
RESTITUTION FOR WRONGS AND THE
RESTATEMENT (THIRD) OF THE LAW OF
RESTITUTION AND UNJUST ENRICHMENT

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It is a Cinderella moment for the law of restitution. After decades of being overshadowed by its stepsisters tort and contract, restitution finally has been invited to the ball. Indeed, it gets its own ball—the proposed *Restatement (Third) of the Law of Restitution and Unjust Enrichment*.¹ The law of restitution is basking in the glow of renewed publicity and is enjoying the attentions of its own Prince Charming in the person of Professor Andrew Kull, who is doing superb work as the reporter for the project.

Perhaps the most important thing about the current *Restatement* project is simply that it is being done. That alone goes a long way to bringing the subject from the obscurity and confusion that has surrounded it for decades. I hope that I will not be misunderstood if I offer a criticism of one aspect of the current project, for my criticism is, I think, very much in the spirit of the project itself. My fear is that in the area of restitution for wrongs the current draft of the proposed *Restatement* pushes Cinderella back to the garret, to languish in the shadow of her stepsister, the law of tort. Ironically, that treatment comes as part of a project that on another matter—benefits obtained by breach of contract²—has

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1. Unless otherwise noted, references herein are to the draft discussed at the 2005 annual meeting of the American Law Institute, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Tentative Draft No. 4, 2005).

I use the term “restitution” to describe a cause of action based on the unjust enrichment principle. There is much to be said for a different terminological convention, under which one would use the phrase “unjust enrichment” when speaking of the substantive cause of action, and restitution when speaking of the remedy. However, I follow the usage of the current Restatement project, tolerating some ambiguity on that point. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. c (Discussion Draft, 2000).

2. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 (Tentative Draft No. 4, 2005)

boldly carved out a place for restitution despite the common view that her other stepsister, the law of contract, should be the sole belle of that ball.

But enough, for now, of metaphor.

I. INTRODUCTION

Perhaps after the current *Restatement* project has been completed and the profession has become familiar with it, it will be possible to discuss a specific topic within the law of restitution without an introduction explaining terminology. But we are still far from that point. Cases are still filled with passages such as:

As stipulated by the parties, the issue for decision was whether “the Defendants, or any of them, breached any contract with Plaintiff, written or oral, in fact or *implied*.” We read the mention of “implied” contracts as a reference to the doctrine of quasi-contract or unjust enrichment, under which courts imply a contract as a matter of law where necessary to avoid unjust enrichment. This interpretation is based in part upon the apparent intent of parties in distinguishing “implied contracts” and contracts “in fact,” and draws further support from the inclusion of unjust enrichment claims in the complaint.³

Or:

Finally, plaintiff assigns error to the trial court’s denial of its motion to conform the pleadings to the evidence it presented at trial. The motion did not supply the proposed pleadings, but we infer, based on plaintiff’s brief, that it sought to add a specification seeking to recover \$298.78 for parts and labor that it supplied and that defendant did not pay for. That specification, presumably, would have been in equity based on some theory such as unjust enrichment or *quantum meruit*. . . . Here, granting plaintiff’s motion would have injected an equitable claim based in quasi-contract into a legal action based on statutory law.⁴

Let us not mince words. These passages are little short of gibberish. “Quantum meruit.” “Contract implied in law.” “Quasi contract.” “Equitable claim.” These are nifty-sounding lawyer phrases. But it is rare to encounter a lawyer who can use them with any precision. And, I must add, that is mostly because we law professors have not done a competent job of training law students in the law of restitution. The key to understanding the relationship

3. *Cablevision of Breckenridge, Inc. v. Tannhauser Condo. Ass’n*, 649 P.2d 1093, 1096 (Colo. 1982).

4. *Pro Car Care, Inc. v. Johnson*, 118 P.3d 815, 820 (Or. Ct. App. 2005).

among tort, contract, and restitution is to think about the central organizing principle of each body of law.

Tort. The central substantive notion is that one must not (unjustifiably) harm another. The correlative remedial principle might be expressed as “a party who unjustifiably harms another owes a duty to pay a sum of money that will compensate the other for the harm.”

Contract. The central substantive notion is that one must not (unjustifiably) fail to perform one’s promise to another. The correlative remedial principle might be expressed as “a party who unjustifiably fails to perform a promise to another owes a duty to pay a sum of money that will put the non-breaching party where she would have been if the promise had been performed.”

Restitution. The central substantive notion is that one must not (unjustifiably) enrich oneself at the expense of another. The correlative remedial principle might be expressed as “a party who unjustifiably enriches himself at the expense of another owes a duty to pay a sum of money that will disgorge the enrichment.”

In some situations, only one of these bodies of law applies. In other situations, they overlap. Consider these three hypothetical scenarios:

Case One. Debbie hits Paul with a baseball bat, causing him great injury. Paul sues Debbie.

Case Two. Debbie owns the baseball bat that Babe Ruth used to hit his last home run. She promises to sell that bat to Paul. Later, she regrets the agreement and refuses to deliver. Paul sues Debbie.

Case Three. Paul owns the baseball bat that Babe Ruth used to hit his last home run. He sells it for \$250,000 and decides to donate the money to the Baseball Hall of Fame. He packages up \$250,000 in currency⁵ and sends it, along with a letter saying “Here’s a donation of the money I received from selling the Babe’s bat,” to “B-ball Hall of Fame, Springfield, Massachusetts.” Later, he realizes that he mistakenly sent the money to the Basketball Hall of Fame in Springfield, Massachusetts, instead of the Baseball Hall of Fame in Cooperstown, New York. Paul sues the Basketball Hall of Fame seeking return of the money.

Each of Cases One, Two, and Three falls only within one of the established branches of substantive private law.

Case One falls squarely and solely within the substantive law of tort. Debbie unjustifiably caused injury to Paul, and Paul seeks

5. I use currency in the example because if I used a more plausible example of donation by check the issues would be complicated by the possibility of actions based on the law of the check system.

compensation for that injury. No one would be confused into thinking that Paul's action against Debbie has anything to do with any promise or with any notion of unjust enrichment.

Case Two falls squarely and solely within the substantive law of contract. Debbie made a promise to Paul and unjustifiably refused to perform that promise. Paul sues seeking a remedy that will place him in the position he would have been in if Debbie had performed her promise. No one would be confused into thinking that Paul's action against Debbie has anything to do with harm suffered by Paul or with any notion of unjust enrichment.

Case Three falls squarely and solely within the substantive law of restitution. Paul conferred a benefit upon the Basketball Hall of Fame and did so simply as a result of a mistake. There is no reason that the Basketball Hall of Fame should retain that benefit. Now, in fact, lawyers are likely to be confused about this; but no well-trained lawyer should be confused about it. Paul is entitled to judgment for \$250,000 from the Basketball Hall of Fame. That has been settled law since at least the middle of the seventeenth century.⁶ For some reason, however, there never cease to be news stories on some version of this scenario, presenting it as though it were a novel problem.⁷ It is not. It's about as simple a case as one

6. *E.g.*, *Bonnel v. Foulke*, (1657) 82 Eng. Rep. 1224, 1224 (K.B.) ("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 q̄ droit ad vient & demand & jeo luy pay, jeo poy aver indebitatus assumpsit vers il q̄ done a moy le primer receipt.")

7. *E.g.*, Associated Press, *Cubs' Payroll Goof Gives Carrier \$301,000; Tribune Co. Sues to Recover Money Intended for Relief Pitcher*, Sept. 10, 2004, available at <http://sports-boards.net/forums/showthread.php?t=1858>.

MIDDLETOWN, Conn.—The company that owns the Chicago Cubs and The Hartford Courant are battling a former newspaper carrier to get back the last of \$301,000 it accidentally gave to him instead of a baseball player with the same name.

The Tribune Co. money that was meant for Mark Guthrie, the relief pitcher, was sent to the bank account of Mark Guthrie, the Courant deliveryman, in three payments, the final one made last October. Five weeks later the Cubs realized the error, and the team took back \$275,000 before Guthrie froze his account.

The Cubs sued in February but last month filed legal documents offering to drop the suit if he handed over the final \$26,000.

"We have no desire to embarrass Mr. Guthrie or bring undue attention to his actions—we just want the money back," said attorney Paul Guggina, who is representing the Cubs.

Guthrie, 43, said the matter is more complicated.

"I need them to open the books to me and show me I don't have any tax liabilities," he said. "It's mind-boggling. They never should have made the mistake to begin with."

can imagine for the substantive law of restitution. Paul's right to recover has nothing to do with any bad action by the Basketball Hall of Fame. It doesn't make any difference that Paul may have been sloppy—"negligent" if one likes fancy lawyer talk.⁸ Nor does Paul's right against the Basketball Hall of Fame have anything to do with any promise, explicit or implied, made by the Basketball Hall of Fame.

Now consider three further scenarios, where the substantive law of restitution overlaps with one or more of the other two branches.

Case Four. Debbie goes to Dr. Paul for dental treatment. Nothing is said about the charge. Dr. Paul sends Debbie a bill for seventy-five dollars, his customary charge for the work. Debbie refuses to pay. Dr. Paul sues Debbie.

Case Five. Debbie steals \$1000 from Paul. Paul sues Debbie for \$1000.

Case Six. Debbie goes to Chez Paul, a fancy restaurant. She orders a meal from the menu and eats it. After dessert, she looks around the dining room carefully, discovers that none of the waiters are present, and runs out of the restaurant without paying the bill. Chez Paul sues Debbie for the price of the meal.

Case Four illustrates the overlap of contract and restitution. The case might be regarded as falling within the law of contract, in the usual sense of enforcing promises. Debbie's action of going to Dr. Paul's office and requesting and receiving treatment can be treated as a manifestation of assent to pay Dr. Paul the seventy-five dollar customary charge for the work. Suppose Debbie was an odd sort of person—perhaps a lawyer—who said, "I offer to pay you seventy-five dollars if you clean my teeth. You may signify your acceptance of this offer by performing the work." We could then say that Dr. Paul has an action against Debbie because she made an offer, the offer was accepted, and performance was rendered. Accordingly, she is obligated to place Dr. Paul in the position he would have been in if she had performed her promise. Or, suppose

The carrier said he had waited for the team to call him as his bank account ballooned.

Guthrie the pitcher, 38, is now a free agent.

8. *See, e.g., Bank of Naperville v. Catalano*, 408 N.E.2d 441, 444 (Ill. App. Ct. 1980):

As a general rule, where money is paid under a mistake of fact, and payment would not have been made had the facts been known to the payor, such money may be recovered. The fact that the person to whom the money was paid under a mistake of fact was not guilty of deceit or unfairness, and acted in good faith, does not prevent recovery of the sum paid, nor does the negligence of the payor preclude recovery.

the same facts, except that Debbie says, "I offer to pay you your usual fee if you clean my teeth." Again, we could say that her liability is based on her promise. But there really is no need to haul out all the conceptual machinery of contract law for this simple case. She got her teeth cleaned, so she has to pay. The substantive law of restitution provides an easy way to describe her obligation. Dr. Paul conferred a benefit upon Debbie by performing the work. Dr. Paul did so in circumstances where payment is routinely required. Accordingly, it would be inappropriate for Debbie to retain the benefit of the services without paying for them.

To see the restitution perspective even more clearly, one need only change the facts of Case Four slightly to suppose that Dr. Paul is a physician who performs emergency services for Debbie when she is lying unconscious after an accident. Though the services are competently performed, Debbie does not survive. Dr. Paul seeks payment for his customary charge from Debbie's estate. It has been settled for years that the doctor would win the case.⁹ The simple explanation is provided by the substantive law of restitution. The doctor is entitled to recover for the reasonable value of the benefit conferred by providing the services. It makes no difference whether one could find some basis for construing any action by Debbie as tantamount to making a promise. Nonetheless, confusion about the relationship between contract and restitution has sometimes led lawyers representing the patient's estate in such cases to waste their client's money by trying to show that the patient never regained consciousness and so could not have manifested assent.¹⁰

Case Five illustrates the overlap of tort and restitution. One might think of this as a case where Debbie inflicted a harm on Paul by depriving him of \$1000, and so she must compensate him for the harm he suffered. Or, one might think of this as a case where Debbie inappropriately obtained a benefit from Paul by taking the \$1000 from him, and so she owes a duty to disgorge the enrichment she obtained. In a simple case, it really doesn't matter which way we describe the case. We get into troubles only if we get caught up in arcane jargon and start talking about the restitution action as one in which Paul "waives the tort and sues in *assumpsit*."¹¹

9. See, e.g., *Cotnam v. Wisdom*, 104 S.W. 164 (Ark. 1907).

10. *Id.* at 165 (dismissing as silly the argument of the patient's lawyer that the patient "was never conscious after his head struck the pavement. He did not and could not, expressly or impliedly, assent to the action of the appellees. He was without knowledge or will power.").

11. See 1 GEORGE E. PALMER, *THE LAW OF RESTITUTION* § 2.1 (1978) ("The expression 'waiver of tort' is inaccurate; it has been a source of confusion and sometimes of unsatisfactory decisions . . . it should be wholly discarded.").

Case Six illustrates the overlap of tort, contract, and restitution. There is no question that Debbie is obligated to Chez Paul for the cost of the meal. We can describe that obligation in various ways. We might say that by sitting down in the restaurant, ordering from the menu, and eating the meal, Debbie manifested that she promised to pay Chez Paul the price of the meal. Or, we could say that what Debbie did was equivalent to stealing from Chez Paul, and she is obligated to pay damages for the harm she inflicted. Or, we could say that Debbie enriched herself by eating the meal, so she is obligated to disgorge the enrichment she received.¹²

The irony is that despite the fact that this is all very simple, many lawyers thinking about these six examples will feel entirely comfortable with the tort and contract cases and will feel comfortable with the overlap cases, so long as they are described from the perspective of tort or contract. By contrast, the restitution approach, either in the case of payment by mistake where restitution is the only plausible approach, or in any of the overlap cases, is likely to leave lawyers feeling a bit uneasy. It's pretty common to hear law students and lawyers say something along the lines of: "I more or less understood contracts and torts, but I never really understood that stuff about quasi-contract or restitution." That, I suspect, is the product of little more than the way we organize the first-year curriculum in law school.

Suppose that in the first year of law school we taught tort and restitution but not contract. Students would emerge saying that they more or less understood the subjects they took, but never felt comfortable about that other odd subject. We would have people saying things like: "I understood tort and restitution, but in our restitution class we sometimes encountered quasi-restitution and that always confused me. I understand that you have to pay for stuff that you get. So all the stuff about sale of goods and sale of real estate was pretty simple. You owe a duty of restitution for the benefit that you received. But sometimes you have to pay even though all that happened was that you made a deal, and then nothing ever happened. I don't see how you could say that anyone was enriched if neither side performed. But somehow people did win those cases, on the notion of "quasi-restitution." I guess the idea was that simply by making a deal you were sometimes "enriched," in a way, if the deal was one that would turn out to be a good one. And so, I suppose, maybe you could say that you were entitled to that enrichment just by virtue of making the deal, so that if the other side refused to perform, you were entitled to sue in quasi-restitution for the benefit that you should have received. But

12. Maybe I should not talk about disgorging meals.

anyway, it sure was confusing, and I hope there's not much of it on the bar exam."

If we taught restitution and contract but not tort, we'd end up with law students and lawyers similarly confused about those weird quasi-restitution cases where sometimes you had to pay just because somebody else got hurt, even though you didn't make any promise or obtain any enrichment.

II. IS RESTITUTION PARASITIC?

There is not much point in talking about which branches of law are basic and which are odd. If history had unfolded in a different way, restitution might occupy a more prominent place in the organization of law and law school curricula, but that is not the way that things happened. Counter-factual history is sometimes fun—what if the South had won the Civil War?—but it's not a subject to be pursued all that seriously. But there is a danger in confusing accidental products of history with coherent logical explanations. It will undoubtedly remain the case for the foreseeable future that contract and tort will occupy center stage and restitution will lurk in the wings. But, when our subject matter is the law of restitution, we should not be so modest. The thesis of this Article is that on the topic of restitution for wrongful conduct, it is not helpful to think that the law of tort is the natural source of judgments about what is rightful and what is wrongful. That is, the contribution of the law of restitution in that area is more than an additional remedy for conduct that is judged wrongful under the law of tort or other law.

The black-letter text of the current proposed *Restatement* might be read as neutral on the question whether restitution is an independent basis of liability. Section 40 provides for restitution of benefits obtained "by an act of trespass or conversion," which seems to limit restitution recovery to cases where the conduct is tortious under other law. The other provisions in the chapter on restitution for wrongs are a bit more open-textured. Section 41 provides for restitution of benefits obtained "by misappropriation of financial assets." Section 42 provides for restitution of benefits obtained "by misappropriation or infringement of another's legally protected rights in any idea, expression, information, image, or designation." Section 43 provides for restitution of benefits obtained "in breach of a fiduciary duty." Finally, Section 44 provides a residual rule authorizing restitution of benefits obtained by "conscious interference with another's legally protected interests." Focusing on the general formulation found in Section 44, one might read the language as meaning that the unjust enrichment principle may itself be the basis for determining that the conduct does constitute an interference with "legally protected interests."

The official comments and reporter's notes, however, are very clear in stating that the determination of rightful versus wrongful conduct is to be based solely on other law; that is, the unjust enrichment principle plays no independent substantive role. The comment to Section 44 provides, "Restitution by the rule of this Section will sometimes yield a recovery where the claimant could not prove damages, but it does not create a cause of action where the claimant would otherwise have none."¹³

Similar passages appear in the comments to other sections within this Chapter. For example, the comment to Section 42, on interference with intellectual property rights, states that:

The rights referred to in this Section, and the acts constituting a prohibited interference therewith, are defined by state and federal law outside the scope of this Restatement. . . . The law of restitution does not define the substantive rules of ownership on which a claim for infringement or misappropriation necessarily rests. The rule of this Section depends on a body of law that defines the underlying entitlements, just as the rule of § 40 (describing restitution for trespass or conversion) depends on a body of law that defines ownership rights in tangible property.¹⁴

The Reporter made the point quite clearly at the May 2005 American Law Institute ("ALI") meeting where this Chapter was discussed:

The uniform assumption throughout all of these Sections, §§ 40 through 44, is that the boundary line between what's mine and what's yours is fixed by other law. . . . We are certainly not trying to restate what acts constitute infringement of a patent, a copyright, or a trademark in this Section, nor whether in a particular jurisdiction there is such a thing as a right of publicity, or, if there is, what its contours might be. Nor, just to continue with this theme, because it is very important, when we get to § 43, are we trying to restate the underlying law of fiduciary obligation, to state whether, under given circumstances, a particular action or inaction gives rise to a fiduciary duty and, if it does, whether it has been breached; nor, finally, last but not least, in § 44 are we creating any new causes of action. We make it explicit that we are not.¹⁵

13. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 44 cmt. a, at 153 (Tentative Draft No. 4, 2005).

14. *Id.* § 42 cmts. a & b, at 85, 87.

15. Andrew Kull, *Discussion of Restatement of the Law Third, Restitution*

To some extent, the position taken by the Reporter is clearly correct. As a matter of the organization and scope of the project, it would make no sense to attempt in the *Restatement of Restitution* a comprehensive statement of all of the related bodies of law that define wrongful conduct. That, however, is different from saying, as the current draft does, that the law of restitution plays *no role* in defining wrongful conduct. In some areas, particularly areas where the judgments of other law about rightful and wrongful conduct are not entirely clear, it is the thesis of this Article that the law of restitution does and should play an important substantive role.

It is also important to distinguish the thesis of this Article from a point that Professor Kull accurately, though provocatively, describes as “arid”: that is, whether in general the law of restitution should be described as substantive or remedial.¹⁶ Let us, for the moment, confine our attention to simple examples in the area of restitution for wrongful conduct, such as an action for taking of another’s tangible personal property. Consider, for example, the scenario given as an illustration in Section 40 of the current draft of the *Restatement*, where Owner brings an action against Dealer who has purchased and resold Owner’s stolen car.¹⁷ The point of Section 40 is that, at least where Dealer acted as a conscious wrongdoer, Owner can recover the amount of the resale—\$20,000 in the illustration—even if the value of the car at the time of the theft was only \$18,000. The tort law of conversion would presumably measure the recovery by the amount of harm suffered by the Owner; that is, the loss of the \$18,000 value of the car. The law of restitution seeks to prevent Dealer from profiting by the wrongful conduct, and so dealer must disgorge the \$20,000 benefit obtained by the wrongful sale of Owner’s car.

The controversy that Professor Kull aptly describes as “arid” is as follows: Should Owner’s cause of action for \$20,000 be described as based on the substantive law of tort, with the law of restitution providing only a different calculation of the remedy? Or, should Owner’s cause of action for \$20,000 be described as based on the law of restitution? It is entirely true that, in such a case, nothing of substance turns on the resolution of the dispute. It is, as Professor Kull correctly notes, a dispute about the table of contents of books rather than the content of the books.¹⁸ If I understand him correctly,

and Unjust Enrichment, 82 A.L.I. PROC. 249, 287 (2006).

16. *See id.*

17. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40 cmt. d, illus. 13, at 56 (Tentative Draft No. 4, 2005).

18. Kull, *supra* note 15, at 273 (“My own view is that ultimately it depends on how you look at it, and it really doesn’t matter because we’re just arguing

Professor Kull takes the view that it is simpler to describe the law of restitution in this and other areas as providing a cause of action, but whether that cause of action exists or not depends on other law—the law of conversion in the example here under consideration.

But the controversy seems arid only if we confine our attention to simple examples. Suppose I devise a machine that will dematerialize the protons, neutrons, and electrons from the watch on your wrist and reform them into a watch on my wrist. Is that a conversion? I don't think there is much doubt about how a court would resolve such a case. I have no doubt that a court would conclude that my conduct was wrongful. It is possible that the court might justify that conclusion by drawing on principles solely within the law of tort, such as by emphasizing the circumstance that my machine caused the watch on your wrist to dematerialize, thereby harming you. But, I think it is equally plausible to suppose that the court would say that whatever conclusion one might reach as a matter of the tort law of conversion, it is simply not appropriate for me to enrich myself at your expense. Accordingly, you should have a cause of action based on the unjust enrichment principle, whether or not you would have a cause of action in conversion. It strikes me as quite unhelpful to insist, as the current draft of the *Restatement* does, that any such conclusion would have to be based on law other than the law of restitution.

It is worth contrasting the approach taken to restitution for wrongs with the approach taken in another section of the proposed *Restatement*, Section 39 on profit derived from opportunistic breach of contract.¹⁹ Under Section 39, there may be cases in which a party who profits by a breach of a contract owes a duty of restitution of those profits, even though the amount of the profits exceeds the usual contract remedy of the amount needed to place the non-breaching party where she would have been if the agreement had been performed. On a certain view of substantive contract law and contract remedies—the view associated with the concept of “efficient breach”²⁰—that rule is anomalous in the extreme. On that view, all that it means to say that a person is bound by a contract is that the

about how to write the Table of Contents for some book, in this case the *Restatement*. Personally, I am satisfied that it is simpler to describe overlapping liabilities than to say that part of the law of restitution confers a substantive cause of action, while another part of this curious subject is simply an additional remedy to be brought out where you have a tort or a contract claim.”).

19. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 (Tentative Draft No. 4, 2005).

20. See A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 29-32 (1983).

person must either perform or pay damages to place the non-breaching party in the position she would have occupied if the promise had been performed.²¹ If the circumstances are such that one side might be better off breaching and paying damages, then that is just what that party ought to do. Yet, Section 39 of the *Restatement of Restitution* says that, albeit in carefully limited extreme cases, a party who profits by breach may owe a duty of restitution. As the Reporter has noted, that rule is clearly in tension with the efficient breach hypothesis,²² yet, as the Reporter has also noted, the cases do support recovery in some such situations.²³

The substantive approach taken in Section 39 of the proposed *Restatement* has been widely applauded.²⁴ That is a view that I share. Moreover, as a matter of organization, it makes sense to deal with the issue within the *Restatement of Restitution*, rather than treating it as solely a matter of the law of contract. Treating this openly as an issue within the law of restitution facilitates comparisons to other instances of unjust enrichment and makes it clear that restitution principles must be developed with sensitivity both to other restitution issues and to issues normally regarded as solely within the sphere of contract law. On balance, the law is better if it is openly acknowledged that in some extreme cases a person ought not be able to profit from breach of contract, even if that notion is in tension with much of what underlies contract law. The thesis of this Article is that the same view ought be taken in the area of restitution for wrongs. To be sure, in most of the territory within this subject, the dividing line between rightful and wrongful conduct is and should be drawn on the basis of the law particular to the species of wrongful conduct. However, in at least some cases, it is useful to look to the law of restitution itself for guidance on drawing that line.

21. As Holmes famously stated, "The duty to keep a contract . . . means a prediction that you must pay damages if you do not keep it,—and nothing else." O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

22. Kull, *supra* note 15, at 257-58.

23. *Id.* at 250-53.

24. *Id.* at 256 (Professor Laycock: "enormous accomplishment"); *id.* at 257 (Justice Kass: "admirable"); *id.* at 259 (Professor Kovacic-Fleischer: "I would also like to second the other speakers who have complimented you on this Section"); *id.* at 262 (Professor Cohen: "the Section . . . is well deserving of all the praise that's been thrown your way"); *id.* at 266 (Professor Young: "Like some others who spoke, I am a warm admirer of this Section").

III. INTERFERENCE WITH RIGHTS THAT ARE
PROTECTED BY OTHER LAW

It is certainly true that in many instances the role of the law of restitution is to provide a basis for recovery for acts that are fairly clearly described as wrongful by other law. In many such cases, plaintiff would have a cause of action under other law, so that recovery based on the unjust enrichment principle can with equal plausibility be regarded as providing a remedy for a wrong described by other law or as providing a cause of action, though one that is “parasitic” on other law for the basic judgment of right and wrong.

In some cases within this general category, the law of restitution provides a basis of recovery where other law has, often for little good reason, created an obstacle to recovery. A classic instance is provided by *Raven Red Ash Coal Co. v. Ball*,²⁵ in which a coal company held an easement entitling it to transport coal mined from certain property via a tramway constructed over plaintiff’s land. Plaintiff sued for overuse of the easement when it discovered that the coal company had also used the tramway to transport coal from other land not within the scope of the easement. The tort principle that one must compensate for harm done provides little help in such cases, for it would have been hard for plaintiff to show that it had suffered any actual, measurable harm from overuse of the easement. On the other hand, simple property concepts suffice to label defendant’s act wrongful. It is basic to our conception of property that ownership of land includes the right to exclude others. Defendant had contracted for the right to transport certain coal over plaintiff’s land. Any further use was wrongful, that is, amounted to a trespass. There are various ways that one might compute the remedy for that trespass. To be sure, plaintiff would be entitled to compensation for any actual harm sustained, but in the case itself that would presumably have generated no recovery. Granting restitution for the value of the benefit obtained provides a useful way of vindicating simple property notions.

The restitution action on the facts of *Raven Red Ash* encountered a historical difficulty. The approach taken in the English case of *Phillips v. Homfray*²⁶ would have denied recovery on the ground that merely using another’s land, without removing anything of value from it, constituted only a tort. *Raven Red Ash* rejected that approach, holding that plaintiff could bring a restitution action to recover the saved expense, or as it was put at the time, plaintiff could “waive the tort and sue in assumpsit.” The

25. 39 S.E.2d 231 (Va. 1946).

26. (1883) 24 Ch.D. 439 (C.A.).

original *Restatement of Restitution* accepted the older view that denied recovery in such cases.²⁷ The current draft of the *Restatement* appropriately adopts the approach taken in *Raven Red Ash*.²⁸

As is the case with real property, a person who wrongfully uses personal property should have a duty to make restitution for any benefit obtained. The current draft of the *Restatement* describes the basic principle as follows: “A person who obtains a benefit by an act of trespass or conversion . . . is accountable to the victim of the wrong for the benefit so obtained.”²⁹ There is a problem with that formulation. As currently drafted, there is an action for restitution only if there would be an action for trespass or conversion. That formulation confuses the substantive law of personal property with the remedial law of tort. The thought presumably is that recovery is warranted any time that the substantive law of personal property recognizes that a person has the right to exclude another from use of certain personal property and another person obtains a benefit by interfering with that right. The key step in that inquiry is whether the law of personal property does or does not give plaintiff a right to exclude defendant from the use in question. It is, however, a different question whether the remedial law of tort would describe the act in question as a “trespass or conversion.”

Consider, for example, *John A. Artukovich & Sons, Inc. v. Reliance Truck Co.*³⁰ Artukovich, the owner of a crane, had leased it to Ashton Company. Ashton hired Reliance to transport the crane to Ashton’s job site. Reliance loaded the crane on its trucks, but before delivering it to Ashton, Reliance realized that it could use the crane to fulfill another contract. Reliance contacted Ashton and was told that permission would have to come from Artukovich. Reliance attempted without success to contact Artukovich, but went ahead and used the crane in the other job anyway. Artukovich sued Reliance for the value of Reliance’s use of the crane. The court stated explicitly that the case presented two issues: (1) whether Artukovich could recover on a theory of conversion, and (2) whether Artukovich could recover on an unjust enrichment theory.

27. RESTATEMENT OF RESTITUTION § 129 (1937). Palmer was harshly critical of that result. 1 PALMER, *supra* note 11, § 2.5, at 76 (“It is a reproach to the administration of justice that many courts have adhered to tradition . . . [I]f courts were aware of the fact that the denial of restitution rests wholly upon obsolete precedent, one who has faith in the judicial process is forced to believe that the precedent would be discarded.”).

28. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40 reporter’s note c, at 63 (Tentative Draft No. 4, 2005).

29. *Id.* § 40(1).

30. 614 P.2d 327 (Ariz. 1980).

Considering first the tort theory, the court held that an action for wrongful detention of personal property would lie only if plaintiff then had a legal right to the use of the property. Because Artukovich had rented the crane to Ashton, it could not satisfy that requirement, and therefore no tort action would lie.³¹ Nonetheless, the court ruled that Artukovich did have a right to recover from Reliance on a restitution theory. Reliance obtained a benefit from the unauthorized use of Artukovich's crane, and was required to make restitution for the value of that benefit, whether or not Artukovich could show that it suffered any loss. The case could not be any clearer on the point that the availability of the restitution action does not depend on whether plaintiff would have had an action under the law of tort for conversion or trespass.³²

If taken literally, the current *Restatement* draft would seem to say that plaintiff in *Artukovich* would not have a restitution action, because plaintiff would not have a tort action.³³ The problem could easily be fixed by returning to a formulation used in an earlier draft under which the restitution action would be available for an "interference with legally-protected rights in tangible property."³⁴ The problem with the current draft is that the restitution action is tied too closely to the tort action for conversion. But either form of action has as its objective vindication of legal interests that are well-established under the law of property. The crane belonged to Artukovich. That meant that Artukovich alone was entitled to permit or prohibit others from using it. Reliance used it without

31. *Id.* at 329 ("Since Ashton had taken possession of the crane by authorizing its agent, Reliance, to transport the crane to Tucson, plaintiff, Artukovich, no longer had any right to use nor was it in a position to use the crane at the time of Reliance's unauthorized use. Plaintiff, therefore, cannot recover damages for its loss of use of the crane on a theory of conversion.").

32. Professor Friedmann has discussed in detail situations where restitution has been and should be granted when a person obtains a benefit by infringement of another's interest in personal property, yet the act does not constitute the tort of trespass or conversion. Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504, 532-51 (1980).

33. Or, perhaps the conclusion would only be that plaintiff's restitution action falls within the residual category described in Section 44, rather than the category of restitution of benefits obtained by trespass or conversion covered by Section 40. The current draft, however, treats *Artukovich* as a Section 40 case. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40 reporter's note d, at 66 (Tentative Draft No. 4, 2005). Moving the cases of unauthorized use of chattels not involving a technical trespass or conversion from Section 40 to Section 44 seems inappropriate, inasmuch as the latter section is much more restrictive of liability than Section 40.

34. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40 (Preliminary Draft No. 6, 2004).

obtaining Artukovich's consent, and that use was clearly a violation of Artukovich's property rights.

IV. COMPUTATION OF RESTITUTION RECOVERY FOR INFRINGEMENT OF RECOGNIZED PROPERTY INTERESTS

Continuing to focus on areas where other law does quite clearly mark the line between rightful conduct and wrongful conduct, it is worth pausing for a moment to consider how one should determine the extent of restitution recovery. Under the current draft of the *Restatement*, such issues depend primarily on the distinction between conscious and innocent wrongdoing. As Section 40 puts it:

(a) A conscious wrongdoer . . . will be required to disgorge all gains (including consequential gains) derived from the wrongful transaction.

(b) A person whose conduct is innocent or merely negligent will be liable only for the direct benefit derived from the wrongful transaction. Direct benefit may be measured, where such a measurement is available and appropriate, by reasonable rental value or by the reasonable cost of a license.³⁵

The distinction between conscious and unconscious wrongdoing may help in some cases, but it does not seem to account fully for our intuitions about the appropriate measure of recovery. It is one thing to say that an unconscious wrongdoer should not be required to disgorge all profits made from what turned out to have been a wrongful use of another's property. It is another thing to say that any conscious wrongdoer should be required to disgorge all profits. There are simply some cases in which that recovery seems far too harsh. There may, however, be more that can be said about why it sometimes does seem appropriate to require a conscious wrongdoer to disgorge profits.

Consider the classic Great Onyx Cave case, *Edwards v. Lee's Administrator*.³⁶ The owner of land discovered that it contained the entrance to a magnificent limestone cave and developed the cave as a tourist attraction. The owner of adjacent land brought suit when he realized that the tours included portions of the cave system that

35. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40(2) (Tentative Draft No. 4, 2005). A similar formulation appears in Sections 41, 42, and 43.

36. 96 S.W.2d 1028 (Ky. 1936). One of the highlights of the current *Restatement of Restitution* project was a "field trip" for the advisers and members consultative group to the actual cave, now a part of Mammoth Cave National Park. See 27 A.L.I. REP., Fall 2004, at 1-2.

lay beneath his land. It would have been difficult to identify any actual harm suffered by plaintiff. Having no means of access to the cave system from his land, plaintiff could never have developed it as an attraction. Yet given our system of property law, defendant's exploitation of the portions of the cave under plaintiff's land constituted a trespass. The problem is to decide how one should compute the restitution recovery. In the case itself, the court ruled that plaintiff was entitled to recover a portion of defendant's profits from the venture, the proportion being computed on the basis of the square footage of the cave under each party's land. The current draft of the *Restatement* approves of that result and bases it on the distinction between conscious and innocent wrongdoing.³⁷

The result in the Great Onyx Cave case has long been regarded as somewhat troubling. Professor Prosser thought the result foolish: "Since it is quite apparent that [plaintiff] had no slightest practical possibility of access to the cave . . . the decision is dog-in-the-manger law, and can only be characterized as a very bad one."³⁸ Others are willing to accept the substantive result that some recovery was warranted, but are troubled by the extent of the recovery. Dawson noted that the "formula may have taken insufficient account of the defendant's contribution as entrepreneur and the fact that only he could supply an entrance."³⁹ Similarly, Palmer suggests that while "[i]t is fair to deprive a willful wrongdoer of all profit . . . the *Edwards* case goes beyond this since no allowance was made for the defendant's contributions to the creation of that profit."⁴⁰

The key to the approach in the Great Onyx Cave case may lie not merely in the rough distinction between conscious wrongdoers and others, but in the way that defendant's conduct affected our ability to decide what would otherwise constitute a fair price for the use wrongfully taken. If there had been an established market price for the right to exhibit portions of a cave under the land of an owner who had no means of surface access, one would imagine that market would furnish an appropriate measure of recovery, as in the *Raven Red Ash* case. But in the Great Onyx Cave case, defendant's wrongful conduct prevented the operation of the only fair means of setting a price for the use of the property.

37. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40 cmt. c, illus. 4 (Tentative Draft No. 4, 2005).

38. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 13, at 73 (4th ed. 1971); see also *Recent Decisions*, 37 COLUM. L. REV. 503, 504 (1937) (calling the Great Onyx Cave case an "astonishing result").

39. John P. Dawson, *Restitution Without Enrichment*, 61 B.U. L. REV. 563, 613 n.158 (1981).

40. 1 PALMER, *supra* note 11, § 2.12, at 163.

Suppose that the cave features that warranted commercial development had been located under plaintiff's land, but that the only access to the cave was on defendant's land. If defendant had acted honestly, it would have gone to plaintiff and bought the right to enter plaintiff's land and exhibit the cave features. What would an appropriate price have been? It makes no sense to say that the appropriate price is the "fair market value," for the situation is too specialized for there to be anything that one can honestly call a fair market price. But, consider for a moment. All that we mean by "fair market price" is the price that would be produced by negotiation between a large number of willing buyers and willing sellers of similar property. In a situation like the Great Onyx Cave case, there really is no market, so "fair price" means simply the price that is agreed to by this particular seller and this particular buyer.

Now shift to the situation presented in the case itself. Defendant did not bargain with plaintiff. Rather, defendant simply took the use of plaintiff's property,⁴¹ circumventing the negotiation that is the only way of setting the fair price for such an unusual right. The wrong was not only the taking of the use of property, but also the taking of the only fair way of measuring the value of that use.⁴² In that situation, there is something to be said for adopting a measure of recovery that probably does exceed the likely outcome of the bargaining.

There may be yet another aspect of wrongful taking that warrants a rather generous measure of recovery in certain cases. Consider the well-known egg-washing machine case, *Olwell v. Nye & Nissen Co.*⁴³ Plaintiff and defendant had been co-owners of an egg business. In 1940, plaintiff sold his interest in the business to defendant. Not included in the sale, however, was an egg-washing machine. Plaintiff retained ownership of the machine and stored it on an adjacent property. Sometime thereafter, defendant, without

41. Cf. BEATRIX POTTER, *THE STORY OF A FIERCE BAD RABBIT* 8 (1906) ("He doesn't say 'Please.' He takes it!").

42. Professor Kull hints at this aspect of the case in one passage of the commentary to the current *Restatement* draft:

The more difficult issues of valuation are accordingly those in which the defendant has made a use of the claimant's property for which there is no ordinary market; or in which the defendant has bypassed any market by taking without asking, or by proceeding in the face of a refusal.

RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40 cmt. b, at 48 (Tentative Draft No. 4, 2005).

43. 173 P.2d 652 (Wash. 1946). In the years I taught a Restitution course, I assembled a marvelous collection of students' imaginative responses to the following take-home exam question: "Special Question (No credit, but much appreciation!) Draw and/or describe an egg-washing machine."

discussion or consent, took the machine out of storage and used it about once a week for three years. Plaintiff then discovered the use and offered to sell the machine to defendant for \$600, about one-half of its original cost. Defendant's counter-offer of \$50 was refused, and plaintiff brought suit.

Plaintiff would certainly have had an action for conversion, but the maximum recovery would presumably have been the value of the machine. Given that plaintiff had offered to sell it for \$600, that would presumably have been the maximum amount of the recovery. Instead, plaintiff sued for restitution of the benefit defendant obtained by the wrongful use of the machine. As evidence of the value of that benefit, plaintiff proved that defendant had saved the labor expense of washing eggs by hand, amounting to about \$10 per day. Over the three-year period for which damages were assessed, that amounted to \$1560. The Washington Supreme Court held that this was an appropriate case for restitutionary recovery, and that the saved labor expense was an appropriate measure of the benefit wrongfully obtained by defendant's use of the machine. Ironically, however, the amount that plaintiff would have been entitled to was less than the ad damnum in plaintiff's complaint, only \$25 per month. So, the recovery was reduced to the \$900 amount sought in the complaint.

The striking thing about the case is that, had it not been for the pleading mistake, the court would apparently have been willing to grant damages measured by the saved labor costs of \$1560 even though plaintiff had offered to sell the machine for \$600. The decision has been criticized as awarding an overly generous measure of recovery. The current *Restatement* draft more or less accepts the result in an illustration, but bases that conclusion on the distinction between conscious and innocent conversion and the fact that defendant had refused plaintiff's offer to sell the machine.⁴⁴ Others are more critical. Palmer noted that the wrongfulness of defendant's conduct is relevant, but concluded that "[a] recovery that departs this far from market standards is at least suspect."⁴⁵ Dawson was even more critical, noting that "[t]here must be something incurably wrong about this."⁴⁶

There may, however, be more to the matter than first meets the eye. If using the machine was so obviously profitable, why didn't defendant buy it along with the rest of the egg-washing business? Why did plaintiff keep it, squirreled away in storage collecting dust?

44. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40 cmt. d, illus. 16 at 58-59 (Tentative Draft No. 4, 2005).

45. 1 PALMER, *supra* note 11, § 2.12, at 161.

46. Dawson, *supra* note 39, at 612.

The case does not permit any confident conclusions, but offers tantalizing clues. Plaintiff bought the machine in 1929. Plaintiff sold his interest in the egg business in 1940, and, at that time, defendant apparently had no interest in the machine. Defendant, however, began using the machine on May 31, 1941. As the court notes explicitly, the reason was “the scarcity of labor immediately after the outbreak of the war.”⁴⁷ The picture one gets is that plaintiff may well have been a tinkerer, or a dreamer, who, in 1929, thought that the egg-washing machine was a great idea. Defendant may well have been the more hard-nosed practical sort, who thought it silly to spend money on a fancy machine when you could hire people more cheaply to wash the eggs by hand. But, with the dramatic rise in labor prices due to the outbreak of World War Two, the choice between machine washing and hand washing looked very different.

Consider in this regard the classic children’s story of the three little pigs.⁴⁸ Pig One quickly built his house with straw and spent his time playing the flute. Pig Two spent a bit more time building his house with sticks, but then joined the fun, playing the fiddle. Pig Three was the practical, nay boring, drudge. He labored endlessly building a strong house of bricks, deferring his gratification of playing the piano until his work was done. When the big bad wolf came, he easily blew down Pig One’s house and Pig Two’s house. Fortunately for them, Pig Three let them take refuge in his strong house, where all were saved from the wolf.⁴⁹

Now, suppose that Pig Three had been away when the big bad wolf came. Suppose that Pig One and Pig Two escaped from the wolf, ran to Pig Three’s house, found that he wasn’t home, but entered anyway taking refuge from the wolf. Later Pig Three discovered what happened and sued Pig One and Pig Two for unlawfully making use of his house. What would the recovery be? Pig One and Pig Two may have been guilty of a trespass, but a trespass action would presumably give Pig Three only nominal damages. At the other extreme, one might say that the value of the refuge that the first two pigs took was saving their lives, and since Pig One and Pig Two would presumably value their lives above all else, Pig Three should be able to collect essentially infinite damages

47. *Olwell*, 173 P.2d at 652-53.

48. I use the Disney version of the classic folk tale. *THREE LITTLE PIGS* (Walt Disney 1933).

49. Needless to say, the Disney version cleaned up the story a good deal. In prior versions, the first two little pigs were eaten by the wolf. See Wikipedia, *Three Little Pigs*, http://en.wikipedia.org/wiki/Three_little_pigs (last visited Jan. 21, 2007).

from them. Neither approach accurately captures the situation. Pig One and Pig Two got to sing and dance all day while Pig Three slaved away building his house. Then, when the big bad wolf came by, Pig One and Pig Two took advantage of Pig Three's work and sheltered themselves in his strong house. In short, Pig One and Pig Two appropriated to themselves the value of Pig Three's investment in a strong house.

Consider another casebook classic, the tort case of *Ploof v. Putnam*.⁵⁰ Putnam owned an island in Lake Champlain. Seeking safety during a sudden violent storm, Ploof moored his boat on Putnam's dock. Putnam's servant unmoored the sloop. As a result, the boat was destroyed in the storm, and Ploof and his family suffered injuries. The Vermont Supreme Court ruled that Ploof could recover for the damages suffered on the grounds that the sudden necessity privileged the temporary use of Putnam's property, so that casting off Ploof's boat was wrongful. Now consider a variant. Suppose that the dock owner had not cast off the boat, but sued for the trespass. At most, there would have been a technical trespass, with recovery of nominal damages. Indeed, the result in the case suggests that the temporary use would not have even been a trespass, so no recovery would have been allowed.

Now consider a further variant. Suppose that Ploof and Putnam own adjacent waterfront parcels. Putnam, a crusty old Vermonter, spends considerable time and effort maintaining his dock. Ploof, a carefree New Yorker who only summers in Vermont, allows his dock to deteriorate. Putnam often warns Ploof that his dock is falling into disrepair, but Ploof is too interested in his sailing parties to waste time fixing up the dock. As is no surprise to Putnam, Ploof's dock is destroyed in a violent storm. Ploof runs out and moors his fancy sailboat to Putnam's dock. What result if Putnam sues Ploof? Would we be willing to say that the emergency created by the storm gives Ploof a privilege to make use of Putnam's dock? Even if not, would we be willing to say that Putnam can recover only nominal damages for the trespass? The problem, as in the three little pigs hypothetical, is that one party has obtained the benefit of another's prudent investment. Qualitatively, we can see that Ploof has reaped the advantage of the Putnam's prudent expenditure on measures that might prevent or alleviate future harm. Quantitatively, it is extremely difficult to put a figure on the value of that benefit.

So, let us reconsider the *Owll* case. Plaintiff invested in the egg-washing machine in 1929, at a time when, presumably, that seemed a silly thing to do. Once the war broke out and labor prices

50. 71 A. 188 (Vt. 1908).

skyrocketed, the decision to invest in the egg-washing machine no longer looked so foolish. When the time came that the investment in the machine would pay off, defendant just took it. Presumably, if the war had been of short duration, or if for any other reason labor prices dropped to their former level, defendant would have stopped using the machine and gone back to hiring cheap labor. It would hardly be just to permit defendant to take advantage of plaintiff's investment. Placing a dollar figure on that benefit is, however, extraordinarily difficult. It seems highly unlikely that one really could provide evidence of the reasonable rental value of egg-washing machines in Tacoma, Washington, in 1941. Any effort to give content to that notion is likely to end up begging the question. How should we price the right to use the machine after an unexpected labor shortage changed foolishness into prescience? Why not simply say that defendant does not get the advantage of appropriating the investment? That is exactly the result of the damage calculation approved by the court.

V. IS RESTITUTION PARASITIC? THE QUESTION REVISITED

In the cases considered thus far, one can always look to the law of property for a resolution of the basic question whether defendant's use of plaintiff's property was wrongful. The deeper question is whether the unjust enrichment principle itself provides a basis for resolving the question whether use of another's chattels is wrongful in cases where no clear answer is provided by the remedial law of tort or the substantive law of property. In considering that question it is useful to begin with a setting in which the unjust enrichment principle seems, at first look, to play purely a derivative role. Consider the delightful old case of *Johnson v. Weedman*.⁵¹ The owner of a horse had left it in the care of defendant. Without authority, defendant rode the horse fifteen miles. As the Illinois Supreme Court stated, "the horse died within a few hours afterwards, *but not in consequence of the riding*."⁵² The horse owner contended that the unauthorized use amounted to a conversion, citing a fair number of authorities for the proposition that a use of personal property by a bailee beyond the terms of the authority created by the bailment constituted a conversion. The ironic result of application of that principle would be that the owner could choose to treat defendant as becoming the owner by virtue of the conversion, and thereby recover the value of the horse at the time of the conversion. The fact that the horse died afterwards would then be defendant's problem. Evidently plaintiff's lawyer had not

51. 5 Ill. (4 Scam.) 495 (1843).

52. *Id.* at 496 (emphasis added).

counted on the skill of his opponent. As Prosser noted, “a young lawyer named Abraham Lincoln succeeded in convincing the court that there was no conversion . . . since [the riding] was not a sufficiently serious invasion of the owner’s rights.”⁵³ The restitution angle is provided by the court’s suggestion that “[a]nother form of action would be better adapted to adjust the real rights of the parties. Peradventure in an action of assumpsit for the use of the horse, the value of his services might be recovered.”⁵⁴ In modern terminology the thought is that an action for restitution of the value of the use of the horse for the period it was ridden would yield an appropriate measure of the benefit wrongfully obtained.

Consider a similar situation, presented by another Illinois decision a century and a half later. In *Schlosser v. Welk*,⁵⁵ a video store allowed employees to take home videos without charge. An employee who had been fired discovered, two months later, that she had taken home eight videos. The former employee returned the videos, having never viewed them, but the store sued her for the daily rental fee, amounting to \$549. The Illinois Appellate Court affirmed a judgment for the store on unjust enrichment grounds, but evidently could not bear to measure the benefit at the daily rate. The court reduced the judgment to one day’s rental fee, nine dollars, without any particular effort to explain just why that was the appropriate measure of the benefit.⁵⁶

In one sense, restitution seems to play purely a derivative role in both of these cases. No resort to the unjust enrichment principle is needed to conclude that the action of riding the horse or keeping the videos was wrongful. Rather, that conclusion is based on simple concepts of property, contract, and tort. In *Johnson v. Weedman*, the horse was the property of plaintiff. The contract between plaintiff and defendant conferred only limited rights on defendant. Defendant’s use of the horse in excess of authority was tortious. In *Schlosser v. Welk*, the videos belonged to the store. The employee’s right to take them came to an end with the termination of her employment. Her retention of the tapes thereafter was tortious.

In another sense, however, it may be misleading to regard the unjust enrichment principle as merely derivative, doing nothing more than providing a method of computing recovery for a wrong

53. PROSSER, *supra* note 38, at 80. Adding to the irony, the name of the losing plaintiff was Andrew Johnson.

54. *Johnson*, 5 Ill. (4 Scam.) at 497.

55. 550 N.E.2d 241 (Ill. App. Ct. 1990).

56. A dissenting judge would have affirmed the full \$549 judgment, on the grounds that the benefit was properly measured by the daily rental fee, regardless of what the fired employee actually did with the tapes. *Id.* at 244 (Heiple, J., concurring in part, dissenting in part).

defined by other law. It is commonplace that it makes no sense to speak of a legal right if the law provides no remedy for its violation.⁵⁷ It is equally true that it makes little sense to identify or classify a legal right in the abstract without considering in detail what remedy will be provided for infringement of that right.⁵⁸ What does it mean to say that plaintiff in these cases was the owner of the property and that defendant's use was tortious? Can we really decide that the use was tortious without considering what remedy would be provided? Plaintiff's lawyer in *Johnson v. Weedman* thought so, but lost that argument. The Illinois Supreme Court ruled that if conversion meant that plaintiff recovered the value of the horse, then defendant's acts must not have constituted a conversion. Rather, the court began with the notion that defendant's wrong was obtaining the benefit of riding the horse when he had not paid for that right. In essence, the court concluded that defendant's act should be regarded in whatever light would produce the result that defendant was liable only for the value of the use of the horse. In other words, first one decides how to measure the benefit that defendant obtained, then one categorizes the conduct in a fashion that will yield the desired remedy.

So, too, it is hard to account for the result in *Schlosser v. Welk* on the assumption that the substantive issue is settled solely by property or tort law, with restitution simply providing the remedy. The point that is abundantly clear in *Schlosser* is that a majority of the court thought it unfair to allow the owner of the videos to recover two months' rental price. That was not a remedial conclusion. Rather, the fact that the employee had not been unjustly enriched to that extent was the starting point of the analysis. No characterization of the rights of the owner under property law or conduct of the employee under the tort law would have been accepted by the court if the result was liability for two months' rental.⁵⁹

57. As Jerome Frank put it:

It is idle chatter to speak of a legal wrong for which there is no legal redress; a so-called legal right without a legal remedy is . . . of no practical value, being but a shabby mythical entity like the 'grin without a cat' which Lewis Carroll's Alice, justifiably, could not understand, for it is comprehensible only to those who dwell in Wonderland.

Hammond-Knowlton v. United States, 121 F.2d 192, 205 n.37 (2d Cir. 1941).

58. Perhaps the classic example of that point is Lon Fuller's path-breaking article on the reliance interest in contract law. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 *YALE L.J.* 52, 373 (1936-37).

59. It is also worth noting that in *Schlosser* it may well have been possible to reach a satisfying result if the problem had been treated solely under tort

VI. NO, RESTITUTION IS NOT PARASITIC

So, we come at last to the main point. In cases where property or other law does not clearly denominate the conduct in question as wrongful, does the unjust enrichment principle itself ever call for recovery? As has been noted, the current draft of the *Restatement* emphatically answers no. "Restitution . . . will sometimes yield a recovery where the claimant could not prove damages, but it does not create a cause of action where the claimant would otherwise have none."⁶⁰ The cases, however, do not really support that characterization, nor is it consistent with a satisfactory account of the role of restitution in our legal system.

Consider *University of Colorado Foundation, Inc. v. American Cyanamid Co.*⁶¹ A pharmaceutical company contacted two university professors to conduct studies on a vitamin product. The professors performed the requested study and later performed several other related studies that they devised themselves. The results of the various studies were disclosed to the pharmaceutical company in memoranda that the company agreed to treat as confidential. The company, however, filed a patent application based on the professors' work and a patent was issued. After lengthy and complex litigation, the doctors were awarded a sum designed to measure the incremental increase in profits that the company had obtained by virtue of the rights it enjoyed under the patent. The case did not involve the difficult issue of whether state law rights with respect to claimed inventions are preempted by federal patent law.⁶² Rather, the issue was whether the doctors or the company were entitled to receive the profits derived from the

law. The employee's action of taking the videos and retaining them for a period of two months would presumably amount to a conversion. 1 RESTATEMENT (SECOND) OF TORTS § 222A (1965). Yet that conclusion would, at most, entitle the store to judgment for their value, and the value of the eight tapes was certainly not \$549—nearly seventy dollars each. The fact that the employee returned the videos might reduce the judgment, but would not eliminate conversion liability, so that the final amount of the judgment under tort principles might have been the value of the tapes less the value restored to the store. 4 RESTATEMENT (SECOND) OF TORTS § 922 (1979). The point worth noting about *Schlosser* is not that one might have reached a satisfying result if one viewed the case solely from the perspective of property and tort, but that the court seems not to have felt any need to do that. Rather, the court seemed entirely comfortable with approaching the problem as an instance of restitution as substantive law. The basic substantive principle was the unjust enrichment principle; the issue was only how to compute the amount of the benefit.

60. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 44 cmt. a, at 153 (Tentative Draft No. 4, 2005).

61. 342 F.3d 1298 (Fed. Cir. 2003).

62. See generally 1 PALMER, *supra* note 11, § 2.8.

patent. The Court of Appeals for the Federal Circuit concluded that the doctors were entitled to recover and based that ruling squarely and solely on the unjust enrichment principle.

The current *Restatement* draft includes an example based on the *University of Colorado Foundation* case.⁶³ The *Restatement* draft states that an essential element of the case was a determination that the professors “had ownership rights, protected by local law, in the ideas and information at issue,”⁶⁴ and that these rights were misappropriated by the company. It is not entirely clear what the draft means by the quoted phrase.⁶⁵ Given the general approach of the current draft, the notion presumably is that the law of restitution does not itself determine whether the professors had a species of property right in the idea; rather, that determination must be based on other law. But, that is hardly the sense that one would get by reading the opinion. The court treats plaintiffs’ case as based on the unjust enrichment principle. The court was certainly not saying that state law could itself create a property interest in an idea. Any such approach would have led the court directly into the thicket of federal patent preemption. Rather, the opinion seems to be based on the notion that the property interest is derived from federal patent law, but plaintiffs’ cause of action is based on the diversion of the benefit of that property interest to defendant through defendant’s inappropriate conduct. The notion presumably is that the professors had the right either to patent the idea themselves or to forgo patent rights and allow the idea to pass into the public domain. The wrongful act of defendant was in diverting the benefit of that right to itself.

The *University of Colorado Foundation* scenario may be what the *Restatement* has in mind in a passage suggesting that in some situations related to intellectual property disputes, the law of restitution provides “interstitial rules to govern cases not addressed

63. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 42 cmt. e, illus. 3 (Tentative Draft No. 4, 2005).

64. *Id.*

65. Similar confusion is presented by other uses of the phrase “local law,” or equivalent notions, in other passages. See, e.g., RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 42 cmt. f, illus. 6, at 94-95 (Tentative Draft No. 4, 2005) (providing an illustration based on *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977), stating that the court “determines that the complaint states a cause of action under local law”); *id.* cmt. g, illus. 15, at 99 (providing an illustration based on *Matarese v. Moore-McCormack Lines, Inc.*, 158 F.2d 631 (2d Cir. 1946), stating that “[b]y the law of the jurisdiction, an idea voluntarily submitted may be protected against ‘misappropriation’ if it meets certain tests of originality and concreteness”).

by a given enactment.”⁶⁶ Federal patent law creates the property right in the idea, but does not happen to speak to the diversion problem presented in the *University of Colorado Foundation* case. The thought behind the *Restatement’s* reference to interstitial rules is presumably that in such a situation, the law of restitution may fill in the lacuna, though it remains the case that other law does the principal work of defining right and wrong. But, on reflection, it is far from clear that the situation is that simple. In the first place, the “interstitial” notion is inconsistent with the claim that the law of restitution does not itself determine right and wrong. An interstice is, by definition, a hole. If you are going to fill that hole you have to get the fill somewhere. If the fill comes from the law of restitution, then it necessarily is the case that the law of restitution is providing the substantive law.

Moreover, it is far from clear that issues of the sort involved in *University of Colorado Foundation* can accurately be described as minor additions to a basic structure established by other law. The general scenario is that some body of law gives a package of rights to the person who is first in line. Suppose that I do invent that machine that causes watches to dematerialize and reappear on my wrist. I go to the patent office to file my patent application. Unbeknownst to me, the fellow in line just before me is filing a patent application covering the same invention that he independently devised. If his application gets filed before mine, presumably it’s tough luck for me.⁶⁷ But, would our conclusion differ depending on how he got in line before me? Suppose that he realizes that we have competing patent applications. We are both standing on the street waiting for a cab to go to the patent office. Rudely, he jumps in front of me, gets in the cab, and makes it to the patent office first. Do I have a restitution action against him? Suppose he hits me with a stick, and thereby gets in the cab first. Do I have a restitution action against him? These are not easy problems. For example, in commercial law, it is well-settled that priority between competing security interests in the same collateral is determined by the temporal order of filing of financing statements.⁶⁸ That priority

66. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 42 cmt. a, at 86 (Tentative Draft No. 4, 2005).

67. Actually since writing this I have realized that in the United States patent priority turns on the date of invention, not the date of filing. The example works, however, in most of the rest of the world where patent priority dates from filing, not invention. See 2 R. CARL MOY, MOY’S WALKER ON PATENTS § 8.35 (4th ed. 2006). Or, if you prefer to stay in the United States, just change the hypo so that the other fellow’s skullduggery results in him inventing the device first, e.g., he snuck into my lab and destroyed my preliminary work.

68. U.C.C. § 9-322(a)(1) (2003).

rule is routinely described as a “pure race” regime; that is, the first to file has priority even if he filed with notice of an earlier unfiled security interest.⁶⁹ But, in some cases, courts have drawn on more general concepts to subordinate the claim of someone who achieved priority as a consequence of morally reprehensible conduct.⁷⁰

The *University of Colorado Foundation* case presents a similar problem. The issue is not whether one does or does not have exclusive rights in the idea. That is an issue resolved by patent law, just as the issue of priority among competing security interests is resolved by the Uniform Commercial Code Article 9 priority rule. Rather, the issue is whether the company got the patent rights by such wrongful conduct that it should not be entitled to enjoy the benefits of the patent. There are a variety of ways that one might describe the means by which the company got the patent rights. As the current draft of the *Restatement* notes, the liability might be described as based on the Section 42 principle of restitution for interference with intellectual property rights, or the rules concerning restitution of benefits obtained by fraud, by opportunistic breach of contract, or by breach of confidence.⁷¹ That suggests strongly that the *University of Colorado Foundation* case is another illustration of the phenomenon earlier noted in connection with *Johnson v. Weedman* and *Schlosser v. Welk*. The reason that recovery was granted was the unjust enrichment principle itself. Any description of the conduct as wrongful under other law was really just the product of the conclusion based on the unjust enrichment principle.

The independent role of the unjust enrichment principle can also be seen in cases involving fiduciaries, or, more precisely, cases at the fringes of the category of fiduciary relationships. It is well-settled that a true fiduciary is not permitted to derive a personal profit from the relationship, as in the common cases of trustees who misappropriate trust assets, earn a profit with the assets, and then return the assets to the trust.⁷² Similarly, the duty of loyalty prevents a trustee from diverting to himself a profitable opportunity that came to his attention by virtue of his fiduciary capacity.⁷³ Most

69. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 24-3, at 843 (5th ed. 2000).

70. See, e.g., *Gen. Ins. Co. of Am. v. Lowry*, 570 F.2d 120 (6th Cir. 1978) (subordinating claim where secured creditor who would otherwise have had priority was an attorney who had represented one of the parties in the earlier defectively implemented secured transaction).

71. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 42 cmt. e, illus. 3 (Tentative Draft No. 4, 2005).

72. *Id.* § 43 cmt. c, illus. 5.

73. *Id.* § 43 cmt. d.

such cases fit well within the approach taken in the current *Restatement*; that is, the determination that it is wrongful for the trustee to derive personal benefit from his fiduciary capacity is based on principles developed within the law of fiduciaries rather than being based on restitution as a separate body of law.⁷⁴ But, when one moves to the fringes of the category, it becomes far less clear that trust law is central.

Consider the well-known English case of *Reading v. Attorney General*.⁷⁵ A sergeant in the British army, stationed in Cairo, Egypt, earned a considerable sum of money by agreeing to ride, in uniform, on trucks being used by liquor smugglers, thereby avoiding inspection of the trucks by the local police. The House of Lords ruled that the Crown was entitled to recover the amount of the profits that the sergeant had thereby obtained. Perhaps because the case was decided at a time when a pure unjust enrichment theory was regarded as somewhat suspicious by English courts,⁷⁶ the opinion does not itself treat the case an instance of unjust enrichment. American commentators, however, have quite uniformly regarded this as an unjust enrichment case, to be treated as falling within the same general category as routine cases in which a trustee derives personal profit from his fiduciary capacity.⁷⁷ The current draft of the *Restatement* treats the situation as such, albeit noting that the description of this as a “fiduciary” case is a bit strained: “Courts may find a confidential relation (and a breach of confidence) in some marginal cases, escaping classification elsewhere, in which the defendant has gained an unjust benefit in violation of a significant duty owed to the claimant.”⁷⁸

If one takes the general approach of the current draft of the *Restatement*, one would have to say that the first question in the *Reading* situation is whether this was a fiduciary or similar confidential relationship. That would be an issue of the law of

74. In correspondence concerning an earlier draft of this Article, Professor John D. McCamus pointed out to me that it may, in fact, be more historically accurate to regard the unjust enrichment principle as the generative principle of the rule that fiduciaries may not profit from the relationship, rather than as playing a merely parasitic role. There is an excellent discussion of the fiduciary cases in the treatise he coauthored, PETER D. MADDAUGH & JOHN D. MCCAMUS, *THE LAW OF RESTITUTION* 576-87 (1990). For present purposes, however, it suffices to note that the unjust enrichment principle does seem to play more than a parasitic role in at least some fiduciary cases.

75. [1951] A.C. 507 (H.L.).

76. See ROBERT GOFF & GARETH JONES, *THE LAW OF RESTITUTION* 11-14 (1966).

77. See 1 PALMER, *supra* note 11, § 2.11, at 149.

78. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 cmt. f, at 134 (Tentative Draft No. 4, 2005).

fiduciaries, not an issue of the law of restitution. Only after that question of other law is resolved would one then invoke the principle that restitution is available for profits derived from abuse of a fiduciary or similar relationship. Yet that description hardly seems apt. Without in any way meaning to suggest disrespect for members of the armed services, an army sergeant is not what first comes to mind when one thinks of the category of trustees or other fiduciaries. Is it really accurate to say that the sergeant had to disgorge the profit because he was a fiduciary? Isn't it more accurate to say that we call him a fiduciary because we think that he should disgorge the profit? Consider several variants of the facts. Suppose that Reading had retired, or been fired, from the army, but kept his uniform. He then wore the uniform while riding on the trucks. Would he still be liable? Is it the actual uniform that matters? Would the case be different if the sergeant returned his army-issued uniform after having used it as a pattern to make a copy from his own cloth? Or, suppose that he was so well-known as a British sergeant that he could accomplish the same objective by riding on the trucks in mufti? It is not entirely clear how we should resolve those and other variants. But I very much suspect that in puzzling through these problems we would begin by thinking about whether it would be just for Reading to enrich himself in the particular case. The conclusion that he was or was not a "fiduciary," or that the conduct was or was not an "abuse" of the fiduciary relationship, is likely to be added as a convenient way of categorizing the case rather than as the actual basis of decision.⁷⁹

Much the same phenomenon can be seen in another well-known case on the fringes of the law of fiduciaries, *Harper v. Adametz*.⁸⁰ Seller hired a real estate broker to sell his house and farm. Plaintiff told the broker that he would buy the entire property, but broker did not convey that offer. Instead, the broker falsely told the seller that plaintiff was interested in only part of the tract. Broker arranged a

79. The situation is quite similar to cases where an employer seeks to impose a constructive trust on the proceeds of an employee's embezzlement. The constructive trust device, which developed within the law of true fiduciaries, has been used for remedial purposes in any situation where a wrongdoer profitably invests the stolen money. See 1 PALMER, *supra* note 11, § 2.14. But, in some of the early cases, lawyers may have feared that the fiduciary notion would be taken seriously, leading to bizarre descriptions such as the assertion that a bank janitor's duties were "to sweep the bank's offices, to arrange and care for the furniture therein, and, while in the discharge of his said duties, to watch over, guard, and preserve, to the extent of his ability, all property of the bank." *Neb. Nat'l Bank v. Johnson*, 71 N.W. 294, 295 (Neb. 1897).

80. 113 A.2d 136 (Conn. 1955).

sale of the entire property to a straw man acting for him, and then sold a portion to the buyer. As a result, the seller got what he expected to receive for the entire parcel, the buyer got part of the land for the amount he was willing to pay for that part, and the broker ended up getting most of the land for a small payment. If the seller had sued, the case would not have presented any real difficulty. The broker would be precluded from deriving a personal profit from the transaction. But the seller did not sue. Rather, the action was brought by the buyer.⁸¹ It is hard to see any harm suffered by the buyer, and the broker was not a fiduciary for the buyer. But, as in *Reading*, there is one thing that seems abundantly clear. When the dust settles, the broker should not be permitted to enrich himself by his clever scheme. I don't think it is accurate to regard that as the result of an analysis of other law concerning the arrangement. Rather, that seems to be the reason for the conclusion.

The independent substantive role of the unjust enrichment principle becomes even clearer in situations where there is no well-settled other law. A good example is *Cablevision of Breckenridge, Inc. v. Tannhauser Condominium Ass'n*.⁸² A condominium association had subscribed to a community antenna television service, paying the specified charge for each condominium unit. Then, a tinkerer resident evidently decided that it was silly for the association to pay the charge for each unit. He could, and did, wire up his own distribution system within the condominium so that all units could have the TV service, though the association paid only for three units. The cable company sued, seeking to recover the amount that the association would have paid if it had continued to pay at the set rate for each unit. The complaint evidently adopted a scattershot approach to the search for an appropriate legal theory,⁸³ but the parties soon settled on a single issue—whether the complaint stated a cause of action under a theory of implied contract. The Colorado Supreme Court eventually concluded that the cable company could recover on the basis of unjust enrichment.⁸⁴

The opinion hardly suggests that the court believed that the outcome turned on any body of law other than the law of restitution. The court began with the proposition that one can recover on the

81. The litigious inclination of the buyer may well be attributable to the fact that he was the well-known Yale Law School professor Fowler V. Harper.

82. 649 P.2d 1093 (Colo. 1982).

83. "Cablevision's amended complaint contained eight claims for relief, including breach of contract, concealment, conversion, various claims of unjust enrichment, and a request for injunctive relief." *Id.* at 1095.

84. The opinion is noteworthy for its horribly garbled discussion of "implied contracts" and "quasi-contract," *id.* at 1096, quoted at the outset of this Article.

basis of unjust enrichment if one shows that plaintiff conferred a benefit upon defendant, that defendant made use of the benefit, and that it would be inequitable for defendant to retain the benefit without payment. Considering those elements in turn, the court concluded that recovery was appropriate. There was no effort in the opinion to describe the cable company's interest as some form of property, nor was there any discussion of the agreement between the cable company and the condominium association. Rather, the court concluded that recovery was warranted simply because it was unjust for the condominium association to receive the benefit of cable service to each unit while paying only for a few units.

In assessing the role of the unjust enrichment principle in the *Cablevision of Breckenridge* case, it is important to note the date. The opinion was rendered in 1982, and the underlying facts occurred in the mid-1970s. Cable TV was then in its infancy. Indeed, the word was even a bit different—the service was then described as “community antenna television.” All that was involved was putting up a big antenna to receive local over-the-air broadcasts and distributing the signal to the subscribers. No Fox, no TBS Superstation, no 24-hour *Law and Order* orgies, no mud-wrestling channel, no pay-per-view movie channels. Just the three, or maybe four, local broadcast stations. Because the service was new, there was essentially no specialized legal regime governing it.⁸⁵ But the problem of piracy presented itself as soon as the service developed. In cases like *Cablevision of Breckenridge* courts were left to figure out how to devise a remedy for an act that simply seemed to be wrongful.⁸⁶ If the problem were presented today, the solution would be easy. With the maturation of the cable TV industry, a specific legal regime developed. Though practical problems of policing remain severe, the legal problem of unauthorized reception is now resolved by statute.⁸⁷ But, at the time of the *Cablevision of Breckenridge* case, that legal development was still in the future. It

85. There had been some efforts, with mixed results, to base a remedy for unauthorized reception on an old provision of federal law. See generally Daniel G. Spraul, Comment, *Decoding Section 605 of the Federal Communications Act: A Cause of Action for Unauthorized Reception of Subscription Television*, 50 U. CIN. L. REV. 362 (1981).

86. One is reminded of Justice Stewart's well-known “definition” of pornography. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“But I know it when I see it.”).

87. A provision of the 1984 federal statute on cable TV specifically creates civil liability, as well as criminal penalties, for the unauthorized use of cable TV transmissions, 47 U.S.C. § 553 (2000), and most states now have similar statutes. See 1 DANIEL L. BRENNER ET AL., *CABLE TELEVISION AND OTHER NONBROADCAST VIDEO: LAW AND POLICY* § 5:89 (2006).

is precisely in such a setting that the unjust enrichment principle plays its most important substantive role. Distinguishing mine from thine is easy when we are speaking of land or simple chattels. The substantive law of property and the remedial law of tort have had centuries to develop concepts of ownership and remedies of trespass and conversion. But when the subject matter is new, courts are bound to encounter situations in which established legal concepts do not quite fit. That is the time when the unjust enrichment principle can play a particularly useful independent role.

All right, I have put it off long enough.

Isn't it a complete rejoinder to the argument advanced herein simply to whisper the name *International News Service v. Associated Press*?⁸⁸ In that famous, or infamous, decision the Supreme Court approved an injunction precluding International News Service ("INS") from copying and distributing to its subscribers news accounts that it had copied from Associated Press. In a nutshell, the basis of the decision was that INS was "endeavoring to reap where it has not sown."⁸⁹ The potential sweep of that notion has scared judges and commentators ever since.⁹⁰ After all, reaping where one has not sown is a pretty good definition of civilization. Even confined to the specific setting of unfair competition, the tendency has been to minimize the potential impact of the decision. As the *Restatement (Third) of Unfair Competition* notes:

Although courts have occasionally invoked the *INS* decision on an ad hoc basis to grant relief against other commercial appropriations, they have not articulated coherent principles for its application. It is clear that no general rule of law prohibits the appropriation of a competitor's ideas, innovations, or other intangible assets once they become publicly known. In addition, the federal patent and copyright statutes now preempt a considerable portion of the domain in which the common law tort might otherwise apply. . . . The better approach, and the one most likely to achieve an appropriate balance between the competing interests, does not recognize a residual common law tort of misappropriation.⁹¹

88. 248 U.S. 215 (1918).

89. *Id.* at 239.

90. For a sampling of the commentary, see James A. Rahl, *The Right to "Appropriate" Trade Values*, 23 OHIO ST. L.J. 56 (1962). For a more recent review, including warning of potential revival of the *INS* approach in connection with current developments in intellectual property, see Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 VA. L. REV. 149 (1992).

91. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. b, at 411 (1993)

At least within the field of unfair competition, the *INS* “restitutionary impulse”⁹² has been limited by complex doctrines of federal preemption concerning patents, trademarks, and copyrights. Isn’t the thesis of the present Article tantamount to a suggestion that the *INS* monster be let out of the box and given free reign to ramble about all areas of law, leaving a trail of confusion and uncertainty?

Whether it is or is not accurate to regard *INS* itself as the poster child for the dangers of an overly aggressive role for the unjust enrichment principle,⁹³ it is an important question whether we are safer if we say that other law always defines what conduct is wrongful or if we say that, in at least some cases, the unjust enrichment principle is itself the basis of judgments of right and wrong. One way to assess that issue is to examine an area where the unjust enrichment principle might have played an important independent role, but, in fact, did not do so. The development of the right of publicity is a good example.⁹⁴ In that development, one does find isolated references to unjust enrichment concepts. Some of the language in Judge Frank’s seminal opinion in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* suggests an unjust enrichment rationale.⁹⁵ Kalven mentioned the point explicitly in his well-known article, noting that the rationale for protecting a right of publicity “is the straightforward one of preventing unjust enrichment by the theft of good will.”⁹⁶ But, for the most part, the law on the right of

(citation omitted).

92. See Gordon, *supra* note 90.

93. For a more sympathetic reaction to the case, see Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85 (1992).

94. I make no effort herein at a comprehensive treatment of the issue. For general discussion, see, e.g., J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* (2d ed. 2004). The first chapter of that four-volume treatise presents a useful overview of the complex history of the development of the rights of privacy and publicity in American law.

95. 202 F.2d 866, 868 (2d Cir. 1953) (“We think that, in addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph. . . . This right might be called a ‘right of publicity.’ For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.”).

96. Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966). Kalven’s comment achieved even greater notoriety by virtue of its quotation by Justice White in the well-known “human cannonball” case, *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977).

publicity has developed quite independently of the law of restitution, with much of the discussion and controversy centered on differentiating the right of publicity from the right of privacy founded on Warren and Brandeis' famous article.⁹⁷ One now finds whole treatises devoted to the right of publicity,⁹⁸ and the subject is treated by ALI as a part of the law on unfair competition.⁹⁹

One might see the development of the right of publicity as a perfect model of the approach approved and adopted in the current draft of the *Restatement*. The area has not developed as a branch of the law of restitution itself but as an independent body of law. But the subject also illustrates some of the dangers of that approach. One of the most controversial issues in the law of publicity is whether the right dies with the person or descends to the person's heirs.¹⁰⁰ A dispassionate observer would, I think, conclude that discussion of that controversy has been significantly weakened by the "argument" that the right of publicity is a "property right" and *therefore* must have postmortem duration just like any other property right. Suppose that a stronger tie had been maintained between the right of publicity and the law of restitution. Courts considering whether a right of publicity could be exercised by heirs would have to confront directly not only the question whether it is unjust for someone to profit by exploitation of another's name or likeness, but also whether it is appropriate for someone other than the person in question to enforce that right. That question is very much like the issue in *Reading v. Attorney General* and *Harper v. Adametz*. To be sure, both of those cases did allow a third party to sue for disgorgement of profits, but it is quite clear in both cases that the action was allowed not because plaintiff was particularly entitled to the recovery, but because it seemed clear that defendant should not be able to retain the benefit and there was no one else around to sue. That issue looks very different from the claim that the great-grandchildren of Robert Schumann are entitled to recover from someone who exploits his fame because Schumann had a "property right" in his name and that right must have descended to his heirs.¹⁰¹

97. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

98. See, e.g., MCCARTHY, *supra* note 94.

99. RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-49 (1993).

100. See 2 MCCARTHY, *supra* note 94, ch. 9.

101. *Schumann v. Loew's Inc.*, 144 N.Y.S.2d 27 (N.Y. Sup. Ct. 1955). Of course, plaintiffs lost that case. My point is only that it is unlikely in the extreme that the cause of action could have been asserted with a straight face were it not for the seeming logic of the argument that the right was a property right.

Consider a case like *Reading v. Attorney General*. Should the problem be regarded as part of the law of fiduciary relationships, or should it be regarded as part of the law of restitution? If the issue is treated purely as a matter of fiduciary relationships, the focus is likely to be on whether the relationship is sufficiently similar to other fiduciary or quasi-fiduciary cases to fall within the principle that a fiduciary is not permitted to profit from the relationship. Treated as a substantive restitution case, the issues would be whether it is unjust for the sergeant to obtain profit from his position, and whether the enrichment should be recoverable by the government. That focus might lead us to reflect more deeply on whether we really are prepared to treat any profits obtained by someone who might be labeled a “fiduciary” as profits that must be disgorged. Would the United States have an action against any former president to recover the profits that the former president makes from speeches and other public appearances? Presumably not, even though one might well say that the only reason that former presidents can become rich making speeches is that they are just that—former presidents. Would a law firm have an action against one of its partners to recover profits that the partner makes from publishing a law book? Probably not, though it is worth noting that many firms, by agreement, do treat any law-related income obtained by partners as earnings of the partnership. The problems are hard, but reflection on similar problems in other areas of the law of restitution may assist in resolving them.

VII. CONCLUSION

Relatively minor changes would be required to make the current draft of the *Restatement* consistent with the view that, in some cases, the law of restitution does itself play a role in deciding what conduct is wrongful. First, the black letter text should be revised to eliminate the explicit ties between restitution recovery and the remedial aspects of the law of tort. The place where this problem is clearest is Section 40, which currently covers only cases of “trespass or conversion.”¹⁰² A more accurate formulation was used in an earlier draft, which provided for restitution of benefits obtained “by wrongful interference with legally-protected rights in tangible property.”¹⁰³ With that change, each section of this chapter can be regarded as deliberately open on the question whether the line between rightful and wrongful conduct is drawn by other law or,

102. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40 (Tentative Draft No. 4, 2005).

103. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40 (Preliminary Draft No. 6, 2004).

at least in part, by the unjust enrichment principle itself. The comments could discuss that issue explicitly, perhaps following the model of the passage in the current comments on the “interstitial” role of the unjust enrichment principle in areas where other law is the primary but not exclusive source of judgments about right and wrong.¹⁰⁴ All of the passages in the comments in the current draft that insist that other law always draws that line should be reformulated. It is appropriate and accurate to state that in *most* cases, other law draws that line. It is not appropriate or accurate to say that is true in *all* cases. Of course, if other law has concluded that no remedy is required for certain conduct, then one should be very careful about suggesting that a remedy is available on the basis of the unjust enrichment principle. The comments to Section 39 on benefits obtained by opportunistic breach of contract might provide a good model. Finally, some of the illustrations should be revised to make them more accurate reflections of the approach taken in decided cases by eliminating the confusing references to other law in cases where the basis of decision in the actual case was the unjust enrichment principle itself.

Initially, it may seem that the approach taken in the current *Restatement* draft may limit the extent to which the unjust enrichment principle may, in Dawson’s memorable phrase, “induc[e] quite sober citizens to jump right off the dock.”¹⁰⁵ On reflection, however, the opposite seems more likely. Even if one adopts the approach taken in the current draft of the *Restatement*, the unjust enrichment principle will continue to play some role in the development of the fringes of the categories now covered in the chapter on restitution for wrongs. Under the approach taken in the current *Restatement* draft, however, a court addressing such an issue should not regard it as a matter of the law of restitution. Rather the court should first consider whether as a matter of “local law” the conduct should or should not be treated as wrongful. Only if the court does decide, on the basis of other law, that the conduct is wrongful would the issue then fall within the scope of the *Restatement of Restitution*. The result would be quite ironic. Notions of unjust enrichment are bound to influence that decision, but the court might well not see the analogy to other difficult issues that are treated in the *Restatement of Restitution*. Curiously, then, under the approach adopted in the current draft of the *Restatement of Restitution*, the most interesting, novel, and difficult issues about

104. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 42 cmt. a, at 86 (Tentative Draft No. 4, 2005).

105. JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 8 (1951).

restitution for wrongful conduct would not fall within the scope of the project.