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# TOPIC V: THEORETICAL EXPLORATIONS OF UNJUST ENRICHMENT

## RESTITUTION AND RELATIONSHIPS

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*This Essay examines how restitutionary doctrines protect the integrity of certain types of relationships by providing guarantees against betrayal of trust and by making free riding a losing proposition. It also considers contexts wherein restitution serves to recruit third parties – parties external to the relationship the law seeks to safeguard – as indirect guardians.*

*More broadly, this Essay challenges the schism between autonomy-based and utility-based accounts of restitution, or of private law more generally, and it explains how a pluralist theory may help to address this flaw.*

### I. BEYOND AUTONOMY AND UTILITY

Many – dare I say most – analyses of private law are, understandably, either individualist or collectivist. Private law regulates our daily interactions as individuals and thus inevitably plays a role in setting up the rights we have against one another and their correlative duties. This rights-based perspective of private law includes stronger and weaker positions. For example, Ernest Weinrib argues that the reasons for the parties’ entitlements must be entirely internal to their relationship, whereas I hold that it is enough that the entitlements are correlative, as long as the implications of the reasons supporting the plaintiff’s entitlement sufficiently converge with those

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supporting the defendant's liability.<sup>1</sup> Whatever one's position is on this matter, the propositions that we need to think about private law as the legal realm that prescribes our interpersonal rights and duties and that the one (and, some argue, the only) significant way of thinking about these rights is in terms of individual autonomy appear unquestionable.

Collectivist accounts of private law are somewhat more controversial, resulting in one of the most conspicuous splits in private law theory. In the last few decades, law and economics scholars have produced a robust body of scholarship analyzing in minute detail how private law doctrines maximize, or can and should maximize, social welfare.<sup>2</sup> Part of the impetus of contemporary corrective-justice theory is geared to contest the legitimacy of this – or any other – collectivist perspective on private law.<sup>3</sup> This is a powerful critique, insofar as it targets a blunt instrumentalism that perceives civil suits as merely one “mechanism whereby the state authorizes private parties to enforce the law.”<sup>4</sup> It is far less convincing against the view that welfarist and other collectivist normative commitments may inform the parties' ex ante entitlements, in a way that is still constrained by the weaker form of correlativity mentioned above.<sup>5</sup> In fact, one source of support for this weaker form is the significant explanatory power of private law's welfarist accounts, which seems puzzling if collectivist concerns indeed have no role to play in private law, as the stronger form of correlativity suggests.<sup>6</sup>

Many accounts of the law of restitution follow this general path of theorizing about private law, analyzing restitutionary doctrines in terms of autonomy or utility. Most chapters in my book, *The Law and Ethics of Restitution*, also look at significant restitutionary categories such as mistakes, self-regarding conferral of benefits, wrongful enrichments, restitution in contractual settings, and constructive trusts in bankruptcy through the lenses of

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<sup>1</sup> Compare Ernest A. Weinrib, *Reviving Restitution*, 91 VA. L. REV. 861, 862 (2005), with Hanoch Dagan, *Just and Unjust Enrichments*, in *THE GOALS OF PRIVATE LAW* 423, 432-35 (Andrew Robertson & Tang Hang Wu eds., 2009). In fact, I argue that even the absence of the latter, weaker form of correlativity does not invariably and necessarily delegitimize a private law cause of action. *Id.* at 434.

<sup>2</sup> Alongside collectivist accounts of the welfarist kind, there are also analyses of private law in terms of distributive justice. See, e.g., Gregory C. Keating, *Nuisance as a Strict Liability Wrong*, J. TORT L. (forthcoming 2011) (manuscript at 3-4), available at <http://works.bepress.com/gregorykeating/27>.

<sup>3</sup> See, e.g., ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 3-14, 212, 214 (1995).

<sup>4</sup> Edward L. Rubin, *Punitive Damages: Reconceptualizing the Runcible Remedies of Common Law*, 1998 WIS. L. REV. 131, 154.

<sup>5</sup> See Hanoch Dagan, *The Limited Autonomy of Private Law*, 56 AM. J. COMP. L. 809, 816 (2008).

<sup>6</sup> The language of the text is advisedly cautious: the claim that collectivist concerns may affect our ex ante private law entitlements allows for the possibility that, in some types of cases, they should not.

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autonomy and utility.<sup>7</sup> For the above reasons, I still hold that these perspectives are important, indeed crucial, for our understanding of the law of restitution. But I would now argue that the third normative commitment – to community or, more broadly, to the facilitation and protection of interpersonal relationships, which I discussed in *The Law and Ethics of Restitution* as having only “limited implications in restitutionary doctrine,”<sup>8</sup> is far more significant than I had realized.

In this Essay, I hope to give relationship its proper role in restitution theory. The Essay discusses how restitutionary doctrines protect the integrity of certain types of relationships by providing guarantees against betrayal of trust and by making free riding a losing proposition. It also considers contexts where restitution serves to recruit third parties, who are external to the relationship the law seeks to safeguard, as indirect guardians.<sup>9</sup> Finally, I conclude with some remarks on why monist accounts of private law, such as those focusing on autonomy or on utility, tend to obscure private law’s role in facilitating relationships and on ways a pluralist theory of restitution may help to address this flaw.

## II. REINFORCING RELATIONSHIPS FROM WITHIN

Thinking about restitution as a means for reinforcing relationships may seem surprising. Like torts – and unlike property and (to a lesser extent) contracts – restitution is rarely involved in the governance of relationships;

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<sup>7</sup> HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 9-10 (2004).

<sup>8</sup> *Id.* at 330. Still, some of the discussion that follows builds on *THE LAW AND ETHICS OF RESTITUTION*, in particular on chapter 6.

<sup>9</sup> Like any theoretical analysis which relies on the law’s effects on people’s lives, my account may be criticized for lack of verified empirical data. But for legal theorists, as opposed perhaps to sociologists of law, the significance of omitting robust empirical inquiries is itself an empirical question. Since the answer to this question depends on a judgment of these inquiries’ expected benefits to the project at hand vis-à-vis their costs, it could change from one context to another. And in most of the contexts that I cover, the at times implicit impressionistic empirical observations on which I tend to rely seem to me good enough for this purpose. Moreover, given the largely reconstructive (rather than explanatory) task of this Essay, I am not sure that such empirical inquiries would yield too many relevant insights. Even where it seems likely that most affected people are actually ignorant of the doctrine – such as in relationships of informal intimacy – they may well know enough about the “character” of a legal institution to be affected by the legal design. Finally, a relationship-facilitating account, irrespective of its empirical effects, also seems important to me as one consideration for prescribing the proper allocation of people’s entitlements. Be this as it may, as a legal realist, I am happy to invite a rebuttal of these conjectures or of my judgment of their sufficiency. While some reliance on commonsensical observations about social reality is inevitable, I do concede that, in some contexts, reality may turn out to be different from what we think it is. If this is shown to be the case, either by providing relevant empirical data or through a competing commonsensical account, I will be delighted to revisit my conclusions.

rather, its dramas are either one-shots or endgames. This feature of restitution may exacerbate our lawyerly tendency to concentrate on the operation of law during times of rupture (e.g., litigation), at the expense of its daily – but no less germane – functioning in the background of various types of social interactions.<sup>10</sup>

A. *Deterring Betrayals of Fiduciaries and Intimates*

Many of the interpersonal material interactions that concern private law are indeed one-shots, but in many contexts we interact in more stable ways. The long-term material enterprises we form do not only yield economic benefits. Often, they are also important *loci* of significant and intrinsically valuable interpersonal relationships.<sup>11</sup> Both types of long-term relationships require some degree of cooperation and trust. Therefore, in an imperfect world where we can never trust one another absolutely, both types of relationships are sources of serious vulnerabilities requiring protective legal rules able to reinforce the parties' mutual trust and their willingness to cooperate.<sup>12</sup>

The fiduciary relationship is an obvious example. Fiduciary relationships are typified “by vulnerability and susceptibility to abuse”<sup>13</sup> because a beneficiary is subject to the fiduciary's discretionary power over a significant practical interest of hers.<sup>14</sup> For this reason, the beneficiary's entitlement to the fiduciary's loyalty is the distinctive feature of fiduciary law.<sup>15</sup> This reason may perhaps also explain why restitution for breach of the duty of loyalty is so entrenched in our law that it is rarely seriously disputed.<sup>16</sup> Difficult questions remain as to the proper scope and the appropriate form of profits-based recovery in such contexts, given the potential benefits and the detrimental difficulties of under-enforcement inherent in such relationships.<sup>17</sup> For my

<sup>10</sup> Cf. H.L.A. HART, *THE CONCEPT OF LAW* 79-88 (1961).

<sup>11</sup> See HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* chs. 8-10 (2011).

<sup>12</sup> See JEREMY WALDRON, *When Justice Replaces Affection: The Need for Rights*, in *LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991*, at 370, 373-74, 376, 385, 387 (1993); Carol M. Rose, *Trust in the Mirror of Betrayal*, 75 B.U. L. REV. 531, 535, 537-38, 540-41, 546, 550 (1995).

<sup>13</sup> JAMES EDELMAN, *GAIN-BASED DAMAGES: CONTRACT, TORT, EQUITY AND INTELLECTUAL PROPERTY* 85 (2002); see also PETER BIRKS, *AN INTRODUCTION TO THE LAW OF RESTITUTION* 332-33 (paperback ed., rev. 1989); EDELMAN, *supra*, at 216, 244; GRAHAM VIRGO, *THE PRINCIPLES OF THE LAW OF RESTITUTION* 453-54, 518 (1999).

<sup>14</sup> See Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 262 (2011).

<sup>15</sup> See Paul B. Miller, *Justifying Fiduciary Duties* 43-44 (June 2011) (unpublished manuscript) (on file with author); Lionel D. Smith, *The Structure of Fiduciary Obligation* (June 2011) (unpublished manuscript) (on file with author).

<sup>16</sup> See ANDREW BURROWS, *THE LAW OF RESTITUTION* 503 (2d ed. 2002); Robert Chambers, *Liability, in BREACH OF TRUST* 1, 25-26 (Peter Birks & Arianna Pretto eds., 2002); Note, *Garnishing Graft: A Strategy for Recovering the Proceeds of Bribery*, 92 YALE L.J. 128, 134-36 (1982).

<sup>17</sup> See DAGAN, *supra* note 7, at 234-40.

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current purposes, however, it will suffice to emphasize that, by deterring breaches of the fiduciary's loyalty, restitution plays a crucial role in vindicating the beneficiary's entitlement to that loyalty, thereby preserving the integrity of the fiduciary relationship.

The fiduciary category is familiar, but I argue that another set of restitutionary doctrines dealing with seemingly disparate topics such as unjust enrichment between cohabitants and rescission of gifts because of undue influence can, and indeed should, be analyzed along similar lines. In these settings, the law of restitution subtly reinforces fragile but valuable communities of informal intimacy. More precisely, these restitutionary doctrines support a liberal vision of community.

By community, I refer to any "group of people who share a range of values, a way of life, identify with the group and its practices and recognize each other as members of that group."<sup>18</sup> In identifying themselves with a community, individuals commit themselves to it, endorse and promote its projects, and regard their own well-being as intimately linked to its flourishing. This commitment is, at least partly, a voluntary choice (hence the liberal qualifier), reflecting the value – either instrumental or intrinsic – of such communities for individuals for as long as they continue to be sources of value. Indeed, communal activities yield economic gains as well as other goods, which constitute valuable ways of life. Being part of such a community is also a source of self-respect for individuals and allows them to be at ease in the world.<sup>19</sup>

Claims of unjust enrichment facilitate this informal intimacy by protecting interpersonal relationships of reciprocity, trust, and reliance and by shielding the parties from the lingering risks of opportunism and abuse of trust. Consider the law of cohabitation. Absent an explicit contractual arrangement, restitution is a major source of cohabitants' claims. Restitution in this context bases both liability and the measure of recovery on the existence of a significant asymmetric contribution.<sup>20</sup> Differences between states frustrate any attempt to identify a majority position on cohabitation in American law. But it

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<sup>18</sup> See ANDREW MASON, *COMMUNITY, SOLIDARITY AND BELONGING: LEVELS OF COMMUNITY AND THEIR NORMATIVE SIGNIFICANCE* 21 (2000).

<sup>19</sup> See *id.* at 21, 23, 51-52, 59; cf. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 193, 198-207 (1986) (explaining that the intrinsic value of certain collective goods can also be appreciated from a liberal perspective because personal autonomy requires a range of acceptable alternatives and at least some of the social conditions that constitute such alternatives are also collective goods).

<sup>20</sup> See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28 (2011); *id.* § 28 cmts. a, c-e. For a critique of the RESTATEMENT (THIRD)'s rule, see Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 736 (2006). Sherwin's position relies heavily on her more general suspicion of rule-oriented realism. See Emily Sherwin, *Rule-Oriented Realism*, 103 MICH. L. REV. 1578, 1579 (2005) (reviewing DAGAN, *supra* note 7). I address these concerns in Dagan, *supra* note 1, at 229-30.

is safe to state that this restitutionary regime of balancing significant net surpluses – either by way of “a substantial equity investment in real estate or personal property titled in the other partner’s name” or in the form of services that go beyond “the ordinary give-and-take of a shared life” – represents the middle-of-the-road approach between assimilating cohabitation into marriage (thus allowing cohabitants to share their partners’ earnings) and deterring (if not penalizing) cohabitating couples.<sup>21</sup>

Allowing recovery for a significant asymmetric contribution facilitates the functioning of cohabitation as an intermediate institution, stabilizing and facilitating a relationship of long-term informal intimacy between marriage and arm’s-length dealings.<sup>22</sup> A legal regime that prescribes the scope of legal intervention at a threshold of extraordinary benefits (and extraordinary burdens) typifies categories of cases wherein law seeks to inculcate a social ideal of long-term reciprocity. This ideal is the regulative principle of informal liberal communities, as is the case in a cohabitation relationship. On the one hand, setting the threshold at the level of extraordinary benefits rejects the strict and typically short-term accounting that applies in more individualistic social settings, thus refusing to reduce the cohabitants’ relationship to monetizable exchanges and seeking instead to preserve and inculcate their sense of mutual responsibility. On the other hand, by limiting the degree of acceptable asymmetrical benefits – by requiring rough equivalence of benefits (or burdens) – such a regime takes proper account of the limits of solidarity and the dangers of opportunism.<sup>23</sup>

In supporting long-term reciprocity, the restitutionary doctrine governing cohabitation recognizes, preserves, and fosters the non-commodified significance of membership alongside the more calculated (and thus commodified) aspect of it. Long-term reciprocity insists that membership in a community (in this case, cohabitation) should not be reducible to a market relationship, urging us instead to adhere to our plural and ambivalent understandings of membership both as a source of mutual advantage and as a locus of belonging.<sup>24</sup> In this way, long-term reciprocity facilitates the cohabitants’ collective pursuit of joint ends, encouraging a relationship of trust,

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<sup>21</sup> Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1399-1402 (2001).

<sup>22</sup> Cf. Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationship*, 66 WASH. & LEE L. REV. 1565, 1569 (2009) (presenting three rationales for distinguishing marriage and cohabitation, with different views on autonomy and pluralism).

<sup>23</sup> Long-term interpersonal relationships in liberal environments are particularly vulnerable to opportunistic behavior because of the liberal commitment to free exit. See DAGAN, *supra* note 11, at 166-68.

<sup>24</sup> Cf. MARGARET JANE RADIN, *CONTESTED COMMODITIES* 102-14 (1996) (discussing incomplete commodification as a strategy for holding onto such ambivalent understandings).

mutual support, cooperation, and reliance, while protecting the parties from the risks of unilateral selflessness.

I claim that the seemingly disconnected rule, which makes a gift or a gratuitous inter vivos transfer induced by undue influence subject to rescission and restitution, can be similarly justified as reciprocity-enhancing. Undue influence typically deals with transfers from certain “susceptible persons,” notably the elderly, to persons “in whom they have placed special confidence, or to whom they are otherwise subservient,” raising suspicions that the transferor’s free will was overcome by the transferee’s will.<sup>25</sup> Commentators have disputed the nature and focus of undue influence as either a matter of impaired consent and thus analogous to a mistake or as a matter of abuse of power and thus resembling unconscionable conduct.<sup>26</sup> But both sides to this ostensibly dichotomous debate, respectively focusing on purely individualistic and purely collectivistic standpoints, apparently acknowledge that their proposed one-sided focus is necessarily partial. They both seem to agree that undue influence cases involve an exceptional degree of reduced autonomy on the part of one, and a parallel exceptional degree of control or influence in the other. In other words, both sides implicitly recognize the intrinsically relational nature of undue influence.<sup>27</sup>

The deep relational nature of undue influence is further revealed once one realizes the intent-defying potential of this doctrine, as when courts decline to give effect to the clear manifestation of testators’ wills if they deviate from certain accepted social norms. These outcomes are built into the doctrine that tends to find dependence on relatives innocuous, while finding similar dependence on people outside the formal family structure, such as a helpful neighbor, suspicious.<sup>28</sup> Such family protectionism may be objectionable insofar as family relationships are not always coextensive with caring

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<sup>25</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 15 (2011); *id.* § 15 cmt. b; see also Fiona R. Burns, *Undue Influence Inter Vivos and the Elderly*, 26 MELBOURNE U. L. REV. 499, 515, 517-21 (2002).

<sup>26</sup> Compare Peter Birks & Chin Nyuk Yin, *On the Nature of Undue Influence*, in GOOD FAITH AND FAULT IN CONTRACT LAW 57, 58, 61, 68, 72, 78-79 (Jack Beatson & Daniel Friedmann eds., 1995) (defending the plaintiff-sided nature of undue influence), with Rick Bigwood, *Undue Influence: ‘Impaired Consent’ or ‘Wicked Exploitation,’* 16 OXFORD J. LEGAL STUD. 503, 504, 507-12 (1996) [hereinafter Bigwood, *Impaired Consent*] (discussing inherent defects that defeat voluntariness and undue influence as “Wicked Exploitation”), and Rick Bigwood, *Undue Influence in the House of Lords: Principles and Proof*, 65 MOD. L. REV. 435, 436-37 (2002) [hereinafter Bigwood, *House of Lords*] (defining the relationships of influence and suspicions of abuse).

<sup>27</sup> See Birks & Chin, *supra* note 26, at 67, 69-70, 85-87, 89; Peter Birks & Charles Mitchell, *Unjust Enrichment*, in 2 ENGLISH PRIVATE LAW 525, 554 (Peter Birks ed., 2000) (conceptualizing undue influence as “a relational loss of self”); Bigwood, *House of Lords*, *supra* note 26, at 438; Bigwood, *Impaired Consent*, *supra* note 26, at 504.

<sup>28</sup> See Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 575-77, 582, 584-86, 591, 601-06 (1997).

relationships. But if we refine this privilege by applying it to the people with whom the transferor had a trust-based, family-like relationship for a significant period of time,<sup>29</sup> we can appreciate the important reciprocity-facilitating rationale underlying undue influence law. Thus conceived, undue influence law is a means by which courts mirror and support a well-entrenched social practice of long-term reciprocity,<sup>30</sup> although one that, as it must be in a liberal context, is subject to the liberty of potential transferors to exit from intimate relationships if they so choose.<sup>31</sup>

This account vindicates the *Restatement (Third) of Restitution and Unjust Enrichment's* recommendation to focus the analysis of undue influence on the question of dominance and subordination in the grantee-grantor relationship.<sup>32</sup> If the point of undue influence law is to prescribe the outer limits of reciprocity-based giving and thus of reciprocity-based relationships,<sup>33</sup> it must look at the relationship between the parties. Thus, it can neither be solely plaintiff-based nor solely defendant-based. The unique role of undue influence, therefore, arises exactly where the transferor was not entirely lacking in terms of her overall judgment, as in incapacity or mistake, and the transferee's behavior was not entirely unconscionable, as in duress. By resisting submission, subservience, and subordination within relationships, the law of undue influence not only guards the transferors' individual personhoods but also proscribes corruptions of the ideal of community, thus vindicating the (liberal) ideal of a genuine community.<sup>34</sup>

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<sup>29</sup> Cf. Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 268-71 (2001) (discussing an actual relationship approach in a family context). Courts may still presume that these people are family members because, in fact, this is probably true in the majority of cases. But this presumption should be rebuttable, and the ultimate identity of the privileged group should be determined by examining, in proper cases, the quality of the transferor's nonstandard relationships. See Trent Thornley, *The Caring Influence: Beyond Autonomy as the Foundation of Undue Influence*, 71 IND. L.J. 513, 544-45 (1996).

<sup>30</sup> See Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 608-10 (1999).

<sup>31</sup> At times, such an exit might indeed damage the doctrine's reciprocity-enhancing function: "a legal regime that affords no remedy for flagrantly unfair violations of reciprocity might undermine such relationships by making them too risky and vulnerable to abuse." DAGAN, *supra* note 7, at 200-01. Here again, the law of restitution provides a remedy by allowing "such victims of an opportunistic (or simply capricious) repudiation of the norms of reciprocity" to recover for significant uncompensated expenses. *Id.* at 201.

<sup>32</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 15 (2011); *id.* § 15 cmt. b; see, e.g., MALCOLM COPE, *DURESS, UNDUE INFLUENCE AND UNCONSCIENTIOUS BARGAINS* 69, 155-74 (1985); 4 GEORGE E. PALMER, *THE LAW OF RESTITUTION* § 19.2, at 102 (1978).

<sup>33</sup> See ROSS GRANTHAM & CHARLES RICKETT, *ENRICHMENT AND RESTITUTION IN NEW ZEALAND* 92-94 (2000).

<sup>34</sup> See Mindy Chen-Wishart, *Undue Influence: Beyond Impaired Consent and Wrongdoing Towards a Relational Analysis*, in *MAPPING THE LAW: ESSAYS IN MEMORY OF*



### B. *Circumscribing Opportunism*

My previous examples focused on unique types of relationships, fiduciaries and intimates, which rely critically on trust, reliance, and long-term reciprocity and may thus be destroyed by opportunism. Similar opportunistic behavior, however, threatens more mundane forms of interpersonal interactions as well. And again, the law of restitution is, or at least can be, of major significance.

Free riding is a case in point. Some forms of free riding are certainly necessary and even important because interdependence, including deliberate dependence, is the defining feature of every human community.<sup>35</sup> That is why law in many cases does not interfere when one person's activity generates positive externalities that others enjoy. Some cases, however, justify intervention. Autonomy and utility provide important justifications for requiring the free rider to make restitution in categories of cases in which the parties' interests are sufficiently locked in, but their cooperation in jointly serving these interests is unlikely. Familiar examples are cases of co-owners, parties who are subject to a common liability, or cases of class actions or of the maritime doctrine of general average. Although the promotion of the parties' own self-interest in these cases requires cooperation, their jointly beneficial collective action might be frustrated without legal intervention because the individual interest of each of them might supersede their collective good.<sup>36</sup> In such circumstances, restitution becomes an attractive tool for forcing the parties to pay their proportionate share of the collective good, thus overcoming these free-rider difficulties. Solving such free-rider problems in these cases is justified not only on welfarist grounds. If carefully fine-tuned – meaning, if concerns of subjective devaluation are properly addressed – restitution can also promote autonomy, at least insofar as autonomy is understood as self-determination so that “personal gatekeeping” is but a means for this ultimate value. Thus, where law's abstention is likely to frustrate goals and aspirations that require collective action, overriding the explicit disinterest of restitution defendants in participating and paying for a collective action may indeed be justified from an autonomy perspective as well.

The details of this line of analysis are complex and include a consideration of the subtle but important differences hinted at above between its analyses

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PETER BIRKS 201, 216-17 (Andrew Burrows & Lord Roger of Earlsferry eds., 2006); Mindy Chen-Wishart, *Undue Influence: Vindicating Relationships of Influence*, 59 CURRENT LEGAL PROBS. 231, 252-53 (2006); cf. ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 151, 152-53 (1993) (explaining why subordination corrupts the ideal of community in marriage).

<sup>35</sup> See Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. LEGAL STUD. 449, 468 (1992); Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 167-68 (1992).

<sup>36</sup> This contingency is the expected outcome if no single member of the group is likely to derive sufficient benefits from that good to justify paying the entire cost of supplying it alone, and no coalition of members can feasibly divide the costs among members.

from the perspectives of autonomy and utility.<sup>37</sup> For the current purposes, however, these differences can be set aside. What merits emphasis here is that in some, though by no means all, categories of cases where restitution applies as a solution to free riding, it is also justified as a means of safeguarding the integrity of the parties' relationships. Whereas in certain categories of cases the parties whose interests are sufficiently locked in together are strangers, in others their interdependence is a feature of their ongoing relationship. In this type of case, free riding might not only generate underinvestment in the parties' public good but could also undermine their interpersonal relationship and demoralize their community. In such cases, therefore, restitution is, or at least should be, particularly appropriate.

Consider someone's restitutionary claim from her co-owners for investing in a common property.<sup>38</sup> While American law allows such claims for the payment of taxes, mortgages, and other necessary expenditures by one commoner on behalf of the others, most courts are much less forthcoming regarding parallel claims for necessary repairs, allowing contributions only at partition (or, in rare cases, through setoff).<sup>39</sup> These rules seem particularly unfortunate for the potential role of restitution in facilitating relationships. Co-owners who make repairs assume a significant risk of non-reimbursement or are led to partition as the only available avenue to recoup their expenditures. By contrast, a broad contribution rule regarding investments reasonably required to prevent harm to the resource or to protect the commoners' continued ownership or possession, in force in Continental jurisdictions, avoids these detrimental outcomes.<sup>40</sup> Such a background norm of restitutionary recovery protects a cooperating co-owner from the others' possible opportunism by ensuring that parties who invest today will not be exploited tomorrow.<sup>41</sup> It enables people, without taking prohibitive individual risks, to gain the significant benefits that may flow from a well-functioning co-ownership, both economic (notably economies of scale and risk-spreading) and

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<sup>37</sup> See generally DAGAN, *supra* note 7, ch. 5, from which the previous paragraph draws. See also Daniel Friedmann, *Unjust Enrichment, Pursuance of Self-Interest, and the Limits of Free Riding*, 36 LOY. L.A. L. REV. 831, 846-47 (2003). For a recent utilitarian account, see Ariel Porat, *Private Production of Public Goods: Liability for Unrequested Benefits*, 108 MICH. L. REV. 189, 189, 220-21 (2009). For an interesting attempt to "rehabilitate" the controversial case *International News Services v. Associated Press*, 248 U.S. 215 (1918), along these lines, see Shyamkrishna Balganesh, "Hot News": *The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419, 422-29 (2011).

<sup>38</sup> The analysis of co-ownership draws on DAGAN, *supra* note 11, at 191-92.

<sup>39</sup> *Id.* at 191.

<sup>40</sup> *Id.* at 191-92.

<sup>41</sup> As the text implies, restitutionary recovery is not supposed to be deployed by co-owners on a regular basis, both because it would be costly and because, in the context of an ongoing cooperative relationship of long-term reciprocity, it is correctly perceived as unnecessary, unneighborly, or even hostile. Rather, restitution functions as a background norm whose mere existence encourages efficient investments and facilitates cooperation.

socio-psychological (benefits of working together, taking part in successful collective enterprises, and enriching interpersonal relationships through common tasks).<sup>42</sup>

Though deficient in the context of co-ownership, American law of restitution does seem to take this facilitative direction regarding the somewhat looser type of relationship prevailing between commercial parties. Courts do not go as far as suggesting a liberal use of unjust enrichment as the premise for a broad doctrine of implied-by-law contract,<sup>43</sup> and they are particularly careful not to expand restitution where this might impede the efficient conduct of business.<sup>44</sup> In other cases, however, at least some courts seem willing to impose restitutionary liability for the free acceptance of services or goods even when the defendant did not manifest positive desire and willingness to pay for them, as long as she had an opportunity to reject them and knew that the goods or services were to be paid for.<sup>45</sup> This position may be based on the courts' appreciation of the possible trust-building benefits of restitution, even in commercial contexts.<sup>46</sup>

### III. SAFEGUARDING RELATIONSHIPS FROM WITHOUT

The doctrines mentioned so far focus on direct reinforcement of the parties' relationships. But the law of restitution also safeguards these relationships from the outside by recruiting third parties to the task. This is at least one virtue of both the rule dealing with restitution for the supply of necessities and those rules concerning restitution of transfers outside the scope of the

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<sup>42</sup> The Continental doctrine (correctly) does not require from co-owners the same level of solidarity as the restitutionary regime governing cohabitation discussed above and thus does not extend to improvements.

<sup>43</sup> See Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695, 760-61, 775.

<sup>44</sup> See *Prod. Process Consultants, Inc. v. Hubbell Steel Corp.*, 988 F.2d 794, 797 (7th Cir. 1993) (stating that restitutionary recovery may retroactively upset the parties' allocation of business risks); *Cnty. Comm'rs of Caroline Cnty. v. J. Roland Dashiell & Sons, Inc.*, 747 A.2d 600, 610 (Md. 2000) (stating that an express contract covers the subject matter at issue); *Landcom v. Galen-Lyons Joint Landfill Comm'n*, 259 A.D.2d 967, 967-68 (N.Y. App. Div. 1999) (stating that conferring a benefit is part of a business practice wherein those seeking to secure a deal frequently expend efforts in the hopes of increasing the likelihood of that occurrence).

<sup>45</sup> See *Great Plains Equip., Inc. v. Nw. Pipeline Corp.*, 979 P.2d 627, 640 (Idaho 1999); *Paffhausen v. Balano*, 708 A.2d 269, 272 (Me. 1998); *Po River Water & Sewer Co. v. Indian Acres Club of Thornburg, Inc.*, 495 S.E.2d 478, 482 (Va. 1998); LORD GOFF OF CHIEVELEY & GARETH JONES, *THE LAW OF RESTITUTION* 20 (Gareth Jones ed., 7th ed. 2009). *But see BURROWS*, *supra* note 16, at 21.

<sup>46</sup> See *Media Servs. Grp. v. Bay Cities Commc'ns, Inc.*, 237 F.3d 1326, 1331 (11th Cir. 2001); *Abington Constructors, Inc. v. Madison Paper Indus.*, 2000 WL 620203, at \*7 (1st Cir. March 21, 2000).

transferor's authority or following the misconduct of an intermediary towards the plaintiff.

Consider first how the favorable approach of the law of restitution to interventions by strangers for the supply of necessities to family members manifests the reciprocity-enhancing rationale that this Essay celebrates. Necessaries doctrine focuses on the supply of, or payment for, food, clothing, housing, medical care, utility bills, and the like that a spouse or a parent fails to provide to her spouse or child. In such cases, the necessities doctrine allows the spouse (or child) to purchase or receive the goods or services at issue from a supplier, charging the other spouse (or parent).<sup>47</sup> Allowing the supplier's restitution claim seems mysterious – or simply unjustified – if one focuses on the autonomy concerns of the plaintiff, or even on the welfare of both litigating parties, but is easily justified from the relationship-facilitating perspective this Essay presents.

As the *Restatement (Third)* states, allowing, indeed encouraging, such claimants' interventions in supplying necessities is premised on "the benefits of prompt action" to protect the interests of third parties.<sup>48</sup> Protecting dependents is one way whereby necessities doctrine does safeguard relationships of long-term reciprocity. Promoting sharing in marriage is yet another particularly important aspect in common-law/equitable division states, whereby spouses' rights during an intact marriage are solely determined by formal title so that marital status is irrelevant. By expanding creditor collection possibilities to include both spouses, law indirectly enables the non-propertied spouse to act on behalf of the marital unit as a whole.<sup>49</sup> The necessities doctrine thus preserves the ability of each spouse to act in the world as an individual and also reinforces the spouses' mutual trust, reciprocity, and caring by providing them some (admittedly limited) protections from abuse.

Although the lack-of-authority doctrine is ostensibly detached from the necessities rule, from a relationship-facilitating prism the two are closely related. Where "an agent, trustee, or other fiduciary" transfers legal title to the plaintiff's property "outside the scope of the transferor's authority, or otherwise in breach of the transferor's duty to the principal or beneficiary," the

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<sup>47</sup> See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 22 cmts. c, g (2011); HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 266 (2d ed. 1988).

<sup>48</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 22 cmt. a; see also Margaret M. Mahoney, *Economic Sharing During Marriage: Equal Protection, Spousal Support and the Doctrine of Necessaries*, 22 J. FAM. L. 221, 231-32, 240-42, 244-45, 260 (1983-1984).

<sup>49</sup> In other words, the necessities doctrine (imperfectly) mimics the sphere of equal management in community property regimes. See, e.g., *Jersey Shore Med. Ctr.-Fitkin Hosp. v. Estate of Baum*, 417 A.2d 1003, 1009 (N.J. 1980). On the governance regime of community property in general, and on equal management in particular, see DAGAN, *supra* note 11, at 223-27.

transfer is “subject to rescission and restitution.”<sup>50</sup> True, not all transferees would ultimately be liable, but rather only those who took the property “with notice of the transferor’s lack of authority” or those who may have been unaware of this fact but took it “as donee[s]” or “did not change [their] position as a result.”<sup>51</sup> I do not need to discuss here the (valid) reasons for protecting bona fide purchasers and transferees who detrimentally changed their positions.<sup>52</sup> What matters for my purposes is that, by making transfers outside the scope of authority vulnerable to restitution, the law again recruits third parties – this time transferees, rather than suppliers – to police the integrity of agency, trust, or fiduciary relationships. As the *Restatement (Third)* notes, such transferees are held accountable, even absent “direct awareness of the transferor’s lack of authority,” where they have “notice that the transferor occupies a fiduciary relation to another person, and . . . the circumstances of the transaction are such as to suggest that the transferor may be using the property of the beneficiary for personal gain.”<sup>53</sup> As it further indicates, similar rules with similarly happy consequences apply regarding other, even more egregious forms of an intermediary’s misconduct, as where an agent embezzles her principal’s funds or acts fraudulently or where fiduciary or confidential duties are breached.<sup>54</sup>

To appreciate the significance of this broad restitutionary relationship-facilitating doctrine, consider a category of cases that is not explicitly discussed in the *Restatement (Third)* but is closely related to the restitutionary doctrine of lack of authority, namely, when one spouse purports to convey a property that he or she owns as a tenant by the entirety or that was a part of the marital estate in community property jurisdictions.<sup>55</sup> In most jurisdictions, a valid alienation requires a joint act by both spouses, whereas other jurisdictions provide each spouse with full powers of alienation as to his or her undivided one-half. The analysis of this section easily justifies the majority rule. A joint decision by both spouses is important in these contexts because such joinder helps ensure that these major decisions reflect a communal goal rather than individual ones, which is particularly significant in the context of so-called traditional marriages. Similarly to the other doctrines surveyed above, the majority position here places some burden of policing the integrity of marriage on third parties, unless they had neither knowledge nor reason to suspect that the asset is part of a marital estate. Especially insofar as banks and other institutional third parties are concerned, this rule is likely to make them insist on joinder before they enter into the transaction.

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<sup>50</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 17.

<sup>51</sup> *Id.* § 17 cmt. a.

<sup>52</sup> See DAGAN, *supra* note 7, at 47-49, 256-58.

<sup>53</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 17 cmt. d.

<sup>54</sup> *Id.* § 17 cmt. a (referring to sections 13, 41, 43).

<sup>55</sup> This paragraph draws on DAGAN, *supra* note 11, at 15, 21-23.

## IV. FROM MONISM TO PLURALISM

The law of restitution plays a significant role in protecting, reinforcing, and facilitating relationships. It acts by providing safety nets for trusting parties (beneficiaries, intimates, partners and co-owners, and even business transactors) and by recruiting third parties (service suppliers and potential transferees) to police the integrity of these relationships. We may lose sight of this important function if we look at restitution from a monist perspective – that is, if we assume (as do many private law theorists) that one regulative principle or one balance of such values guides the entire terrain of private law in general, or the law of restitution in particular. Were restitution guided by one such value, it could not have been fostering relationships because, at least in a liberal environment, as long as people discharge their duties to society, they should be able to elude relationships altogether should they wish so.<sup>56</sup>

Private law should always facilitate and support institutions that safeguard individual autonomy. This explains, for example, why a property-law regime with no fee simple absolute would have been unacceptable in a liberal society. Unless we are trapped in the monist paradigm, however, this does not imply that private law should support *only* such institutions. Quite the contrary, a truly liberal private law should appreciate the plurality of reasonable but conflicting conceptions of the good and promote the freedom-enhancing function of pluralism and the individuality-enhancing role of multiplicity. It should thus create and facilitate different types of institutions, each incorporating a different value or different balance of values, so that people can choose their own ends, principles, forms of life, and associations by navigating among them.<sup>57</sup> On these grounds, property theorists should, for instance, discard the conception of property as “sole and despotic dominion” and endorse in its stead the understanding of property as an umbrella of property institutions where each institution stands for a distinct balance of property values.<sup>58</sup> By the same token, restitution theorists should be released from the straightjacket of analyzing the law of unjust enrichment either in terms of autonomy or in terms of utility, or even in terms of both these important underlying commitments. A pluralist approach to the law of restitution can elucidate ways of facilitating relationships and thus help to promote the significant potential of restitution for this task. I hope that this short Essay is a step in that direction.

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<sup>56</sup> See Leslie Green, *Rights of Exit*, 4 LEGAL THEORY 165, 176 (1998); Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 11-12, 15-16 (1990).

<sup>57</sup> Hanoch Dagan, *Pluralism and Perfectionism in Private Law* 13 (December 7, 2011) (unpublished manuscript) (on file with author); see also Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1017, 1027 (2011).

<sup>58</sup> See generally DAGAN, *supra* note 11.