrichment principle apply when the payor (Iowa) was satisfied with services rendered and is not the plaintiff in the lawsuit?), neither the court nor the parties even raised, much less addressed these questions.[245]

VI. Conclusion

I have argued that that the amount of restitution law produced by a given system corresponds to the degree that restitutionary remedies are conceptualized as correlating to specific legal entitlements arising from property and contract. Hence, the less remedial discretion allotted to the courts,

243. *Id.* at 426.

244. Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc., 432 F. Supp. 2d 862, 934 (S.D. Iowa 2006).

245. Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc., 509 F.3d 406, 426–28 (8th Cir. 2007); Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc., 432 F. Supp. 2d 862, 864–941 (S.D. Iowa 2006). In fact, arguing as amicus, the Government claimed that "restitution is a private law equitable doctrine that orders liability and remedies between private individuals based on unjust enrichment; it has no application in a suit by taxpayers raising an Establishment Clause challenge to a congressional appropriation." Brief for the United States as Amicus Curiae Supporting Appellant, Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc. at 7, 509 F.3d 406 (8th Cir. 2007) (No. 06-2741), 2006 WL 3098141, at *7; *see also* Laskowski v. Spellings, 443 F.3d 930, 933–45 (7th Cir. 2006) (providing a debate between the majority (Judge Posner) and dissent as to whether restitution is available for payments made in violation of the Establishment Clause), *rev'd on other grounds*, 127 S. Ct. 2553, 2553 (2007). For an argument against restitution orders for First Amendment violations see David T. Raimer, Note, *Damages and Damocles: The Propriety of Recoupment Orders as Remedies for Violations of the Establishment Clause*, 83 NOTRE DAME L. REV. 1385, 1395–1413 (2008). On the general question of money damages for Establishment Clause violations, see generally Doug Rendleman, *Irreparability Resurrected?*, 59 WASH. & LEE L. REV. 1343 (2002).

the greater the need for the substantive law of restitution.[246] Because a dominant strand of English legal thought maintains that remedies arise by operation of law, the courts strive to articulate a series of legal rules connecting rights to remedies. Moreover, since these determinations are conceptualized as presenting questions of law, restitution cases are decided by the elite courts charged with norm articulation and the development of substantive legal doctrine.

American courts, by contrast, play on different shades of equity to create a separate "remedial" phase of litigation where discretion rather than law prevails. In crafting restitutionary remedies, courts tend to focus more on the prudential, practical, and factual aspects of the award rather than the legal rules that lead from rights to remedies. Because these are subject to the prudential calculus of the district court, there are both lesser need and fewer opportunities for the generation of substantive legal doctrine.

Finally, it must be stressed that the sharp distinctions drawn between Anglo and American perspectives are comparative rather than absolute. While many English judges and scholars insist on the "indissoluble connection" between the rights and remedies, a substantial body of Anglo-Commonwealth literature is dedicated towards refuting precisely these claims.[247] Similarly on the American side, there is significant debate on the extent to which a "court of equity has a roving commission to do good once it identifies a threshold violation of law that justified its intervention,"[248] and particularly in the public law context, this view has come under considerable attack in the past decades.[249] Yet, the lack of homogeneity within each system should not obscure that the sensibilities of English and American law towards *private law* equitable remedies are anchored at different points on the law/discretion

246. *See, e.g.*, Millett, *supra* note 137, at 399–407 (advocating the development of a comprehensive law of restitution in response to the confusion of remedial construction trust law); Sherwin, *supra* note 205, at 730–37 (suggesting the *Restatement of Restitution*'s discretionary standards in cases between former cohabitants is contrary to the overall spirit of the *Restatement* and raises problems that adherence to a stricter set of restitution law rules could avoid); Birks, *Proprietary Rights*, *supra* note 169, at 216–17 (arguing for a more restrictive use of constructive trusts and a greater use of substantive law of restitution).

247. *Supra* notes 175–88 and accompanying text.

248. Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 73 (1993); *see also* John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Power of the Federal Courts*, 84 CAL. L. REV. 1121, 1122–23 n.15 (1996) (laying out the general arguments for and against the federal courts broad use of remedial power).

249. *See id.* ("Other academics have criticized the new role that judges have played in structural reform, primarily on the ground that federal courts are institutionally and functionally ill-suited to the task of administering public institutions. Federal judges, these scholars observe, have little experience in managing large, bureaucratic institutions.").

continuum. I am unaware of any English court that displays the level of agnosticism towards asset distribution as found in cases like *Durham, Elliot* and *Credit Bancorp*, and one can scour the entirety of the Commonwealth literature and find no more than a few examples of the discretionary language generated from even a cursory investigation of constructive trust law. Conversely, there are few examples of recent American cases that undertake the painstaking analysis of tracing, trust, property, and unjust enrichment law found in decisions such as *Westdeutsche* and *Foskett*.

* * *

However, even as US courts are less likely to control discretion via the conceptual analysis of private law, over the course of the twentieth century, American law has developed alternative mechanisms for constraining judicial discretion. Elite American courts have devoted considerable energies toward articulating a complex and highly theorized set of gatekeeping doctrines which govern the courts' authority to resolve disputes. Particularly in the federal courts, American law is focused less on the source and scope of private law rights and more and more on the procedural, jurisdictional and statutory limitations on exercises of "inherent equitable powers."[250] In future writing, I plan to examine the relationship between the decline of conceptual private law analysis and the concomitant rise of a procedural and jurisdictional discourse that seeks to articulate the limits of judicial power.

250. *See, e.g.*, Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 648–56 (2006) (identifying the three main ways remedial concerns manifest in procedural doctrine).

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