



**Digital Commons@**

Loyola Marymount University  
LMU Loyola Law School

Loyola of Los Angeles Law Review

---

Volume 36

Number 2 *Symposia—Honor thy Mother & Father: Symposium on the Legal Aspects of Elder Abuse and Second Remedies Forum: Restitution*

Article 14

---

1-1-2003

## Restitution: Ancient Wisdom

David F. Partlett

Russell L. Weaver

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

---

### Recommended Citation

David F. Partlett & Russell L. Weaver, *Restitution: Ancient Wisdom*, 36 Loy. L.A. L. Rev. 975 (2003).  
Available at: <https://digitalcommons.lmu.edu/llr/vol36/iss2/14>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# RESTITUTION: ANCIENT WISDOM

*David F. Partlett\* and Russell L. Weaver\*\**

## I. INTRODUCTION: AN ALLEGORY

Even crusty law professors go to the movies and, as youngsters, read books of mystery and adventure. In thinking about restitution's place in the law, we are reminded of J.R.R. Tolkien's *Lord of the Rings*, because restitution seems to be an ancient wisdom that has been lost to modern American jurisprudence. Although its spirit has been kept alive by a smattering of legal hobbits, powerful forces are trying to prevent a revival of the ancient wisdom. Nevertheless, non-American scholars have kept the knowledge alive, and Americans wait for a hero who will restore the wisdom to its rightful place. Lord Mansfield's message is brought to a new day.<sup>1</sup> While we are sure that Tolkien would never have thought that his mythology could be so misused, so much license has been taken by Hollywood that we hope you will bear with us as we spin out the need for a revival of restitution.

This Article first explores the way in which restitution has been lost in American jurisprudence. It suggests that a way back may be found through a refocus on the elements of private law more eloquently articulated on the pages of foreign law reviews and books, and in the law reports of foreign courts. We then turn to a pedagogical thesis in which we assert that our students may be more appropriately taught restitution in a capstone remedies course where an awareness of the panoply of remedial devices will prepare our students to bring to the courts and to scholarship the type of revival we call for in the first Section of our Article.

---

\* Dean, Washington and Lee University School of Law.

\*\* Professor of Law and Distinguished University Scholar, University of Louisville, Louis D. Brandeis School of Law.

1. See *Moses v. Macferlan*, 97 Eng. Rep. 676, 681 (K.B. 1760).

## II. THE COMMON LAW WORLD DIVIDED

Restitution has found a most uncomfortable home in the curricula of American law schools. It is a remnant of private law in an era when private law is falling to public law analysis.<sup>2</sup> Voluntary relationships, integrity of property, and equity are at the root of restitution,<sup>3</sup> yet those notions find little place in Torts, Contracts, and Property courses. Much analysis in tort law is instrumental and overrides the inter-party aspects of transactions.<sup>4</sup> Contract analysis is also dominated by economic analysis that looks to the wealth maximizing function of its rules. Property courses do not dwell on theoretical underpinnings.

Restitution occupies a part of the Remedies course in most American law schools. The Reporter's introductory memorandum to the Discussion Draft of the *Restatement (Third) of Restitution and Unjust Enrichment* bravely states that a "modern law of restitution . . . has met vastly increased academic interest and judicial acceptance" but admits that, like the disappearance of the dinosaurs, the law departed from the "curriculum in the mid-1960s."<sup>5</sup> It did have a "hey-day" with Dawson, Palmer, Seavey, Scott, and Wade, but American scholarly champions are now gone.

By and large, American academics have deserted for the glories of interdisciplinary work that imports to law the light of other disciplines.<sup>6</sup> Indeed, American academics are generally disdainful of the scholarship created in the rest of the common law world. It is doctrinal, and to be doctrinal is the kiss of death for American law

---

2. For a recent example, see Thomas C. Galligan, Jr., *Deterrence: The Legitimate Function of the Public Tort*, 58 WASH. & LEE L. REV. 1019 (2001).

It is interesting that modern American regulation scholarship often confronts public law issues, such as restitution for tobacco-related diseases. See Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 GA. L. REV. 847 (1999).

The claims of Nazi slaves and American slavery have occupied, and will likely occupy, the attention of American scholars. See also Frederic L. Kirgis, *Restitution as a Remedy in U.S. Courts for Violations of International Law*, 95 AM. J. INT'L L. 341 (2001).

3. See Ross Grantham & Charles Rickett, *On the Subsidiarity of Unjust Enrichment*, 117 L. Q. REV. 273 (2001).

4. See *id.* at 295-96.

5. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT xv (Discussion Draft 2000) [hereinafter RESTATEMENT (THIRD)].

6. See, e.g., Symposium, *Law, Knowledge, and the Academy*, 115 HARV. L. REV. 1277 (2002).

professors' chances of tenure or professional respect. This attitude has isolated American academic law and the teaching of law from many fertile areas. This is particularly true of equity, where the law has been stunted, and American academics have generally been blind to the interesting and important work being done in the rest of the world in the vineyards of restitution.

Because of this disdain, American academics have not given restitution the close analysis that it deserves. Naturally, there are exceptions. Douglas Laycock has made a real contribution to the literature with his well-grounded arguments that restitution is gap-filling in the same way that equity supplemented the common law.<sup>7</sup> Andrew Kull has also produced insightful scholarship and is now embarked upon the daunting Reporter's role in the *Restatement*.<sup>8</sup> But on the whole, the restitution arena has seemed too doctrinal, almost too legal for modern American scholars.<sup>9</sup>

We cannot reverse the trends in modern legal scholarship. In the most recent *Harvard Law Review* a number of top-flight scholars worry about law, knowledge, and the academy.<sup>10</sup> Todd Rakoff, in the introduction, talks of "embedded" and "non-embedded" scholarship.<sup>11</sup> Most restitution scholarship is embedded in the law. It is out of kilter with the non-embedded state of modern legal scholarship that prizes an external view of the law. Take Deborah Rhode's critique of doctrinal or embedded scholarship. She contends that it "exhaustively exhumes unimportant topics or replicates familiar arguments on important ones. Too little effort is made to connect law to life . . ." <sup>12</sup> "Worse still," she says, it "is too often indifferent or oblivious to empirical and interdisciplinary

---

7. See Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1278 (1989).

8. See RESTATEMENT (THIRD), *supra* note 5, at ix.

9. See, e.g., Symposium, *Restitution and Unjust Enrichment*, 79 TEX. L. REV. 1763 (2001). For a broader and comparative analysis, see PATRICK S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* (1987).

10. See Symposium, *Law, Knowledge, and the Academy*, *supra* note 6.

11. Todd D. Rakoff, *Introduction*, 115 HARV. L. REV. 1278, 1285-87 (2002).

12. Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1340 (2002).

materials . . . .”<sup>13</sup> The enterprise of restitution scholarship, and of much private law scholarship, especially non-American, is then given little respect.<sup>14</sup>

Because of these trends in American scholarship, the field of restitution has been left to non-Americans in the post-Second World War period, with the most adept and receptive scholars being those that have a connection with the old world of equity jurisprudence. For example, many Australian High Court decisions, although overly verbose and turgid, do take seriously the subtleties of the common law. Take the recent case of *Roxborough v. Rothmans of Pall Mall Australia*.<sup>15</sup> This case dealt with a variation of the mistakenly-paid tax problem.<sup>16</sup> Usually, a plaintiff payor asks for restitution for payment mistakenly made to the State. Here the plaintiff retailer of tobacco had paid monies to the wholesaler.<sup>17</sup> The retailer had increased the price of its product to reflect the “tax” imposition.<sup>18</sup> The wholesaler had not handed over the relevant payments to the State before the “taxes” were found unconstitutional.<sup>19</sup> The retailer then made a restitutionary claim for the payment that represented the “tax” portion.<sup>20</sup>

The Australian High Court tackles the considerable doctrinal difficulty with a depth that one would not find in United States courts.<sup>21</sup> Interestingly enough the High Court places great reliance

---

13. *Id.* at 1341. The “law and . . .” project can fail fatally as Anne M. Coughlin reminds us in *I’m in the Mood for Law*, 53 STAN. L. REV. 209 (2000) (reviewing the law and literature in her critique of Guyora Binder & Robert Weisberg, LITERARY CRITICISMS OF LAW (2000)).

14. Foreign scholars are sometimes seduced by American instrumental analysis in approaching restitution. See Hanoch Dagan, *Mistakes*, 79 TEX. L. REV. 1795, 1810–11 (2001) (adopting a normative formula for restitution of mistaken payments that minimize social costs). A rapprochement between the substantive American judicial and legal method, and the more formalistic method employed elsewhere, seems far off. See David F. Partlett, *The Common Law as Cricket*, 43 VAND. L. REV. 1401 (1990).

15. (2001) 185 A.L.R. 335.

16. See *id.*

17. See *id.* at 337.

18. See *id.*

19. See *id.*

20. See *id.*

21. Some would say that Canadian courts cast adrift from the jurisprudence of equity have lumbered a little like a “bull in a china shop” in the area of restitution.

on American authority from the early part of the last century.<sup>22</sup> The great lions are cited including Justice Cardozo's decisions in *Atlantic Coast Line Railroad Co. v. Florida*<sup>23</sup> and *Wayne County Produce Co. v. Duffy-Mott Co.*,<sup>24</sup> and Judge Learned Hand's 1946 dissenting opinion in *123 East Fifty-Fourth Street, Inc. v. United States*,<sup>25</sup> but surprisingly few modern decisions are deemed worthy of mention.<sup>26</sup>

At the same time, restitution is an area where the nexus of legal history with close doctrinal exegesis was particularly suited to those not captured by the "law and . . ." projects. Restitution is one of the finest hours of non-American legal scholars. It represents the revenge of the much maligned rule-oriented scholars. One thinks of Goff and Jones, of Birks and Burrows, with some of those at this very forum. Reviewing a number of restitution books, Professor Stephen Smith has concluded that over the past twenty-five years, "unjust enrichment law" has witnessed the "most noteworthy scholarly achievements in the area of private law . . ."<sup>27</sup>

### III. THE FUTURE OF RESTITUTION IN THE CURRICULUM

To be sure, the American Law Institute may fan the restitution flame in the United States. But, even if that happens, it is doubtful that students will receive adequate exposure. The habits of mind established by prevailing torts, contracts, and property analyses have

22. See *Roxborough*, 185 A.L.R. at 371–75.

23. 295 U.S. 301 (1935).

24. 155 N.E. 669 (N.Y. 1927).

25. 157 F.2d 68 (2d Cir. 1946) (Hand, J., dissenting).

26. The Australian High Court makes a comparison to *United States v. California*, 507 U.S. 746, 751 (1993), but otherwise cites only older American decisions. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (rejecting as a defense for a refund of an unlawful tax that the over-charged party had passed some of the costs of the tax onto customers); *Hanover Shoe Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968); *Stone v. White*, 301 U.S. 532, 534 (1937); *Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 348 (1937); *United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 402 (1934); *Decorative Carpets, Inc. v. State Bd. of Equalization*, 58 Cal. 2d 252, 254–55, 373 P.2d 637, 639 (1962); *Philpott v. Superior Court*, 1 Cal. 2d 512, 36 P.2d 635 (1934); *Standard Oil Co. v. Bollinger*, 169 N.E. 236 (Ill. 1929); *Richardson Lubricating Co. v. Kinney*, 168 N.E. 886, 889–90 (Ill. 1929); *Bd. of Highway Comm'rs v. City of Bloomington*, 97 N.E. 280, 283 (Ill. 1911); *Shannon v. Hughes & Co.*, 109 S.W.2d 1174, 1177 (Ky. 1937); *Chapman v. Forbes*, 26 N.E. 3 (N.Y. 1890).

27. Stephen A. Smith, *Taking Law Seriously*, 50 U. TORONTO L.J. 241, 256–57 (2000).

taken firm root. When restitution is reached by some in the elective Remedies course, it appears to be difficult to reconcile with earlier law. It lacks roots. Too often, the sources of restitution are unexamined and the law is approached through a sea of examples where courts have afforded restitution in the form of a bedazzling armory of equitable remedies. The status of restitution is left unexamined and is assumed. Given the short time available, and without the benefit of policy analysis, most students are befuddled by this new creature—restitution.<sup>28</sup> Students have had, at this point, a cynical view of legal rules. They view the doctrine as infinitely malleable. For example, in the plastic realm of negligence, students are accustomed to activist courts acting unconstrained by rules. The realist strain lives and students wonder why, in the absence of rigidity, should one have to call on equity or restitution to fill the gaps in the law?

In our view, a deeper understanding of restitution would enrich American law school curricula. The dominant regulator of rights and duties (contracts, torts, and property) can be more thoroughly understood by appreciating that a failure in the premises of those rights and duties can precipitate a claim for restitution. The standard is one that supports the liberal voluntary transaction base of the common law. It lives in that netherworld of strict formal rights that promote certainty, with rules that promote fair balancing and justice between individuals. For example, sometimes the conditions of a wealth transfer are such that the transfer cannot stand.<sup>29</sup>

In core courses, the pillars of the common law, restitution doctrine deserves greater development. Often, no mention is made of restitution except that the principle is one pertaining to the measure of damages. Where substantive restitution is alluded to, it is often mentioned in passing with no attempt to give context or a sense of wider application to it. As is well known, quasi contract may include a proper appreciation of unjust enrichment as the base of restitution.<sup>30</sup> In Torts, mistake and coerced transactions are referred

---

28. See Andrew Kull, *The Simplification of Private Law*, 51 J. LEGAL EDUC. 284, 291 (2001).

29. See Ross Grantham & Charles Rickett, *On the Subsidiarity of Unjust Enrichment*, 117 L.Q. REV. 273, 275 (2001).

30. See *id.* at 276.

to, but often without alluding to restitution and the equitable remedies that may attach.<sup>31</sup>

The Remedies course introduces restitution. Too often, the roots in unjust enrichment are inadequately explored, and students are left with little sense of restitution's relationship to torts, contracts, and property. The presence of restitution in the Remedies course encourages the misperception that restitution is itself just a remedy. Shortly after the subject of restitution is broached, the instructor begins to focus on the remedial problems of tracing, equitable liens, subrogation, and constructive trusts. Any concept that restitution forms a separate substantive area of law is cut off at the origin.

The American Law Institute's ("ALI") efforts to create a second *Restatement of Restitution* may revive the place of restitution in the American legal curriculum.<sup>32</sup> However, as we have argued, the reception is likely to be less than welcoming. The ALI restatement process has been most effective in areas where opinion-makers in the legal academy and the judiciary have agreed on a course of development. The prime example is the rapid adoption of section 402(A) of the *Restatement (Third) of Torts*.<sup>33</sup> The development of strict liability for defective products was felt to be an idea whose time had come.<sup>34</sup> Moreover, the concept was simple and responsive to the external policy perspective of enterprise liability. Nevertheless, the *Restatement* is likely to make the body of restitution law accessible to modern lawyers. The concern is whether the translation of the *Restatement* to the courts will be subtle and responsive to the purposes of the law.

#### IV. LOST MEMORIES

Giants once roamed the land, but the memory is lost. Only in other common law countries has the restitution mantle been picked up. Patience with the common law method of case development and acceptance by the academy has led to an "embedded" debate about the scope and nature of restitution.<sup>35</sup> Ironically, it may be that the

---

31. *See id.* at 295–96.

32. *See* RESTATEMENT (THIRD), *supra* note 5, at xi.

33. *See, e.g.,* Gary T. Schwartz, *The Beginning and the Possible End of Modern American Tort Law*, 26 GA. L. REV. 601, 623–24 (1992).

34. *See id.* at 620.

35. The discussion at a gathering of restitution scholars differs markedly from a gathering of leading American tort scholars. The Articles in this



*Restatement* will have a greater initial impact on non-American jurisprudence.

If restitution can be recaptured, it may lead to a revival of Cardozoian analysis in private common law.<sup>36</sup> The *Restatement* will draw comment particularly as it touches commercial relationships. Just as tort, contract, and property have received attention, their relationship with the subsidiary concept of restitution will force a reappraisal. The scholarship accumulated mainly outside the United States may be brought to bear on the rather old-fashioned enterprise of taking the rules seriously.<sup>37</sup>

#### V. DEALING WITH THE LOST RINGS

We hope that our analysis points out the costs of losing touch with an entire body of developed legal knowledge. The law developed in response to needs that are as present today as they were in the pre-World War II era. The challenge is to equip a new generation of lawyers with the tools to rediscover the principles of restitution. Without a receptivity to the *Restatement*, to the scholarship and court opinions outside the United States, and to the learning of scholars and judges of an earlier era, American law is fated to pass through a painful and costly reinvention of knowledge.

---

Symposium take seriously the issue of the internal consistency of restitution. The hope is that they will lead to an understanding of the bar by application of rigorous classification. *Cf.* Smith, *supra* note 27, at 254 (proposing that even if one disagreed with how unjust enrichment used to be classified, that classification was intelligible and open to debate). Tort law is usually tied to reference points outside the law itself, posing questions such as the deterrent effect of the rule or its capacity to internalize the costs of accidents. Thus, Dean Green observed that tort law was public law in the guise of private law. Dean Prosser, although he possessed and exhibited strong analytical skills in reordering tracks of tort law, was a thorough realist. For a defense of tort law as law, not social policy, see John C. P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 731 (2001).

36. See John C. P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1456–61 (1999) (explaining Cardozo's approach to a case analysis).

37. See John C. P. Goldberg & Benjamin C. Zipurski, *The Moral of Macpherson*, 146 U. PA. L. REV. 1733, 1807–12 (1998); Goldberg, *supra* note 36, at 1456–61; see also Partlett, *supra* note 14, at 1422–28 (describing the advantages and drawbacks of formalism); Smith, *supra* note 27, at 249–56 (arguing that “doctrinal scholarship provides the best way of understanding law”).

This leads us to one overarching question: how can we, as law professors, best accomplish the task? No doubt, we will have to possess the passion and patience to readdress the law of restitution. This will require us to perform the careful Cardozian task of attending to the details of the rules and looking at how they operate in concrete factual settings.<sup>38</sup> The knowledge will then live in our graduates and find its way to the courts. So, we are hoping for a reemphasis on restitution in the basic Remedies course.

## VI. TEACHING THE BASICS

Even if restitution is taught in Remedies, rather than as a separate course, there are certain basic principles that students need to learn. Of course, they need to learn the underlying concept, “unjust enrichment,” and they need to gain some appreciation for the variable nature of the concept. Because most first-year courses are focused on their own limited subject matter (i.e., torts, contracts, property), first-year students often gain only a limited understanding of restitution’s nature and the variability of recovery. As discussed more fully below, even though two cases seem to be similar, factual variations can lead to dramatically different levels of recovery.

For example, defendant steals black walnut timber from plaintiff’s land and uses it for studs in his new home. As timber, the wood has a value of \$20,000. As studs, the wood has a value of \$2,000. Defendant argues that he used the wood for studs, and that stud-quality wood would have cost him only \$2,000. Plaintiff, by contrast, argues that defendant actually stole wood worth \$20,000. Even though defendant used the wood in a way that provided him only with \$2,000 of value, the court will award plaintiff \$20,000 because of the way the wood was taken (theft) and the fact that defendant actually received \$20,000 in value. The fact that defendant chose to use the wood in a way that failed to realize the full value is his problem.

On the other hand, on similar facts (defendant uses black walnut timber for studs), suppose that the fault lies with plaintiff rather than defendant. Assume that defendant ordered wood from a lumberyard, making it clear that he wanted to use the wood as studs. However, plaintiff mistakenly sent defendant expensive wood, black walnut

---

38. See Goldberg, *supra* note 36, at 1461.

wood worth \$20,000, rather than stud-quality wood worth \$2,000. If defendant fails to notice the mistake, there might be no “unjust enrichment” so that plaintiff can recover only the contract price (\$2,000). The fact that the mistake was due to plaintiff’s error is highly relevant. Various factors can affect whether a particular case involves “enrichment” as well as whether the enrichment is “unjust.”<sup>39</sup> So, students need to gain at least a rudimentary understanding of restitution precedent and principles.

One of the challenges of teaching restitution is that, as students begin to appreciate the power of restitutionary remedies, they see unjust enrichment in every context and want to make broad use of the special restitutionary remedies (i.e., the constructive trust, the equitable lien, and tracing). In other words, students tend to take the vague concept “unjust enrichment” and apply it too broadly. In fact, the availability of restitutionary remedies is significantly limited by restitution precedent: restitution and restitutionary remedies are available in some types of cases, but not in others.<sup>40</sup> In addition, courts have imposed significant limitations on certain restitutionary remedies.<sup>41</sup> Students need to study this precedent, or at least some of it, so that they understand the scope of restitution and the limits imposed thereon.

Once the core is established, students should be led to understand the “special restitutionary remedies”: constructive trust, equitable lien, and tracing. In their first-year courses, some students have been introduced to these concepts. So, when students arrive in Remedies, they have a rudimentary understanding of the principles. But students often do not understand the importance of combining tracing with a constructive trust or equitable lien, and do not understand how these equitable devices can gain plaintiffs important advantages that can make the difference between a meaningful recovery and a nearly complete loss.<sup>42</sup> In addition to learning these

---

39. See RESTATEMENT OF THE LAW OF RESTITUTION § 1 (1937).

40. See RESTATEMENT (THIRD), *supra* note 5, § 2 cmt. a.

41. See *Frambach v. Dunihue*, 419 So. 2d 1115, 1117 (Fla. Dist. Ct. App. 1982).

42. For example, defendant defrauds plaintiff, takes his money, and invests it in real estate. When plaintiff sues, he realizes that defendant is bankrupt and that many creditors are vying for the money and property that remain. If plaintiff can succeed in tracing his money into the land, he may be able to assert a constructive trust or equitable lien (as appropriate) on the land, and

advantages, students also need to understand the limits of these restitutionary remedies and devices. Tracing is not always permitted, and constructive trusts and equitable liens are not always available.<sup>43</sup>

## VII. INTEGRATION

But, if restitution is to assume its rightful place in the curriculum and the law, faculty need to teach more than just the basics. They need to teach restitution in an integrated way. Indeed, that is part of the advantage of the Remedies course: it offers students the opportunity to see law in an integrated way that prepares them for the practice of law. Part of the problem with law school is that students often see the law in limited contexts or “pigeonholes.” In first-year courses, students have studied remedies, but they have usually done so in isolated contexts. In other words, they see tort remedies in their Torts class, contract remedies in their Contracts class, and property remedies in their Property class. This isolation of remedies may be effective and necessary, but it makes it more difficult for students to see remedies from a comprehensive perspective.

A comprehensive perspective is both necessary and desirable. Practicing lawyers do not confront remedial problems in a pigeonholed way. Few clients walk into a lawyer’s office and express their legal dilemma in subject-specific ways (e.g., “I have a tort problem involving conversion and want to talk to you about the availability of injunctive relief and damages.”). More commonly, a client pours out a sad story involving an unorganized mixture of relevant and irrelevant facts and asks for help. The lawyer’s tasks are to sort through the facts, to separate the wheat from the chaff, to decide how the case should be framed, and to evaluate remedial options. As the lawyer performs these tasks, the lawyer may cut across subject matter boundaries. Indeed, in a given case, a lawyer may have to evaluate remedial options involving tort, contract, and

---

thereby gain priority over other creditors. See *In re Radke*, 619 P.2d 520, 525 (Kan. Ct. App. 1980). Without restitution, plaintiff stands in line with the other creditors and receives only pennies on the dollar.

43. For example, *Cunningham v. Brown* is the case that gave rise to the term “Ponzi scheme.” See 265 U.S. 1, 7 (1924). Essentially, defendant constructed a pyramid scheme in which he took some people’s money and passed it on to others. When the scheme collapsed, some victims tried to use tracing and restitution to gain a priority over other victims. The court rejected the claim as an unlawful preference.

restitutionary claims. In addition, the lawyer may have to evaluate remedial options involving damages, injunctive relief, and special restitutionary devices.

A Remedies course is an appropriate home for restitution. Students have a base of knowledge within the established private law categories. They will have had some introduction to restitution and should relish the opportunity to investigate its place and justification. Provided the course avoids the peril of treating restitution as a mere remedy, restitution will be properly seen as filling those gaps that should have troubled students as they exited their Torts, Contracts, and Property classrooms. By the time they reach the second or third year, students are hungry to view the law in a more integrated and comprehensive way. Moreover, students are more capable of studying topics like restitution and analyzing those topics in context. Indeed, since third-year students will be practicing in a year, they need to begin the transition from looking at law in pigeonholed ways to perceiving it more creatively and subtly. Few law school courses offer students this opportunity.

The interplay of restitution and remedies offers a unique opportunity to begin the transition from student to lawyer. Skills that students need to acquire include an approach for evaluating diffuse facts and an idea about how to form these facts into coherent and effective causes of actions. A necessary aspect of this evaluation involves consideration of the relationship between causes of action and remedial options. As any good lawyer knows, one's choice of a particular cause of action can affect and limit the lawyer's remedial options.

For example, suppose that defendant steals plaintiff's prize bull that is worth \$20,000. Obviously, plaintiff can sue in conversion for the value of the bull at the date of the conversion. Also, plaintiff might use injunctive relief or a modern replevin statute to get the bull back. But restitution is an option as well. As a result, good lawyering necessarily requires evaluation of competing causes of action and remedial options, including restitutionary options.

Of course, an essential aspect of lawyering is fact investigation and analysis. In order to competently evaluate causes of action and remedies, one needs to know quite a bit about the facts. Under modern pleading rules, a lawyer can plead multiple and inconsistent causes of action, and can learn more about the facts in the discovery

process.<sup>44</sup> But, at some point, the lawyer will be forced to make an election of remedies. In addition, depending on what the facts reveal, the lawyer might want to bring in other defendants. The factual investigation might necessarily entail asking a variety of questions including the following: What did defendant do with the bull? Did he keep it? Did he sell it? To whom? For how much? What did he do with the proceeds? Did he butcher the bull for the meat? Did he use the bull to inseminate cows? Did offspring result? Depending on the answers to these questions, a lawyer might seek to combine both restitutionary and non-restitutionary remedies.

In Remedies, students have the chance to learn the importance of fact investigation and analysis, and to gain some practice. For example, as students analyze the problem mentioned in the prior paragraph, the answers they receive can push them to pursue certain remedies rather than others, and can encourage them to sue certain defendants rather than others. To illustrate, suppose that defendant sold the bull, dissipated the proceeds and is otherwise insolvent. It might make little sense to sue defendant for damages.<sup>45</sup> However, it might be worthwhile to sue the purchaser for conversion. In addition, if plaintiff still wants the bull back, it may make sense to seek replevin or injunctive relief against the purchaser (assuming that he/she still has it). On the other hand, suppose that defendant sold the bull to a stockyard for butchering, and then dissipated the proceeds. If the bull was actually butchered, replevin and injunctive relief may make little sense (unless plaintiff wants the meat). In addition, if defendant is insolvent, it again makes little sense to sue defendant. But, once again, plaintiff might sue the purchaser for conversion.

Other factual variations might encourage plaintiff to use other causes of action and other remedies. Suppose for example that defendant kept the bull and used it to inseminate his cows. If plaintiff no longer wants the bull back, plaintiff could again sue in conversion. If plaintiff does want the bull back, plaintiff could seek replevin or injunctive relief. But these remedies do not provide plaintiff with complete relief if the bull's semen has been used to produce offspring or to produce pregnant cows. In such situations, plaintiff could use tracing to follow the bull's semen into the

---

44. See FED. R. CIV. P. 8(a), (e)(2).

45. See DAN B. DOBBS, *DOBBS LAW OF REMEDIES* § 5.17 (2d ed. 1993).

offspring, or into a mother cow's uterus, and then attempt to impose either a constructive trust or equitable lien on the offspring.

Other factual variations might lead plaintiff in quite different directions. Suppose that some time has elapsed between the date of theft and the date of suit. During this time, defendant sold the bull and invested the proceeds in real estate. Subsequently, the value of the real estate rose significantly. Otherwise, defendant has no money, and does have a large number of creditors. In such circumstances, it makes sense to trace the bull into the proceeds and then into the real estate. It might also make sense to try to impose a constructive trust or an equitable lien on the real estate. At the very least, these remedies should allow plaintiff to recover the value of the bull. Whether plaintiff could also gain the increased value of the real estate might be more debatable, but plaintiff can at least make a claim.

Is it possible to bring fact and claim analysis into the remedies course? We think so. Students can be given a more sophisticated problem (i.e., the bull problem set forth above), but the professor can include only those facts (both relevant and irrelevant) that a non-lawyer client might provide to a lawyer. At that point, students can be allowed to engage in discovery against "defendant" by sending interrogatories to their professor. As students gain more information, they may decide to join other defendants and subject those defendants to interrogatories as well. At the end of the project, the students can be asked to write a comprehensive memo analyzing the strengths and weaknesses of competing causes of action and remedial options.

#### VIII. CONCLUSION

An ancient wisdom has been lost to modern American jurisprudence. Although its spirit has been kept alive by isolated hobbits, it is time for a revival of the wisdom and time for a modern torchbearer to take up the cause of restitution. Despite the modern disdain for embedded scholarship, we suggest that a revival in common law legal method is needed if the ancient wisdom is to be restored to its rightful place and if restitution is to be treated as something more than an oddity of the law and the curriculum. We further claim that restitution can find a highly useful home in a properly constructed remedies course, and will provide a flow of

well-prepared lawyers alert to the potency of private law to enhance our remedial system of law.



