
SYMPOSIUM

A CONFERENCE ON RESTITUTION AND UNJUST ENRICHMENT

EDITORS' FOREWORD

Boston University School of Law held a Conference on Restitution and Unjust Enrichment on September 16 and 17, 2011. The Conference was co-sponsored by the American Law Institute (ALI) and was held in honor of the ALI's 2011 publication of the *Restatement (Third) of Restitution and Unjust Enrichment*. Boston University School of Law Professor Andrew Kull served as the Reporter for the *Restatement (Third)*, spending fifteen years bringing the project to fruition. Professor Kull also has authored numerous books, articles, and reviews.

The *Restatement (Third)* represents the ALI's first comprehensive treatment of restitution and unjust enrichment since the original *Restatement of Restitution: Quasi Contracts and Constructive Trusts* created the modern law of this topic in 1937. The ALI never published a "Restatement Second" on this subject, abandoning publication of an attempted "Restatement Second of Restitution" after two tentative drafts in the early 1980s.

The *Restatement (Third)*'s first section – which reproduces the original *Restatement of Restitution*'s first section, with only a slight change in wording – states, "A person who is unjustly enriched at the expense of another is subject to liability in restitution." Within this general principle lies a vast body of law. Yet the teaching of and attention paid to restitution and unjust enrichment as a distinct body of law has declined in recent years in the United States. We hope that the *Restatement (Third)*'s publication will revitalize this body of law in the United States, as it has been revitalized in other common-law countries. To this end, this symposium issue advances discussion of an increased role for restitution and unjust enrichment in U.S. law.

At the Conference on Restitution and Unjust Enrichment, participants were invited to address any topics within the law of restitution and unjust enrichment. Prominent scholars from around the world gave live presentations. Given the breadth of the issues within the law of restitution and unjust enrichment, the presentations and resulting papers unsurprisingly cover a wide range of topics. We have organized their contributions under these general topic headlines:

Issues of Restitution Doctrine

These contributors address issues that might easily be classified within the table of contents of the *Restatement (Third)* or any other treatise on restitution and unjust enrichment: How do the terms of the parties' contract influence the remedy available when the injured party elects restitution instead of damages for breach? How does English law compare to American law in some standard scenarios of mistake, and what differentiates an invalidating mistake from other types of mistake? What are the justifications for the "slayer rule" and their implications for other restitution for wrongs? What do issues of causation in tort tell us about the scope of liability in disgorgement cases? Andrew Burrows, Nili Cohen, Daniel Friedmann, Mark Gergen, Helen Scott, and Danie Visser presented.

The Availability and Justification of Property-Based Remedies in Restitution

These contributors discuss property-based remedies in restitution, typified by the constructive trust. Issues include the consequences of these remedies in the familiar battle for priority between restitution claimants and competitors for the defendant's property, as well as theoretical justifications for proprietary rights in restitution. Emily Sherwin, Lionel Smith, and Robert Stevens presented.

Common-Law Restitution and Ponzi Schemes

These contributors explore the general theme of equitable remedies in the specific area of Ponzi schemes, notably the aftermath of the investment fraud of Bernard L. Madoff, as well as statutory or theoretical alternatives to the orthodox equitable approach. Saul Levmore presented, and Andrew Kull contributed his paper subsequent to the Conference.

Defenses and Objections to Liability in Restitution

While still in the realm of classifiable restitution doctrine, these contributors focus on defenses or other objections to liability. Topics include a new proposed account of change of position – one of the most important defenses to liability in restitution – and a discussion of cases in which restitution would act as an officious intermeddler with a competing set of legal rules. Gerhard Dannemann and Justice James Edelman presented.

Theoretical Explorations of Unjust Enrichment

These contributors engage in more general theoretical explanations of the idea of unjust enrichment: How do restitutionary doctrines protect certain types of relationships, and how do we address the schism between autonomy-based

and utility-based accounts of restitution? How does corrective justice illuminate the unjustness of unjust enrichment? Why are conceptions of unjust enrichment in Canada and England moving in different directions from those in the United States? Hanoch Dagan, Mitchell McInnes, and Ernest Weinrib presented.

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