

## WHEN IS ENRICHMENT UNJUST? RESTITUTION VISITS AN ONYX BATHROOM

*Doug Rendleman\**

### I. INTRODUCTION

This Article examines whether a court ought to grant a plaintiff restitution when the events fall in the penumbra between principles and rules and the plaintiff cannot locate the defendant's enrichment in one of the established restitution categories. The subject, which has attracted the thoughtful analysis of leading scholars, is a major contested issue in contemporary restitution scholarship.<sup>1</sup> Having

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\* Huntley Professor, Washington and Lee University School of Law. Thanks to Professor Emily Sherwin, Professor Rich Seamon, Professor Peter Linzer, Dean David Partlett, and Mr. Joe Carpenter for careful readings and thoughtful comments on earlier drafts and to the Frances Lewis Law Center for summer research support.

Thanks finally to the Kentucky court for inspiring the title. "Onyx" has resonated in restitution since that court explored the renowned "Great Onyx Cave" in *Edwards v. Lee's Adm'r*, 256 Ky. 418, 96 S.W.2d 1028 (1936).

1. See generally Jeff Berryman, *Mr. Garland Goes to Ottawa: Comments on Restitution in Canada Through the Lens of Garland v. Consumers' Gas*, 36 LOY. L.A. L. REV. 779, 801-02 (2003) (concluding that a third approach is superior to a "traditional category" approach or a "principled" approach because the court following the third approach will proceed on "general principles" while reconciling the principles with the categories of recovery); Daniel Friedmann, *Unjust Enrichment, Pursuance of Self-Interest, and the Limits of Free Riding*, 36 LOY. L.A. L. REV. 831 (2003) (examining problems created by a "broad concept of unjust enrichment" and examining a palliative principle which rejects restitution of benefits the plaintiff conferred in his self-interest); Andrew Kull, *The Source of Liability in Indemnity and Contribution*, 36 LOY. L.A. L. REV. 927 (2003) (searching unsuccessfully for a principled breach of duty as a basis for contribution-indemnity in decisions mostly from New York and concluding that undefined "fairness" is an unsound foundation for recovery); Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695 (2001) (maintaining that since courts need a doctrinal safety valve based on a general standard of "fairness" to escape harsh and narrow substantive rules and to avoid unfairness in a particular dispute, they can base such a decision on unjust

published two recent “from-the-bottom-up” articles about particular problem areas in restitution,<sup>2</sup> I thought it propitious to write a short “from-the-top-down” piece about restitution analysis to contribute to the debate and to this important Symposium. After all, real life will continue to catapult “unprecedented” disputes into courts.

This Article begins by identifying the unjustness issue in freestanding restitution as the doctrinal problem for analysis. Next, it outlines two possible ways for a decisionmaker to approach unjustness, calling them “broad restitution” and “narrow restitution.” It then emphasizes two analytical techniques to ameliorate narrow restitution’s asperity and to deepen broad restitution’s analysis. The first analytical technique this Article commends to a court is a common law and legal realist approach. The second suggestion is that the court consider the way a decision to grant restitution will affect a related body of substantive law. Finally, this Article closes by employing the suggested techniques with three examples of increasing difficulty.

Cal Contrak’s difficulty in collecting for remodeling two onyx bathrooms is the final example.<sup>3</sup> Contrak was hired by Bertha Beyer to remodel two bathrooms in Chateau Haut LaRue, an antebellum plantation house Beyer was purchasing for \$860,000 from Tom Zale. After Contrak finished by installing the onyx tile, which gives this article its title, Beyer paid him with a \$41,000 check. Beyer’s check was dishonored. Beyer also breached her contract with Zale. She then filed for bankruptcy and discharged her debt to Contrak.

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enrichment-restitution); Eoin O’Dell, *The Principle Against Unjust Enrichment*, 15 DUBLIN U. L.J. 27, 36-38 (1993) (maintaining that “unjust” standing alone is not a principle but a category to organize the various specific grounds for restitution); Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083 (2001) (rejecting the argument that a court should base restitution on “equity” without further definition in favor of a more detailed approach with unjust enrichment as an organizational and descriptive principle instead of a legal rule).

2. Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 GA. L. REV. 847 (1999) [hereinafter Rendleman, *Common Law Restitution*]; Doug Rendleman, *Quantum Meruit for the Subcontractor: Has Restitution Jumped Off Dawson’s Dock?*, 79 TEX. L. REV. 2055 (2001) [hereinafter Rendleman, *Quantum Meruit for the Subcontractor*].

3. This bathroom example is derivative of facts in *Orleans Onyx, Inc. v. Buchanan*, 472 So. 2d 598 (La. Ct. App. 1985).

Finally, after having pleaded guilty to an unrelated fraud charge, Beyer became an involuntary guest of the federal government. With Beyer out of the picture, the inquiry below turns to whether Contrak may recover restitution from Zale on the ground that the onyx bathrooms unjustly enriched him.

Since Contrak's claim lies on one of restitution's fault lines, this article will begin by filling in the background, referring to the onyx bathrooms from time to time before paying them a call in the end.

## II. RESTITUTION AFTER BREACH AND FREESTANDING RESTITUTION

Restitution is divided into two branches. First is restitution for breach, which occurs after the defendant breaches a non-restitution substantive standard by, for example, committing a tort or breaching a contract. Here the plaintiff may choose restitution as an alternative to compensatory damages. Second is freestanding restitution, which the court bases on the defendant's unjust enrichment without finding any other violation of substantive law. Since there is no other substantive breach, a freestanding-restitution plaintiff recovers restitution or nothing. Contrak's restitution claim against Zale is freestanding since Contrak's contract was with Beyer, and Zale neither committed a tort nor breached any other non-restitution substantive duty to Contrak.

Decisionmakers find freestanding restitution more difficult than restitution following the defendant's breach. When the plaintiff seeks restitution as an alternative remedy for breach, for example, when the defendant has committed a tort or breached a contract, the court can identify a "wrong" and the incorrectness of the defendant's enrichment is straightforward and readily labeled "unjust." When, however, the defendant benefits at the plaintiff's expense but has not breached a non-restitution substantive standard to trigger legal liability for damages, the court must pursue a more nettlesome inquiry into whether the defendant's enrichment is unjust.

What are the grounds for freestanding restitution? One example is mistake, a large subject that includes many subtopics. Other grounds for freestanding restitution are doctrines that undermine or negate a person's consent to a transfer like duress, undue influence, and lack of capacity. Freestanding restitution also includes recovery of benefits that the plaintiff transferred under an agreement, which fails as an enforceable contract, for example, for lack of a writing

required by the statute of frauds. Perhaps the most difficult category of freestanding restitution is a claim like *Contrak's* to recover benefits the plaintiff willingly, and without a mistake, conferred on the defendant absent a contract or gift.

### III. BROAD RESTITUTION AND NARROW RESTITUTION

Whether a restitution plaintiff may recover freestanding restitution will often depend on which of two competing approaches to unjustness the court chooses.

This Article will refer to the two competing approaches to unjustness in freestanding restitution as “broad restitution” and “narrow restitution.”<sup>4</sup> The issue which divides the approaches is whether the defendant’s “unjust enrichment” standing alone is a sufficiently stable principle or rule to serve as a doctrinal foundation for a court’s restitution decision. Does restitution have a catch-all category that allows a plaintiff who cannot show one of the recognized categories of freestanding restitution to convince the court that the defendant received an unjust benefit?

#### A. *Broad Restitution*<sup>5</sup>

Lord Mansfield’s well-known statement in 1761 in *Moses v. Macferlan*<sup>6</sup> begins a summary of broad restitution. Lord Mansfield explained unjust enrichment in assumpsit with the sweeping pronouncement that “natural justice” and “equity” obligated the defendant to return the plaintiff’s money.<sup>7</sup> “In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obligated by the ties of natural justice and equity to refund the money.”<sup>8</sup> This statement is the first pillar of broad restitution.<sup>9</sup>

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4. Rendleman, *Common Law Restitution*, *supra* note 2, at 888–92.

5. The following text divides several sources into competing “camps.” Professor Emily Sherwin’s organization influenced my treatment which, however, is not identical to hers, particularly in its analysis of Professor Dawson’s views. *See* Sherwin, *supra* note 1, at 2086 n.9.

6. 97 Eng. Rep. 676 (K.B. 1760).

7. *Id.* at 681.

8. *Id.*

9. A somewhat shaky pillar, as Professor Friedmann points out. *See* Friedmann, *supra* note 1, at 865–67.

Organizing restitution under the general principle of unjust enrichment found favor in section one of the first *Restatement of Restitution* in 1937. Section one reads simply, “A person who has been unjustly enriched at the expense of another is required to make restitution to the other.”<sup>10</sup> Section one is the other pillar of broad restitution.<sup>11</sup>

Important scholars agree. For example, “[u]njust enrichment,” the late Professor George Palmer wrote, setting the tone for broad restitution, “is an indefinable idea in the same way that justice is indefinable. But many of the meanings of justice are derived from a sense of injustice,”—here, specifically unjust enrichment.<sup>12</sup> “This wide and imprecise idea has played a creative role in the development of an important branch of modern law,” he maintained.<sup>13</sup> Although his four-volume treatise on restitution bristles with technical rules, Palmer recognized unjust enrichment standing alone as a safety valve: “The idea of unjust enrichment permeates almost the whole of restitution and occasionally is called upon to explain the relief given when anything more precise defies formulation.”<sup>14</sup>

Professor Dan Dobbs’s views resemble Palmer’s. “Unjust enrichment,” Dobbs observed, “cannot be precisely defined, and for that very reason has the potential for resolving new problems in striking ways.”<sup>15</sup> Dobbs also discussed whether unjust enrichment standing alone is too imprecise to be a “rule”: Vagueness is not the problem, he insisted, rather the issue of unjustness in difficult freestanding restitution disputes is “how to treat new forms of

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10. RESTATEMENT OF THE LAW OF RESTITUTION § 1 (1937).

11. The *Restatement* limited a plaintiff’s restitution for an unsolicited benefit in section two with the officiousness or “volunteer” concept: “A person who officiously confers a benefit upon another is not entitled to restitution therefor.” *Id.* § 2. Courts that have used section one as a foundation for broad restitution generally do not cite section two. *See, e.g., Kistler v. Stoddard*, 688 S.W.2d 746 (Ark. Ct. App. 1985) (discussing *Restatement* section one); *Kossian v. Am. Nat’l Ins. Co.*, 254 Cal. App. 2d 647, 651, 62 Cal. Rptr. 225, 225 (Cal. Ct. App. 1967) (discussing the underlying principles of *Restatement* section one).

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

13. *Id.*

14. *Id.* § 1.7, at 44.

15. DAN B. DOBBS, *DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* § 4.1(2), at 557 (2d ed. 1993).

intangible value.”<sup>16</sup> A court will encounter the difficult task of adopting restitution doctrine to “substantive issues about what forms of intangible advantage deserve legal protection.”<sup>17</sup>

The authors of a leading English treatise on restitution also argue for a generalized right to restitution.<sup>18</sup> Respectable scholarly authority supports unjust enrichment standing alone as an overarching principle for broad restitution.<sup>19</sup>

Several courts in the United States, including the court in the Louisiana decision I used for *Contrak*’s claim against *Zale*,<sup>20</sup> have based restitution on “natural justice,” “equity,” and “unjust enrichment” as expressed by Lord Mansfield and in the *Restatement of the Law of Restitution* section one.<sup>21</sup> This Article classifies decisions of these courts together as broad restitution decisions.

### *B. Narrow Restitution*

Another formidable line of authority, favoring narrow restitution, rejects restitution based on unjust enrichment alone.

The late Professor John Dawson was an articulate and redoubtable opponent of restitution based on unjust enrichment standing alone. His view was that restitution, even though it is based on sound principles and policies, is susceptible to abuse and requires principles of confinement. In his view, restitution was inevitable:

[A]ny highly developed legal system needs restitution remedies and cannot get on without them. No matter how much attention is devoted to refining and elaborating other legal techniques, there will remain situations in great variety for which standard techniques do not provide. The only common feature in these situations, apart from their

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16. *Id.* at 562.

17. *Id.* at 563.

18. See LORD GOFF & GARETH JONES, *THE LAW OF RESTITUTION* 12 (Gareth Jones ed., 5th ed. 1998).

19. See generally DOBBS, *supra* note 15; GOFF & JONES, *supra* note 18; PALMER, *supra* note 12.

20. *Orleans Onyx, Inc. v. Buchanan*, 472 So. 2d 598 (La. Ct. App. 1985).

21. See, e.g., *Kistler*, 688 S.W.2d 746 (discussing *Restatement* section one); *Kossian*, 254 Cal. App. 2d 647, 62 Cal. Rptr. (discussing the underlying principles of *Restatement* section one); *Black v. City of Lawrence*, 215 P. 297, 299 (Kan. 1923) (quoting Lord Mansfield in *Moses v. Macferlan*); *Seastrand v. D.A. Foley & Co.*, 175 N.W. 117, 119 (Minn. 1919) (same).

unforeseeability, is the acquisition by one person of a gain through another's loss.<sup>22</sup>

Dawson maintained that restitution based on the defendant's unjust enrichment alone results when a court transmogrifies an aspiration into a rule of law.<sup>23</sup> He expressed the risk of a court abusing unjust enrichment standing alone with two metaphors. One is what I call Dawson's dock:

[A] general principle prohibiting enrichment through another's loss appears first as a convenient explanation of specific results; it is an instrument for quite practical and intelligible purposes. Yet once the idea has been formulated as a generalization, it has the peculiar faculty of inducing quite sober citizens to jump right off the dock.<sup>24</sup>

Dawson's second metaphor was of becoming lost: "Any really generalized technique, explicitly tied to the unjust enrichment principle, can carry us so far that we would quickly lose our way."<sup>25</sup>

Dawson thought that unjust enrichment standing alone enabled a court to become a dangerous roving commission; wandering, perhaps intoxicated by the heady brew of its rhetoric, off the end of the dock or into the labyrinth, in either event, to no good purpose.<sup>26</sup> He wielded his rhetoric and metaphor against the two pillars of broad restitution identified above: Lord Mansfield and the *Restatement's* section one:

When lawyers reach the stage of dealing with these [various unjust enrichment] situations, results can be made intelligible only through expressing this common feature in the form of a kind of "rule."

... [Our] ethical faculty, including a sense of justice ... ensures that the disapproval of enrichment through

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22. JOHN P. DAWSON, UNJUST ENRICHMENT 150–51 (1951).

23. *See id.* at 4–5, 8.

24. *Id.* at 8.

25. *Id.* at 143. Professor Emily Sherwin responded to an earlier draft of this Article with a slightly different reading of Dawson, to wit: "Dawson's fear that a decisionmaker's discretion may lead to error led him to be concerned that a decisionmaker seeking a rule will treat 'unjust enrichment' as a broad rule which would then eclipse more subtle doctrine." Note from Emily Sherwin, Professor of Law, University of San Diego (on file with author) [hereinafter Sherwin, Note].

26. *See* DAWSON, *supra* note 22, at 151–52.

another's loss, once formulated as a motive in particular cases, will tend to become an imperative. A useful and necessary principle becomes something more than a "general guide." In some of its aspects it is a rule. It seems so simple and so clearly just. Why should we not extend it? . . . Our own compilers [of the first *Restatement of Restitution*], Professors Seavey and Scott, could scarcely have had the intention of leading us into the wilderness. Yet an American court today need only cite Section 1 of the Restatement of Restitution, if Lord Mansfield seems out of date.

We have done much and can do more to fortify ourselves. If we know the forest is enchanted we have not too much to fear.<sup>27</sup>

Restitution, Dawson insisted, needed principles of containment expressed in the form of rules to keep judges from jumping off his metaphorical dock or from becoming lost in his metaphorical forest.<sup>28</sup> Dawson argued that a court should require the plaintiff to show "some specific ground" for restitution, like "fraud, mistake, compulsion, undue influence, impossibility or frustration, sometimes substantial breach, and certain kinds of illegality."<sup>29</sup> He found other examples of successful principles of confinement in European systems of restitution, particularly in German law.<sup>30</sup> Contrak's morally appealing restitution claim against Zale<sup>31</sup> cannot surmount Dawson's prerequisite "specific ground"; it would fail as a legal claim.

Dawson's is a slippery-slope argument.<sup>32</sup> Commonly accepted principles of morality tell us that the defendant's benefit is improper, and to neutralize the benefit, he should pay restitution to the plaintiff. A court, Dawson thought, must resist such temptation.<sup>33</sup> Instead, the court ought to draw a definite line between recovery and no recovery. A court that accepts unjust enrichment standing alone as a

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27. *Id.*

28. *See id.*

29. *Id.* at 117–18.

30. *See id.* at 119–27, 130–35, 143.

31. *See Orleans Onyx, Inc. v. Buchanan*, 472 So. 2d 598 (La. Ct. App. 1985).

32. *See Frederick Schauer, Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

33. *See DAWSON, supra* note 22, at 143.

rule or a direction of decision in a particular dispute is drawing a dangerously indefinite line. For if the court cites unjust enrichment standing alone to reverse a particular defendant's unfair benefit, it will create a precedent. In future disputes where the defendants should win, the courts will be unable to distinguish today's precedent; the future courts will be constrained to let the plaintiffs recover. Thus in future disputes, courts attempting to administer this indefinite line between liability and no liability will make too many incorrect decisions.

Because of the future error cost it will create with an imprecise line, a court faced with the first dispute ought to resist the temptation to base restitution on the defendant's unjust enrichment standing alone. The court should not establish a precedent that will lead to incorrect results in future disputes because future judges cannot distinguish the precedent. The court should countenance an unfair result today in this dispute to prevent many incorrect results in future disputes. Because preventing the unwise future decision is more important than deciding today's dispute correctly, today's plaintiff must lose. It is far better to give courts a clear, easy-to-administer rule that leaves some apparent injustice uncorrected rather than an imprecise rule that sends them off the end of the dock, or leaves them wandering in the forest—arbitrarily wreaking havoc in the social and legal systems. The courts must preserve the bright line, for once they cross it, once they create exceptions, then there is no place to stop. “The *Principle of the Dangerous Precedent*,” wrote Professor Cornford, “is that you should not do an admittedly right action for fear you, or your equally timid successors, should not have the courage to do right in some future case, which, *ex hypothesi*, is essentially different, but superficially resembles the present one.”<sup>34</sup>

Broad support can be stated in several ways for Dawson's skepticism about what I have called broad restitution. The Discussion Draft of the *Restatement (Third) of Restitution and Unjust Enrichment* (“*Restatement (Third)*”), although subject to revision and not yet official American Law Institute policy, reproves unjust enrichment as “at best, a name for a legal conclusion that remains to be explained; at worst, an open-ended and potentially

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34. FRANCIS M. CORNFORD, *MICROCOSMOGRAPHIA ACADEMICA: BEING A GUIDE FOR THE YOUNG ACADEMIC POLITICIAN* 15 (6th ed. 1964) (1908).

unprincipled charter of liability.”<sup>35</sup> The draft suggests that “unjustified enrichment” moves the court’s analysis from moral to legal to require “enrichment that lacks an adequate legal basis.”<sup>36</sup>

Professor Andrew Burrows, the author of another leading English work on restitution, prefers not to “leave the question of what constitutes an unjust enrichment to a judge’s unfettered discretion.”<sup>37</sup> Burrows seeks instead to constrain the court with a definition of unjustness which refers to “the decided cases,” and not to “a vague appeal to individual morality.”<sup>38</sup>

Precisely when a defendant’s unjust enrichment compels a court to grant a plaintiff restitution is not evident to proponents of narrow restitution. They think that the phrase, too abstract to have a generally accepted meaning, is both incomplete and inadequate. The words “unjust enrichment” are an incomplete statement of a rule because a court’s analysis moves from abstract principle to concrete result without an intermediate rule structure. “Unjust enrichment” is an inadequate rule because it provides little or no guidance for people forming contracts and planning primary conduct, for lawyers drafting documents and negotiating settlements, and for judges drafting jury instructions and deciding motions or appeals. A major risk proponents of narrow restitution perceive is that a decisionmaker will fill the doctrinal vacuum with individual morality.

Finally, the phrase “unjust enrichment” at large creates an unbounded and unpredictable source of potential liability. The concept of unjust enrichment may not lead courts to “creative” decisions, as Palmer maintained;<sup>39</sup> however, because it is an open-ended and indeterminate concept, narrow restitution’s advocates argue that it may be a foundation for unpredictable decisions in the future.

On the one hand, broad restitution provides courts with a wide charter to correct unjust enrichment. On the other hand, two related ideas are central to the criticism of broad restitution. Unjust

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35. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (Discussion Draft 2000) [hereinafter RESTATEMENT (THIRD)]. As an advisor to the *Restatement (Third)*, I will state the obvious: Nothing in this Article is ALI policy or *Restatement* doctrine.

36. *Id.*

37. ANDREW BURROWS, *THE LAW OF RESTITUTION* 55 (1993).

38. *Id.*

39. See PALMER, *supra* note 12, at 5.

enrichment standing alone is too vague for a decisionmaker to understand and apply. Moreover, it creates too much judicial discretion. As such, it leads to unpredictable court decisions and to potentially excessive recovery for plaintiffs. Narrow restitution formulations facilitate stability and predictability and curb subjective judicial decisions.

There is a danger, however, that many of the critics of broad restitution would purchase legal stability at the potentially high cost of depriving courts of flexibility to develop the common law to changing conditions and to adopt appropriate solutions for disparate disputes. This Article will propose a modified form of broad restitution, a middle ground between the broad and narrow poles.

#### IV. RESTITUTION ANALYSIS AND COMMON LAW TECHNIQUE

##### *A. Restitution Analysis in General*

Unlike courts in most other countries, judges in the United States administer restitution with a lay jury.<sup>40</sup> Also, restitution in the United States is judge-made: the courts use common law techniques to decide unprovided-for disputes and shape restitution doctrines to contemporary needs, through powers that include the ability to repudiate obsolete or inappropriate doctrines.<sup>41</sup> Each jurisdiction in the United States has the final say on restitution doctrine within its bailiwick. Contrast that, for example, with the United Kingdom where the House of Lords has both the power and the ability to create a unified and well-articulated body of common law.

How to travel from a principle to a rule to a decision in a dispute is more of an analytical technique or process than a set of rules. The

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40. In contrast to the civil courts in the rest of the world that lack juries, several leading United States restitution decisions are appeals from jury verdicts. *See, e.g.*, *Campbell v. Tenn. Valley Auth.*, 421 F.2d 293 (5th Cir. 1969); *Olwell v. Nye & Nissen Co.*, 173 P.2d 652 (Wash. 1946); *Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231 (Va. 1946); *Cotnam v. Wisdom*, 104 S.W. 164 (Ark. 1907); *Maglica v. Maglica*, 66 Cal. App. 4th 442, 78 Cal. Rptr. 2d 101 (1998).

41. *See* LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 68–73, 140–42, 151–56 (2001) (maintaining that courts should follow “a standard that allows judges to overrule, but presumptively favors retention of the rule”); RONALD A. CASS, *THE RULE OF LAW IN AMERICA* ch. 5 (2001).

law often boils down to a series of questions that focus the decisionmakers' critical judgments on the important features of the dispute. Enrichment and unjustness are spongy ideas. Restitution doctrines have never comprised precise rules that lead to predictable and certain results.

No one has identified a substitute for applying human judgment to discrete instances. Explanations that seek to decide controversies based on a single factor fail to provide the assembly-line justice they promise.

This Article recommends that courts use a modified form of broad restitution based on applying common law technique and examining related bodies of law to resolve restitution disputes. It first proposes a legal-realist approach and a common law technique. Some bodies of knowledge are better conveyed by answers. Other bodies of knowledge are better conveyed as avenues of inquiry; they are better analyzed through a series of questions. The kind of restitution this Article discusses is one of the latter. Paraphrasing Leon Green on negligence, we may have a process for passing judgment on this kind of restitution dispute, but there is practically no "law of restitution" beyond the process itself.<sup>42</sup>

A series of questions will focus judges' and jurors' critical judgments on the crucial restitution issues. While the answers to those questions will not steer everyone to the same solution of a difficult restitution dispute, they should focus everyone's judgment on the important issues and lead to a beneficial discussion, if not to universal approbation for a particular solution. Because of the untidiness that results, observers of restitution will need to tolerate process, ambiguity, pluralism, and even some inconsistency.

The first three questions are standard: Has the defendant benefited or been enriched? Was the defendant's enrichment unjust? Was the defendant's benefit, if any, at the plaintiff's expense?<sup>43</sup>

This Article recommends that a judge or a jury ought to emphasize the question: Will granting the plaintiff restitution

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42. See LEON GREEN, JUDGE AND JURY 185 (1930).

43. The reader will observe the influence of English scholars in formulating the foregoing questions. See GOFF & JONES, *supra* note 18, at 15; Peter Birks, *At the Expense of the Claimant: Direct and Indirect Enrichment in English Law*, OXFORD U. COMP. L. F. 3, 16 n.11 (2000), available at <http://ouclf.iuscomp.org/articles/birks.htm>.

undermine a policy of property, contract, tort or other substantive law?<sup>44</sup>

A court should not award a plaintiff restitution without examining restitution's effect on other substantive doctrines that decline liability. Counter-policies that militate against granting restitution may emerge from examining the property, contract, tort, or other substantive doctrines that forbid or do not support compensatory damages. If the plaintiff cannot recover under a related non-restitution substantive principle, can the judge grant and measure restitution in ways that advance, or at least do not retard, the non-restitution principle? In short, can the court grant and measure restitution yet avoid incongruence with the related substantive policy?

A court can solve most difficult disputes asking for broad restitution by applying common law technique and by asking whether a decision to grant restitution will undermine the reason the plaintiff cannot recover under another body of substantive law. These inquiries will lead the court to decisions that serve the goal of restitution in a way that responds to the valid concerns which lead to narrow restitution.

Contrak's troublesome related substantive doctrine is contract.<sup>45</sup> He had a contract with Beyer. By remodeling now to be paid later, he extended credit to Beyer. All extensions of credit include the risk of nonpayment. Should Contrak suffer the consequence of extending unsecured credit to tomorrow's bankrupt? The other side of the dispute emphasizes Zale's enrichment—the remodeled bathrooms—and maintains that Zale's benefit is unjust and should not be free.

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44. See Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1284–85 (1989); Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083, 2112 (2001) (concluding that the decisions she analyzed “moved far afield of established doctrine and, if regularized, would entail significant changes in the rules governing contracts, insurance, and gifts.”). Aware of the analytical difference between this article and hers, Professor Sherwin nevertheless expressed her opinion that Professor Dawson would agree with the point in the text above because of his concern that broad restitution would “eclipse more subtle doctrine.” See Sherwin, Note, *supra* note 25.

45. See *supra* note 3 and accompanying text.

*B. Common Law Technique*

One feature of narrow restitution arguments, particularly in the *Restatement (Third)* and Professor Burrows's book, is the distinction between established legal precedents and a decisionmaker's personal moral justifications for restitution.<sup>46</sup> These authorities register approbation for granting restitution based on established legal precedent, but they disapprove of individual moral judgments.<sup>47</sup>

The jury and the common law court's choice, I will argue, is more complex than the foregoing. As my above quotation from Professor Cornford<sup>48</sup> foreshadows, I trust a future court's ability to decide a similar dispute correctly enough to dispense with petrified adherence to earlier solutions. Asking "what did we do last time?" and accepting the answer without more is too static. Wiser by far is the court that asks in addition, "Did it make sense then?" and "Does it make sense today?"<sup>49</sup>

One part of common law technique is the doctrine of precedent—treating like disputes alike while adapting to changing conditions and aspirations over time.<sup>50</sup> The doctrine of precedent includes rules dealing with how a decisionmaker may mold the results from earlier disputes to decide later disputes and rules about when a prudent decisionmaker may abandon earlier decisions.

The common law process requires judges, often working with juries, to create solutions to disputes. These solutions govern the past events of the present dispute and simultaneously become rules of precedent for unknown future disputes. The process of creating, applying, and promulgating decisions means that courts modify the common law in the course of deciding disputes.

The court that looks backward to earlier judicial precedents and declines to grant a plaintiff restitution if it finds none will petrify the common law and may interfere with the court's duty to correct actual

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46. See *RESTATEMENT (THIRD)*, *supra* note 35, § 1; *BURROWS*, *supra* note 37, at 21.

47. See *RESTATEMENT (THIRD)*, *supra* note 35, § 2(3); *BURROWS*, *supra* note 37, at 21.

48. See *CORNFORD*, *supra* note 34.

49. If this is heresy to the Washington and Lee creed, I plead guilty.

50. See *ALEXANDER & SHERWIN*, *supra* note 41, at 68–73, 140–42, 151–56; *FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 181–87 (1991).

instances of unjust enrichment. Under the better principles of common law reasoning, as articulated by Professor Melvin Eisenberg, a court should not consider legal rules to occupy a separate moral domain within the whole society's moral universe.<sup>51</sup> Requiring support of legal precedent as a prerequisite is too narrow. A court deciding a difficult restitution dispute should first examine legal precedents and administrative necessities. It should then look beyond legal precedents to the whole society's moral and economic values.

Professor Eisenberg distinguishes doctrinal propositions from social propositions.<sup>52</sup> Doctrinal propositions are legal rules in the documents lawyers think of as expressing legal doctrine; social propositions are expressions of morality, economic policy, and experience.<sup>53</sup> Common law courts, Eisenberg maintains, may revise a rule when it is incongruous with its justification.<sup>54</sup> The court ought to compare doctrinal propositions to social propositions seeking what he calls "double coherence."<sup>55</sup> Does the rule reflect contemporary values and policies?<sup>56</sup> Is it also logically consistent with other doctrine?<sup>57</sup> A court's obligation to the common law transcends judges' personal beliefs.<sup>58</sup>

Professor Eisenberg insists that the judge ought to eschew decisions based on personal morality unless the view is also shared generally. The court should follow widely held social propositions, not personal ones.<sup>59</sup> Thus, social propositions operate in every decision, if only in the background.<sup>60</sup> Although Eisenberg does not

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51. See MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 152–53 (1988); see also Owen M. Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739, 751–54 (1982) (showing how moral values enrich constitutional interpretation).

52. See EISENBERG, *supra* note 51, at 1–2.

53. See *id.*

54. See *id.* at 44–49.

55. See *id.*

56. See *id.* at 14–19, 26–37.

57. See *id.*

58. See *id.* at 21–26.

59. See *id.* at 14–42.

60. See *id.*; see also Fiss, *supra* note 51, at 754 (“[J]udges have an incentive to temper their commitment to [positivistic] legal theory and thus to read the moral as well as the legal text.”).

cite Dawson's work,<sup>61</sup> he appears to reject the reasoning that led Dawson to the dock and forest metaphors.<sup>62</sup>

Other constraining factors, in addition to coherence, operate on courts—the lawyers' adversary arguments and techniques, the tradition and reality of jury trial, and the need for written justifications. Important parts of professional training and discourse leading courts to create and modify common law rules are the arguments presented by lawyers, accepted by juries, and justified in a court's written decision stating reasons.

Restitution is a body of common law principles that exists between and behind property, contract, and tort, and where it produces variations and analogies. Contested freestanding restitution disputes, particularly of the section one variety, are unruly. Often "unique," they do not conform to any pattern. There is no precedent, and there are strong arguments on both sides. In a world where no rule exists, the court's decision perforce creates a rule.

In the United States, restitution is common law or judge-made law. As distinguished from statutes, judges make and apply common law rules at the same time. Common law courts remake common law rules in the act of applying them. If the doctrine of precedent means that a decision is one that affects future disputes that fall within the ambit of its principle, a skeptic might view a common law rule as not a rule at all. A wise and prudent court will tailor a difficult restitution decision to the individual dispute. The court may be lacking in direct precedent; its decision will not create much precedent; and the decision may create new law. If no rule is apparent, the court will develop one; if the rule is outmoded or unfitting, the court will replace or modify it within the ambit of the constraining techniques discussed above.

The more formal style articulated by Professor Burrows and in the *Restatement (Third)* emphasizes that law is a system of rules that are known or can be found; a court's decision-making is deductive reasoning from these rules.<sup>63</sup> A court will apply known and precise

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61. See DAWSON, *supra* note 22.

62. See EISENBERG, *supra* note 51, at 14–42.

63. See RESTATEMENT (THIRD), *supra* note 35, § 1 cmt. b; BURROWS, *supra* note 37, at 1–3, 55.

rules to the facts. It need not look above legal rules to the whole society's moral code or economic-commercial needs.<sup>64</sup>

Society is too complex and changes too rapidly for that conception of law to describe a court's common law decision-making. In exceptional cases, replacing legal rules that lack social support with rules based on existing standards is a significant and inevitable ingredient in a court's common law technique.<sup>65</sup>

#### V. THREE EXAMPLES<sup>66</sup>

Since a court following broad-restitution reasoning can be too capacious, the question of whether a particular defendant has been unjustly enriched requires rigorous legal analysis. This Article commends a tough-minded common law technique that examines benefit, unjustness and, in particular, the effect restitution would have on related legal regimes.

When a plaintiff seeks freestanding restitution, the court's inquiry into whether granting recovery would undermine the policy reason to reject restitution may be complex and difficult. Legal systems develop restitution after the basics of contract, property, and tort are in place. Late arrivals have the difficulty of accommodating established systems. Often unjust enrichment policies point a decisionmaker in one direction and the other substantive system's policies point him in another.<sup>67</sup> To properly accommodate apparently conflicting policies requires the court to pay sedulous

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64. The *Restatement (Third)* and Professor Burrows may be more subtle than the textual statement, and they may preserve play in the common law's joints. The discussion draft explains that "unjustified" in unjustified enrichment is intended neither to repudiate the traditional, equitable explanation of restitutionary liability nor to suggest any change in the nature or scope of those rules that have previously been described in terms of unjust enrichment. See *RESTATEMENT (THIRD)*, *supra* note 35, § 1 cmt. b. Professor Burrows would keep the common law courts' "traditional incremental deductive approach," and the common law's "gradual incremental development." *BURROWS*, *supra* note 37, at 55.

65. See Sherwin, *supra* note 1, at 2111–12.

66. In this Section, I provide three examples: Brad-On-Tape, the drained quarries, and the Onyx bathrooms. While I made up the first example, the other two are derived from two actual cases—*Ulmer v. Farnsworth*, 15 A. 65 (Me. Super. Ct. 1888); *Orleans Onyx, Inc. v. Buchanan*, 472 So. 2d 598 (La. Ct. App. 1985)—with a slight modification of facts to make them fit the analysis.

67. See *DAWSON*, *supra* note 22, at 38–40.

attention to facts and context, and to compare incommensurate values in ways the metaphor of weighing and balancing does not quite capture.

*A. First Example—The Expired Copyright*

Long after the copyright on Henry Johns's nineteenth-century novel *Tightening the Bolt* expired, Brad-On-Tape recorded a compact-disc version and rented it profitably to its customers. Johns's literary executor and heirs sued Brad for restitution. Clearly benefited by the novel, Brad nevertheless is not liable to the former copyright proprietors for restitution.

In asking whether Brad's enrichment is unjust, I am aided by focusing on whether granting restitution to plaintiffs will undermine the policy reason to deny recovery under the related legal regime, here copyright. After protecting the author's exclusive right to "copy" for a limited term to encourage authors to create, the copyright statutes end his statutory monopoly and recognize non-ownership in the public domain after the fixed term expires. Terminating the author's monopoly advances an interest related to the free expression protected by the First Amendment; the purpose is to advance the social interest in wide dissemination. Any publisher is free to copy, print, record, or otherwise peddle the work. The author's heirs cannot use copyright doctrines to prevent Brad's taping and dissemination after that term. Accordingly, the court should not grant them restitution, which would upset the way copyright law allocates between protection and dissemination. Brad-On-Tape's enrichment is not unjust.<sup>68</sup>

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68. There are other ways to express this conclusion. The Constitution delegates to Congress "Power" to grant to "Authors" the copyright monopoly for only "limited Times." U.S. CONST. art. I, § 8. *See also* Eldred v. Ashcroft, \_\_\_ U.S. \_\_\_, 123 S. Ct. 769 (2003). Professor Nimmer thought the proprietor's property interest in copyrighted material was for a fixed period instead of being perpetual like real or personal property because of the public interest in free speech under the First Amendment. *See* Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1193–96 (1970). Among other techniques Congress used to circumscribe an author's copyright monopoly, the Copyright Act abolishes or preempts state doctrines equivalent to copyright. *See* 17 U.S.C. § 301 (1976). Although I found no decision directly on point, granting the plaintiffs in the text restitution would give them a copyright-like protection in something within the subject matter of copyright, but not covered by

No responsible author of an article about restitution would pass up an opportunity to quote Lord Mansfield who warned in 1785:

[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity, and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.<sup>69</sup>

The copyright statutes strike the balance between Lord Mansfield's "extremes"—restitution should respect it.

*B. Second Example—The Drained Quarry*<sup>70</sup>

Restitution for the plaintiff's improvement of the defendant's property—the subject of this example and the next one—raises efficiency problems, liquidity problems, valuation problems, and efficiency-autonomy problems. Although the defendant's benefit may be clear, the court should analyze carefully what effect granting restitution would have on related contract and property law.

Ron and Quince own adjoining tracts of rural land; both tracts have stone quarries which are connected by tunnels underground. Because of depressed prices for the stone and the mines' obsolescence, the quarries have not been worked for decades and have filled with rain water. After a building boom triggered a dramatic price rise, quarrying stone became economically feasible. Ron approached Quince with a plan to share the cost of pumping the water out of both quarries, but Quince refused to agree. So Ron pumped the water out of his quarry which, because of the connecting

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copyright. To advance the constitutional policy of "allowing free access to copy whatever the federal patent and copyright laws leave in the public domain," Justice Black wrote for a unanimous Court, "when an article is unprotected by a patent or copyright, state law may not forbid others to copy that article." *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964). In short, granting restitution to Johns's heirs would grant what copyright law forbids. Restitution would be a preempted state law doctrine, because it prevents or burdens a competitor from making copies. Restitution would effectively extend copyright protection when the copyright law would not extend it because of expiration of statutory copyright.

69. *Sayre v. Moore*, 102 Eng. Rep. 139, 140 (K.B. 1785).

70. This example is based on the facts and decision in *Ulmer v. Farnsworth*, 15 A. 65 (Me. Sup. Ct. 1888).

tunnels, also drained the water from Quince's. Quince sold her quarry to Sam who paid her several tens of thousands dollars more than he would have if her quarry had still been flooded. Quince, clearly benefited, laughs all the way to the bank because she does not have to pay Ron restitution.

Why not? Consider related contract and property doctrine. After Ron and Quince negotiated but did not form a contract, Ron went ahead. Ron intentionally conferred the benefit on Quince's property that she had declined to form a contract to pay for. Property ownership includes an owner's autonomy to decide whether to improve it; an owner's improvements ought to come from her own efforts and her contracts with others. Particularly after an owner has declined to form a contract, a court should not interfere with the owner's right to choose.

Freedom to contract includes freedom from contract. Quince is not liable to Ron in contract because she specifically declined to enter into one. The court's decision on restitution ought to be made in light of the reasons to favor voluntary exchange, to preserve autonomy about whom to deal with and how to spend money, to set the value both sides place on the exchange, and to facilitate efficient exchanges which leave both people better off.

Moreover, since Ron went ahead after Quince declined to participate in his pumping scheme, a court should assume he calculated a gain from the benefits to his quarry alone less his costs to pump out both quarries. He is not entitled to confer this benefit on her and then ask the court to order her to pay.

Declining restitution here creates what an economist may call holdout, bilateral monopoly, and free rider problems. In practical terms, Quince may have tried to negotiate an extremely favorable price and then, failing agreement but knowing Ron would be likely to proceed, she received the benefit of Ron's efforts. Denying Ron restitution puts a premium on her uncooperative behavior. Declining Ron restitution nevertheless is but another way of saying that an owner's autonomy and freedom of choice include the freedom to be stubborn, even pigheaded, within the ambit of the law and to resist another's entreaty.

The parties' contract will control if there is one. The parties' failure to contract should control if Quince declined to form one.<sup>71</sup>

*C. Third Example—Restitution Revisits the Onyx Bathrooms*<sup>72</sup>

Cal Contrak was hired by Bertha Beyer to remodel two bathrooms in Chateau Haut LaRue, an antebellum plantation house Beyer was purchasing for \$860,000 from Tom Zale. After Contrak finished installing onyx tile, Beyer paid him with a \$41,000 check which Beyer's bank returned to Contrak dishonored—"not sufficient funds." Before the scheduled closing, Beyer defaulted on her contract with Zale. Beyer is now in a federal penitentiary after pleading guilty to unrelated fraud charges. Contrak sued Beyer and Zale for \$41,000; Beyer for breach of contract and Zale for restitution-unjust enrichment. After Beyer defaulted, she filed for bankruptcy and discharged Contrak's \$41,000 judgment for breach of contract.

Contrak maintains that since the original bathrooms were installed in the 1920s, Zale was enriched or benefited by the remodeled bathrooms. Zale, who has moved back into Chateau Haut LaRue and does not intend to redo the bathrooms, nevertheless cites aesthetic misgivings. In particular, he thinks the flashy and gaudy onyx bathroom furnishings are incompatible with both his sedate lifestyle and with the chateau's antebellum decor.<sup>73</sup>



The onyx bathrooms will repay careful study and lead to heated discussion. Zale's argument against restitution follows. Almost all property improvements occur after a contract in which the owner and the improver agree on the project and the price. The bargained

71. Professor Friedmann analyzed the decision that this example is based on, and concluded that with the facts presented in the text, the court ought to grant Ron restitution. See Friedmann, *supra* note 1, at 849–52. Our contrasting conclusions illustrate the pluralism this Article recognizes: when dealing with disputed freestanding restitution disputes, people may follow the same or similar analysis to dissimilar results.

72. This example is based on the facts and decision in *Orleans Onyx, Inc. v. Buchanan*, 472 So. 2d 598 (La. Ct. App. 1985).

73. Steve Alaniz & Francesco Marciuliano, *Sally Forth*, THE WASH. POST, May 21, 2002, at C13.

contractual exchange has two economic advantages. First, economic theory tells us that because each party values the other's consideration more than his or her own, both parties to a voluntary transaction are better off after the exchange. Second, the parties' price term sets a value. Here the home-buyer was willing to pay plaintiff Contrak \$41,000 in a bargained exchange for an improvement, but defendant Zale was not involved in the transaction.

Contrak has conferred a benefit on Zale and then Contrak has sued Zale for its value. If the court both legally validates the benefit Contrak conferred on Zale and then sets its value, two consequences will be likely: First, the court will interfere with Zale's autonomy to decide how to spend his money and how to keep his property; and second, the court will value the improvement inefficiently, or less efficiently than a negotiated exchange would have. People should organize improvements and transfers under voluntary contracts whenever that is reasonably possible. And Contrak did have a contract with Beyer. Thus, the court should reject Contrak's request for restitution from Zale and remit Contrak to the typical unpaid fate of someone who extended unsecured credit to a future bankrupt.

In the decision that this problem is based on, the trial judge and the appellate court thought not.<sup>74</sup> The defaulting buyer had paid the contractor about half of the contract rate, and the trial judge had entered a judgment for restitution against the homeowner for about another fourth, leaving the contractor paid about three-fourths of the contract rate.<sup>75</sup> The homeowner who had lost the sale was, however, "enriched" by the gaudy and incongruous bathrooms, which no one expected would be torn out.<sup>76</sup> The homeowner's enrichment was obviously, though indirectly, at the cost of the hapless contractor.<sup>77</sup> Furthermore, it would be "unjust" to let the homeowner keep the remodeled bathrooms without paying anyone anything. Although the trial judge may have made an uneducated guess on how to measure his restitution, the jilted contractor recovered an amount, which was probably less than profitable for its efforts.<sup>78</sup> After all, restitution is based on the defendant's benefit, not the plaintiff's loss.

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74. *See Orleans Onyx*, 472 So. 2d at 600.

75. *See id.*

76. *See id.* at 601.

77. *See id.* at 600.

78. *See id.*

The “right” answer then, the answer under precedent, to the onyx bathrooms is for Contrak to receive a restitution judgment against Zale for as much as \$30,000. One difference between this example and Quince’s quarries above is that Quince had converted her benefit to cash by selling it, while Zale is living with his. If Zale lacks the resources to pay the judgment for remodeling he did not order, Contrak can file it for a judgment lien on Chateau Haut LaRue, creating the equivalent of a mechanic’s lien which was not available to him otherwise.<sup>79</sup> Many readers will disagree with the courts about the onyx bathrooms.

If the courts had applied the original *Restatement of the Law of Restitution*’s section 110, Contrak would not have recovered anything. According to that section’s blackletter, “A person [Contrak] who has conferred a benefit upon another [Zale] as the performance of a contract with a third person [Beyer] is not entitled to restitution from the other [Zale] merely because of the failure of performance by the third person [Beyer].”<sup>80</sup> The *Restatement* commentary does not supply intelligible reasons for this flat rule.

There are justifications for refusing Contrak restitution. A court could limit Contrak to his contract rights against Beyer because Contrak extended credit to Beyer by remodeling the bathrooms without being paid. Moreover, if Contrak recovers from a second-best defendant, Zale, after Beyer’s bankruptcy, the effect of Beyer’s bankruptcy discharge and distribution may be distorted. In short, Contrak picked the wrong person to work for without assuring payment and ought to suffer the consequences of Beyer’s bankruptcy discharge.<sup>81</sup>

Under the head of “enrichment,” the onyx bathrooms illustrate problems of value and liquidity. The principal issue under

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79. A less intrusive solution would be to grant Contrak restitution in the form of an equitable lien that Contrak could file for record notice, but which he could not realize on until Zale solves the liquidity problem by selling the property.

80. RESTATEMENT OF THE LAW OF RESTITUTION § 110 (1937). The *Restatement (Third) of Restitution and Unjust Enrichment* § 29 (Preliminary Draft No. 4, 2002) expands the “merely because” in *Restatement of the Law of Restitution* § 110, and presents a variety of more flexible solutions than § 110. Not yet considered by either the Council or the membership, § 29 of *Restatement (Third) of Restitution and Unjust Enrichment* is not an American Law Institute policy.

81. See Birks, *supra* note 43, at 1.

“unjustness” is whether a court may reject restitution and limit Contrak’s recovery to his contract with Beyer. Instead of *Restatement of the Law of Restitution* section 110’s obstruction, this article proposes to the court the following factual and contextual question: Would granting Contrak restitution from Zale seriously erode the reasons Contrak cannot recover from Beyer in contract?

Although a restitution scholar could wish for better analysis from the court on this point, if a court were to grant Contrak restitution, it could give several intellectually respectable reasons. Although Contrak and Zale did not have a contract to remodel the bathrooms, Contrak did not intend to make a gift to Zale, for Contrak’s contract with Beyer negates any intent to confer a gift on anyone. Contrak expected payment—from someone. Zale received a benefit, of sorts, a benefit which Zale retains, perhaps because it can be neither returned nor reversed without tearing the onyx bathrooms out. Perhaps Zale is better off with the “improved” bathrooms both in personal comfort and in augmented market value. The court can measure Contrak’s restitution conservatively so that the episode leaves Contrak without “profit” and retains the sting of dealing with Beyer. Perhaps Contrak will recover restitution measured by Zale’s gain in market value. Value after less value before equals Zale’s “benefit.”<sup>82</sup>

On the other hand, a court can give persuasive reasons to deny Contrak restitution. Although Zale has paid no one, forcing him to pay Contrak lets Contrak confer a benefit, albeit under contract with another, and force Zale, a non-party to the contract, to pay. Zale contracted with no one; forcing Zale to pay Contrak restitution is an inefficient judicial transaction. Restitution interferes with Zale’s autonomy and ability to form contracts for home improvement, or to spend that money for anything else. Zale’s benefit is both illiquid, no pun intended, and difficult to value; the shock to Zale’s spirit from the onyx’s adverse aesthetics may overcome any augmented, but unrealized, market value. Zale can neither return the remodeled bathrooms nor even remove them without leaving him with no bathrooms at all.

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82. See Rendleman, *Quantum Meruit for the Subcontractor*, *supra* note 2, at 2076–78.

On balance, the considerations against restitution in the preceding paragraph persuade me more than the considerations supporting it above. But a court, which followed the common law analysis I have suggested into how restitution affects related doctrines and granted *Contrak* recovery, would not have jumped off the end of Professor Dawson's dock or become lost in his wilderness. In other words, a court's dissimilar result on the "unjustness" fault-line is part of the pluralism we should expect and tolerate in perplexing restitution disputes.

#### VI. CONCLUSION

In contrast to restitution for breach where the non-restitution substantive doctrine the defendant violated supplies the court with objective standards of unjustness, freestanding restitution disputes create a risk of a decision that diverges from established expectations. Courts and scholars have struggled with the problem of how to render just, yet predictable and consistent, freestanding-restitution decisions.

Following the factual and contextual analysis I present above, lawyers, jurors, and judges will ask a series of questions in the aegis of the common law technique. These questions will use related substantive doctrine, as well as moral and economic considerations, to focus their judgment on the hard question of unjustness. Preparing to accept responsibility for the decisions by formulating reasoned justifications for their ultimate choice will focus courts' judgment on the crucial issues in determining unjustness. Guided and constrained by past decisions, but not frozen to them, they will occasionally disagree about how to accommodate the sometimes-competing values of restitution and non-restitution substantive doctrines.