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# Indeterminacy and the Law of Restitution

James Steven Rogers\*

Squishy. That's been the rap on the law of restitution since before there even was a law of restitution. In *Moses v. Macferlan*,<sup>1</sup> Lord Mansfield stated that whenever the defendant is "under an obligation, from the ties of natural justice, to refund" the money, the law allows an "action [for money had and received], founded in the equity of the plaintiff's case."<sup>2</sup> Lord Mansfield commented that "[t]his kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged."<sup>3</sup> As he summarized the point, "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."<sup>4</sup> That was undoubtedly one of the decisions that the anonymous writer Junius had in mind in his 1770 accusation against Mansfield that "instead of those positive rules, by which the judgment of a court of law should invariably be determined, you have fondly introduced your own unsettled notions of equity and substantial justice."<sup>5</sup> Although the law of restitution is now respectable in England, during the early twentieth century English judges seem to have delighted in heaping scorn upon the notion that cases could be determined by "that vague jurisprudence which is sometimes attractively styled 'justice as between man and man.'"<sup>6</sup> As Thomas Edward Scrutton remarked, "The whole history of this particular form of action has been what I may call a history of well-meaning sloppiness of thought."<sup>7</sup> Even someone as friendly to the law of restitution as John Dawson famously remarked that the unjust enrichment principle "has the peculiar faculty of inducing quite sober citizens to jump right off the dock."<sup>8</sup>

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1. *Moses v. Macferlan*, (1760) 97 Eng. Rep. 676 (K.B.).
2. *Id.* at 679.
3. *Id.* at 681.
4. *Id.*
5. LETTERS OF JUNIUS, Letter XVI (John Cannon ed., 1978).
6. *Baylis v. Bishop of London* [1913] 1 Ch. 127, 140.
7. *Holt v. Markham* [1923] 1 K.B. 504, 513.
8. JOHN P. DAWSON, UNJUST ENRICHMENT 8 (1951).

At the outset of the project that has now resulted in the Restatement (Third) of Restitution & Unjust Enrichment,<sup>9</sup> Reporter Andrew Kull confronted this problem head on. At the ALI's initial consideration of the project in 2000, he noted the perceived "amorphous" nature of the subject, remarking that many people have felt that "a purported legal principle that necessarily appeals to a shared sense of what equity and good conscience require is untrustworthy."<sup>10</sup> Has the effort to make restitution more determinate succeeded, or is the law of restitution still saddled with a degree of reliance on vague concepts of justice that marks it as distinctly different from its cousins, the laws of tort and contract?<sup>11</sup>

One reading the new Restatement is likely to conclude that appeals to vague concepts of justice are characteristic of the law of restitution. Consider the solutions the Restatement offers to the following problems. A person who mistakenly discharged a lien on property seeks subrogation to the discharged lien. Is the remedy available? That depends on whether such relief is "necessary to prevent the unjust enrichment of the other."<sup>12</sup> A person who mistakenly conferred a non-monetary benefit on another seeks to recover the value of the benefit. Is the remedy available? That depends on whether such relief is "necessary to prevent unjust enrichment."<sup>13</sup> A person who mistakenly improved another's property seeks to recover the value of the improvement. Is the remedy available? That depends on whether such relief is "necessary to prevent unjust enrichment."<sup>14</sup> A person who mistakenly made a gift seeks to recover the value of the gift. Is the remedy available? That depends on whether such relief is "necessary to prevent the unintended enrichment of the recipient."<sup>15</sup> A person who mistakenly executed a writing that did not express the parties' actual agreement seeks reformation. Is the remedy available? That depends on whether such relief is "necessary to prevent the unjust enrichment of the

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9. The recently completed project is referred to herein as the "Restatement" and is cited herein as "R3RUE."

10. 77 A.L.I. PROC. 239 (May 17, 2000).

11. Of course, one might say that the open appeal to concepts of justice is a virtue, not a defect, of the law of restitution. My point is not to agree or disagree with such assessments, but to ask whether the law of restitution is really different in this respect from other bodies of law.

12. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 8(2) (2011) [hereinafter R3RUE] (Payment in Discharge of Lien).

13. *Id.* § 9(1) (Benefits Other than Money).

14. *Id.* § 10 (Mistaken Improvements).

15. *Id.* § 11 (Mistake in Gifts Inter Vivos).

other."<sup>16</sup> In these, as well as numerous other sections of the Restatement, the operative legal rule is expressed with a qualification that relief is available only "as necessary to prevent unjust enrichment."<sup>17</sup>

Other provisions of the Restatement use somewhat different, but equally vague, formulations. Suppose that a person lacking capacity, such as a minor, transferred property and now seeks to recover it. Is the remedy available? That depends on whether the transferee gave value and acted reasonably, in which case "the court may qualify or deny the right to rescission . . . to avoid an inequitable result."<sup>18</sup> Suppose that a person who provided professional services to protect another's life or health seeks to recover the value of the services. Is the remedy available? That depends on whether "the circumstances justify the decision to intervene without request."<sup>19</sup> Is one who benefitted by interfering with another's legally protected interests required to disgorge that benefit? That depends on whether "competing legal objectives make such liability inappropriate."<sup>20</sup> In general, can a person who transferred money or property avoid the transaction and recover what was transferred? That depends on whether the plaintiff "compensates the other for loss from related expenditure as justice may require," whether "the interests of justice are served by allowing the claimant to reverse the challenged transaction," whether "rescission would prejudice intervening rights of innocent third parties," and whether the plaintiff is guilty of "prejudicial or speculative delay . . . in asserting a right of rescission, or a change of circumstances unfairly prejudicial to the defendant, justifies denial of the remedy."<sup>21</sup> May a constructive trust be imposed on property? That depends on whether the recipient "is unjustly enriched by the acquisition of title to identifiable property."<sup>22</sup> May an

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16. *Id.* § 12 (Mistake in Expression).

17. For additional examples of this language, see R3RUE §§ 18 (Judgment Subsequently Reversed or Avoided); 19 (Recovery of Tax Payments); 23 (Performance of a Joint Obligation (Indemnity and Contribution)); 24 (Performance of an Independent Obligation (Equitable Subrogation)); 25 (Uncompensated Performance Under Contract with Third Person); 26 (Protection of Claimant's Property); 27 (Claimant's Expectation of Ownership); 28 (Unmarried Cohabitants); 29 (Common Fund); 30 (Unrequested Intervention: Residual Rule); 32 (Illegality); 33 (Incapacity of Recipient); 36 (Restitution to a Party in Default).

18. *Id.* § 16(3)(b) (Incapacity of Transferor).

19. *Id.* § 20(1) (Protection of Another's Life or Health). Essentially the same formulation appears in Sections 21 (Protection of Another's Property) and 22 (Performance of Another's Duty).

20. *Id.* § 44(1) (Interference with Other Protected Interests).

21. *Id.* § 54 (Rescission and Restitution).

22. *Id.* § 55 (Constructive Trust).

equitable lien be imposed on property of a person who "is unjustly enriched by a transaction?" That depends on whether "the connection between unjust enrichment and the defendant's ownership of particular property makes it equitable that the claimant have recourse to that property."<sup>23</sup> May a person whose property is used to discharge a lien obtain relief by subrogation? That depends on whether "the defendant is unjustly enriched," but "the remedy of subrogation may be qualified or withheld when necessary to avoid an inequitable result in the circumstances of a particular case."<sup>24</sup> May a person assert a tracing claim to more valuable property obtained by a wrongdoer with the claimant's property? That depends on whether the relief sought "is grossly disproportionate to any loss on which the claimant's right to restitution is based."<sup>25</sup> Will a restitution claim succeed against a person who has changed position? That depends on whether "an obligation to make restitution of the original benefit would be inequitable to the recipient."<sup>26</sup> Will delay preclude the claim of a person otherwise entitled to an equitable remedy? That depends on whether "the remedy in question would be unfairly prejudicial to another party because of an intervening change of circumstances."<sup>27</sup>

So, the accusation of reliance on vague concepts of justice certainly seems to be borne out by an examination of the Restatement. Yet, it is a different question whether the law of restitution is in this respect significantly different from other bodies of law. Let us begin by considering the law of torts.<sup>28</sup> Is a person who touches another liable for battery? That depends on whether the contact is "offensive,"<sup>29</sup> meaning "it offends a reasonable sense of personal dignity."<sup>30</sup> Is a person liable for causing emotional distress to another? That depends on whether the defendant's conduct was "extreme and outrageous."<sup>31</sup> Is a person privileged to use force to protect himself against another? That depends on

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23. *Id.* § 56(1)(b) (Equitable Lien).

24. *Id.* § 57 (Subrogation as a Remedy).

25. *Id.* § 58(3)(c) (Following Property Into its Product and Against Transferees).

26. *Id.* § 65 (Change of Position).

27. *Id.* § 70(2)(b) (Limitation of Actions; Laches).

28. For convenience, citations herein are to the Second Restatement of Torts, rather than to the corresponding provisions of those portions of the Third Restatement that have been completed at this time. Needless to say, the law of tort has not become more determinate in the years since publication of the Second Restatement.

29. RESTATEMENT (SECOND) OF TORTS § 18 (1965) (Battery: Offensive Contact).

30. *Id.* § 19 (What Constitutes Offensive Contact).

31. *Id.* § 46 (Outrageous Conduct Causing Severe Emotional Distress).

whether he used only "reasonable" force to "defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally on him."<sup>32</sup> Is a person liable to another for conversion of another chattel? That depends on whether the defendant's action "so seriously interferes with [the plaintiff's rights] that the actor may justly be required to pay the other the full value of the chattel."<sup>33</sup> Is a person liable for negligent harm to another? That depends on whether the defendant acted as would "a reasonable man under like circumstances."<sup>34</sup> Is a seller of a product liable for harm the product causes to a user? That depends on whether the product was in "a defective condition unreasonably dangerous to the user or consumer or to his property."<sup>35</sup> Is a defendant's conduct the proximate cause of the harm suffered by the plaintiff? That depends on such matters as whether the defendant's conduct was "a substantial factor in bringing about the harm,"<sup>36</sup> whether "looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm,"<sup>37</sup> and whether the harm was produced by some superseding factors that "appear after the event to be extraordinary rather than normal in view of the circumstances."<sup>38</sup> Is the owner of livestock liable for a trespass by the animals? That depends on whether the harm "might reasonably be expected to result from the intrusion of livestock," or whether the harm resulted from "the unexpected operation of a force of nature."<sup>39</sup> Is a person liable for harm resulting from an "abnormally dangerous activity"? That depends on such factors as whether the activity presented "a high risk of some harm," whether the activity "is not a matter of common usage," the "inappropriateness of the activity to the place where it is carried on," and the "extent to which its value to the community is outweighed by its dangerous attributes."<sup>40</sup> Is a person liable for fraudulently misrepresenting a fact? That depends on whether the other party acted in "justifiable

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32. *Id.* § 63 (Self-Defense by Force Not Threatening Death or Serious Bodily Harm).

33. *Id.* § 222A (What Constitutes Conversion).

34. *Id.* § 283 (Conduct of a Reasonable Man: the Standard).

35. *Id.* § 402A (Special Liability of Seller of Product for Physical Harm to User or Consumer).

36. *Id.* § 431 (What Constitutes Legal Cause).

37. *Id.* § 435(2) (Foreseeability of Harm or Manner of Its Occurrence).

38. *Id.* § 442(b) (Considerations Important in Determining Whether an Intervening Force Is a Superseding Cause).

39. *Id.* § 504 (Liability for Trespass by Livestock).

40. *Id.* § 520 (Abnormally Dangerous Activities).

reliance on the misrepresentation."<sup>41</sup> Is a person liable for defamation if he publishes information in circumstances that would ordinarily be privileged? That depends on whether "he abuses the privilege."<sup>42</sup> Is a person liable for intruding upon another's seclusion or privacy? That depends on whether "the intrusion would be highly offensive to a reasonable person."<sup>43</sup> Is a person liable for interfering with another person's performance of a contract? That depends on whether he acted "improperly," which depends on a variety of factors, including "the nature of the actor's conduct," "the interests of the other with which the actor's conduct interferes," and "the social interests in protecting the freedom of action of the actor and the contractual interests of the other."<sup>44</sup> Is a person liable in nuisance for interfering with another's right to use and enjoy his land? That depends on whether the other suffered "significant harm, of a kind that would be suffered by a normal person in the community,"<sup>45</sup> and on whether the actor's conduct was "unreasonable."<sup>46</sup> Can a person recover damages for the consequences of another's tortious act? That depends on whether the harm suffered was one that "he could have avoided by the use of reasonable effort or expenditure after commission of the tort."<sup>47</sup>

Now let us consider the law of contract. At first blush, it might appear that vague ethical concepts play a lesser role here than in either restitution or tort. In the basic rules of contract law, we do not find phrases such as "a person has a claim for breach of contract if the promisor unjustifiably failed to perform." If one has made a contract one must perform. There is no need to refer to vague notions of justice to reach that result. In part, that merely reflects the different role of the law of contract as distinguished from the law of tort or restitution. Basic contract law is a body of rules for transactions where nothing has gone wrong. Contract law states that parties who have entered into contracts have a legal obligation to perform their promises. But parties who have entered into contracts have far simpler reasons for performing. In the routine case where nothing has gone wrong, the parties have the ordinary human and economic incentives to perform. Legal rules may reinforce those duties, but they are unlikely to be the sole

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41. *Id.* § 525 (Liability for Fraudulent Misrepresentation).

42. *Id.* § 599 (Abuse of Privilege: General Principle).

43. *Id.* § 652B (Intrusion Upon Seclusion).

44. *Id.* § 767 (Factors Determining Whether Interference is Improper).

45. *Id.* § 821F (Types of Nuisance: Significant Harm).

46. *Id.* § 822 (Private Nuisance: Elements of Liability).

47. *Id.* § 918 (Avoidable Consequences).

or primary reason that people perform contracts. Tort and restitution, by contrast, are bodies of law for situations where something has gone wrong. Tort law does not set out the rules of the road for the kind of careful driving that we all do every day. Rather, tort law deals with cases where cars crashed. Restitution law does not set out the ordinary rules for exchange—it deals with cases where something has gone terribly wrong. Thus, it is hardly surprising that the basic rules of contract seem to be simple, for they are the rules for cases where nothing has gone wrong.

Yet if we turn from basic rules of contract formation to rules dealing with defenses to contract enforcement, the role of fuzzy concepts becomes much more apparent. Should a party be relieved from a contract that was formed on the basis of a mutual mistake? That depends on such factors as whether the risk of mistake "is allocated to him on the ground that it is reasonable in the circumstances to do so,"<sup>48</sup> and whether the person's failure to discover the mistake "amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing."<sup>49</sup> Should a court decline to enforce a contract if only one party was mistaken? That depends on whether "the effect of the mistake is such that enforcement of the contract would be unconscionable."<sup>50</sup> If the court does decide not to enforce a contract formed on the basis of a mistake, is a remedy required for performance that has taken place? In such a case, "the court may grant relief on such terms as justice requires."<sup>51</sup> Should a court decline to enforce a contract entered into on the basis of one party's misrepresentation? That may depend on whether the other party "is justified in relying" on the misrepresentation.<sup>52</sup>

Should a court decline to enforce a term of a contract on the basis that it violates "public policy"? That depends on whether "the interest in its enforcement is clearly outweighed in the circumstances by a public policy against enforcement."<sup>53</sup> Should a court decline to enforce a term of a contract that might adversely affect competition? That depends on whether the term "is unreasonably in restraint of trade."<sup>54</sup> Should a court decline to enforce a term of a contract that might adversely affect family relations?

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48. RESTATEMENT (SECOND) OF CONTRACTS § 154(c) (1977) (When a Party Bears the Risk of a Mistake).

49. *Id.* § 157 (Effect of Fault of Party Seeking Relief).

50. *Id.* § 153(a) (When Mistake of One Party Makes a Contract Voidable).

51. *Id.* § 158(2) (Relief Including Restitution).

52. *Id.* § 164 (When a Misrepresentation Makes a Contract Voidable).

53. *Id.* § 178 (When a Term is Unenforceable on Grounds of Public Policy).

54. *Id.* § 186 (Promise in Restraint of Trade).

That may depend on whether the term "is unreasonably in restraint of marriage,"<sup>55</sup> whether the term "would change some essential incident of the marriage relationship in a way detrimental to the public interest in the marriage relationship,"<sup>56</sup> or whether the term, if it affects child custody, "is consistent with the best interests of the child."<sup>57</sup>

Suppose that an agreement fails to specify an essential term. "[A] term which is reasonable in the circumstances is supplied by the court."<sup>58</sup> Suppose that an agreement provides that one party will perform to the satisfaction of the other. Can we decide whether such performance has been rendered? That depends on whether "it is practicable to determine whether a reasonable person in the position of the obligor would be satisfied."<sup>59</sup> Should a court strictly enforce an agreement providing that one party's duty to perform is discharged by the non-occurrence of a condition? That depends on whether doing so "would cause a disproportionate forfeiture."<sup>60</sup> Does one party's failure to perform discharge the other party's duty to perform? That depends on whether the failure to perform was "material,"<sup>61</sup> which depends in turn on such factors as whether the injured party "will be deprived of the benefit which he reasonably expected,"<sup>62</sup> and whether the conduct of the non-performing party "comports with standards of good faith and fair dealing."<sup>63</sup> Suppose that something causes one party to believe that the other party will not perform. If the complaining party has "reasonable grounds to believe" that the other will not perform, he can demand "adequate assurance of due performance" and may, "if reasonable, suspend" performance until he receives such assurance.<sup>64</sup> Can a contractual right be assigned? That depends on whether assignment would "materially" change the obligor's duty.<sup>65</sup> Can a promisee refuse to accept performance from someone to whom the original promisor

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55. *Id.* § 189 (Promise in Restraint of Marriage).

56. *Id.* § 190(1) (Promise Detrimental to Marital Relationship).

57. *Id.* § 191 (Promise Affecting Custody).

58. *Id.* § 204 (Supplying an Omitted Essential Term).

59. *Id.* § 228 (Satisfaction of the Obligor as a Condition).

60. *Id.* § 229 (Excuse of a Condition to Avoid Forfeiture).

61. *Id.* § 237 (Effect on Other Party's Duties of a Failure to Render Performance).

62. *Id.* § 241(a) (Circumstances Significant in Determining Whether a Failure is Material).

63. *Id.* § 241(e) (Circumstances Significant in Determining Whether a Failure is Material).

64. *Id.* § 251 (When a Failure to Give Assurance May Be Treated as a Repudiation).

65. *Id.* § 317(2)(a) (Assignment of a Right).

delegated the duty to perform? That depends on whether the promisee "has a substantial interest" in having the original party perform.<sup>66</sup>

Can a person recover damages that he might have prevented by taking some other action? That depends on whether "the injured party could have avoided [the loss] without undue risk, burden, or humiliation,"<sup>67</sup> and on whether he made "reasonable but unsuccessful efforts to avoid the loss."<sup>68</sup> Can a party recover for consequential damages suffered as a result of the other party's failure to perform? That depends on whether the damages were of a sort that the breaching party had "reason to foresee as a probable result of the breach."<sup>69</sup> Even if so, the damages will not be recoverable if the court "concludes that in the circumstances justice so requires in order to avoid disproportionate compensation."<sup>70</sup> Is a party entitled to an order of specific performance? Perhaps, "in the discretion of the court,"<sup>71</sup> "on such terms as justice requires."<sup>72</sup>

So far, we have considered only concepts of traditional contract law. The role of fuzzy concepts becomes even more apparent if we turn to situations where a promise is not enforceable under traditional doctrine, but the other party has changed position as a result of the making of the promise. The most obvious example is promissory estoppel. Is a person who acts on the basis of a promise not supported by consideration entitled to recover from the promisor? That depends on whether "injustice can be avoided only by enforcement of the promise."<sup>73</sup> If a person who received something in the past now promises to pay for it, is the promisor liable for failing to perform? Perhaps, if the remedy "is necessary to prevent injustice."<sup>74</sup> Suppose that an offeree who reasonably took action on the assumption that an offer would not be revoked learns that the offeror revoked before the offeree has had a chance to accept. Is the offeree entitled to any recovery? Perhaps, "to the extent necessary to avoid injustice."<sup>75</sup> If a person who received an oral promise to convey land significantly changed position in reliance on the oral promise, is the

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66. *Id.* § 318(2) (Delegation of Performance of Duty).

67. *Id.* § 350(1) (Avoidability as a Limitation on Damages).

68. *Id.* § 350(2) (Avoidability as a Limitation on Damages).

69. *Id.* § 351(1) (Unforeseeability and Related Limitations on Damages).

70. *Id.* § 351(3) (Unforeseeability and Related Limitations on Damages).

71. *Id.* § 357(1) (Availability of Specific Performance and Injunction).

72. *Id.* § 358(1) (Form of Order and Other Relief).

73. *Id.* § 90 (Promise Reasonably Inducing Action or Forbearance).

74. *Id.* § 86 (Promise for Benefit Received).

75. *Id.* § 87(2) (Option Contract).

promisee entitled to specific performance? Perhaps, if "injustice can be avoided only by specific enforcement."<sup>76</sup> If a person reasonably relied on some other oral promise covered by the statute of frauds, is some remedy required? Perhaps, "if injustice can be avoided only by enforcement of the promise."<sup>77</sup>

As a final illustration of the role of fuzzy concepts of justice in the law of contract, consider the elephant in the room: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."<sup>78</sup> Actually, there are two elephants. "If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."<sup>79</sup> So, the content of contract law really seems to be that we will require promises to be performed, unless we decide not to do so in a particular case.

Now let us turn from this quick survey of the law of restitution, tort, and contract and consider in greater detail why lawyers seem to feel that the law of restitution is particularly indefinite. Part of the answer may be a lack of clarity about the word "equity." The classic example of this confusion is *Kossian v. American National Insurance Co.*<sup>80</sup> Kossian had performed cleanup work on a burned building under an agreement with the owner of the building. The owner went bankrupt before paying for the work, and a company that held a mortgage on the property took possession. The property was insured, and the mortgagee was the loss payee. Under the terms of the policy, the mortgagee was entitled to collect an amount that included the costs of the cleanup. The court could not stomach the fact that the mortgagee collected from the insurer for the cost of the work, even though Kossian had not been paid for the work. Kossian was allowed to recover, in an opinion principally notable for the obscurity of its rationale. Indeed, the court seems to have taken a perverse delight in its inability to classify the case:

Lack of precedent applicable to the facts peculiar to this case is not surprising, however, as the authors of the Restatement [(First) of

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76. *Id.* § 129 (Action in Reliance; Specific Performance).

77. *Id.* § 139 (Enforcement by Virtue of Action in Reliance).

78. *Id.* § 205 (Duty of Good Faith and Fair Dealing).

79. *Id.* § 208 (Unconscionable Contract or Term).

80. *Kossian v. Am. Nat'l Ins. Co.*, 62 Cal. Rptr. 225, 227 (Cal. Ct. App. 1967).

Restitution] recognize that the essential nature of equity cases concerned with problems of restitution makes definitive precedent unlikely.<sup>81</sup>

Careful commentators have pointed out again and again the confusion that underlies such uses of the word "equity" and its cognates.<sup>82</sup> In legal discourse, the word "equitable" is sometimes used as a simple English language term meaning "fair." In other legal contexts, however, it is used to refer to the complex historical phenomenon that English and American law developed in two separate court systems: the regular courts of law and the "Courts of Equity." All one need do to avoid the confusion is to substitute the word "fair" for "equitable," and the words "Court of Chancery" for "Court of Equity."

Courts dealing with restitution cases are, of course, obliged to reach fair results. That, however, has nothing to do with the historical oddity that we once had separate courts of law and of chancery. All courts need to decide what resolution of the case before them is "fair." That is true whether the subject matter would be classified as restitution, tort, contract, or anything else. Suppose that the judges and lawyers who are so fond of vague references to "equity" in restitution cases were dealing instead with ordinary tort or contract cases. Would they say "This is an action at law, not in equity, so there is no need for us to reach a fair result"?

In other fields, no one seems to have difficulty with the word "equitable." Consider the tort of nuisance. A person whose land is injured by noxious emissions from an adjoining parcel might bring an action seeking damages for the harm to her property. Alternatively, the person might seek an injunction compelling the defendant to cease the pollution. No one would have any difficulty seeing that the action for damages is an action "at law," that is, it is an action that, centuries ago, would have been brought in the regular King's Courts. If, centuries ago, the plaintiff had sought an injunction, she would have proceeded in the Court of Chancery. If someone asked whether the law of nuisance is an "equitable" subject, any well-trained lawyer would say that the question makes no sense. If the remedy sought is damages, the case would—years ago—have been brought in the court of law. If the remedy sought is an injunction, the case would have been brought in the court of chancery. The same is true of the law of contracts. Suppose that the seller refuses to perform a contract for the sale

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81. *Id.*

82. *E.g.*, Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083 (2001); DOUG RENDLEMAN & CAPRICE L. ROBERTS, *REMEDIES—CASES AND MATERIALS* 469–530 (8th ed. 2011).

of land. The buyer can bring an action "at law" for money damages. Alternatively, the buyer can bring an action "in equity" for specific performance. No one would say that contracts is an equity subject. For no apparent reason, however, courts and lawyers dealing with restitution actions seem to revel in referring to "equity" and describing restitution actions as "equitable." Section 4 of the Restatement—aptly titled "Restitution May Be Legal or Equitable or Both"—makes a valiant effort to dispel this confusion. Only time will tell whether that effort will be successful.

The notion that the law of restitution is somehow deficient in that it relies so heavily on vague principles of justice seems particularly odd when one examines the ethical principles that underlie the law of restitution, tort, and contract. It is common to describe the law of restitution as based on the unjust enrichment principle, that is, a person who has been unjustly enriched at the expense of another owes a duty to pay a sum of money that will disgorge the unjust enrichment. Though it is less common to do so, one could describe the law of tort or contract in analogous terms. Thus, the basic principle of the law of tort could be described as the "unjust injury principle," that is, a person who unjustifiably harms another owes a duty to pay a sum of money that will compensate the other for the harm. Similarly, the basic principle of the law of contract could be described as the "unjust breach of promise principle," that is, a person who unjustifiably fails to perform a promise to another owes a duty to pay a sum of money that will place the non-breaching party where she would have been if the promise had been performed.

Now consider the intuitive appeal of these three basic ethical principles. The foundation of tort is the notion that one must not unjustifiably harm another, and that a person who unjustifiably harms another must pay compensation. That is by no means an obvious principle. Holmes advocated the principle that, as a starting place, losses should rest where they fall, so that a cause of action in tort should be recognized only if the defendant can plausibly be regarded as at fault in causing the loss.<sup>83</sup> Much of the development of tort law in the twentieth century can be regarded as a reaction against that notion. Perhaps, in at least some circumstances, a person should be liable in tort even though he was not at fault. For example, if I keep a dangerous animal, perhaps I should be liable for any losses caused by that animal, even though I was scrupulously careful in my efforts to control it. Of more concern in present day affairs, if

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83. OLIVER WENDELL HOLMES, *THE COMMON LAW*, 77–129 (1881).

I manufacture a product that causes a loss, perhaps I should be liable for any harm caused by its use, even though I was scrupulously careful in my efforts to manufacture the product safely.

By the end of the twentieth century, liability without fault in tort had reached an extent that would presumably have shocked Holmes. Nor would he be alone. Tort liability has produced a major backlash in the public eye. Talk of a "litigation-happy" nation has become commonplace, with the usual set piece being the suit against McDonald's brought by a person who spilled hot coffee on herself.<sup>84</sup> Note the basic problem: Tort is concerned solely with the allocation of losses. There are no winners, only losers. If we decide that the circumstances do give rise to liability in tort, then we shift a loss from the plaintiff to the defendant. Instead of one loser, we have another. Not surprisingly, tort theorists have wrestled for centuries—and will continue to do so for many more centuries—with the question of the justification for such loss shifting.

The basic principle of contract law could be stated as "a person must not unjustifiably fail to perform a promise made to another person." A person who does unjustifiably fail to perform must pay an amount sufficient to place the other party in the position in which she would have been had the promise been performed. A common organization of the Contracts class makes the distinctive character of contract law clear at the very outset of the course by means of the famous "hairy hand" case, in which a doctor was found liable for failing to fulfill his promise that a skin graft operation would cure the patient's hand.<sup>85</sup> The lesson of the case is that even if the doctor was guilty of no negligence or malpractice, he was still obligated to give his patient the monetary equivalent of what he promised. Suppose that before the operation Dr. McGee came to his senses and told Hawkins that he could not do the operation. Taken literally, the case means that Hawkins would still be entitled to be placed in the position in which he would have been if the promise had been performed. As Lon Fuller noted many years ago, it is "a queer kind of 'compensation'" to give the plaintiff "something he never had."<sup>86</sup> In some situations, some courts have balked at that notion. In the old English case of *Flureau v. Thornhill*,<sup>87</sup> the court refused to award a prospective real estate buyer damages measured by the difference

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84. *Liebeck v. McDonald's Rests.*, No. 93-02419, 1995 WL 360309 at \*1 (N.M. Dist. Ct. Aug. 18, 1994).

85. *Hawkins v. McGee*, 146 A. 641 (N.H. 1929).

86. L.L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages: I*, 46 *YALE L.J.* 52, 52-53 (1936).

87. *Flureau v. Thornhill*, (1776) 96 Eng. Rep. 635 (K.B.).

between the contract price and the value of the promised property, noting that a buyer is not "entitled to any damages for the fancied goodness of the bargain, which he supposes he has lost."<sup>88</sup> But, for the most part, we take it for granted that the willingness to grant expectation damages is the core of what it means to say that a contract is enforceable.

It is easy to lose sight of how problematic the basic contracts principle is. Consider the case of *Neri v. Retail Marine*.<sup>89</sup> That is a contracts casebook classic on the so-called "lost volume seller" problem. The case holds that a retail buyer who defaults can be liable for the seller's lost profits—even though the seller was able to sell the goods to someone else. The theory is that, but for the buyer's breach, the seller might have made two sales and hence earned twice the profits. The case raises intriguing issues both of general policy and of interpretation of the relevant provisions of Article 2 of the Uniform Commercial Code. What is generally not noted is the human dimension of the case. After he had contracted to buy a pleasure boat, the defendant learned that he had a serious health problem. Rather than enjoying himself cruising around on the new boat, defendant faced hospitalization and, one hopes, recuperation. Imagine his surprise on learning that the seller refused to return his down payment, even though the seller was able to sell the boat to someone else. Imagine his astonishment on learning from the court that the seller was entitled to retain most of the down payment as "compensation" for its lost profits. Nor was the amount trivial—about \$2,500 at the time of the case, or about \$13,500 in today's dollars.

So both tort and contract are based on ethical principles that are far from compelling. What of the law of restitution? The basic substantive principle of the law of restitution is that one must not unjustifiably enrich oneself at the expense of another. Consider a simple instance of the law of restitution—recovery of money paid by mistake. Suppose that I receive \$5,000 from a bank with which I had done no business. Can I keep the money? Does it matter that I did not do anything wrong to get the money? Does it matter that the bank must have been sloppy to send money to someone to whom they owed nothing? The answer is simple. If the bank paid the money to me simply by mistake, the bank has an action in restitution to recover the mistaken payment.<sup>90</sup>

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88. *Id.*

89. *Neri v. Retail Marine Corp.*, 285 N.E.2d 311 (N.Y. 1972).

90. *E.g.*, *Bank of Naperville v. Catalano*, 408 N.E. 2d 441 (Ill. App. Ct. 1980).

For some reason, stories about such cases always seem to capture the fancy of newspaper and television reporters. As the news stories suggest, people are—or at least pretend to be—surprised by the fact that a person who receives money by mistake is legally obligated to return the money. There is, however, nothing at all problematic or puzzling about that result. Nor is there anything novel about the result. The classic decision on recovery of mistaken payment is a mid-seventeenth century English decision. The case is so old that it is barely in English—decisions of the time being reported in that odd argot known as Law French:

Come si un vient a moy & dit, Pay me my rent, I am your landlord, & jeo respond give me your receipt and you shall have it & issint jeo ceo pay, & puis un auter q̃ droit ad vient & demand & jeo luy pay, jeo poy aver indebitatus assumpsit vers il q̃ done a moy le premier receipt.<sup>91</sup>

"Finders keepers, losers weepers" may be a common playground chant, but it has never been an accurate statement of the law.<sup>92</sup> As Lon Fuller noted years ago, the case for restitution recovery is far stronger than the case for recovery based on contract or tort, for it

involve[s] a combination of unjust impoverishment with unjust gain . . . . If, following Aristotle, we regard the purpose of justice as the maintenance of an equilibrium of goods among members of society, the restitution interest presents twice as strong a claim to judicial intervention as the reliance interest, since if A not only causes B to lose one unit but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two.<sup>93</sup>

Now consider the treatment of mistake in contract law. Generations of law students have puzzled over the saga of *Rose 2d of Aberlone*, the valuable breeding cow that was mistakenly sold at her meat price.<sup>94</sup> The fact that the contract was avoided on grounds of mistake in that case provides fertile ground for classroom puzzlements. Should the woman who sold a pretty stone for a small amount be able to set aside the contract once it was discovered that the stone was a valuable topaz?<sup>95</sup> Should the famous violinist be granted relief from his contract to buy what he thought were

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91. *Bonnel v. Foulke*, (1657) 82 Eng. Rep. 1224, 1224 (K.B.).

92. Indeed, it is not even accurate on the playground. Mom will always require Johnny to give back the dollar bill that Mary dropped.

93. Fuller & Perdue, *supra* note 86, at 56; *see also* JOHN P. DAWSON, UNJUST ENRICHMENT 3–8 (1951).

94. *See* *Sherwood v. Walker*, 33 N.W. 919 (Mich. 1887).

95. *See* *Wood v. Boynton*, 25 N.W. 42 (Wis. 1885).

two valuable eighteenth-century violins once it turned out that they were fakes?<sup>96</sup> Does it matter whether the mistake was mutual or unilateral? Does it matter whether the mistaken party was careless? Does it matter how significant the mistake was? Does it matter whether the mistake was one of fact or of law?

If we grant relief from the contract in mistake cases, have we eroded the very basis of contract liability? After all, it is routine for contracting parties to disagree—sometimes dramatically—over the valuation of the subject matter of the agreement. At the beginning of the course, law students learn that the essential function of contract is to bind parties to their deals, so that the reality of the parties' performance will conform to their assumptions. In studying mistake towards the end of the course, the students find that a dramatic difference between assumption and reality may be grounds for refusing to enforce the agreement. The cases seem to defy simple explanation or classification. As Corbin put it:

Cases involving mistake are difficult of classification because of the number and variety of factors to be considered. These factors are found in many combinations. The citation of authorities for a rule stated in general terms is made perilous by this fact. It is equally perilous, and it may be positively harmful, to construct a rule of law, unless it is so limited as to be applicable to a particular combination of many factors. If this exact combination does not recur, what we really have is merely one precedent, and not a rule.<sup>97</sup>

The fact that mistake seems to be far more problematic in contract than in restitution is not really all that difficult to explain. The basic principle of restitution is the unjust enrichment principle. The mistake cases in the law of restitution are among the simplest instances of the unjust enrichment principle. If *A*, by mistake, pays money to *B*, *A* should recover that money. *B* has been enriched. The only reason that happened is that *A* made a mistake. Requiring *B* to return the money corrects that unjust enrichment, and causes no harm to *B*. It does not matter whether the amount was large or small. It does not matter how the mistake was made. It does not matter whether *A* was careful or negligent.

The basic principle of contract is *pacta sunt servanda*. Making people perform promises that they have come to regret is the whole point of contract law. As a judge put it, in a decision requiring farmers to sell their cotton at the price they had agreed on,

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96. See *Smith v. Zimbalist*, 38 P.2d 170 (Cal. Ct. App. 1935).

97. 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 597, at 583 (1960).

Ladies and Gentlemen, this case illustrates about as well as any case that will ever be in a court room that life is a two-way street, that when we make bargains that turn out to be good for us that we keep them and then when we make bargains that turn out to be bad for us that we also keep them. That seems to be the essence of what this case is about. The defendants, naturally, don't want to sell cotton because the price has gone up and if I were one of those defendants I would feel the same way. I would be sick as an old hound dog who ate a rotten skunk, but unfortunately—well, not unfortunately—fortunately we all abide by contracts and that [is] the foundation of which all of the business that you have heard about here today is done.<sup>98</sup>

The mistake cases in contract law are hard because they involve a stark conflict between the basic principles of contract and restitution. If Walker has to sell the valuable cow for a small amount of money, then Sherwood will be enriched and Walker will be impoverished. But if Walker does not have to sell the cow, then Sherwood will not get the benefit of his bargain. It is hardly surprising that there is no simple resolution of that conundrum. Yes, we do think that people should be held to their deals. But our conviction about the justice of doing so has limits. The mistake cases in contracts bring to the fore all of the uncertainties that we have about the basis of enforcing agreements. By contrast, the mistake cases in restitution are fairly simple. About the only reason for denying relief in such cases is the possibility that the recipient of the mistaken benefit may have so changed position as a result of the mistaken payment that it seems unduly harsh to require restoration.

I have described the basic principles of the law of tort and contract in somewhat unusual terms: "One must not *unjustifiably* harm another" and "one must not *unjustifiably* fail to perform one's promise." We do not routinely make such an explicit reference to justice in describing the foundations of tort or contract. If we were honest, we would have to do so. Doing so, however, would make more explicit than we like the fact that the underlying moral principles are far from clear. Why should your loss be shifted to me? Why should I be obliged to pay money to you when you have suffered no loss other than the disappointment of not getting something that I promised you? The law of restitution, by contrast, does unabashedly wear its moral premise on its sleeve: "One must not *unjustifiably* enrich oneself at the expense of another." Perhaps part of the reason that the law of restitution can get away with expressing its basic

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98. *Bolin Farms v. Am. Cotton Shippers Ass'n*, 370 F. Supp. 1353, 1359 (W.D. La. 1974) (quoting Judge Wilbur D. Owens of the Middle District of Georgia in an unreported decision, *Mitchell-Huntley Cotton Co. v. Fulton Benson*).

concept in such starkly moralistic language is a fairly simple point. The basic principle of the law of restitution is simple. There is no need to hide the ethical foundation of the law of restitution because that foundation is capable of standing openly on its own. It is far less clear that the law of contract or tort could survive such an explicit recognition of their underlying ethical foundations.

There may, however, be an even simpler explanation for this apparent difference between the law of restitution, on the one hand, and the law of tort and contract, on the other. Restitution is the new kid on the block. It is still struggling to achieve acceptance and respect. Law professors, to say nothing of lawyers and law students, often have a hard time getting a handle on the subject matter. So, those who advocate the utility of a unified treatment of the law of restitution face the initial burden of explaining what the topic is and why others should believe that it exists. That leads us to an explicit statement of the basic unifying principle of the law of restitution.

Consider the first section of the Restatement: "A person who is unjustly enriched at the expense of another is subject to liability in restitution." There is nothing like that in the restatements of contracts, torts, or—so far as I know—any other field of law. The restatement of contracts does not begin by stating, "A person who unjustifiably fails to perform a promise made to another is subject to liability in contract." The restatement of torts does not begin by stating, "A person who unjustifiably injures another is subject to liability in tort." Why the difference? It would be extraordinarily hard to explain the different approaches in terms of the nature of the subject matter. As we have seen, once one looks to the actual content of the law, there is little difference between restitution and contract or tort in the extent to which specific principles incorporate indeterminate assessments of justice or reasonableness.

History, however, provides a simple explanation for the difference between restitution and contract or tort. Suppose that the ALI had been formed in the early nineteenth century instead of the early twentieth century. Suppose that someone proposed writing a "restatement of torts" in 1810. One suspects that lawyers would have been very puzzled by that suggestion. One could do a restatement of trespass, or a restatement of case, or a restatement of slander, or the like, but what is this new-fangled topic of "tort"? By the early twentieth century, however, lawyers had become used to using contract and tort as basic organizing principles. Accordingly, it seemed only natural that there should be restatements of those topics. For whatever reason, the law of restitution has taken a different historical path. It is commonly said that the subject—as a

coherent body of law—was born with the creation of the first restatement in 1936. The first task for the original restitution restatement project was to justify its existence. Professors Warren Seavey and Austin Scott, the reporters for the original restatement, confronted this task explicitly at the outset of their law review article explaining the project:

The most recent product of the American Law Institute is a restatement entitled "Restitution," a word which to the best of our knowledge is not used as a title in any law digest or treatise. The matters with which it deals are found scattered through many sections of the digests and treatises on apparently diverse subjects. Your editor has asked us to explain why such a grouping of material was undertaken and why there was given to it a title which is indefinite in connotation and unfamiliar to the profession.<sup>99</sup>

Contrast that with the situation of other fields of law. No twentieth or twenty-first century writer would begin a discussion of a restatement of contracts or torts with an apologia for the existence of the project. Of course there is a law of tort and a law of contract. If any proof be needed, there is the fact that we all suffered through courses on those subjects in the first year of law school. If the Restatement (First) of Restitution had truly been successful, the profession would by now be entirely familiar with the idea that restitution is as useful an organizing concept as contract or tort. There would be no need to start a discussion of the subject with a defense of its existence. Restitution, however, remained an obscure topic throughout the twentieth century. There never was a second restatement. During the course of work on the current Restatement, the Reporter or the ALI Director opened many of the discussions by noting that most members of the Institute probably knew little or nothing about the field.<sup>100</sup> A major objective of the Restatement (Third) project has been to bring the field to the attention of the profession. Accordingly, it is not surprising that the Restatement (Third) begins by repeating the general statement that opened the Restatement (First). Perhaps by the time of the fourth restatement that provision can be dropped, but for the immediate future, the profession will have to live with the fact that the restatement of restitution, unlike the restatements of other areas of law, begins with a statement that really comes down to a plea for recognition of the existence of the field.

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99. Warren A. Seavey & Austin W. Scott, *Restitution*, 54 L.Q. REV. 29, 29 (1938).

100. See, e.g., 77 A.L.I. PROC. 226–27 (May 17, 2000) (opening statements of Reporter Andrew Kull).

It is worth considering what difference it may make to judicial decisions that the current Restatement still starts with the statement that "[a] person who is unjustly enriched at the expense of another is subject to liability in restitution." As Professor Kull has noted, "Section 1 of the original Restatement has reportedly been cited in more judicial opinions than all of its other sections combined."<sup>101</sup> It is not uncommon to find an opinion in a restitution case that consists of little more than a recitation of this general principle together with a largely useless laundry list of "factors" to be considered. Professor Kull offers an illustration of such formulae, noting that they "are not helpful, and . . . can lead to serious errors":

To establish a claim for unjust enrichment, the plaintiff must prove three elements: (1) the plaintiff conferred a benefit upon the defendant; (2) the defendant had an appreciation or knowledge of the benefit; and (3) the defendant accepted or retained the benefit under circumstances making it inequitable for the defendant to retain the benefit without payment of its value.<sup>102</sup>

Imagine a tort or contract case. Would one encounter an opinion that essentially consists of nothing more than a statement that:

To establish a claim for breach of contract, the plaintiff must prove three elements: (1) the defendant made a promise to the plaintiff; (2) the plaintiff had an appreciation or knowledge of the promise; and (3) the defendant failed to perform that promise under circumstances making it inequitable for the defendant to fail to pay the plaintiff the value of the promised performance.<sup>103</sup>

In light of the history of the development of the law of restitution, it may be understandable that the Restatement continues to state the general principle in Section 1. That should not, however, be taken as a license for sloppy legal argumentation or opinion writing.

There is a reason that the Restatement does not consist of Section 1 alone. Section 1 is merely a description of the general principle that unifies the specific legal rules that are set out in all of the rest of the Restatement. The law of restitution is to be found in the body of the work, not in its descriptive caption. One is reminded of the provisions commonly found in legal agreements along the lines of the following: "Headings and captions contained in this agreement are inserted for convenience or reference only,

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101. R3RUE § 1 reporter's note a.

102. *Id.* § 1 cmt. d.

103. Contracts teachers do routinely encounter such statements—in exam answers that receive justifiably low grades.

and are not to be deemed part of or to be used in construing this agreement." Maybe even stronger language is needed. Perhaps Section 1 of the Restatement should be accompanied by something akin to the Surgeon General's cigarette package legend: "Warning—citation of this section as authority for the resolution of any specific dispute may be hazardous to your mental health."

Let us now turn from the general principle stated in Section 1 to specific rules in the Restatement that make use of language along the lines of "as necessary to prevent unjust enrichment." In many such provisions, it is doubtful that any such language is really needed. Consider the provision on recovery of mistaken tax payments:

Section 19. Recovery of Tax Payments.

Except to the extent that a different rule is imposed by statute, the payment of tax by mistake, or the payment of tax that is erroneously or illegally assessed or collected, gives the taxpayer a claim in restitution against the taxing authority *as necessary to prevent unjust enrichment* . . . . If restitution pursuant to [the above] would disrupt orderly fiscal administration or result in severe public hardship, the court may on that account limit the relief to which the taxpayer would otherwise be entitled.<sup>104</sup>

The text of the rule states the circumstances that a court may need to take into account in deciding whether to recognize a claim. Having done so, it is far from clear why there is any need for a reference to unjust enrichment. The phrase "as necessary to prevent unjust enrichment" adds nothing and could easily have been omitted.

Take another example, the provision on reformation for mistake in expression:

Section 12. Mistake in Expression.

If an instrument is intended to transfer an interest in property or to embody an obligation pursuant to a valid agreement, and

(a) by a mistake as to its contents or legal effect, the instrument fails to reflect the terms of the agreement; and

(b) performance or enforcement on the terms of the instrument *has resulted or would result in the unjust enrichment of one party at the expense of another*; then

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104. R3RUE § 19 (emphasis added).

the person disadvantaged by the mistake has a claim in restitution *as necessary to prevent the unjust enrichment of the other*.<sup>105</sup>

In subsection (b), the "unjust enrichment" language seems to be only a way of stating the point that relief is needed only when the instrument conveys a greater interest than was intended. In the final sentence of Section 12, the "as necessary to prevent unjust enrichment" formulation seems to be only a reminder that any restitution claim may be subject to defenses, such as change of position and bona fide purchase.<sup>106</sup> Subsection (b) could easily have been stated in other terms, and the last sentence is really not necessary. Thus, the rule could have been stated as follows:

If an instrument is intended to transfer an interest in property or to embody an obligation pursuant to a valid agreement; and

(a) by a mistake as to its contents or legal effect, the instrument fails to reflect the terms of the agreement; and

(b) performance or enforcement on the terms of the instrument has resulted or would result in the receipt of a greater interest than was intended ~~unjust enrichment of one party at the expense of another~~; then

the person disadvantaged by the mistake has a claim in restitution ~~as necessary to prevent the unjust enrichment of the other~~.

No doubt one could proceed through many provisions of the Restatement making similar changes to eliminate language along the lines of "as necessary to prevent unjust enrichment." I do not mean to say that such changes are essential or even desirable. In discussing restitution claims, it is common to use formulations such as "as necessary to prevent unjust enrichment." Thus, it is hardly surprising that the Restatement uses such language. The point is not to criticize the drafting style of the Restatement. Rather, the point is that making fairly liberal use of such general language is a matter of drafting style, not of substance. One could redraft restatements of other topics using the style of this Restatement. Thus, numerous provisions of the restatement of torts could say that, in certain circumstances, a person is obliged to compensate another if her conduct has unjustifiably caused the other to suffer some injury. Numerous provisions of the restatement of contracts could say that, in certain circumstances, a person is obliged to compensate another if she has unjustifiably failed to perform her promise. Whether one formulation or the other is better is only a matter of familiarity and style. It is, however,

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105. *Id.* § 12 (emphasis added).

106. *See id.* § 12 cmt. f.

important to realize that all we are talking about here is just that—style. It would be entirely inaccurate to conclude that the difference in drafting style used in the restatement of restitution, on the one hand, and the restatements of contracts or torts, on the other, reflects any significant difference in the content of the rules being restated.

Thus far, I have suggested that the law of restitution is no less determinate, and no more dependent upon vague principles of justice, than other bodies of law. Accordingly, the repeated usage of the phrase "as necessary to prevent unjust enrichment" in various provisions of the Restatement should not be taken to suggest that there is any significant difference between restitution and other branches of law in the extent to which outcomes can be stated in simple rules. The flip side of that observation is that one should not expect the law of restitution to be more determinate than other bodies of law. Where it is simply not possible to state the applicable rules without including a fair measure of discretion, we simply must accept that fact. In one area—the rules concerning tracing—the Restatement seems to have lost sight of that fact. Ironically, in one area where it is impossible to state rules in simple black-and-white terms, the Restatement attempts to do just that.

Suppose that defendant has obtained an item of property under such circumstances that the law of restitution requires him to turn that item over to plaintiff. Consider a case of theft. Scalawag steals a Ford from Fred. As a matter of simple property law, the Ford still belongs to Fred, so Fred can replevy it from Scalawag. That would be true even if Scalawag is insolvent, owing debts to many other people, including people from whom he stole goods that cannot be found in his hands. Suppose, however, that Scalawag has swapped the Ford for a tractor. The tractor never belonged to Fred, so Fred has no special rights to the tractor as a matter of simple property law. Under the law of restitution, however, Fred can obtain a declaration that Scalawag holds the tractor in constructive trust for Fred, provided that Fred can show that Scalawag obtained the tractor by swapping the Ford for it. The Restatement states this principle without qualification: "A claimant entitled to restitution from property may obtain restitution from any traceable product of that property, without regard to subsequent changes of form."<sup>107</sup> Although this may seem like a simple proposition, it is, in fact, virtually impossible to come up with a coherent explanation for the result that Fred gets the tractor.

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107. *Id.* § 58(1).

In the first place, it is important to recognize that the issue here does not involve a contest between the tracing claimant and the wrongdoer. Tracing only matters if the wrongdoer is insolvent. If Scalawag, in our simple example, has sufficient assets to satisfy all of his creditors' claims, it really does not matter whether Fred gets a money judgment for the value of the Ford or the tractor itself. Either way, Fred is made whole. The tracing claim matters only if Scalawag is insolvent. The question is whether we can justify giving preference to the claim of the creditor who can trace over the claims of creditors who cannot trace.

In a variety of places, the Restatement seems to misstate this issue. For example, a Comment to Section 58 frames the issue as a contest between the restitution claimant and others who decided to become creditors: "The restitution claimant bases a right to recovery on the avoidance of a transaction that is invalid for reasons such as fraud or mistake; the general creditor has made a valid extension of credit."<sup>108</sup> That is not a sufficient justification for granting preference to the restitution claimant. In the first place, the category of unsecured creditors includes lots of people who did not make a voluntary extension of credit. Tort victims are the obvious example. In any significant bankruptcy, tort victims are likely to be a significant class of creditors. Consider, for example, all of the people who had claims against Johns-Manville Corporation as a result of asbestos produced by Manville.<sup>109</sup> Many other claimants, though they may have contract claims, would hardly be accurately described as voluntary lenders (e.g., unpaid employees). So, we cannot justify tracing by saying that the competing claimants are "just creditors."

In other places, the Restatement does seem to recognize that the issue is one of preference among creditors, but offers inadequate explanations for the resolution of that conflict. For example, at a number of places, the

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108. *Id.* § 58 cmt. b. In the version presented at the A.L.I. annual meeting, this Comment referred to the creditor as having made a "voluntary extension of credit." R3RUE § 58 cmt. b (Tentative Draft No. 6, 2008). A similar change was made in Section 55 cmt. d ("*A*'s implicit claim—to justify in equitable terms the remedy of constructive trust—is that *B*'s unsecured creditor *C* will be unjustly enriched, at *A*'s expense, if *B*'s debt to *C* is satisfied from assets that *B* obtained from *A* by fraud.") which had previously referred to *C* as a "voluntary and unsecured creditor." The deletion of the term "voluntary" is a nod in the direction of the point made in this Article, but the Restatement still fails to offer a persuasive justification for the preference given to the tracing claimant.

109. *See* *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2199 (2009) (noting that over 600,000 asbestos claimants have received payments from the Manville Personal Injury Settlement Trust since its creation in 1989).

Restatement suggests that if other creditors can reach the traceable product of the claimant's property, then they will be unjustly enriched.<sup>110</sup> The problem with any such explanation is that it seeks to explain why the restitution claimant has priority over other creditors. But that is not the issue. Neither at state law nor in bankruptcy do we have any general principle that a restitution claimant has priority over other creditors. Rather, the issue is whether a restitution claimant who can trace should have priority over other claimants, including a restitution claimant who cannot trace. It is tracing, not restitution, that is the key. To explain the tracing preference, we have to compare a restitution claimant who can successfully trace with one who cannot trace. None of the rationales commonly offered for the tracing preference respond to that question.

Suppose that Scalawag has not only stolen a Ford from Fred but has also stolen a Chevy from Charlotte. Scalawag swaps the Ford for a tractor. Scalawag sells the Chevy and commingles the sales proceeds in an account in such fashion that Charlotte is unable to trace. The tracing rules say Fred gets the tractor and Charlotte waits in line with the other unsecured creditors. Why should Fred do so much better than Charlotte? It is not convincing to say that the tractor is only there because Scalawag stole Fred's Ford. Some other assets would not be there if Scalawag had not stolen Charlotte's Chevy. So it is hard to see why we should say that the other creditors would be unjustly enriched if they got the tractor, since we do allow them to get the untraceable product of the Chevy. In a setting such as this, Dale Oesterle quite convincingly refuted the argument for tracing in an article published many years ago.<sup>111</sup>

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110. See R3RUE § 55 reporter's note d ("[T]he attempt to enforce a constructive trust in a three-party contest resolves itself into (and ultimately depends upon) the contention that the debtor's general creditors stand to be unjustly enriched at the expense of the restitution claimant."); *id.* § 55 cmt. h ("[T]he equitable basis for the claimant's priority is the assertion that the creditor will be unjustly enriched if the defendant's debt is discharged with property to which (as between claimant and defendant) the claimant is equitably entitled."). This notion may have some intuitive appeal, and may be persuasive in some cases but, like virtually all other rationales for tracing, it ultimately fails. The thought presumably is that the assets in question would not be there but for the wrongdoer's acquisition of its antecedent. But, that does not really help. Suppose that an unsecured creditor sold goods on credit to the debtor. That unsecured creditor could say that, but for his extension of credit, the asset would not be there, but that is not a reason to allow the unsecured creditor to recover the property. The "but for" notion is really a basis for the "swelling of assets" theory that has now been rejected by most authorities, including the Restatement. See *id.* § 58 cmt. e.

111. See Dale Oesterle, *Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC § 9-306*, 36 CORNELL L. REV. 172 (1982).

There is, however, a significant problem. Suppose that we reject the position taken in the Restatement and conclude that we cannot justify the preference that we give to the tracing claimant. Though that position is intellectually sound, it has rather anomalous implications. Once we see that there really is no convincing logical explanation for the tracing rules, we end up with the conclusion that there also is no convincing logical rationale for allowing a replevin claimant to get back his own stolen car from the estate of the insolvent thief.<sup>112</sup> Suppose that Scalawag steals two identical cars, one from Mary and one from Sally. Each day he flips a coin to decide which one to drive. One day he crashes the car he was driving. He is now insolvent. The person whose car is still there gets it back. The other person just has an unsecured claim. Is that fair? Is it rational? Is there some logical explanation? No, but if Mary's car is still there then, by golly, we are going to let her take it back. Sorry, Sally, it is Mary's car. The justification is not logic, but fairly primitive concepts that are very much wrapped up in our notions of property. It is Mary's car and she gets it back, even though only someone who checked the VIN could tell whether it was Mary's car or Sally's car.

The problem with the tracing rules is that they try to extend this primitive property notion, and do so when the primitive justification—"It's my thing, gosh darn it!"—just doesn't work. Suppose Scalawag steals a car from Mary, though he happens to own an otherwise identical car. He disassembles both cars, tosses the parts into a pile, and reconstructs two cars, taking the parts at random. Then he does his coin toss, drive, and crash routine. Can Mary recover the surviving car from Scalawag's estate? How do we decide whether it was or was not Mary's car? That is the question that the tracing rules pretend to answer, and they do so by ignoring the problem. If we applied the standard tracing rules, we would "deem" whichever car remained to have been assembled from the parts of Mary's car. In other words, to the question "How do we decide whether it's still the same thing when all the parts have been mixed up?" the tracing rules basically say, "Assume that the parts had not been mixed up . . . ."<sup>113</sup>

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112. The argument that follows is a somewhat condensed version of a point that I developed in James Steven Rogers, *Negotiability, Property, and Identity*, 12 CARDOZO L. REV. 471, at 491–501 (1990).

113. One is reminded of the old joke about the mathematician, physicist and economist on the desert island trying to figure out how to open cans of food, with the economist saying "assume we have a can opener . . ." Note a further irony. If we say that we want our tracing rules to be at least a plausible way of answering the question of physical identity, then we would end up with a rigorous version of the "proportionate part" concept that Austin Scott developed. See A. SCOTT & W. FLETCHER, *THE LAW OF TRUSTS*, § 517.2 (4th ed.

So, what to do? A restatement has to be just that—it has to more or less take the results of the cases as it finds them. So, rejecting tracing altogether is not feasible, even if it might be the most justifiable result. But, a restatement also needs to be honest about the strengths and weakness of the approaches that have prevailed in the cases. It is unfortunate that the Restatement recites purported justifications that really cannot be supported, e.g., the notion that tracing can be justified by the thought that Scalawag's unsecured creditors would be unjustly enriched if they shared in the traceable product. Moreover, it would have been an easy matter for the Restatement to do some good on these issues. The Restatement could have done here what it does in so many other contexts—admit openly that just results cannot be produced by rigid rules. There may be some cases in which the number of steps required in the tracing analysis are sufficiently few that it seems just as sound to give the claimant the traceable product of her property as her own property. It is, however, unlikely that that will always be the case. Tracing claims generally do not involve simple swaps of tangible goods of the sort considered above. More often, they rely on assertions that a restitution claimant can identify the property that should be subjected to her claim by means of the fictions embodied in the rules on tracing through commingled bank accounts.<sup>114</sup> By the time one has worked one's way through all the complexities of the application of those rules to real world cases, it is far from clear that one would really feel confident about preferring the tracing claimant over other claimants, including restitution claimants who cannot trace.<sup>115</sup>

Why not, then, simply use the formulation adopted in the Restatement in so many other contexts? The relevant provisions could state that a restitution claimant may have a claim to trace, if recognition of that claim is "necessary to prevent unjust enrichment" of the other creditors. To be sure, one would be unable to provide a bright-line test to identify such cases. There is, however, nothing wrong with being honest. The Restatement should have acknowledged more openly than it does that there is a fundamental weakness in the claim that a claimant who can trace has an unassailable right to priority over a claimant who cannot trace. That would

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1989). When Scalawag reassembled the two cars, 50% of each belonged to Mary. Indeed, we would have to apply that notion both to the equitable lien side and the constructive trust side. For an elaboration of this point, see Rogers, *supra* note 112, at 497–500.

114. R3RUE §§ 59, 60.

115. For a thoughtful treatment of the flexibility needed in assessing tracing claims in bankruptcy, see Emily L. Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. ILL. L. REV. 297.

have made it easier for the Restatement to provide a necessary measure of discretion for a court to reject a tracing claim when it seems to produce inequity rather than equity.<sup>116</sup> The reason that we need plenty of flexibility to deny tracing claims is that there frequently is no plausible rationale for the preference that tracing otherwise awards.

In fact, we know what happens if courts feel that restitution claims may result in giving an unfair preference to one creditor over others. They refuse to enforce the restitution claim, relying on very questionable grounds. The prime example is *In re Omegas Group, Inc.*<sup>117</sup> A creditor of an insolvent business asserted that it was entitled to preference over other creditors on the grounds that the way the debtor got money from them could be regarded as fraud, and that the debtor therefore held the proceeds of its dealings with the creditor in constructive trust. In an opinion noteworthy for its excess of rhetoric over analysis, the Court of Appeals for the Sixth Circuit refused to grant constructive trust relief, noting that "[c]onstructive trusts are anathema to the equities of bankruptcy since they take from the estate, and thus directly from competing creditors, not from the offending debtor."<sup>118</sup> Professor Kull has delivered trenchant criticism of the *Omegas Group* opinion, noting that it is based on an apparent ignorance of concepts that, as a matter of the law of restitution, have been settled for centuries.<sup>119</sup> As he states, the opinion displays a "pervasive doctrinal myopia."<sup>120</sup>

As Professor Kull has noted, there were many sound reasons for the result in the *Omegas Group* case. One might have said that the claimant had not made out the case that the debtor acquired property by fraud, or one might have rejected the claim on the grounds that the claimant lacked "clean hands," or one might have found that the claimant could not succeed in a tracing argument. Indeed, the *Omegas Group* opinion does not even discuss the tracing point. Suppose, however, that, in a case like *Omegas Group*, the claimant did have a plausible claim of fraud, was not guilty of unclean hands, and did—with the benefit of the elaborate tracing

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116. The only flexibility recognized by the Restatement is the rule, newly articulated in Section 61, that a court should not recognize a tracing claim beyond the extent of the claimant's actual loss when such recovery would come at the expense of wrongdoers, other creditors, or innocent dependents. R3RUE § 61.

117. *In re Omegas Grp., Inc.*, 16 F.3d 1443 (6th Cir. 1994).

118. *Id.* at 1452.

119. Andrew Kull, *Restitution in Bankruptcy: Reclamation and Constructive Trust*, 72 AM. BANKR. L.J. 265 (1999).

120. *Id.* at 275.

presumptions—succeed in a tracing argument. Even a judge who completely understands the law of restitution and tracing might well be troubled by the suggestion that a creditor who happens to be able to succeed in a tracing argument should come out whole, while another creditor with an indistinguishable claim who cannot trace must line up with all of the other creditors and receive little or nothing.

Suppose that the Restatement recognized openly that it is impossible to articulate a universally convincing justification for the tracing preference. Suppose that the Restatement openly stated that a court asked to rule on such a case needs to consider whether granting that preference is "necessary to prevent unjust enrichment" of the other creditors. At least in cases where the preference depends on a tracing argument, a court that found itself unable to stomach the preference could state honestly that there is no sound basis for granting such relief. That court could well say that if the matter involved only specific property that the debtor had obtained from the claimant by fraud, or perhaps property obtained by the debtor by a simple transaction that clearly could not have occurred but for the acquisition of the property by fraud, then the preference would be granted. At some point, however, the chain becomes sufficiently attenuated that we no longer feel the intuitive appeal of the simple property notion that if the claimant's property is still there then she gets it back. It seems to me that it would be far better to openly acknowledge that fact and give judges a straightforward way of dealing with concerns about the justice of tracing claims.

So, is restitution indeterminate? Yes and no. Yes, there is an unavoidable element of indeterminacy in the effort to state the rules of the law of restitution. That, however, is hardly a phenomenon unique to the law of restitution. If restitution is indeterminate, so are contract and tort. The fact that the current Restatement makes such liberal use of phrases like "as necessary to avoid unjust enrichment" is merely a matter of drafting style, attributable in large measure to the fact that this field of law is still relatively poorly understood relative to other fields of law. Courts dealing with restitution claims should be no more willing to explain their decisions merely by vague references to unjust enrichment than they would feel about making similar assertions in cases involving other legal subjects. There is more to the Restatement than the truism in Section 1 that "[a] person who is unjustly enriched at the expense of another is subject to liability in restitution." There is, however, no use denying that in some areas it is difficult or impossible to state the rules of restitution in simple black-and-white terms.

