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Andrew Kull

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## Three Restatements of Restitution

Andrew Kull\*

For the time being, the American Law Institute is well pleased with its Restatement Third, Restitution and Unjust Enrichment. Work on the project admittedly consumed fifteen years (from 1996 to 2011), but progress was generally steady and meetings harmonious. Its completion has been an occasion for official celebration, of which the present Symposium forms a festive part. With actual publication still some weeks away, it is possible to hope that R3RUE will regain some of the influence of the original Restatement of Restitution—the work whose publication by the ALI in 1937 created the modern subject. If we are indeed about to witness the long-overdue revival of U.S. restitution law that some optimists have predicted, the ALI's decision to stand by its creation—re-restating the law of restitution for a profession that was well on its way to forgetting it—will receive and deserve the credit.

Whether R3RUE will have any such influence remains to be seen. If the law of restitution in this country has been neglected so long that it is already past resuscitating, as some pessimists have warned, this story of another failed attempt to revive it will be of little interest to anyone not directly involved. But should R3RUE meet a favorable reception, it might one day be interesting to recall how close the project came to not happening. The success of the path-breaking 1937 Restatement had already been in some respects fortuitous. To move beyond it, the ALI first had to live down the tumultuous episode of its attempted Restatement Second, Restitution (begun in 1980, abandoned *in extremis* in 1985). Then in the early 1990s it had to resist the seductive proposal that it jettison the troublesome topic of Restitution and replace it with a newly conceived Restatement of Remedies. Doing so would have largely obliterated the American law of restitution as an independent source of liability based on unjust enrichment. But that is the course the ALI was ready to adopt, if it

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\* Austin B. Fletcher Professor of Law, Boston University; R. Ammi Cutter Reporter, Restatement Third, Restitution and Unjust Enrichment (American Law Institute). The present essay is a lightly edited version of informal remarks made on February 25, 2011 at the Washington and Lee Law Review Symposium: Restitution Rollout: Restatement (Third) of Restitution & Unjust Enrichment.

had only been able to persuade its chosen Reporter for Remedies to take on the job.

The contours of restitution have been shaped in important ways by the accidents of ALI administration. The Reporters of the 1937 Restatement of Restitution, Warren Seavey and Austin W. Scott of the Harvard Law School, were not the first to identify and describe a principle of liability for unjust enrichment, cutting across the division between law and equity. An even more important Harvard figure, James Barr Ames, had made this discovery fifty years earlier.<sup>1</sup> Ames inspired a number of successors, and his unjust enrichment principle could be traced through articles, treatises, and even a few legal opinions. But the Harvard idea, if well known to an elite, came as news to most of the legal profession in 1937. Its prompt and seemingly unhesitating acceptance was surely due in large part to the fact that it carried the imprimatur of the American Law Institute. Lawyers thus encountered the law of unjust enrichment for the first time, not as a matter of academic speculation (however enlightened), but as a full-fledged division of the freshly restated American law, sharing a library shelf and a uniform presentation with Contracts, Torts, Property, and Trusts. No one in those days was accusing the ALI of dangerous innovation; if they said restitution was a subject, lawyers were prepared to take their word for it.

By far the boldest feature of the 1937 Restatement was one that today might easily pass unnoticed. This was the administrative decision to combine the legal and equitable sides of restitution—the preexisting law of quasi-contracts and of constructive trusts—within a single Restatement project and a single volume. The fundamental unity of these topics had been the essence of Ames's original insight, and today it is the distinction rather than the combination that generally has to be explained; but their joint presentation in 1937 was a major step.

The organizational breakthrough that gave the world the modern law of restitution—the decision to restate law and equity together—had not been the ALI's original plan, and the wisdom of doing it this way was not immediately apparent. Initial outlines of the Restatement of Trusts (for which Austin W. Scott served as Reporter) called for a chapter on constructive trusts to be appended at or near the end of that work, the way constructive trusts had been handled in the nineteenth century treatises. Such was the intended disposition as late as 1930, the year in which the

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1. For the pre-Restatement phase of the story, see Andrew Kull, *James Barr Ames and the Early Modern History of Unjust Enrichment*, 25 OXFORD J. LEGAL STUD. 297, 303–10 (2005).

ALI announced that it was also planning a separate Restatement of Quasi-Contracts.<sup>2</sup> Had the ALI adhered to its original scheme, restating this part of the law approximately as Ames had found it fifty years earlier, it is safe to say that restitution as we know it would not now exist—either in the United States or elsewhere in the common-law world.

But by 1931 the appropriate treatment of constructive trusts was evidently being reconsidered,<sup>3</sup> and at the ALI's annual meeting in 1932, Director William Draper Lewis advised members that "whether constructive trusts should be part of the volume on Trusts or be more closely related to quasi-contracts has yet to be finally determined."<sup>4</sup> In June 1933, the ALI Council finally "determined to begin work as soon as possible on the volume which would contain those two closely related subjects, Quasi-Contracts and Constructive Trusts which together cover 'Restitution and Unjust Enrichment.'"<sup>5</sup> It would be interesting to know who among the people involved had made the crucial suggestion, who had resisted, and how the decision was ultimately made—but these questions are sadly unanswerable.<sup>6</sup> Once the decision had been made, the new project advanced with nearly incredible speed, obtaining formal approval less than three years later—despite pointed objections that the members did not know what they were approving—at the ALI's annual meeting in May 1936.<sup>7</sup>

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2. See RESTATEMENT OF TRUSTS § 5 (Tentative Draft No. 1, 1930) (referring to a future "Tentative Draft of a Chapter on Constructive Trusts"). In his annual report of that year, Director William Draper Lewis listed quasi-contracts among "other subjects . . . which should be included in this 'first Restatement of our law.'" 8 A.L.I. PROC. 50–51 (1930).

3. See 9 A.L.I. PROC. 58 (1931) (suggesting that future chapters of the Restatement of Trusts would cover "resulting trusts and possibly constructive trusts").

4. 10 A.L.I. PROC. 41 (1932).

5. 11 A.L.I. PROC. 335 (1934).

6. Answers would once have been found in the ALI's typewritten "Minutes of Conferences," a stenographic record of the frequent meetings of Reporters and Advisers for each of the projects concerned. The catalogue of the Harvard Law Library formerly contained detailed bibliographical information for an extensive collection of these typewritten Minutes, which the Library had doubtless acquired among the papers of one or more of the members of the Harvard faculty who attended the meetings—a group that included Seavey, Scott, and Samuel Williston, among others. But a request for the material in 2004 led to the discovery that it could no longer be found. Circumstantial evidence, bolstered by unconfirmed rumor, suggests that the papers were moved to temporary storage during the renovation of the Library in 1997 and never seen again.

7. Most vocal was George B. Rose of Little Rock, Arkansas, who complained that he had in the two weeks preceding the meeting "received over 1000 pages of closely printed matter," that he had read as much of it as he could on the train to Washington, and that he doubted "whether there is anybody else in this hall who has done anything more." 13 A.L.I. PROC. 239–40 (1936). Rose later proposed:

Between approval by the membership and actual publication in 1937, the Reporters made significant changes—one of which was an ill-advised, last-minute decision to abridge the name from "Restatement of Restitution and Unjust Enrichment" to "Restatement of Restitution."

Judging by contemporary reviews and judicial citations, the new Restatement with its doctrinal innovations was promptly and unhesitatingly accepted. Seemingly at a stroke, the American Law Institute had created and made a place for a field of law that only a handful of academics had previously visualized. This was an unparalleled achievement but a precarious one. Only a generation later—just as restitution was finally taking hold in England, Canada, and elsewhere in the Commonwealth—the American parent version had entered an unmistakable decline. Writers who have noticed its rise and fall point to a familiar handful of explanations. There was a broad displacement of private law from the law school curriculum in the 1960s, as American law schools increasingly became what John Langbein has called "academies for the study of public law."<sup>8</sup> Restitution had been the most recent addition to the private-law curriculum, and it suffered from the phenomenon of "last hired, first fired" when the curriculum was modified to reflect the lawyer's role in the modern regulatory state. (Newly developed courses on Remedies made it easier to drop the separate course on Restitution, and easier to overlook the extent to which "Restitution"—so poorly named—is as much about liabilities and defenses as about remedies). And to the extent modern U.S. legal

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That every gentleman who has studied this question and arrived at a mature opinion upon it shall lift his hand, and that only those who lift their hands and certify that they have studied this question be allowed to vote. I do not believe in this hall there is one who will lift his hand under these circumstances, and to vote on a matter about which we know nothing is a crime against the science of jurisprudence.

*Id.* at 253–54. The assertion that the members were in no position to form a considered opinion of the final draft of "Restitution and Unjust Enrichment" went essentially unchallenged. Before the vote was taken, Director Lewis gave unusually explicit assurances that any remaining problems would be addressed by the Reporter and the Council before publication:

I do not want any of you to go away with the feeling that this particular volume on Restitution and Unjust Enrichment, as far as it relates to the highly difficult question of quasi contracts, is going to be published before we are absolutely certain, as far as human ingenuity can make it, that the substantive law is correct and that it is clear and uniform in style. The manuscript will be given the most careful examination. There is no undue hurry.

*Id.* at 330.

8. John Langbein, *The Later History of Restitution*, in *RESTITUTION: PAST, PRESENT AND FUTURE* 57, 61 (W.R. Cornish et al. eds., 1998).

scholarship is still focused on private law, it prefers topics more amenable to an "instrumental" or policy-based analysis; while the concern of restitution, as Ernest Weinrib once observed, is with "the private parts of the private law."<sup>9</sup> A problem in restitution may be just as hard to analyze as a problem of torts or corporations, but the pay-off (if you get it right) often extends no further than justice between A and B.

Larger historical forces probably doomed the Restatement of Restitution to neglect even if it had been more user-friendly, but the 1937 Restatement has some striking defects. Seavey and Scott had put the legal and equitable sides of the subject between the same covers, which was an enormously significant thing to do, but they made little effort to integrate the two sides. Seavey's Part I ("The Right to Restitution") and Scott's Part II ("Constructive Trusts and Analogous Equitable Remedies") could almost have been incorporated without modification from the separate presentations the ALI had originally envisaged. The composite Restatement presumes a reader for whom legal and equitable claims and remedies are still distinct and recognizable, even if put in a single volume for convenience. It therefore presumes a lot of technical legal knowledge that its readers were about to begin to forget. As Douglas Laycock has put it, the Restatement of Restitution was "laden with references to the pre-1937 roots of restitution, references that become less and less familiar to the bar with each passing year. The Federal Rules doomed the Restatement from its birth."<sup>10</sup>

By the 1960s and 1970s, when the ALI was still engaged in the extended process of revision that produced the "Restatement Second," the Restatement of Restitution looked older than its years. Almost before anyone could say that it was "due for replacement," people were hinting that it was overdue for replacement. The subject came up in 1970—after many years in which the topic of restitution had gone entirely unmentioned at ALI annual meetings—when Dean William Prosser was discussing his work on the Restatement (Second) of Trusts. Somebody asked Prosser what he planned to say about contribution between joint tortfeasors. Prosser replied that contribution is a problem in restitution. The Restatement of Restitution authorized very limited contribution between tortfeasors, while the original Restatement of Torts said nothing about it:

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9. Professor Weinrib produced this apothegm in my hearing in the course of a colloquium at the University of Toronto Faculty of Law ca. 1994.

10. Douglas Laycock, Preliminary Report on a Restatement 2d of Restitution: A Report to the Director of the American Law Institute 26 (Nov. 1987) (on file with the Washington and Lee Law Review).

Now . . . on the assumption that some kind of revision of the restitution sections is called for, the question is: Where is it to be done? . . . [S]hould we assume priority and provide a section for Torts to be followed by Restitution, remembering that Restitution is still a dream as far as the Second Restatement is concerned? No plans are yet made, as I understand it, as to when that Restatement will be started. It might be ten years. *It might conceivably be longer.*<sup>11</sup>

Restitution was next mentioned in 1976 by Director Herbert Wechsler, who told the annual meeting, "I hope to see us get under way with work on the Restatement of Restitution, which is a big book that was published in the late thirties, but that will have to take its place in line." Wechsler goes on to explain that the ALI had

approximately \$80,000 a year on which to run the whole restatement project. . . . The president and I have made efforts to supplement the endowment that supports that work, but thus far without success. Unfortunately, it does not involve sex or race or civil liberties, and does not seem to produce much salivation on the part of foundation executives at the present time.<sup>12</sup>

Further references to a hypothetical Restatement Second, Restitution were made in 1978 and 1979, when Allan Farnsworth was presenting the concluding pieces of Restatement Second, Contracts. On the first of these occasions, Professor Farnsworth was explaining an illustration in which a policyholder submits an insurance claim for "total disability"; the insurer—without investigation—sends payment for "partial disability"; whereupon the policyholder signs a receipt acknowledging "payment in full" and release of his claim. The point in the Contracts context was that payment of the lesser amount is not consideration for the release. This led to the following exchange:

MR. PAUL W. WILLIAMS (N.Y.): I would like to ask whether the debtor who paid the \$500 thinking he was satisfying the debt of \$1,000 can get his \$500 back—because many times it is done innocently.

PROFESSOR FARNSWORTH: That is a tough one and I always run into the Restatement of Restitution. There will be a Restatement of Restitution, Second, and it seems to me that is the appropriate occasion for that.

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11. 47 A.L.I. PROC. 383 (1970) (emphasis added).

12. 53 A.L.I. PROC. 48–49 (1976).

Certainly anything that I would say in that regard attendant to this Illustration might be regarded as gratuitous if the Reporter and Advisers were to embark on such a project in the future.<sup>13</sup>

A year later, Donald Rapson was grilling Farnsworth about a case in which "A makes an improper payment to B, and C knowingly gets the benefit of that improper payment. Does not A have a right to restitution from C? I thought you were saying earlier that that was the case."<sup>14</sup> Farnsworth replied that his Contracts draft addressed only a limited set of restitution cases:

We are not talking about the mistaken payment case. That is dealt with in the Restatement of Restitution but not here. . . . Most of the third-party problems don't come up. You have to work to bring them in. If there is a Restatement of Restitution, Second, that is the place to deal with them. *If there is not, it may be because of a feeling that these things are too hard to restate.*<sup>15</sup>

But the Institute was going to try. The next phase of the story is not a happy one.

In May 1980, Director Herbert Wechsler announced in his annual report that his colleague, Professor William F. Young of Columbia, had been at work since February of that year on a "reexamination and revision" of the Restatement of Restitution. Five years later, Geoffrey Hazard's first annual report as Director included this note on "Current Projects":

*RESTATEMENT, SECOND, OF RESTITUTION.* No submission on Restitution will be considered at this meeting. Our agenda, particularly the Corporate Governance and Foreign Relations Law projects, are already very heavy. In light of this constraint, it became useful to afford Professor William F. Young, the Reporter for Restitution, an extended period of concentration on analysis and drafting. We expect to have more from this project next year.<sup>16</sup>

There would be no more. Disregarding the time he must have spent preparing an initial response to Herbert Wechsler's solicitation, Professor Young had been working on Restatement Second, Restitution for five solid years. Those five years must have been as frustrating an experience as any ALI Reporter has ever had.

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13. 55 A.L.I. PROC. 182 (1978).  
14. 56 A.L.I. PROC. 403 (1979).  
15. *Id.* at 403-04 (emphasis added).  
16. 62 A.L.I. PROC. 565 (1985).

Anyone involved with R3RUE who did not already know Professor Young got to know him as a result of Director Lance Liebman's single most intelligent contribution to the project—namely, his idea to ask Bill Young if he would be interested to join the group as an adviser. All of us came to admire Bill's imaginative intelligence, his extensive knowledge of restitution and related fields, and his unfailing gentleness of expression and graciousness of spirit. (These last two qualities may have served him better in the role of adviser than in that of reporter). The careful written comments I received from Bill Young on each successive draft were among the most reliably helpful I received, and there are numerous points at which R3RUE has been improved as a direct result of his suggestions.

Despite the Reporter's tact, intelligence, and expertise, however, the attempt to produce a Restatement Second, Restitution went very badly. A few vignettes will give the flavor.

The project began under an ill omen. In the months following Wechsler's announcement, an all-star committee of advisers had been appointed: the initial lineup included such luminaries as John Dawson, Dan Dobbs, Allan Farnsworth, Ellen Peters, Michael Traynor, John Wade, Charles Allen Wright, and John Frank, a former Yale Law professor who at this point was practicing law in Phoenix.<sup>17</sup> Three days before the advisers met to discuss Preliminary Draft No. 1 in June 1981, Frank wrote to Young to express his regrets that he would be unable to join them in Philadelphia. Instead he was sending a memorandum, compiled with the help of half a dozen summer associates at Lewis & Roca whom Frank had assigned to review the draft. The Reporter's draft, by my calculation, had been sent out for review only two weeks earlier. Frank's letter with its attachments, uniformly critical, was fifty-three pages long.<sup>18</sup>

Preliminary Draft No. 1 became Council Draft No. 1, submitted to a meeting of the ALI Council in October 1981. The Council thought more work was needed. A revised version was presented to the committee of advisers in September 1982 and to the Council two months later. This document became Tentative Draft No. 1, presented for discussion and approval at the annual meeting the following May.

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17. Dawson shortly withdrew from the project, presumably because of ill health. Following the fateful 1984 annual meeting, with only a few months remaining before Restatement Second, Restitution would be abandoned, the committee of advisers was further reinforced with the addition of Stephen Breyer, Robert Keeton, and Douglas Laycock.

18. The letter and memorandum are reproduced among the materials relating to Restatement Second, Restitution in the American Law Institute Library of HeinOnline (on file with the Washington and Lee Law Review).

The proceedings of the 1983 annual meeting are painful to read. They have a nightmarish quality for anyone who has been an ALI reporter. The first afternoon bogged down in discussion of Section 6(2), scarcely a quarter of the way into a fairly short tentative draft. Here Professor Young had incautiously said there might be unjust enrichment of a party "whose conduct in negotiating for a gain or advantage . . . appears unconscionable in purpose or effect."<sup>19</sup> The looseness of this last expression brought forth a torrent of objections. If the meeting had been run by a surer hand, and one more solicitous of the Reporter—someone more like Lance Liebman—it should have been easy for the chair to announce that "the Reporter will consider it" and to move on from there, after 10 minutes' discussion at the most. Instead the wrangling over this one provision proceeded unchecked for what looks like an hour. The atmosphere was thoroughly poisoned, and the remainder of the session was dominated by motions to redraft and recommit.

When Restatement Second, Restitution came back to the Annual Meeting a year later, the project fared no better. Tentative Draft No. 2 began—unwisely I think—with a chapter on "constructive trust, equitable lien, subrogation, and marshaling of assets." Almost immediately, the Reporter was confronted with a prearranged motion—submitted by John Frank and Robert MacCrate, both of them Council members—directing him to replace the word "subrogation" throughout the new Restatement with the word "substitution." After a spirited debate this motion was easily defeated in a voice vote, but that would prove to have been the high point of the day. No more than halfway through, discussing a difficult section entitled "Apportionment of Gain from Proceeds and Products," Douglas Laycock was finding the draft "troubling" and moving to strike certain language; various members were moving to substitute their own editorial suggestions for the language of the Reporter; John Wade was urging that the entire Tentative Draft be sent back to committee. Motions from the floor led only to more motions, and the meeting concluded with the project in disarray.

A draft containing "recommitted sections" was submitted to Council in December 1984, and one last Preliminary Draft was prepared and circulated for a meeting of advisers at the end of January 1985. Sometime after this it was decided that the Reporter be afforded—as we have seen Geoff Hazard describe it—"an extended period of concentration on analysis and drafting."

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19. RESTATEMENT (SECOND) OF RESTITUTION § 6(2) (Tentative Draft No. 1, 1983) (emphasis added).

Restatement Second, Restitution would have been a difficult job in any event. With the benefit of hindsight, it seems to me that Professor Young made tactical errors that tipped the balance against the success of his project. He seems to have conceived the task before him as one of revising and improving the 1937 Restatement, starting not with the familiar parts of the subject but with its recognized difficulties. The assumption for R3RUE, by contrast, was that we had to start on an entirely clean slate—indeed, that we were writing for a legal profession that knew no more about restitutionary claims and remedies than do reasonably bright first-year law students. Instead of starting with what was easiest to understand and hardest to argue with—thereby building confidence among advisers, Council, and membership before tackling the more difficult parts of the subject—Bill Young confronted his second annual meeting with an ambitiously revisionist account of constructive trust, subrogation, and the tracing rules. By the time R3RUE approached any of these thorny topics, nine or ten years into our project, many of the members would have approved anything we said because they were no longer paying attention.

Three years after the decision to suspend work on Restatement Second, Restitution, ALI Director Geoffrey Hazard commissioned a report on the law of restitution from Professor Douglas Laycock, then at the University of Texas. Hazard asked Laycock "to consider whether there is a coherent subject that is worth restating, and if so, the desirable contents of such a restatement."<sup>20</sup> Laycock's "Preliminary Report on a Restatement 2d of Restitution," dated November 1987, answered the two questions separately. The first part of his memorandum addressed the parochial problem facing the ALI: whether to try again to revise the Restatement of Restitution. The longer second part, presenting a practical summary of what the law of restitution covers and why it matters, was subsequently published as a well-known law review article.<sup>21</sup> The first part was not published and is not generally available. But for anyone curious about the origins of R3RUE, the first part of the Laycock memorandum is the single most important source.

Laycock's "Summary of Principal Conclusions" made the following points:

1. Restitution is a distinct body of law, amenable to restatement.

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20. Laycock, *supra* note 10, at 1.

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

2. The defining characteristics of restitution are disputed, and its boundaries are amorphous. But there is practical consensus on the core contents of the field. . . .

3. Restitution is of practical significance when it adds to the other sources of civil liability. Much of restitution is practically significant in this sense, but not all of it.

4. Restitution is not systematically taught in the law schools, and it is not litigated frequently enough to create a fully developed body of precedent in each jurisdiction. Because the law is unfamiliar and undeveloped, a Restatement 2d could have unusual influence. A good restatement might be especially valuable; a bad one might be especially harmful.

5. Because lawyers are generally unfamiliar with restitution, it is especially important that a Restatement 2d be clearly organized and written. The unfamiliar language in which restitution arose, such as quasi-contract, should be avoided as much as possible.

6. It is possible that the decline of professional attention to restitution is irreversible, and that a Restatement 2d would have little impact.

7. The greatest difficulty in restating restitution is identifying a reporter. Few if any scholars are comfortable with the entire field.<sup>22</sup>

Short of offering to be the Reporter himself, Laycock's endorsement of the project could hardly have been stronger. But Hazard was suddenly unwilling to take "yes" for an answer. He commissioned another report from another law professor: this one from Dale Oesterle, then of Cornell. (Several years earlier, Oesterle had published a noted article attacking the restitutionary tracing rules as arbitrary and irrational.<sup>23</sup>) While this was in the works, Hazard's annual report for 1989 advised the membership that the ALI was

pursuing a restart of the Restatement Second of Restitution. Some tentative drafts had been developed in this project, but we encountered difficult conceptual and drafting problems that required a further examination. One study [obviously, the 1987 Laycock memorandum] has been completed and another is well along that give promise of supplying the necessary conceptual framework for this subject.<sup>24</sup>

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22. Laycock, *supra* note 10, at 3–4.

23. Dale Oesterle, *Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC § 9-306*, 68 CORNELL L. REV. 172 (1983).

24. 66 A.L.I. PROC. 484 (1989).

Oesterle's promised study, dated June 1989, arrived a few weeks later. On the question of what the ALI should be doing about Restitution, his conclusions were almost the opposite of Laycock's. In answer to the question "whether restitution . . . is an appropriate subject for a separate Institute restatement," Oesterle concluded "that it is not: Either restitution principles should be included in each of the restatements of contracts, tort, agency, and property law or it should be included in a new Restatement of the Law of Remedies."<sup>25</sup>

It was the Oesterle report, not the earlier Laycock report, that Hazard evidently found persuasive on this central point. Addressing the annual meeting in 1990 he announced a change of direction:

We are exploring a Restatement of Remedies. This is sort of a daughter of Restitution. We had begun Restitution some years back, had some difficulties with it, and reconsidered those difficulties. A Restatement of Remedies would be even more complicated and challenging, but perhaps more coherent in the end. . . . We are aware that the dimensions of this subject could approximate Godzilla.<sup>26</sup>

A year later Hazard repeated, "we contemplate a Restatement of Remedies, building on work begun in Restitution."<sup>27</sup> And a year after that, "we still have on the back burner the possibility of a Restatement of Remedies."<sup>28</sup>

The relevant deliberations were taking place off stage at this point, where they remained for nearly five years. They re-emerged into public view at the annual meeting of the Association of American Law Schools in January 1995, when the AALS Section on Remedies held a well-attended program devoted to the question, "Can and Should the Law of Remedies be Restated? If So, How?" The chairman of the Remedies section and the moderator of the program was Douglas Laycock, and Douglas Laycock had almost certainly prepared the list of questions announced for discussion—some of which read as follows:

Does anyone want a Restatement of Remedies? What would be its benefits? Would they be worth the cost?

Would the project be manageable, or is remedies too all-inclusive to be restated? Is there a core of people willing to do the work?

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25. Dale Oesterle, A White Paper on a Restatement Second of the Law of Restriction [sic] 3–4 (June 1989) (on file with the Washington and Lee Law Review).

26. 67 A.L.I. PROC. 13 (1990).

27. 68 A.L.I. PROC. 664 (1991).

28. 69 A.L.I. PROC. 11 (1992).

If there is to be a Restatement of Remedies, how should it be organized? Should there be a restatement of transsubstantive remedial principles, and also of remedies for particular wrongs? If only one of these, which one?<sup>29</sup>

Announced speakers (in addition to the moderator) were Professors E. Allan Farnsworth, Mary Kay Kane, and Thomas D. Rowe, Jr., all of whom were invited to discuss the treatment of remedies in various ALI projects; also Dale Arthur Oesterle, identified as "Respondent." My own recollection of the session is that there was a lively discussion of the pros and cons of various ways in which the ALI might restate the law of remedies, and that no one in the room expressed any regret at the prospect that by so doing the ALI would be abandoning the Restatement of Restitution until I stood up to do so myself. (I also recall that my remarks were received with a general air of "how did *he* get in here?" . . . but in this I may be mistaken.)

In retrospect, I think I can guess what had been happening off-stage between 1990 and 1995. My surmise is that Geoff Hazard was attracted by Dale Oesterle's suggestion that the ALI forget about Restitution and undertake instead a Restatement of Remedies, and that starting about 1990 he had been trying to persuade Doug Laycock to take the new project on. The questions proposed for discussion by the Remedies section were so neatly formulated because they were the questions that Laycock had been asking himself for several years. I know (because he told me) that Laycock was at one time thinking seriously about doing it. Shortly after the AALS session in January 1995, however, Professor Laycock decided that he would not be Reporter for a Restatement of Remedies. The announcement was made in Geoff Hazard's annual report that May:

We have continued interest in a project for a Restatement of Remedies, or perhaps a revisiting of the Restatement of Restitution. A Remedies project obviously would be wider in scope, and correspondingly more formidable, than one on Restitution. . . . We had in mind a candidate for Reporter but that opportunity has, alas, disappeared. We are open to suggestions.<sup>30</sup>

I have no idea what happened over the next twelve months. But in his 1996 report, Hazard reverted to the subject in these terms: "I have talked to you several times about Remedies. It turns out, I think, that we might be

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29. Association of American Law Schools, Proceedings of the 1995 Annual Meeting 66 (1997).

30. 72 A.L.I. PROC. 461 (1995).

well advised to redefine the project back to the subject of restitution from which remedies originally sprang in the mind of the Director."<sup>31</sup> And a week or 10 days after that year's annual meeting, I received a letter from Geoff asking whether I would be interested in serving as Reporter for a new Restatement of Restitution, should the ALI decide to undertake one. If so, would I prepare a memorandum explaining how I would go about it? I did, and my suggestions were discussed at a "proto" advisers' meeting for R3RUE in June 1997. (Geoff apparently wanted to be sure his untried Reporter was presentable, and he was holding a kind of try-out for advisers at the same time). Progress thereafter was generally steady, and meetings harmonious . . . . But this is where we came in.

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31. 73 A.L.I. PROC. 11 (1996).