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## Intent to Charge for Unsolicited Benefits Conferred in an Emergency: A Case Study in the Meaning of "Unjust" in the Restatement (Third) of Restitution & Unjust Enrichment

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# Intent to Charge for Unsolicited Benefits Conferred in an Emergency: A Case Study in the Meaning of "Unjust" in the Restatement (Third) of Restitution & Unjust Enrichment

Louis E. Wolcher\*

## *Abstract*

*This Article is a legal and jurisprudential case study that attempts to shed light on the use of the word "unjust" in the law of restitution as it has been reinterpreted by the new Restatement (Third) of Restitution & Unjust Enrichment. The particular case studied is the legal meaning of the term "intent to charge" in the law's treatment of claims for unsolicited benefits conferred in emergencies. The author conducts a thought experiment involving the use of a sworn "Declaration of Intent to Charge for Benefits Conferred" to illustrate certain ambiguities and difficulties in the way the new Restatement deals with this legal category. The Article exploits the thought experiment and the difficulties it uncovers in order to advance the author's primary purpose, which is to retrieve dialectically a certain necessary independence for the idea of justice in the development of the substantive law of unjust enrichment.*

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*I. Introduction: The Third Restatement in Historical Context*

The curriculum of most modern American law schools relegates the law of restitution to the status of a bonbon, so to speak, to be served in other courses at the discretion of the instructor: A sort of exotic hors d'oeuvre or after-dinner mint in classes where the real meat-and-potatoes consists of contracts, torts, or remedies.<sup>1</sup> But while our law schools may have slighted this area of the law, the courts never have. As Professor Hanoch Dagan has said, "While restitution receded from the American academic landscape and was marginalized in the law school curriculum, courts continued to develop the doctrine, facing new problems and refining the rules dealing with benefits-based civil liability."<sup>2</sup> Thanks to the herculean efforts of Professor Andrew Kull and his diligent band of advisers, the American Law Institute has at last delivered us the text of a brand new Restatement (Third) of Restitution & Unjust Enrichment (R3RUE).<sup>3</sup> It is a monumental achievement. Thankfully, this text manages to take account of many of the new developments to which Dagan refers that have intervened in American private law litigation since 1936,<sup>4</sup> when the First Restatement was completed,<sup>5</sup> and 1984, when the uncompleted Second Restatement issued its second (and last) tentative draft.<sup>6</sup> Whatever impact the new Restatement may have on the future development of the law of restitution, I believe (and hope) that its completion and publication will encourage legal academics to

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1. See HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 1 (2004) ("Only a bare handful of American law schools offer a restitution course these days, and few academics write in this area. Restitution was subsumed under the general category of remedies or dissipated into the interstices of property, torts, and contract.").

2. *Id.* at 328.

3. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 (2011).

4. See, e.g., DAGAN, *supra* note 1, at 3 ("John Langbein analyzes this unfortunate development as part of the 'terrible toll that the realist movement has inflicted on doctrinal study.'").

5. RESTATEMENT OF RESTITUTION (1937) [hereinafter FIRST RESTATEMENT].

6. RESTATEMENT (SECOND) OF RESTITUTION (Tentative Draft No. 2, 1984) [hereinafter SECOND RESTATEMENT].

give more visibility in the law school curriculum to this important but much neglected subject.

Although a Reporter's Note to the new Restatement states that the taxonomy of "the present Restatement follows the 1937 Restatement without apology,"<sup>7</sup> the ALI's official website also declares that the project's name, which includes the words "restitution" and "unjust enrichment," restores the originally conceived title of the First Restatement as a way of emphasizing the fact that "the subject matter encompasses the independent body of law of unjust enrichment, and not simply the remedy of restitution."<sup>8</sup> The R3RUE, by loudly proclaiming the inadequately understood legal point that restitutionary remedies are not the same as the substantive law of unjust enrichment, affirmatively invites judges, lawyers and legal academics to address the important question posed by Professor Douglas Laycock several years ago: "What is it that makes enrichment unjust in the absence of some wrong for which the law would impose damage liability?"<sup>9</sup>

I have taught a stand-alone class on restitution and unjust enrichment at regular intervals throughout my academic career. I first learned about the subject at the feet of the great Jack Dawson, whose work in the field still remains very important,<sup>10</sup> and who, together with George Palmer, wrote a superb casebook on the subject that has, alas, been out of print for a very long time.<sup>11</sup> As someone who philosophizes a lot about legal themes, the main reason I enjoy teaching this subject so much is that its principal organizing concept contains the word "unjust." This word appears to bring the concept of justice (as opposed to mere lawfulness) directly into the legal arena, thereby confounding (or at least complicating) the distinction between legal positivism and natural law theory. The very first section of the R3RUE states: "A person who is unjustly enriched at the expense of

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7. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 reporter's note a (2011).

8. *Restatement Third, Restitution and Unjust Enrichment*, AM. LAW INST., [http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=14](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=14) (last visited Oct. 5, 2011).

9. Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1285 (1989).

10. See, e.g., JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS (1951) [hereinafter UNJUST ENRICHMENT]; John P. Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409 (1974).

11. JOHN P. DAWSON & GEORGE E. PALMER, CASES ON RESTITUTION (2d ed. 1969). The other leading casebook on restitution, JOHN W. WADE, RESTITUTION: CASES AND MATERIALS (2d. ed. 1966), is also out of print.

another is subject to liability in restitution."<sup>12</sup> The theme of justice shows itself in this formulation because the dyad "unjust enrichment" seems to name a state of affairs—injustice—that judges applying the law of restitution are supposed to pay attention to and care about.

In America, at least, the law of restitution did not begin to be recognized as a separate discipline, displaying its own internal patterns of thought crossing the formal doctrinal boundaries of tort and contract, until the end of the nineteenth century, with the publication of *A Treatise on the Law of Quasi-Contracts* by Dean William Keener of the Columbia Law School.<sup>13</sup> But, of course, the grand principle that no one should be enriched at another's expense is of ancient origin. Aristotle spoke of it,<sup>14</sup> as did the second-century Roman jurist, Pomponius, who famously remarked that "this by nature is equitable, that no one be made richer through another's loss."<sup>15</sup> The principle is said to rest on the aggravation to our sense of injustice that is felt whenever someone's loss is accompanied by someone else's corresponding unwarranted gain.<sup>16</sup> According to Professor Dawson,

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12. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 (2011). The corresponding language in Section 1 of the First Restatement reads, "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." The Second Restatement's version of this topic's organizing principle was rather less elegant: "A person who receives a benefit by reason of an infringement of another person's interest, or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment." SECOND RESTATEMENT § 1 (Tentative Draft No. 1, 1983).

13. WILLIAM KEENER, *A TREATISE ON THE LAW OF QUASI-CONTRACTS* (1893). Professor Dawson claimed that Keener's treatise represents the first recognition in print of the many "interconnections" linking the various topics of restitution. DAWSON, UNJUST ENRICHMENT, *supra* note 10, at 21. The *Introduction* to the Second Restatement, on the other hand, asserts that "[t]he common elements of claims now called restitutionary were not widely perceived until well into [the twentieth] century." *Introduction* to RESTATEMENT (SECOND) OF RESTITUTION (Tentative Draft No. 1, 1983).

14. Aristotle, *Nicomachean Ethics*, 1131b32—1132a14, in 2 JONATHAN BARNES, ED., *THE COMPLETE WORKS OF ARISTOTLE* 1786 (1984).

[T]he law looks only at the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged . . . the suffering and the action have been unequally distributed; but the judge tries to equalize things by means of the penalty, taking away from the gain of the assailant.

*Id.*

15. DIG. 50.17.206 (Ulpian, Ad Edictum 18).

16. Professor Dawson, for example, wrote that the principle against unjust enrichment is almost instinctual, an "aspiration [that] lies deep in human nature." DAWSON, UNJUST ENRICHMENT, *supra* note 10, at 5. Others have articulated this human aspiration in quantitative terms, claiming that the combination of the plaintiff's loss and the defendant's gain makes the plaintiff's claim in restitution "twice" as impressive to our sense of justice. Lon Fuller & William Purdue, *The Reliance Interest in Contract Damages*, 40 YALE L.J. 52,

it responds to "one of the basic questions of distributive justice,"<sup>17</sup> and in its purest form it may even lie at the heart of Marx's theory of exploitation.<sup>18</sup>

Any doctrine that is as broadly and vaguely worded as this one promises to be extremely hard to translate into a system of legal rules, which is why Professor Dawson called the prohibition against unjust enrichment a "working hypothesis" rather than a definitive legal rule.<sup>19</sup> The First Restatement, in its initial "General Scope Note," took the same point of view.<sup>20</sup>

Notwithstanding the admittedly Delphic quality of the term "unjust enrichment," however, I like to remind my restitution students that it is quite rare in American law for the J-word ("justice") to show up explicitly in legal doctrine, even if only in the form of what the First Restatement calls a "general guide[] for the conduct of the courts."<sup>21</sup> I also encourage my students to seize the opportunity for serious independent thinking (as distinguished from mere learning) that is afforded by the circumstance that the J-word actually does show up in this particular subject. Whenever a judicial decision draws a line, and then proceeds to justify it by saying that on this side stands something like justice (i.e., the imperative to rectify unjust enrichment), I say that this gives law students a rare opportunity to think critically about the moral premises of the judgments that our courts make every day. Critical thinking about the normative premises of the legal system also can help keep alive in law students the belief that the idea of justice as such, however one defines it, can be a criterion—or at least a trigger—for the ethically important task of evaluating what lawyers and judges do to other people in the name of what is merely legal or legally valid.

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56 (1936).

17. DAWSON, UNJUST ENRICHMENT, *supra* note 10, at 5.

18. *Id.* at 40 (referring to Marx's theory that the wage bargain unjustly permits the capitalist to pay less for the use of workers' labor power than the value of the marginal product of their labor).

19. DAWSON, UNJUST ENRICHMENT, *supra* note 10, at 26.

20. *See* RESTATEMENT OF RESTITUTION pt. I, ch. 1, topic 1, intro. note (1937) ("In this Topic, these are stated in the form of principles. They cannot be stated as rules since either they are too indefinite to be of value in a specific case or, for historical or other reasons, they are not universally applied.").

21. *Id.*

## II. The Distinction Between Unjust and Unjustified Enrichment

Seen from the foregoing point of view, the R3RUE's commentary on the concept of "unjust enrichment" proves to be somewhat disappointing. To be sure, the commentary does gesture at the role of justice as a possible meta-criterion for the substantive law of unjust enrichment, but it appears to do so rather grudgingly. Moreover, what it gives with one hand, it takes away with the other. The key text is Section 1's Comment b, entitled "Unjust Enrichment." Immediately after stating that "[t]he substantive part of the law of restitution is concerned with identifying those forms of enrichment that the law treats as 'unjust' for purposes of imposing liability,"<sup>22</sup> the comment uses what can only be called a quasi-sociological tone in describing the views of those thinkers who believe there is a "special moral attractiveness" to the law of restitution:

A significant tradition within English and American law refers to unjust enrichment as if it were something identifiable *a priori*, by the exercise of a moral judgment anterior to legal rules. This equitable conception of the law of restitution is crystallized by Lord Mansfield's famous statement in *Moses v. Macferlan*, 2 Burr. 1005, 1012, 97 Eng. Rep. 676, 681 (K.B. 1760): "In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." Explaining restitution as the embodiment of natural justice and equity gives the subject an undoubted versatility, an adaptability to new situations, and (in the eyes of many observers) a special moral attractiveness. Restitution in this view is the aspect of our legal system that makes the most direct appeal to standards of equitable and conscientious behavior as a source of enforceable obligations.<sup>23</sup>

Having thus dutifully reported what "many observers" believe, the remainder of the comment pulls no punches in stating what the drafters of the new Restatement themselves *really* think the meaning of the word "unjust" should be. And it would not be unfair, I believe, to characterize the expression of what they really think on this question as manifesting a particularly severe, if not puritanical, form of legal positivism:

The concern of restitution is not, in fact, with unjust enrichment in any such broad sense, but with a narrower set of circumstances giving rise to what might more appropriately be called *unjustified enrichment*. Compared to the open-ended implications of the term "unjust enrichment," instances of unjustified enrichment are both predictable

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22. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. b (2011).

23. *Id.*

and objectively determined, because the justification in question is not moral but legal. Unjustified enrichment is enrichment that lacks an adequate legal basis; it results from a transaction that the law treats as ineffective to work a conclusive alteration in ownership rights. . . . Because of its greater explanatory power, the term *unjustified enrichment* might thus be preferred to *unjust enrichment*, were it not for the established usage imposed by the first Restatement of Restitution. But while the choice between the two expressions may indicate a preferred vantage point, it implies no difference in legal outcomes. As descriptions of the circumstances that give rise to legal liability, the terms *unjust enrichment* and *unjustified enrichment* are precisely coextensive, identifying the same transactions and the same legal relationships. This is because—notwithstanding the potential reach of the words, and Lord Mansfield's confident reference to "natural justice"—the circumstances in which American law has in fact identified an *unjust enrichment* resulting in legal liability have been those and only those in which there might also be said to be *unjustified enrichment*, meaning the transfer of a benefit without adequate legal ground.<sup>24</sup>

If this passage means to assert that in every instance in which American courts have awarded a remedy in restitution they have relied on a well-established antecedent legal basis for concluding that the defendant's enrichment was unjust, then I submit that it is an overstatement, to say the least. Consider *Bron v. Weintraub*,<sup>25</sup> for example, in which the Supreme Court of New Jersey used the principle (but not the "rule") of unjust enrichment to impose a constructive trust on title to real estate that the defendants had acquired in a lawful but highly inequitable manner.<sup>26</sup> Stating that "public policy is more than a mere summation of its past applications," the court quoted the following statement with approval:

Sometimes . . . public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people—in their clear consciousness and conviction of what is naturally and inherently just and right between man and man. . . . When a course of conduct is cruel

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24. *Id.*

25. *Bron v. Weintraub*, 199 A.2d 625, 625 (N.J. 1964).

26. *Id.* The defendants had purchased for a song the right to redeem title to real estate that had been sold decades before for non-payment of taxes, and then subsequently developed into residences that were resold to the innocent plaintiff-householders. The court stated explicitly that it did not rest its decision imposing a constructive trust on account of the defendants' unjust enrichment on the theory that they had acquired title fraudulently, or, for that matter, on any other theory of positive law outside the principle of unjust enrichment. *Id.* at 627.



or shocking to the average man's conception of justice, such course of conduct must be held to be obviously contrary to public policy, even though such policy has never been so written in the bond, whether it be Constitution, statute, or decree of court.<sup>27</sup>

Not only did the *Bron* court declare the independence of the principle of unjust enrichment from all traditional sources of positive law, it actually applied the principle to the case before it. Finding "no social value or contribution" in what the defendants did when, like any good capitalists, they used the resources of the law and the marketplace to enrich themselves at the expense of the plaintiffs, the court remarked: "On the contrary, decent men must sense only revulsion in this traffic in the misfortune of others."<sup>28</sup> It is impossible to find in the *Bron* decision any judicial awareness of a discretion-constraining antecedent "legal basis," as Comment b puts it, that would make the outcome "both predictable and objectively determined, because the justification in question is not moral but legal."<sup>29</sup> The very existence of decisions such as *Bron* underscores the danger to courts and scholars of falling into what Professor Dagan calls "the positivist trap of unjustified enrichment,"<sup>30</sup> where the desire to equate unjust enrichment with legally unjustified enrichment can result in an "unwarranted simplification of this complex and diversified body of law."<sup>31</sup>

Putting all questions of its descriptive accuracy aside, however, the way this comment describes the concept of unjust (as opposed to unjustified) enrichment reflects what appears to be an extremely narrow view of the judicial process. In criticizing the idea of a "purely equitable account of the subject," the comment states:

Saying that liability in restitution is imposed to avoid unjust enrichment effectively postpones the real work of definition, leaving to a separate inquiry the question whether a particular transaction is productive of unjust enrichment or not. In numerous cases natural justice and equity do not in fact provide an adequate guide to decision, and would not do so even if their essential requirements could be treated as self-evident. Unless a definition of restitution can provide a more informative generalization about the nature of transactions leading to liability, it is difficult to avoid the objection that sees in "unjust enrichment," at best, a

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27. *Id.* at 628 (quoting *Pittsburgh, C.C. & St. L. Ry. v. Kinney*, 115 N.E. 505, 506 (Ohio 1916)).

28. *Id.* at 630.

29. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. b (2011).

30. DAGAN, *supra* note 1, at 18.

31. *Id.* at 25.

name for a legal conclusion that remains to be explained; at worst, an open-ended and potentially unprincipled charter of liability.<sup>32</sup>

When this passage is read together with the balance of Comment b, its logical premise seems to be that the legal system is required to choose between two, and only two, possibilities. First possibility: The law can have clearly articulated antecedent rules that implement the specific policies of each area of restitution without the need for some overarching principle of maddening vagueness to "guide" the courts in the way the First Restatement said they should be guided. Second possibility: The law can allow individual judges to gather wool from some Cloud Cuckoo Land<sup>33</sup> of personal morality where "something identifiable *a priori*" outside of positive law lets them know what is just and unjust in any given case. What is more, it is quite clear from the tenor of Comment b that the drafters of the R3RUE wholeheartedly embrace the first possibility, and reject the second. They attempt to remove the fangs of the term "unjust enrichment" as a separate criterion of judgment by declaring that unjust enrichment and legally unjustified enrichment are "precisely coextensive," and "[i]n no instance does the fact or extent of liability in restitution depend on whether the source of that liability is conceived or described as unjust enrichment, as unjustified enrichment, or as a combination of the two."<sup>34</sup> In this last passage, the drafters do not just attempt to exorcise the ghost of natural law theory from the R3RUE—they also express a particularly acute form of legal nominalism: That is, they warn judges against relying too much (or at all) on the J-word in any of its forms.<sup>35</sup> They seem to be saying that it is not the words "unjust enrichment" or even the neologism "unjustified enrichment" that matter but, rather, whether the plaintiff's claim has "an adequate legal basis" that derives from some other, more particularized, section of the Restatement.

It is important to understand that the matter at stake in this struggle for the soul of unjust enrichment is not, or at least not only, the question of whether the law of restitution should be cast in the form of precise legal rules or loosey-goosey legal standards.<sup>36</sup> There are plenty of both kinds of

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32. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. b (2011).

33. See Aristophanes, *The Birds*, in 2 THE COMPLETE GREEK DRAMA 733 (Whitney Oates & Eugene O'Neill eds., 1938) (explaining that Νεφελοκοκκυγία, or "Cloud Cuckoo Land," is supposed to be a perfect city in the sky that the protagonists in Aristophanes' comedy hope to erect).

34. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. b (2011).

35. *Id.*

36. The best discussion of this important distinction in the form of legal norms is

legal norms in the new Restatement.<sup>37</sup> Nor is the heart of the matter to be found in Ronald Dworkin's analytic distinction between legal rules, which "set out legal consequences that follow automatically when the conditions provided are met," and legal principles, which do not predict consequences in advance but nonetheless possess a "dimension of weight or importance" in the legal system.<sup>38</sup>

I do not think that what is most at stake in the matter of the meaning of "unjust enrichment" is the same as the question of what antecedent form or content the law should give to the legal norms that judges apply in restitution cases. If we insist on thinking of the concept unjust enrichment as a vessel that must contain some sort of a priori content or institutional history before it is applied (whether in the form of a vague "standard" or a "principle"), then the dilemma that the drafters of the R3RUE have expressed in Comment b appears quite compelling. Adhering to the container view of legal norms makes it appear that we have to choose between radical nominalism and radical realism. That is, we can have either a sturdy but empty vessel that merely captures the real content of other, more precise legal rules and standards in the Restatement or a leaky vessel full of idiosyncratic notions of justice and injustice that derive their content from God-knows-where. If that is our only choice, then I believe that what Lon Fuller said about the Catholic tradition of natural law

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found in Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 88 HARV. L. REV. 1685 (1976).

37. Compare RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 56 (2011) (describing the standard-like norm for imposing an equitable lien), with *id.* § 59 (describing the relatively more mechanical and hence rule-like norm for tracing).

38. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 25–26 (1977). I daresay that Dworkin himself would probably not be happy with the R3RUE's decision to deprive the principle of unjust enrichment of any independent jurisprudential weight. Dworkin expresses the view that the saying "no man may profit from his own wrong" expresses an important legal "principle" even if it does not amount to a legal "rule":

We say that our law respects the principle that no man may profit from his own wrong, but we do not mean that the law never permits a man to profit from wrongs he commits. In fact, people often profit, perfectly legally, from their legal wrongs. The most notorious case is adverse possession—if I trespass on your land long enough, some day I will gain a right to cross your land whenever I please. . . . We do not treat these [sorts of cases] as showing that the principle about profiting from one's wrongs is not a principle of our legal system, or that it is incomplete and needs qualifying exceptions. . . . All that is meant, when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another.

*Id.*

thinking applies with equal force to the present situation—the quest for a "higher law" of divine or human justice to fill a positive legal vessel before it is applied is really just another form of positivism.<sup>39</sup> Pre-existing law posited by explicit micro-rules declared in advance or pre-existing law posited by judges' case-by-case interpretations of the general principle of unjust enrichment—either way of imagining how the legal system works—leads inevitably to what John Chipman Gray called "the absurdity of the view of Law preexistent to its declaration."<sup>40</sup>

Fortunately, this is not our only choice. Traditional theories of legal positivism and natural law tend to presuppose that a legal or moral concept has a "content" that remains identical with itself throughout at least some length of time.<sup>41</sup> That is, they presuppose that one can "lay down the law" for oneself at discrete moment  $t_1$  and then proceed to "follow" that law's selfsame content at  $t_2$  and at all subsequent times. But what if time were conceived of dialectically as a dynamic river, á la Heraclitus,<sup>42</sup> rather than as an eternally strung string of selfsame beads, á la Parmenides?<sup>43</sup> What if historical moments flowed and swirled into one another rather than remaining apart as hermetically sealed moments, separated from one another on an otherwise indifferent timeline? If we think of law dialectically, there is a sense in which it always "postpones the real work of definition,"<sup>44</sup> and despite the disapproving tone of these words in the R3RUE's commentary, it is probably a good thing that it does.

The concept of dialectics, though it has a complex philosophical history, will be used quite simply and non-technically in this Article. I do not intend to tell you about dialectics, but rather to adopt a dialectical point of view to uncover an interesting and productive ambiguity in the R3RUE's treatment of a legally significant category, called "intent to charge," as it appears in the substantive law of restitution dealing with unsolicited benefits conferred in an emergency. Adorno's definition of dialectics will suffice to get us on our way: "The name dialectics says no more . . . than

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39. Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 648–57 (1958).

40. JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 63 (David Campbell & Philip Thomas eds., 1997).

41. See Walter Benjamin, *Critique of Violence*, in REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS 277–300 (Peter Demetz ed., 1978) (providing an illustration of this concept).

42. HERACLITUS, FRAGMENTS 55 (T.M. Robinson tr., 1987).

43. PARMENIDES, FRAGMENTS 55–91 (David Gallop tr. 1984).

44. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. b (2011).

that objects do not go into their concepts without leaving a remainder [and] that they come to contradict the traditional norm of adequacy."<sup>45</sup> Even a robot can learn to copy analytic categories.<sup>46</sup> But only a human being is capable of noticing that a legal concept, just like every abstraction, "does not exhaust the thing conceived."<sup>47</sup>

"The determinable flow in every concept makes it necessary to cite others."<sup>48</sup> It will be the task of this Article to demonstrate that there is a "determinable flow" in the concept of "intent to charge" that makes it necessary to cite another concept—that of unjust enrichment itself—in order to resolve the infinitely varied legal problems that can arise whenever a case involving unsolicited benefits conferred in an emergency comes to litigation. While the precise legal topic is narrow, my intent in examining it could not be broader. My goal is to help resuscitate the idea that the word "unjust" in unjust enrichment has a use in this area of the law which transcends all possible statements about it that attempt to reduce it—as the R3RUE's commentary appears to do—to the status of a mere label for a conclusion reached on other legal grounds.

The great legal philosopher H.L.A. Hart once said: "Particular fact-situations do not await us already marked off from each other, and labelled [sic] as instances of the general rule, the application of which is in question; nor can the rule itself step forward to claim its own instances."<sup>49</sup> To believe otherwise is to commit the philosophical error of conflating an abstract concept with the concrete particulars to which it is or may be applied. Such an "identitarian" theory of law risks becoming pure ideology,<sup>50</sup> for every identifying judgment of the form "S is P" contains within it a non-identical element. That this is logically intelligible to us stems from the observation that "every single object subsumed under a class has definitions which are not contained in the definitions of the class."<sup>51</sup> And so, we shall see, do the objects subsumed by those identifying judgments that apply the law of restitution.

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45. THEODOR ADORNO, *NEGATIVE DIALECTICS* 5 (E.B. Ashton trans., 1973).

46. *Id.* at 29–30.

47. *Id.* at 5.

48. *Id.* at 53.

49. H.L.A. HART, *THE CONCEPT OF LAW* 123 (1961).

50. ADORNO, *supra* note 45, at 148.

51. *Id.* at 150.

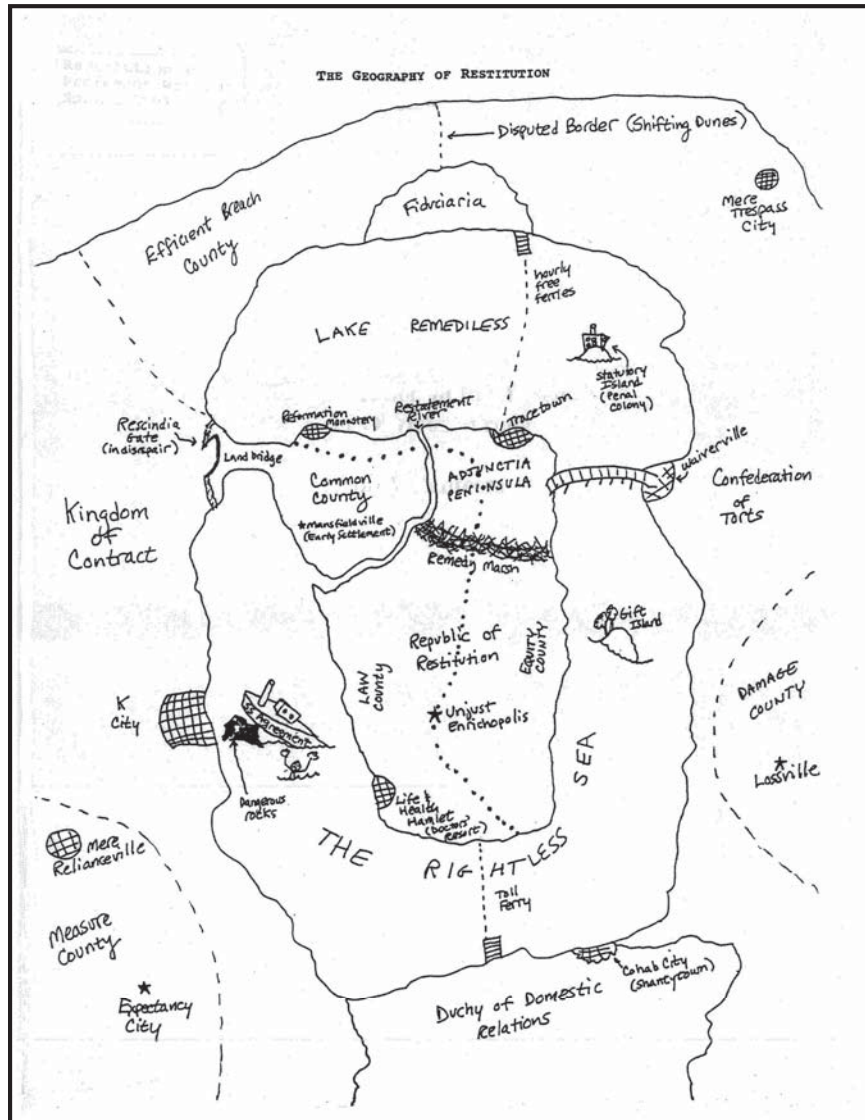
*III. The Location of Our Problem: Somewhere Between the Republic of Restitution and Gift Island*

"In an outline of the sources of civil liability," Professor Laycock wrote, "the principal headings would be tort, contract, and restitution."<sup>52</sup> For many years, I have made use of an extended geographical metaphor in my classes on restitution to illustrate my own version of Laycock's point. I call this metaphor "The Geography of Restitution," and have even reduced it to a crudely drawn map, as if the law of restitution lay at the very center of a Middle Earth<sup>53</sup> that is made up of several other sovereign heads of civil liability that are historically and conceptually related to the "Republic of Restitution" without being identical to it.

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52. Laycock, *supra* note 9, at 1277. Professor Epstein has employed the metaphor of a "fourth wheel" to describe the substantive law of restitution: "The common law coach runs not on three substantive wheels [property, contracts and torts] but on four." Richard A. Epstein, *The Ubiquity of the Benefit Principle*, 67 S. CAL. L. REV. 1369, 1371 (1994).

53. J.R.R. TOLKIEN, *THE HISTORIES OF MIDDLE EARTH*, vols. 1–5 (2003).



On the map, the Kingdom of Contract, the Confederation of Torts, and Fiduciaria are all connected, in one way or another, to the northernmost part of the Republic of Restitution (Adjunctia Peninsula and Common County). Here, the concept "unjust" in the phrase "unjust enrichment" derives its meaning from some other body of law (contract, tort, or fiduciary duty), and restitution merely supplies a set of optional alternative remedies to claimants who do not, strictly speaking, need the substantive law of unjust



enrichment to establish their claims.<sup>54</sup> South of Remedy Marsh, however, the lay of the land is quite different. Here, the legal remedies and equitable remedies furnished by the law of restitution in Law County and Equity County, respectively, are made available only to citizens of the city called Unjust Enrichopolis. That is, in Unjust Enrichopolis, restitutionary remedies are afforded only to claimants who can establish that the defendant's enrichment is unjust even though the defendant did not violate a duty imposed on him by any other legal norm or principle exogenous to the field of restitution.

As was previously mentioned, this Article concerns the meaning of "unjust" as that word is used in the southern part of the Republic of Restitution, after the "regime change," so to speak, that the shock and awe campaign of the R3RUE brought about. Reduced from the status of a "general guide for the conduct of the courts" in the First Restatement,<sup>55</sup> the concept of unjust enrichment in the R3RUE seems to have become a mere label for a conclusion reached on other, purely legal, grounds.<sup>56</sup> Described in terms of the map, I intend to examine and measure the distance separating the inhabitants of Unjust Enrichopolis, who are entitled to restitution, from those of Gift Island (located in the middle of the Rightless Sea), who are not.

The ultimate purpose of this Article is to raise awareness about the meaning of the concept of unjust enrichment by focusing on a narrow but well-defined class of cases in the substantive law of restitution. Think of this as a jurisprudential case study, so to speak, of how the category intent to charge is handled in the context of what Chapter 3, topic 1 of the R3RUE calls "Emergency Intervention." Three specific provisions are involved: Section 20 ("Protection Of Another's Life Or Health"), Section 21 ("Protection Of Another's Property"), and Section 22 ("Performance Of

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54. *But cf.* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 39 (2011) (applying substantive (and not just remedial) principles of unjust enrichment to the category "Profit Derived from Opportunistic Breach (of Contract)"). The drafters were careful to say that this section is a "limited exception" to the general rule, announced in Section 2(2), that "[a] valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment." *Id.* § 2 cmt. c.

55. FIRST RESTATEMENT introductory note, at 11.

56. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. b (2011).

Enrichment is unjust, in legal contemplation, to the extent it is without adequate legal basis. . . . In no instance does the fact or extent of liability in restitution depend on whether the source of that liability is conceived or described as unjust enrichment, as unjustified enrichment, or as a combination of the two.

*Id.*



Another's Duty").<sup>57</sup> In the situations covered by these rules, the claimant has intentionally conferred an unquestionably valuable benefit on another in the absence of any actual or supposed contract or request, and often without the latter's knowledge. Courts granting restitution in such cases do so as an exception to the usual rule, which is itself rooted in a "long-standing judicial reluctance to encourage one person to intervene in the affairs of another by awarding restitution of benefits thereby conferred."<sup>58</sup> In such cases, courts often use the terms "volunteer" and "intermeddler" (and sometimes even "officious intermeddler") to express their conclusion that there is no recognized basis for treating the defendant's enrichment as unjust.<sup>59</sup>

There is only so much new ground that can be tilled by any committee that undertakes to restate a legal field as vast as restitution, and on this particular sub-topic, the R3RUE comes out pretty much the same way the First Restatement did. Thus, the commentary to Section 2 of the new Restatement says that it is "usually unacceptable" to confer a benefit and then seek payment for its value in lieu of "proposing a bargain" to the recipient.<sup>60</sup> This reluctance to reward benefit-conferring volunteers can be traced to a strong policy bias in our legal system in favor of encouraging the formation of contract-based relationships: "Considerations of both justice and efficiency require that private transfers be made pursuant to contract whenever reasonably possible."<sup>61</sup> Judge Posner describes the main reasons for this policy preference in the following well-known passage, which the new Restatement's commentary quotes with approval:

One who voluntarily confers a benefit on another, which is to say in the absence of a contractual obligation to do so, ordinarily has no legal claim to be compensated. . . . If while you are sitting on your porch sipping Margaritas a trio of itinerant musicians serenades you with mandolin, lute, and hautboy, you have no obligation, in the absence of a contract, to pay them for their performance no matter how much you enjoyed it; and likewise if they were gardeners whom you had hired and on a break from their gardening they took up their musical instruments to serenade you. When voluntary transactions are feasible (in economic parlance, when transaction costs are low), it is better and cheaper to require the parties to make their own terms than for a court to try to fix them—better and cheaper that the musicians should negotiate a price

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57. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 20–22 (2011).

58. 2 GEORGE E. PALMER, THE LAW OF RESTITUTION § 10.1, at 359 (1978).

59. *Id.* § 10.1, at 359–60.

60. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 2 cmt. d (2011).

61. *Id.* § 2 cmt. c.

with you in advance than for them to go running to court for a judicial determination of the just price for their performance.<sup>62</sup>

Section 2 of the R3RUE, entitled "Limiting Principles," takes steps to codify this general judicial reluctance to make people pay for benefits they did not request. First, it accentuates the plaintiff's burden of proof in unjust enrichment cases by announcing, in Section 2(1), that "[t]he fact that a recipient has obtained a benefit without paying for it does not of itself establish that the recipient has been unjustly enriched."<sup>63</sup> Second, it establishes in Section 2(2) that if there is a valid contract defining the parties' obligations, then, at least as to matters within its scope, the contract will displace almost all judicial inquiry into the defaulting promisor's unjust enrichment.<sup>64</sup> Third, it states in Section 2(3) that "[t]here is no liability in restitution for an unrequested benefit voluntarily conferred, unless the circumstances of the transaction justify the claimant's intervention in the absence of contract."<sup>65</sup> And fourth, it declares in Section 2(4) that an "innocent recipient" may not be subjected to a "forced exchange," which it defines as "an obligation to pay for a benefit that the recipient should have been free to refuse."<sup>66</sup>

The most critical provision of Section 2 for present purposes is subpart three. Grammatically speaking, this text creates both a general rule and an exception: There is no right to restitution for unrequested benefits voluntarily conferred, unless. Unless what? The R3RUE recognizes, as indeed it must, given the plethora of cases on point, that while it is

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62. *Indiana Lumbermens Mut. Ins. Co. v. Reinsurance Results, Inc.*, 513 F.3d 652, 656–57 (7th Cir. 2008), quoted with approval in RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 2 reporter's note a (2011).

63. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 2(1) (2011).

64. *Id.* § 2(2). Comment c to this section, which is entitled "Restitution subordinate to contract," describes the law's pro-contract bias in situations controlled by Section 2(2) as follows:

Considerations of both justice and efficiency require that private transfers be made pursuant to contract whenever reasonably possible, and that the parties' own definition of their respective obligations—assuming the validity of their agreement by all pertinent tests—take precedence over the obligations that the law would impose in the absence of agreement. Restitution is accordingly subordinate to contract as an organizing principle of private relationships, and the terms of an enforceable agreement normally displace any claim of unjust enrichment within their reach . . . subject to a limited exception in cases of profitable and opportunistic breach of contract.

*Id.*

65. *Id.* § 2(3).

66. *Id.* § 2(4).

"usually" unacceptable for a restitution claimant to confer a benefit and then seek payment for its value without having first proposed a bargain, there are exceptions:

There are cases in which a claimant may indeed recover compensation for unrequested benefits intentionally conferred—because the claimant's intervention was justified under the circumstances, and because a liability in restitution will not prejudice the recipient. Chapter 3 of this Restatement constitutes a catalogue of instances in which such recovery may be permitted.<sup>67</sup>

I do not intend to dwell in this Article on the doctrinal line dividing the usual case, in which restitution is denied, from the special cases described in Sections 20 through 22, where there is a presumption that restitution will be granted. Instead, I mean to focus almost exclusively on the R3RUE's treatment of a particular subset of the cases governed by Sections 20 through 22. In this subset of cases, the claimant's ability to recover in restitution is said to depend solely on the question of his intent—whether he had an intent to charge for his services at the time that he rendered them. In short, I am concerned here with the cases covered by the "unless" clause of Section 2(3). If, as that clause states, "the circumstances of the transaction justify the claimant's intervention in the absence of contract,"<sup>68</sup> then it must also be stated that the new Restatement gives the claimant both good news and bad news. The good news is that you might recover in restitution for the unsolicited benefit you have justifiably conferred on the defendant. The bad news is that you will forfeit the right to recover if you acted without having something called an intent to charge at the very time you acted. Logically speaking, if the general rule is "No recovery for benefits voluntarily conferred in the absence of contract," and the exceptions are listed in Sections 20–22, then I will be concerned in this Article with an exception to the exception—reversion to the general rule of non-recovery where intent to charge is absent in cases that otherwise fall within the exceptions.

#### *IV. The Criteria for Having an "Intent to Charge"*

The word "intent" comes from the Latin *intentus*, the past participle of *intendere*, which originally signified the act of "stretching out" (*tendere*)

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67. *Id.* § 2 cmt. d.

68. *Id.* § 2(3).

towards something.<sup>69</sup> Towards what kind of thing does the concept of intent to charge stretch? Much like its common-law cousin contract, the law of restitution has always distinguished between intention and the manifestation of intention.<sup>70</sup> Legally speaking, an "intention" is classified as subjective: The word is supposed to refer to an actor's state of mind. Intention in this sense is equivalent to what the R3RUE calls "actual intent,"<sup>71</sup> and what the Restatement (Second) of Contracts calls "real intention."<sup>72</sup> A "manifestation of intention," on the other hand, is said to be objective: The term refers to what the actor factually says and does within a given social context, and has nothing to do with what may or may not be going on inside his mind.<sup>73</sup>

While the so-called objective theory of contract tends to accord primary juridical significance to the category of manifestation of intent in constructing a person's contractual rights and duties,<sup>74</sup> the subjective category of "intention" plays a much greater role in the sphere of restitution law. For example, the First Restatement, in the course of discussing the restitutionary implications of transfers made in anticipation of gratuity or contract, states that a person's manifestation of intent controls if what is manifested is intent to create a contract or intent to confer a gift, but that "[w]here a manifestation is ambiguous, the intent of the person conferring the benefit to receive or not receive compensation controls."<sup>75</sup> Thus, you can lose a restitution case against someone on whom you conferred a benefit that the other has requested when your manifestation of intention is "ambiguous" and your actual intention was not to seek compensation.<sup>76</sup> Alternatively, you can "manifest" a gratuitous intent in making a transfer of

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69. "in-tent." *Online Etymology Dictionary*, DICTIONARY.COM. <http://dictionary.reference.com/browse/in-tent>.

70. *See, e.g.*, FIRST RESTATEMENT § 26 cmt. e & § 57 cmt. d.

71. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 11 cmt. b (2011).

72. RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981).

73. *See id.* § 2 cmt. b ("The phrase 'manifestation of intention' adopts an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention.").

74. *See, e.g.*, *Lucy v. Zehmer*, 84 S.E.2d 516, 522 (Va. 1954) (concluding promise subjectively meant as a jest or bluff is nonetheless legally enforceable because the promisor's manifestation of intent was to enter into a contract and the promisee was unaware of the jest).

75. FIRST RESTATEMENT § 57 cmt. d.

76. *Id.* § 57 cmt. d, illus. 8; *cf.* *Bloomgarden v. Coyer*, 479 F.2d 201, 212 (D.C. Cir. 1973) ("[I]n situations involving personal services, it has been variously stated that a duty to pay will not be recognized where it is clear that the benefit was conferred gratuitously or officiously.").

money to someone, yet still recover in restitution if your unmanifested actual intention was not gratuitous.<sup>77</sup> Likewise, in *Marvin v. Marvin*, the California Supreme Court held that someone involved in a relationship of unmarried cohabitation might recover in restitution for the reasonable value of household services rendered to his partner, less the reasonable value of support received, "if he can show that he rendered services with the expectation of monetary reward."<sup>78</sup>

The R3RUE carries forward the First Restatement's distinction between actual intent and manifested intent in a variety of different contexts. Thus, for example, Comment b to Section 11, which deals with the effect of mistakes in *inter vivos* gift transactions, states: "Where conclusive evidence of the transferor's *actual intent* is lacking, it will be difficult to prove that a gratuitous transfer was in fact the result of a mistake."<sup>79</sup> Similarly, an illustration to Section 28, which involves benefits conferred in the context of unmarried cohabitation between the parties, makes the result depend, at least in part, on the court's finding that the services in question were "presumptively gratuitous."<sup>80</sup> More to the point, however, Comment c to Section 21 (entitled "Gratuitous Services") unequivocally states: "There is no claim in restitution for services, however valuable, that the provider has rendered *without intent to charge*."<sup>81</sup>

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77. FIRST RESTATEMENT § 26 (3) ("A person who has transferred money to another without intention to make a gift thereof may be entitled to restitution although at the time of the transfer he manifested that the money was transferred as a gift."); *see also* Conkling's Estate v. Champlin, 141 P.2d 569, 571 (Okla. 1943) (concluding manifestation of intent to make a gift does not control where other evidence shows "that in finality no gift was intended").

78. *Marvin v. Marvin*, 557 P.2d 106, 106 (Cal. 1976). The R3RUE appears to accept the *Marvin* court's conclusion in cases involving services rendered by unmarried cohabitants to their partners (§ 28 cmt. c), although it notes that "claims based purely on *domestic* services are less likely to succeed" than claims based on "direct contributions" to the defendant's assets, such as "money, property, services or a combination thereof" (§ 28 cmt. d). *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 reporter's note a (2011) (explaining that the *Marvin* court's decision to reject status-based entitlements in cohabitation cases in favor of well-founded property claims based on contract or unjust enrichment "is the current law of most U.S. jurisdictions").

79. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 11 cmt. b (2011) (emphasis added).

80. *Id.* § 28 illus. 2 (2011). *Compare* Kellum v. Browning's Adm'r, 231 S.W. 459, 463 (Ky. 1929) (illustrating the rebuttable "presumption of gratuity" where services are rendered by someone who stands in a kinship or family relationship to the recipient), *with* Sieger v. Sieger, 202 N.W. 742, 744 (Minn. 1925) (illustrating the rebuttable presumption that husband's transfer of purchase money to wife "was intended as a gift, settlement, or advancement to the wife, and not as a resulting trust to the husband").

81. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 21 cmt. c (2011)

When considered as legal rather than psychological categories, intent to charge and gratuitous intent are what Hohfeld would have called "jural opposites."<sup>82</sup> To act with intent to charge is *eo ipso* to act without gratuitous intent, and vice versa. The special case of performing another's duty to supply necessities to a third person while having what the R3RUE calls a "conditional donative intent,"<sup>83</sup> though it is factually more complicated than the case of supplying benefits directly to the defendant, is no different. The R3RUE treats a claimant who intends that the immediate recipient of a benefit not be charged, while at the same time intending that the one who owes the recipient a legal duty be charged, as harboring two separate pairs of juridically opposite intents: (1) a gratuitous intent (and therefore no intent to charge) vis-à-vis the recipient, and (2) an intent to charge (and therefore no gratuitous intent) vis-à-vis the defendant.<sup>84</sup>

In these and other situations, the R3RUE seems to distinguish a person's intent from his manifestation of intent on the model of what Wittgenstein called the "inner and outer" (*Inneres und Äusseres*).<sup>85</sup> The law treats the "outer," or objective, world of manifested intent as a public text, so to speak, that fact-finders are capable of reading and interpreting if they are given enough information about the relationship between the parties and the conventional standards of meaning that the parties and their community employ.<sup>86</sup> The "inner," or subjective, world of intention, although accessible in principle to the senses of no one but the actor, is treated as a private text that nonetheless could have public consequences if the trier of fact is given sufficient evidence of its existence.<sup>87</sup> Thus, for example, the R3RUE offers a pair of illustrations for its conclusion that, in property salvage cases, the presence or absence inside the plaintiff of a non-gratuitous subjective intent would make all the difference to recovery.<sup>88</sup> Although "[t]here is no claim in restitution for services, however valuable,

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(emphasis added).

82. WESLEY HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 12 (David Campbell & Philip Thomas eds., 2001).

83. *RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT* § 22 cmt. d (2011).

84. *Id.* § 22 illus. 9.

85. 2 LUDWIG WITTGENSTEIN, *REMARKS ON THE PHILOSOPHY OF PSYCHOLOGY* 63–63e (C.G. Luckhardt & M.A.E. Aue trans., 1980) [hereinafter *REMARKS*].

86. *Id.*

87. *Id.*

88. *RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT* § 21 cmt. c, illus. 7–8 (2011).

that the provider has rendered without intent to charge,"<sup>89</sup> it says, the result would be otherwise if the "trier of fact finds that [the plaintiff] did not act gratuitously in preserving [defendant's] property."<sup>90</sup> In stating that "[t]he relevant state of mind of the claimant is a question of fact,"<sup>91</sup> the commentary makes it clear that the distinction between inner and outer is alive and well in the law of restitution, even if it is not completely clear what kind of "fact" a state of mind is supposed to be.

Considered from a purely phenomenological perspective, it is no doubt the case that "[a] person who intervenes in an emergency will rarely consider, at the time of intervention, whether he should charge for his services or seek reimbursement for his expenses."<sup>92</sup> What, then, does the R3RUE mean when it says, "The relevant state of mind of the claimant is a question of fact"?<sup>93</sup> A brief foray into Wittgenstein's philosophy of psychology will help us understand what this question is attempting to ask.

According to Wittgenstein, it is nonsensical to speak of private states of mind such as "intent" (gratuitous or otherwise) as factual in the way that material objects are factual—that is, on the model of an object and its designation.<sup>94</sup> When I speak to you about my intent, I am not typically referring to something going on in my head, such as a brain process.<sup>95</sup> The sentence "I intend to eat the last cookie on the plate" is simply not the equivalent of the sentence "A cookie-related neuron just fired in such-and-such region of my left prefrontal cortex." Nor do people typically interpret another's statement of intent as a mere label for some sort of mental occurrence or feeling that they cannot observe because it is hidden somewhere deep inside the speaker. Although intentions may be accompanied by such mental occurrences or feelings, these are not the same as the intentions they accompany.<sup>96</sup> What is more, an intention, unlike a state of consciousness, does not display what Wittgenstein calls "genuine

89. *Id.* § 21 cmt. c (2011).

90. *Id.* § 21 illus. 8 (2011).

91. *Id.* § 21 cmt. c (2011).

92. ROBERT GOFF & GARETH JONES, *THE LAW OF RESTITUTION* 271 (1978).

93. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 21 cmt. c (2011).

94. WITTGENSTEIN, REMARKS, *supra* note 85, at 63.

95. See HANS-JOHANN GLOCK, *A WITTGENSTEIN DICTIONARY* 179 (1996) ("Mental or physical processes or states are neither necessary nor sufficient for believing, intending or meaning something.").

96. *Id.* at 180; LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 591, at 155e (G.E.M. Anscombe trans., 1953) [hereinafter *PHILOSOPHICAL INVESTIGATIONS*].



duration."<sup>97</sup> Thus, I can "have the intention of going away tomorrow" without having this thought constantly, or even intermittently, on my mind today.<sup>98</sup> Finally, we would do well to remember that an actor's description or avowal of his intention can have consequences in the world, legal and otherwise, that no mere unspoken mental occurrence could ever have.

In *Philosophical Investigations*, Wittgenstein demonstrates this last point by means of an iconic example—his famous "beetle in a box."<sup>99</sup> Although the immediate purpose of the example is to explode the idea that the meaning of the word "pain" depends on some purely private inner experience to which no one but the sufferer has access, the analysis is equally (if not eerily) relevant to the case of intent to charge:

Now someone tells me that he knows what pain is only from his own case!—Suppose everyone had a box with something in it: we call it a "beetle." No one can look into anyone else's box, and everyone says he knows what a beetle is only by looking at *his* beetle—Here it would be quite possible for everyone to have something different in his box. One might even imagine such a thing constantly changing.—But suppose the word "beetle" had a use in these people's language?—If so it would not be used as the name of a thing. The thing in the box has no place in the language-game at all; not even as a *something*: for the box might even be empty.—No, one can "divide through" by the thing in the box; it cancels out, whatever it is. That is to say: if we construe the grammar of the expression of sensation on the model of "object and designation" the object drops out of consideration as irrelevant.<sup>100</sup>

From a Wittgensteinian point of view, words that are used to describe mental states acquire all of their familiarity and meaning from their "outer" use in social life, according to publicly shared criteria, and not from some private "inner" experience.<sup>101</sup> This implies that a legally significant phrase like intent to charge does not "stand for a family of mental and other processes."<sup>102</sup> Instead, we learn what a person's subjective intent is in any given case by interpreting three publicly observable criteria: (1) what the person avows, (2) his explanation of what he intended, and (3) the context in which he acts.<sup>103</sup> Now, it would be quite wrong to conclude from all of

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97. LUDWIG WITTGENSTEIN, ZETTEL § 45, at 10e (G.E.M. Anscombe & G.H. von Wrights eds., G.E.M. Anscombe trans., 1970).

98. *Id.* § 46, at 10e.

99. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 96, § 293, at 100e.

100. WITTGENSTEIN, REMARKS, *supra* note 85, § 293, at 100e.

101. *Id.*

102. WITTGENSTEIN, ZETTEL, *supra* note 97, § 26, at 6e.

103. *See* GLOCK, *supra* note 95, at 180.



this that courts are playing a sort of crooked shell game with the word "intent," and that underneath the shells of judicial rhetoric about subjective or "actual" intention there is no pea. On the other hand, it would be equally wrong to conclude that there is or must be such a subjective intent pea hidden there, however invisible it may be to an outside observer. In short, the model of "object and designation,"<sup>104</sup> as Wittgenstein puts it, is simply unhelpful for understanding what texts like the R3RUE are actually doing when they use phrases such as intent to charge in a legally significant way.

Strictly speaking, the empirically existing world is not made up of "facts." It primordially consists of raw reality itself—of that which keeps on coming to the fore and then slipping away in that ever-refreshed present moment we call "now." In law, as in daily life, a proposition of fact is a human statement, made within the social context of a shared language, about a portion or aspect of reality that has been noticed, selected and organized according to some conscious or unconscious criterion. Thus, the R3RUE's confident assertion that intent to charge and "gratuitous intent" refer to facts that must be determined by the trier of fact<sup>105</sup> can only make sense if the evidence for these legally significant subjective states of affairs is public, or, if you will, "objective." Only publicly shared criteria for applying the words intent to charge and gratuitous intent can give those terms any legal significance in a real case. In short, the trier of fact, and more generally the legal system itself, can only determine what a restitution claimant subjectively intended in any given case by examining his words (Objective Fact No. 1) and the social context in which he acted to confer the benefit in question (Objective Fact No. 2).

Of course, all of this comes down to saying that these extra-mental objective evidentiary facts are criteria for the presence of someone's subjective intent but not symptoms of it. It makes perfectly good sense to talk about the symptoms of something if we have other criteria for identifying and describing it.<sup>106</sup> Pain, for example, can be a symptom of an injury or disease because an x-ray or some other diagnostic tool can uncover the pain's source. But in the case of intent to charge, the *only* means the law has of identifying and describing a person's subjective intent is to examine what he objectively said (then or now) and to look at the

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104. *Id.*

105. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 21 illus. 8 (2011); *see also* Cape Girardeau Bell Tel. v. Hamil, 140 S.W. 951, 954 (Mo. App. 1911) (noting the distinction between gratuitous intent and intent to charge is classified as a "question of fact").

106. *See* LUDWIG WITTGENSTEIN, THE BLUE AND BROWN BOOKS 24–25 (2d ed. 1960).

objective context in which he acted. If there are hidden mental occurrences to which the legal concept intent to charge somehow refers, then they would "cancel out" in the public use of the words intent to charge in exactly the same way that the contents of the box in Wittgenstein's example were cancelled out by the public use of the word "beetle."<sup>107</sup>

Which party bears the burden of proof on the issue of intent to charge is, of course, a different and much more complicated question. It is a fair generalization to say that the R3RUE combines both adherence and non-adherence to the case law, most of it rather old, on the question of restitution in many emergency benefit situations in which the claimant had an intention to charge. For example, after having displayed a small burst of independence from tradition in a comment to an earlier draft,<sup>108</sup> the final version of Section 20 obediently follows the cases in holding that a nonprofessional who acts to protect another's life or health in an emergency can never recover in restitution.<sup>109</sup> However, who should bear the burden of proof on the question of intent where it is relevant is not stated explicitly, although there is plenty of authority for the proposition that professional rescuers enjoy a rebuttable presumption that their services were rendered with intent to charge.<sup>110</sup>

In cases involving the performance of another's duty to supply necessities to a third person in the absence of the sort of emergency with which we are dealing here, the First Restatement seems to make the

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107. WITTGENSTEIN, REMARKS, *supra* note 85, at 63.

108. Comment b to Section 20 of Tentative Draft No. 2 asserted that "a claim in restitution based on an emergency rescue by a nonprofessional would be entirely consistent with the rule of this Section, in any case in which the court was satisfied (*inter alia*) that the claimant had not acted gratuitously and that the benefit conferred was capable of valuation." This language was deleted from the final, published version.

109. According to Kronman and Posner, the cases in the area appear to make "the presumption of no intent to charge irrebuttable, with the result that the nonprofessional rescuer is never entitled to a monetary award." ANTHONY KRONMAN & RICHARD POSNER, *THE ECONOMICS OF CONTRACT LAW* 60 n.4 (1979). The drafters of the new restatement acknowledge this point. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 20 cmt. b (2011) ("Emergency assistance rendered by nonprofessionals, however valuable, does not give rise to a claim in restitution under existing law.").

110. See FREDERIC WOODWARD, *THE LAW OF QUASI CONTRACTS* § 201, at 314–15 (1913) (noting services of physicians and nurses "are generally rendered with the expectation of compensation"); *cf.* *Greenspan v. Slate*, 97 A.2d 390, 390 (N.J. 1953) ("[A]s a physician in practice of his profession he naturally intended to charge for his services."). The new Restatement appears to accept this line of authority. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 20, cmt b, illus. 1–4 (2011) ("The present section authorizes a claim in respect of 'professional services,' whether the claim is asserted by the provider directly . . . or by a third party who pays for the services.").

presence of gratuitous intent an affirmative defense.<sup>111</sup> If necessities are supplied to a third person in an emergency, however, the First Restatement's blackletter explicitly makes the presence of intent to charge an element of the claimant's case in chief.<sup>112</sup> The position of the R3RUE on the burden of proof regarding intent to charge in cases of necessities supplied to third persons in either sort of situation is difficult to determine, since the blackletter of Section 22, unlike that of Section 114 of the First Restatement, does not mention intent to charge, relegating the issue to a comment. One might plausibly think that the allocation of burden of proof depends on how the category is described. If described in terms of the presence of "intent to charge," then the burden is on the plaintiff. If described in terms of the presence of "gratuitous intent," then the burden is on the defendant. Unfortunately, the commentary has it both ways: Referring to those who intervene "without the intention to seek compensation or reimbursement," it states that "[p]ayment or other performance rendered with the intention of making a gift will not support a claim under this section."<sup>113</sup>

The R3RUE's position on the burden of proving intent to charge in cases of emergency property salvage is also unclear, though here the drafters reject the most conservative interpretation of the leading cases,<sup>114</sup> according to which the common law (unlike the law of salvage in admiralty)<sup>115</sup> raises an irrebuttable presumption against recovery for services rendered in an emergency to save the defendant's property from imminent destruction.<sup>116</sup> In Illustration 8 to Section 21, the R3RUE

111. FIRST RESTATEMENT § 113 cmt. e ("[I]n the absence of circumstances indicating an intent to make a gift, it is inferred that a person supplying goods or rendering services intends to charge therefor.").

112. *Id.* § 114(a).

113. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 22 cmt. d (2011).

114. *See, e.g.*, Glenn v. Savage, 13 P. 442, 448 (Or. 1887) ("The law will never permit a friendly act, or such as was intended to be an act of kindness or benevolence, to be afterwards converted into a pecuniary demand."); Bartholomew v. Jackson, 20 Johns. 28 (N.Y. Sup. Ct. 1822) ("If a man humanely bestows his labor, and even risks his life, in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the service rendered as *gratuitous*, and it, therefore, forms no ground of action.").

115. *See* GRANT GILMORE & CHARLES BLACK, THE LAW OF ADMIRALTY § 8-1-14, at 532-78 (2d ed. 1975) (explaining what constitutes salvage, who may become salvors, and how the courts compute and distribute the salvage award).

116. WOODWARD, *supra* note 110, § 207, at 326 ("The doctrine of salvage is peculiar to admiralty law, the common law raises an irrebuttable presumption . . . that services rendered in an emergency in the preservation of property, like emergency services [by nonprofessionals] in the preservation of life, are gratuitous . . ."). Professor Palmer rejects

describes a case in which a claimant, *B*, who saves *A*'s property from an approaching flood, is said to have a claim for restitution against *A*, but only "[i]f the trier of fact finds that [*B*] did not act gratuitously in preserving [*A*'s] property."<sup>117</sup> The Reporter's Note states that "Illustration 9 accepts the judgment of the trial court that was rejected on appeal in *Bartholomew v. Jackson*,"<sup>118</sup> though contrary to the First Restatement, it does not say or suggest who bears the burden of proof on the question of gratuitous intent.<sup>119</sup>

At the end of the day, however, the question of which party should bear the burden of proof on the issue of intent to charge is a matter of law and policy that can be safely ignored in the context of the present study.<sup>120</sup> However interesting or important it may be, answering this question is simply immaterial to my goal, which is to investigate the jurisprudential significance of the sheer existence of the legal category intent to charge in the substantive law of restitution. What is most significant for present purposes is that the R3RUE advances the view that there can and should be recovery in restitution in cases of this sort if either intent to charge or no

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Woodward's view that the presumption of gratuity in these cases should be irrebuttable, stating that "[t]he issue is properly one of fact, to be proved in the usual way." PALMER, *supra* note 58, § 10.3, at 370. Keener, too, criticizes the idea that emergency property salvors could never recover for their services, even "if it can be shown that [they] intended to receive compensation for the services rendered." KEENER, *supra* note 13, at 356 (conceding that in such cases "the right of recovery is denied by the weight of authority").

117. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 21 illus. 7 (2011).

118. *Id.* § 21 reporter's note c.

119. Section 117 of the First Restatement provides that a property salvor is entitled to restitution if five specific conditions are satisfied, including the condition stated in Section 117(d) that the person seeking restitution "intended to charge for such services or to retain the things as his own if the identity of the owner were not discovered or if the owner should disclaim." FIRST RESTATEMENT § 117(d). This arrangement implies that the person seeking restitution bears the burden of proof on the issue, since it is listed as a condition of his ability to recover. The blackletter of Section 21 of the R3RUE lists only two conditions, neither of which mentions with the issue of intent to charge. Instead, the drafters deal with the issue of intent in Comment c and illustrations 7 and 8. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 21 illus. 7–8 (2011).

120. On the law-and-policy implications of burden of proof, Goff and Jones cite Roman law for what they call the "appealing" proposition that "the onus should be on the defendant to demonstrate that the stranger intended to render his services gratuitously" in property rescue cases, because most people are too busy to think explicitly about their motivations in emergencies; therefore, they say, to place the burden on the claimant would be "unnecessarily severe," given that substantial social benefits accrue from encouraging people to save valuable property that would otherwise be destroyed. GOFF & JONES, *supra* note 92, at 271.

gratuitous intent can be demonstrated as a matter of fact. Regardless of who must do the demonstrating, the new Restatement's legal premise that intent to charge is some kind of fact in the first place is all that matters here.

*V. A Thought Experiment to Test the Third Restatement's Preference for the Concept of Unjustified Enrichment*

The time is now ripe to propose a modest thought experiment. According to the well-settled law of restitution, "[a] person manifests that he does *not* expect compensation for a benefit which he confers upon another if a reasonable person would so believe from what the transferor says or does."<sup>121</sup> Now let this context-specific manifestation of an intent that is gratuitous be absolutely reversed: Let the claimant objectively manifest an intention to charge for everything he does that benefits someone else. In particular, imagine that some (or many) people were to execute the following document and then take aggressive steps to disseminate it, as widely as possible, by such means as giving copies to all their friends and acquaintances, publishing it in the legal notices section of the local newspaper, posting it prominently on their Facebook pages, reciting it out loud to their spouses or partners each and every morning at the breakfast table, and so forth:

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121. FIRST RESTATEMENT § 57 cmt. a (emphasis added).

*General Declaration of Intent to Charge for Benefits Conferred*

I make this declaration to enact my sincere and irreversible choice to opt out of all social and legal conventions in which the law of restitution and unjust enrichment creates a rebuttable presumption that my benefit-conferring actions have been performed with gratuitous intent solely by virtue of the objective context in which they are performed. I mean this declaration to apply to every non-contractual transfer of benefits by me to someone else that may occur now and in the future, with one and only one exception: Those cases in which my actions are accompanied by a subjective intent-in-fact to confer a gift that is provable by specific evidence that the thought "I intend this to be a gift" was literally present in my consciousness in the form of a mental image at the time of my actions. Therefore, with the exception of my contractual relations, whether express or implied-in-fact (wherein the terms of said contracts will control my rights and obligations) I hereby solemnly declare that I do now intend, and for the rest of my life always will intend, to charge and hold accountable for payment any and all persons who receive benefits from me (in whatever form) as a result of my actions or inactions, no matter how "altruistic" or "gratuitous" they may seem to be to the recipient or to an outside observer. I intend the amount of the charges to be determined by the rules and principles which govern the measurement of benefits under the law of restitution.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on \_\_\_\_\_, at \_\_\_\_\_

\_\_\_\_\_  
Declarant

\_\_\_\_\_  
Witness

[Unsworn declaration under penalty of perjury pursuant to 28 U.S.C. § 1746]

I realize that waving a declaration like this around town is probably not the best way to "win friends and influence people," as Dale Carnegie famously put it.<sup>122</sup> I can even imagine palimony-averse individuals like Lee Marvin beginning to cringe at the prospect of their live-in partners trying to put them on notice that the free ride is over when it comes to the way the law treats the economic value of household services.<sup>123</sup> But, in truth, the

122. DALE CARNEGIE, HOW TO WIN FRIENDS AND INFLUENCE PEOPLE (1936).

123. See *Marvin v. Marvin*, 557 P.2d 106, 123 (Cal. 1976) (establishing the possibility of a restitution award for domestic services in cohabitation cases if the claimant "can show that he rendered services with the expectation of monetary reward"). The *Marvin* court also said that the value of the plaintiff's services in the event he could prove he expected a

real point of my thought experiment is not to assess its practical wisdom, or even to evaluate its feasibility as a legal strategy for greedy rescuers or needy cohabitants. I am also not interested in addressing the normative question of what a court should do with one of these declarations if ever it were offered into evidence in a real case.

The ultimate purpose of the thought experiment is jurisprudential and philosophical rather than narrowly "legal." At the most general level, the point I want to make with the *Declaration of Intent to Charge for Benefits Conferred* is actually quite simple: In order to remain real, legal concepts, like all concepts, must be ceaselessly replenished by the appearance of the concrete particulars that they aspire to govern. Only hitherto unassimilated particulars can give the concepts employed in the law of restitution their proper weight, and, more importantly, can prevent the legal system from depreciating the very idea of reality itself into a farce. It seems to me that this inherently dialectical relationship between the abstract and the particular lies at the core of Professor Palmer's insight that "[u]njust enrichment is an indefinable idea in the same way that justice is indefinable," and shows why "[t]his wide and imprecise idea has played a creative role in the development of an important branch of modern law."<sup>124</sup>

The *Declaration of Intent to Charge for Benefits Conferred* attempts to opt out of the usual default rule in restitution cases involving emergency benefits. A default rule is not an unbending legal command—it is what the law will assume to be the case in the absence of evidence to the contrary.<sup>125</sup> In the law of restitution involving benefits conferred in an emergency, the general default rule is clear: "[T]he courts are disposed to assume that the claimant's effort was inspired by altruism or benevolence."<sup>126</sup> It will come as no surprise to learn that the prevailing law-and-economics view of the subject attempts to justify this assumption on efficiency grounds. For example, in one oft-cited article, Landes and Posner have this to say about what they call the problem of "altruistic versus compensated rescue":

Since the enforcement of a legal claim for compensation is costly even if the claim is settled rather than litigated, we predict that a legal system concerned with maximizing efficiency would refuse to grant

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monetary award would be offset by "the reasonable value of support received" from the defendant. *Id.* at 122–23. When the case was retried, it was found that these two numbers offset one another, with the result that at the end of the process the plaintiff recovered exactly nothing. *See* *Marvin v. Marvin*, 176 Cal. Rptr. 555, 559 (Cal. Ct. App. 1981).

124. 1 GEORGE E. PALMER, *THE LAW OF RESTITUTION* § 1.1, at 5 (1978).

125. *See, e.g.*, E. ALLAN FARNSWORTH, *CONTRACTS* § 7.1 (4th ed. 2004).

126. SECOND RESTATEMENT § 3 cmt. c (Tentative Draft No. 1, 1983).



compensation in rescue situations where altruism provided a strong inducement to rescue attempts. . . . A legal rule entitling the rescuer to compensation in these situations would be inefficient because it would substitute a costly legal transaction for a costless altruistic exchange.<sup>127</sup>

Although Landes and Posner have undoubtedly provided lawyers and judges with a nuanced microeconomic study of the welfare effects of the substantive law of unjust enrichment in several different emergency benefit situations, it must also be said that their analysis rests on motivational premises that are sociologically static. That is, they unreflectively naturalize the social distribution of altruistic and self-interested motives in their models, in much the same way that Rousseau naturalized them in the eighteenth century.<sup>128</sup> These authors merely assume that altruism provides "a strong inducement to rescue" in certain types of situations, presumably because they believe that many or most people have, in fact, acted altruistically in such situations in the past. Courts, too, tend to naturalize the social distribution of altruism and self-interest, as the following passage from a well-known nineteenth-century decision, *Hertzog v. Hertzog*, will demonstrate:

Thus if a man is found to have done work for another, and there appears no known relation between them that accounts for such service, the law presumes a contract of hiring. But if a man's house takes fire, the law does not presume or imply a contract to pay his neighbors for their services in saving his property. The common principles of human conduct mark self-interest as the motive of action in the one case, and kindness in the other; and therefore, by common custom, compensation is mutually counted on in one case, and in the other not.<sup>129</sup>

The sort of analysis that is employed by Landes and Posner and in the *Hertzog* decision presupposes that what most people have tended to do heretofore in certain types of situations is what they will always continue to

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127. William Landes & Richard Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 95 (1978).

128. See *A Discourse on the Origin of Inequality*, in JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND THE DISCOURSES 31, at 46–47 (G.D.H. Cole tr., 1973).

Throwing aside . . . all those scientific books, which teach us only to see men such as they have made themselves, and contemplating the first and most simple operation of the human soul, I think I can perceive in it two principles prior to reason, one of them deeply interested in our own welfare and preservation, and the other exciting a natural repugnance at seeing any other sensible being, and particularly any of our own species, suffer pain or death.

*Id.*

129. *Hertzog v. Hertzog*, 29 Pa. 465, 465 (1857).



do. But history shows that social and individual arrangements can and do change, and that what an earlier age took to be "natural" a later age might recognize as "unnatural" (i.e., socially constructed). It is therefore unnecessary to decide whether Professor Palmer was right to call Landes and Posner's article "[a]n unpersuasive attempt . . . to provide an economic analysis of the problems" involved in emergency property and life rescues.<sup>130</sup> For my *Declaration of Intent to Charge for Benefits Conferred* seeks neither to change nor to justify any rule of the common law. Instead, it exploits the law's default rules by exhibiting the possible emergence of no less than a new type of human being.

In particular, the declaration foreshadows the appearance of someone who has chosen to gird his loins for uncompromising competitive struggle in the twenty-first century global marketplace, in a manner that coldly accepts Heidegger's depressing diagnosis that modern technology has transformed the entire world into a "standing reserve" (*Bestand*) full of human and natural resources whose only purpose and function is to be exploited.<sup>131</sup> The kind of person who would sign a declaration like this would be engaging in a particularly perverse form of what Foucault has called "the government of self."<sup>132</sup> Such a person would have chosen to transform herself into a *homo economicus* from top to bottom—a money-grubbing economic creature in virtually all of her interactions with others.

The idea of declaring under penalty of perjury that the prospect of a cash reward, not altruism or benevolence, will always be the mainspring of your actions unless you explicitly (and provably) choose to act altruistically in this or that particular situation is not merely a direct refutation of the courts' usual default rule in substantive restitution cases. My thought experiment also represents a radical but logical extension of Adam Smith's remark that "[n]obody but a beggar chuses [sic] to depend chiefly upon the benevolence of his fellow-citizens."<sup>133</sup> One might even say that it invites human beings to enter into what Ayn Rand famously called a "utopia of greed."<sup>134</sup> Since its very existence is made possible by the way the doctrinal categories of the R3RUE treat the concept of intent to charge, I

130. GEORGE PALMER, *THE LAW OF RESTITUTION* 923 (Cumulative Supp. No. 4, 2010).

131. MARTIN HEIDEGGER, *THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS* 17 (William Lovitt trans., 1977).

132. MICHEL FOUCAULT, *THE GOVERNMENT OF SELF AND OTHERS: LECTURES AT THE COLLÈGE DE FRANCE 1982–83* (Frédéric Gros ed. & Graham Burchell trans., 2010).

133. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 14 (Edwin Cannan ed., 1937).

134. AYN RAND, *ATLAS SHRUGGED* 752 (1999).

believe that it constitutes an excellent test of the drafters' expressed desire to equate, without leaving any remainder, the concepts of unjust enrichment and legally unjustified enrichment.<sup>135</sup>

From the point of view of basic legal theory, the formal relation between the categories "intention" and "manifestation of intention" in the law of restitution is the same as the relation between a question of fact and a mixed question of law and fact. The legal system determines a party's manifestation of intention by looking at what he said and did in a certain context (facts) from the point of view of what a "reasonable person" (a legal construct) would have taken the facts to signify.<sup>136</sup> As a mixed question of law and fact, the task of determining a party's manifestation of intention is therefore explicitly interpretive: It requires the decision maker to apply the legal norm of a "reasonable person" to the facts and then reach a normative conclusion that either grants or denies recovery. On the other hand, the R3RUE treats the category of a party's subjective intent to charge as raising a pure question of fact, uncontaminated by any need for legal interpretation.<sup>137</sup> Either the claimant intended to charge for the benefits he conferred on the defendant or he did not: No question of the normative reasonableness or justice of his intention seems to be involved.

As we have already seen, however, resolving the "factuality" of a person's state of mind on this issue depends exclusively on the very same kinds of objective evidence that are examined when a manifestation of intention is involved—evidence of what the claimant said and did in a given context. But, whereas in the case of a manifestation of intent the trier of fact is allowed and required to apply an explicitly normative concept (what a "reasonable person" would have understood the facts to mean), in the case of a subjective intention, the R3RUE provides for no normative component in the process of fact-finding. Indeed, Comment b to Section 1 appears to rule out a priori any assessment of the one normative criterion that would be of most assistance, I submit, in resolving the case presented by my thought experiment. I am referring, of course, to the justice of plaintiff's case—to the justice of a case that depends on a court accepting the

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135. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. b (2011).

136. *See, e.g.*, FIRST RESTATEMENT § 57 cmt. a ("A person manifests that he does not expect compensation for a benefit which he confers upon another if a reasonable person would so believe from what the transferor says or does.").

137. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 21 cmt. c (2011) ("There is no claim in restitution for services, however valuable, that the provider has rendered without intent to charge. The relevant state of mind of the claimant is a question of fact.").

normative premise that this declaration embodies so aggressively—one that goes against the grain of a century and a half of case law.

To summarize all of this in the form of a rhetorical question: How can the concept of legally unjustified enrichment eclipse any independent role for the concept of unjust enrichment if what is legally unjustified depends for its determination on a "fact" that cannot be determined without engaging in at least some sort of normative interpretation?

Professor Levmore has expressed the normative premise of the cases in this area as follows: "[O]ne may explain that the law's treatment of volunteers reflects a moral consensus, real or wishful, that extremely good and bad deeds are unlikely to be influenced by or simply should not be regulated by economic incentives."<sup>138</sup> The moral rhetoric displayed in the Oregon Supreme Court's decision in *Glenn v. Savage* illustrates Levmore's point rather nicely:

The law will never permit a friendly act, or such as was intended to be an act of kindness or benevolence, to be afterwards converted into a pecuniary demand. It would be doing violence to some of the kindest and best effusions of the heart, to suffer them afterwards to be perverted by sordid avarice. Whatever differences may arise afterwards among men, let those meritorious and generous acts remain lasting monuments of the good offices, intended in the days of good neighborhood and friendship; and let no after-circumstances ever tarnish or obliterate them from the recollection of the parties.<sup>139</sup>

Texts such as this exhibit a clear ideological commitment to the much-deconstructed and much-criticized distinction between private and public spheres, on which most of the common law of contract, tort and restitution is based.<sup>140</sup> What we can see in the R3RUE's treatment of intent to charge is a weakening of the line of demarcation between public and private that earlier case law established. By supporting recovery in emergency benefit situations in which there is an intention to charge, the R3RUE lifts the veil separating the private sphere, where it is said that subjective altruism normally rules in emergency situations, and the public sphere, where the rigorous objectivity of the commodity form and contract are said to be the prevailing norms for social organization. The *Declaration of Intent to Charge for Benefits Conferred* goes even further; it rips off the veil completely. In doing so, it gives us the opportunity to consider whether

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

139. *Glenn v. Savage*, 13 P. 442, 448 (Or. 1887).

140. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 253–57 (1987).

there is or should be any independent role for the principle of "unjust enrichment" in the law of restitution.

### VI. Conclusion

Legal concepts classify facts in the way socket wrenches turn nuts and bolts: Both instruments are premade to accommodate only certain types of other premade objects. Every practicing lawyer knows that what the law calls "the facts" are not just out there, in the world, waiting to be picked up like a nugget of gold on the ground. Facts are selected and crafted by human beings out of something that precedes them in reality, something messily particular that always leaves an unclassified remainder when pressed into the procrustean bed of a juridical statement that formally relates "the facts" to "the law."<sup>141</sup> The relationship between an abstract legal concept and the particular situation that confronts it on any given occasion is therefore fundamentally different than the relationship between the law and the facts of a case. The word "particular" gestures at something that has yet to be subdued in the form of any sort of statement—something that might very well surprise us and cause us to rethink the standard conceptions we have hitherto used to organize and express our experiences.<sup>142</sup> To ignore the continuing emergence of the particular in reality in favor of a single-minded quest to subsume premade facts into premade concepts is to engage in what Theodor Adorno called "peephole metaphysics."<sup>143</sup> A legal system afflicted by unwavering attachment to this sort of metaphysics is inherently sclerotic: It could never bring itself to respond sensitively to changes in the world around it.

Consider what Roberto Unger has to say, from the left, about the role of imagination in the study and practice of law:

Our interests and ideals remain nailed to the cross of our arrangements. We cannot realize our interests and ideals more fully, nor redefine them more deeply, until we have learned to remake and to reimagine our arrangements more freely. History will not give us this freedom. We must win it in the here and now of legal detail, economic constraint, and deadening preconception. We shall not win it if we continue to profess a science of society reducing the possible to the actual and a discourse

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141. Cf. E.A. FARNSWORTH & W. YOUNG, *CASES AND MATERIALS ON CONTRACTS* 871 n. b (3d ed. 1980) (discussing courts' "attempts to squeeze a quasi-contractual duty into the Procrustean bed of contract").

142. Cf. ADORNO, *supra* note 45, at 172.

143. *Id.* at 138.

about law anointing power with piety. It is true that we cannot be visionaries until we become realists. It is also true that to become realists we must make ourselves into visionaries.<sup>144</sup>

Now consider what Richard Epstein says, from the right, about human nature:

The key question is why rules governing private property (by which I include those dealing with property, contract, and tort) enjoy such great temporal durability in the common law. And the answer is that they depend upon assumptions that hold across a wide range of circumstances and cases. There are certain permanent features of the human condition that are not dependent on technology or on the peculiarities of time and circumstance. It is to these permanent features of the human condition that any sound legal system must respond. Two conditions come instantly to central stage. First, the scarcity of resources is a constant condition for all societies at all times, no matter how they are organized. . . . Second, the widespread, if not universal, presence of self-interest necessarily follows. *Any individual who practices a form of voluntary and unreciprocated altruism will have fewer resources at his command than one who follows the dictates of self-interest.*<sup>145</sup>

One might say that the thought experiment put forward in this Article represents a synthesis of the otherwise antithetical sociopolitical points of view expressed in these two passages. On the one hand, the *Declaration of Intent to Charge for Benefits Conferred* is clearly a radical attempt to "reimagine our arrangements more freely,"<sup>146</sup> as Unger puts it, although I have no doubt that Unger himself would be personally horrified by the direction taken by this particular form of reimagining. But on the other hand, the declaration also seems to be but a simple logical extension of Epstein's claim that "[a]ny individual who practices a form of voluntary and unreciprocated altruism will have fewer resources at his command than one who follows the dictates of self-interest," and that the immutably paired social conditions of economic scarcity and individual self-interest both inform and ought to inform how the law is written and applied.<sup>147</sup>

However, the foregoing synthesis has a purpose that transcends all debates about legal policy in the particular segment of restitution law to which it applies. Legal decisions are more than just official records of the

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144. ROBERTO UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 189–90 (1996).

145. Richard A. Epstein, *All Quiet on the Eastern Front*, 58 U. CHI. L. REV. 555, 559–60 (1991) (emphasis added).

146. UNGER, *supra* note 144, at 189.

147. See Epstein, *supra* note 145, at 559–60.

public resolution of private disputes according to well-settled legal rules and principles. They are also more than venues in which the government officials called "judges" work out the best possible interpretation of our past legal institutions and practices,<sup>148</sup> or discover and announce those legal rules that best promise to make society better off in the future.<sup>149</sup> That a legal decision can be portrayed and analyzed as if it were exclusively some of these things, or even all of them at once, almost goes without saying, as many generations of law students would be able to attest. But certainly that is not all there is to law or even a restatement of the law. Legal decisions are also cultural artifacts in the way that ancient tools or cave paintings are cultural artifacts. Whatever the specific purpose of their creator may have been, they also communicate something about the form of life (*Lebensform*), to borrow Wittgenstein's phrase, that produced them.<sup>150</sup>

If this Article has accomplished its primary purpose, then, it will have revealed something significant about the rather petrified sociolegal form of life that is imagined by the Restatement (Third) of Restitution & Unjust Enrichment.

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148. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* (1986).

149. See, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF THE LAW* (7th ed. 2007).

150. WITTGENSTEIN, *REMARKS*, *supra* note 85, § 19, at 8e ("[T]o imagine a language is to imagine a form of life.").

