

COMMENT

RESTITUTION IN CONTEXT

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In preparing, upon our request, a book review of Wade, Cases and Materials on Restitution, Professor Macaulay was led to inquire whether restitution—normally taught in law school as available relief against unjust enrichment—lends itself as an appropriate unit of study. The stimulating analysis that followed merits inclusion in the Articles section. After acknowledging advantages which accrue from the traditional course content, the author poses the problems which arise from the isolation of restitution into purely doctrinal organization. In the light of his conclusions, the casebook is appraised.*

Dean Wade's new casebook on restitution prompts reflection on whether the field is an appropriate unit of study.¹ Why pull together from all the corners of the law the concept of unjust enrichment rather than, say, all the remedies for conversion, fraud, mistake, breach of contract and the like? What is gained by isolating unjust enrichment for special attention? What are the problems created by such an isolation? And, finally, how well does Dean Wade's casebook maximize whatever gains there may be, while minimizing the losses?

RESTITUTION AS A UNIT OF STUDY

1. *The Case for Isolating Unjust Enrichment*

Restitution is the study of unjust enrichment.² This involves two major questions: When is enrichment unjust? What are the remedies which can be used to take away enrichment deemed unjust and to restore the economic balance? Needless to say, study organized around these ideas is not without utility. Such an organization emphasizes rules not considered elsewhere in any detail. Moreover, these rules are significant. Restitution provides much of the legal protection

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* CASES AND MATERIALS ON RESTITUTION. BY JOHN W. WADE. Brooklyn: Foundation Press, 1958. Pp. xxxi, 903. \$11.00.

1. "Law professors are as far from agreement on . . . [the proper scope and treatment of the whole subject of restitution] . . . as they ever were." Dawson, Book Review, 38 CORNELL L.Q. 634, 635 (1953). Cf. Keeton, Book Review, 37 TEXAS L. REV. 365 (1959).

2. Of course, this is only substantially true. For a definition of restitution see York, Book Review, 11 J. LEGAL ED. 425, 426-27 (1959).

of freedom to make gifts and bargains, and restitution is also a useful tool in the legal salvage operation which attempts to clean up the mess left when a transaction collapses or stealing is discovered. Clients often want to get out of transactions or to get back their property or its value. There are rewards for the attorney with ingenuity who appreciates what can be done by waiving a tort, seeking a constructive trust or asking for the market value, rather than the contract rate, of a performance rendered by his client before a contract was breached.

Yet these arguments indicate only that restitution should not be ignored. Why study unjust enrichment as a unit rather than merely parceling out its material to torts, contracts, property and other somewhat functional areas? At a minimum one can defend restitution as a unit simply because this organization pulls together some of the most baffling and interesting problems in the cases. Moreover, study of restitution as a unit aids in understanding each of the rules and remedies thereby brought together. Restitution's concepts are difficult and hardly understood from only a case or a note in a contracts, sales or similar casebook or treatise. These concepts are related. Ideas from one body of restitution material will influence the development of another body of that material. For example, it is difficult to understand fully the restitutionary remedies for misrepresentation without seeing the development of tracing proceeds in the trust and conversion cases. Moreover, a separate course in which equitable restitutionary remedies are combined with quasi-contract in an attempt to obtain a comprehensive view of the subject "permits at least a comparative study of restitutionary remedies themselves, of the kind any lawyer must make when searching out workable solutions."³

Finally, but perhaps not as obviously, the material found in any casebook on restitution presents many of the favorite problems of realistic jurisprudence insofar as that brand of legal thought centers upon the tension between decision based on rule and decision based on reaction to individual cases.⁴ Restitution is an unusually flexible body of case law; its rules leave a great deal of give-and-play enabling judges and juries to consider many cases on their merits unhampered by doctrine.⁵ One is tempted to draw an analogy to administrative law.

3. Dawson, *supra* note 1.

4. "[T]he subject of Restitution . . . is a truly superlative collection of jurisprudential loose ends." Mechem, Book Review, 25 IOWA L. REV. 187, 189 (1939).

5. "Since transactions involving large amounts of money are ordinarily well planned, it is not surprising to find that the amounts involved in quasi contract litigation are usually small. In a system of law which relies on appeal to courts of last resort to get its rules settled, rules which involve ordinarily only small amounts are likely to remain unsettled." Patterson, *The Scope of Restitution and Unjust Enrichment*, 1 Mo. L. REV. 223, 233 (1936).

In some ways restitution's flexibility can be looked upon as a case law equivalent to an administrator's power to base decision on unexplained expertise.⁶ As Professor Dawson has stated, "the most obvious comment about the American law of restitution is that it lacks any kind of system."⁷ Arguably, one of the major points of emphasis in studying restitution ought to be the virtues and drawbacks of judicial discretion.

The history of restitution is one of innovation and relative freedom to decide cases unburdened by formal rules. At an early date the "tort" action of *assumpsit* was stretched to encompass not only the enforcement of promises actually made but also promises which the law implied in order to reach desired results. But it remained for Lord Mansfield in 1760 to open the door to discretion by explaining the basis for this quasi-contractual remedy as an obligation to make restitution when "natural justice" and "equity" commanded.⁸

Many judges seem to adopt a free and easy manner in applying restitution's remedies once they have made a decision to give relief of some type. One senses an impatience with the accounting details involved in restoring the *status quo*. For example, in *Moritz v. Horsman*⁹ the court found that the heirs could get restitution from an adopted son of the deceased who had received a share of the estate by mistake. However, the adopted son had spent some of the money. Without more than the vaguest possible evidence of what had happened to the money or how much remained, the court pulled numbers out of the air to limit the amount the heirs could recover.

Freedom to decide on the basis of a "sense of justice" often is provided by the nature of restitution's rules. Many of the doctrines are clear enough when applied to typical cases but lack precision at the boundaries when applied to situations other than the typical one. Many rules turn on questions of knowledge, motive and intent, thus giving the trier of fact some leeway in doubtful situations. Some restitution concepts can be expanded or contracted to yield particular results; witness the accordion-like term "benefit" which, without further explanation, can both include and exclude losses in reliance on a contract which do not add to the assets of the defendant. Rule and counter-rule exist with little in their statement to tell one when to use the rule and when to use the counter-rule. For example, relief is not given for unilateral mistake (too often), yet relief is given if one party *should have known* of the other's error. But when should he have

6. See generally Auerbach, *Should Administrative Agencies Perform Adjudicatory Functions*, 1959 WIS. L. REV. 95, 100-08.

7. DAWSON, UNJUST ENRICHMENT 111 (1951).

8. *Moses v. Macferlan*, BURR. 1005, 97 Eng. Rep. 676 (K.B. 1760).

9. 305 Mich. 627, 9 N.W.2d 868 (1943).

known? Fictions also serve, although not too artfully, to conceal the reasons for decision in a magical fashion; one thinks of the beautifully logical arguments developed from the premise that a "rescinded" contract ceases to exist and vanishes without a trace. Of course, it follows that once the rescinded contract "ceases to exist" recovery of the fair market value of a part performance rendered before breach "cannot possibly" be limited to the contract rate.

The study of restitution can involve considering how far this flexibility and discretion are desirable. Undoubtedly, the power to deal with each case on its facts is valuable insofar as judges and juries ought to be the agencies through which society works out sensible solutions to all the problems created by the wide variety of human transactions. Reaching the best possible answer in each case to questions such as when to let people out of bargains or overturn other transactions for fraud, duress, mistake or breach of fiduciary duty requires fine line drawing and great attention to individual differences. One can doubt whether legislators or judges framing common law rules could crystallize wise solutions for all cases drawing these lines and respecting the differences. Even the oldest restitution problems are not all solved in a satisfactory way, and restitution cases constantly raise new problems where experience is limited. The judge or jury faced with the particular case may be able to come out with a sensible decision without being able to generalize a rule for broader classes of cases.

It is a familiar story that flexibility and discretion have drawbacks. One ideal is that an individual can "foresee the action of the state and make use of this knowledge as a datum in forming his own plans. . . ." ¹⁰ Insofar as legal response is flexible it is less foreseeable. But how much certainty is needed? Professor Gardner has stated that, "the certainties which parties chiefly desire in making contracts are the certainty that promised cooperation in their enterprises will be forthcoming, that their labor will not be forced into unproductive channels, and that they will receive and retain the economic values which their efforts may produce." ¹¹ Despite the flexibility which has been described, restitution is not an uncharted sea; much is settled. Most transactions are hard to overturn in the typical situation. We are not, for example, yet to the point where a bargainer can back out of a deal merely because he made a mistake in predicting a normal increase in the market price of the basic raw material needed for his

10. HAYEK, *THE ROAD TO SERFDOM* 81 (1944).

11. Gardner, *An Inquiry Into the Principles of the Law of Contracts*, 46 *HARV. L. REV.* 1, 40 (1932).

performance of a contract. What we have is, rather, a number of areas marked off within which discretion can operate.¹² Discretion can be, and often is, exercised to achieve the values stated by Professor Gardner. Then, too, to a great degree one can plan so as to avoid these areas of discretion. For example, form contracts often seek to avoid the effect of salesmen's representations not contained in the written document. Even within the areas of discretion, case law practice is to crystallize repeated judgments into rules as more and more instances come before the courts. Perhaps there is more reason to worry that rigidity has set in too quickly in some areas before sensible judgments have been worked out.

Yet even if the degree of flexibility in restitution doctrine has sufficient utility to outweigh its cost in certainty, students ought to recognize that discretionary action can be arbitrary action. Perhaps arbitrary or irrational decision is encouraged by the fact that restitution, somewhat like criminal law, stresses the right and wrong nature of conduct. The *wilful* defaulter, the *fraudulent* bargainer, the *officious* intermeddler, and the *negligent* actor are all villains in restitution's cast of characters. At times the desire to punish wrongdoing can get in the way of sensible judgment.¹³ It is easy, for example, to be blinded to the claims of innocent third parties by a desire to punish the wrongful defendant. It is easy, for example, to obscure the difficult policy questions raised by restitution to a plaintiff in default on a contract by finding such a plaintiff a wrongdoer to be punished. This is not to deny that society ought to deal with wrongful conduct, but students ought to be aware that moral judgments are not easy to make under the limitations of an adversary system, especially when we are not clear as to the moral assumptions of economic transactions. Arbitrary decision may also be fostered by the fact that questions such as the proper allocation of risk, the permissible degree of coercion in bargaining, and the desirability of preferring the claim of one creditor to that of another are business or economic questions not easy to answer. One can ask whether judges, lawyers and jurors can make these moral and economic judgments demanded by restitution theory with any degree of skill. How far can or should attorneys introduce evidence relevant to these moral and economic issues? Or does restitution theory really contemplate the application of rational norms based on moral or economic theories? Is what we seek, rather, a community reaction to the individual case as expressed by a judge's or jury's "sense of justice"?

12. Cf. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 122, 123 (1924).

13. Cf. Sharp, *The Limits of Law*, 61 *ETHICS* 270, 279, 280 (1951).

The questions are easy to ask.¹⁴ Many would say that they ought to be asked in any study of materials on restitution. Moreover, the existence of these questions may itself justify pulling together these materials for study.

2. *The Problems Created by Isolation*

While there are reasons to isolate restitution for study, this isolation may present some serious, but perhaps not insoluble, problems. A "pure" doctrinal organization, that is, one excluding everything but cases on unjust enrichment, would take restitution ideas out of context—with inevitable loss of understanding.¹⁵ Since restitution is part of the legal framework for diverse economic activity the problem of context is aggravated. One considers, for example, certain aspects of family and related non-commercial transactions such as services rendered by one family member or neighbor to another, or allocations of wealth by one family member to another through gifts, trusts or wills. Restitution remedies protect, to some degree, the use and exchange value of property in both commercial and non-commercial dealings. One's reliance on others to do his business is facilitated somewhat by constructive trust devices which take away the fruits of wrongdoing committed while acting in a representative capacity. Finally, and perhaps most significantly, restitution concepts and remedies are part of the legal framework for bargaining transactions. A "pure theory" of restitution considers only part of the legal system relevant to a given problem and also tends to overlook what restitution shows about the relationship of the legal order to certain social institutions and values.

(a) Restitution and Complementary and Conflicting Rules of Law

Focusing attention on restitution blurs the total picture of the legal system. Restitution itself is an advance over the older organization around quasi-contract because "a treatment of these remedies [constructive trust, equitable lien, subrogation and decrees of rescission or reformation as well as quasi-contract] . . . demonstrates to the student how the ingenuity of the practicing attorney may make the difference between a barren legal right and complete and adequate relief."¹⁶ Yet restitution alone presents only part, and often only a small part, of the legal rights and remedies involved in a transaction.¹⁷

14. On these questions see generally WEBER, *LAW IN ECONOMY AND SOCIETY* 74, 201-03, 228, 230 (Rheinstein ed. 1954).

15. Dawson, *supra* note 1.

16. Wade, Book Review, 5 J. LEGAL ED. 242, 243 (1952).

17. Cf. KEETON, *FRAUD AND MISTAKE* (1954); WRIGHT, *CASES ON REMEDIES* (1955).

An attorney seeking complete and adequate relief often must choose between restitution and full compensation for loss; benefits conferred and losses caused are theories of recovery which may produce awards of very different amounts. Furthermore, often it is difficult to understand a particular rule of restitution without fitting it into the context of all legal and equitable relief available on similar facts. This is particularly true if the restitution rule has been developed to fill gaps in contract, tort or property notions. For example, rescission and reformation for fraud, innocent misrepresentation and certain mistakes are restitution's contributions to protecting a bargainer from the consequences of dealing without the knowledge needed for choice, risk assumption and prediction. But on the same facts an attorney often would be able to use also the tort of deceit and the remedies for breach of warranty. He would be compelled to consider their use where the plaintiff's loss (*e.g.*, consequential damages) far exceeds the defendant's gain. Furthermore, modern printed form contracts often contain clauses disclaiming responsibility for warranties and representations not stated on the face of the document. Suppose a salesman makes an oral warranty, and the customer signs the contract without reading it. Can the customer get some or all of the benefits of the warranty? This may involve the restitutionary remedies of rescission or reformation for fraud or mistake, but it may also involve to an equal degree the parol evidence rule and the Statute of Frauds. Finally, the lack of development in certain restitution doctrines may be explained by the fact that the same problem traditionally is handled by other rules; the contract requirement of consideration, for example, serves to overturn some bargains resulting from undue coercion. This may be one reason why the restitution theory of business compulsion or economic duress remains to be worked out fully.¹⁸

(b) Restitution, Social Institutions and Values

Concentration on restitution cases runs the danger of overlooking the relationship of this part of the legal system to certain social institutions and values. If restitution's rules and remedies are to be understood fully, they must, like any other body of rules and remedies, be related to the policies they carry out or attempt to carry out. Restitution doctrines reflect both the urge to take away gains made at the expense of another and certain ethical and economic assumptions related to the type of transaction which produced the gain which one party calls unjust.

18. KESSLER & SHARP, *CASES ON CONTRACTS* 294-97 (1953); Sharp, *Pacta Sunt Servanda*, 41 *COLUM. L. REV.* 783 (1941).

The most apparent, and perhaps the most discussed, policy underlying restitution is the urge to take away gains made at the expense of another.¹⁹ This idea carries restitution into the legal framework of almost every type of economic activity. Yet as Professor Dawson has warned:

"From the record it appears that 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 . . . It constantly tends to become a 'rule,' to dictate solutions, to impose itself on the mind."²⁰

This general principle of corrective justice aimed against "free rides" should be, and usually is, subject to the claims of other general principles. For example, a land owner who loves the architecture of Frank Lloyd Wright returns from a trip and finds that another, under the mistaken impression that he owned the land, has built a pink colonial-ranch-style house. The land owner is asked to pay for the "gain" he has received from the mistaken improver's loss. Should the owner pay for the house or should his freedom of choice be protected?

These clashes of policies are usually resolved verbally by saying that gains made at the expense of another need not be given back unless the gains were unjust. But it is hard to classify enrichment as "unjust" without considering what you mean, under the circumstances of the case before you, by the term "just." And a rational definition of justice will turn on certain ethical and economic assumptions related to the transaction which produced the gain. Without this policy context any restitution rule will be most difficult to understand and evaluate. A sketch of the impact of some of the policy considerations of commercial bargaining on restitution may help point up the influence of context on decision.

At least three not totally consistent themes about the relationship of law and economic activity run through the legal framework for bargaining and are reflected to a significant degree by restitution. One idea is that law should play as little part as possible in order to encourage self-reliance. Another is that law should provide a framework for and protect the chance to make rational plans, and that the

19. See, e.g., DAWSON, UNJUST ENRICHMENT (1951); Jackson, *The Restatement of Restitution*, 10 MISS. L.J. 95 (1938); Patterson, *supra* note 5.

20. DAWSON, UNJUST ENRICHMENT 8 (1951).

law should see that these plans can be carried out. Finally, commercial law, to some extent, reflects the idea that people ought to be let out of bad bargains or ought to have heavy losses shifted from their shoulders.

(1) Most restitutionary ideas at first glance seem inconsistent with the policy that the law ought to keep hands off bargaining in order to encourage self-reliance. Those who have entered contracts because of duress, fraud or mistake seek restitution because in the particular case they were not able to take care of themselves. Yet the *caveat emptor* (or *caveat vendor* or *caveat insurer*) notion undoubtedly serves as a brake on sweeping relief, and most bargainers who want to back out of a deal find the opportunities provided by restitution decidedly limited: One cannot rely on some statements, no matter how gross the misrepresentation, and get out of the deal at the time the fraud is discovered.²¹ One cannot apply his signature on the dotted line without reading the contract and expect much sympathy. The idea can be, and has been, carried too far. Some judicial opinions do reflect a notion of commerce as "the wandering peddler, the horse-trader, the side-show at the fair . . . arms-length bargaining, single occasion deals, and the devil take the fool."²² However, a relatively free market system does work better if bargainers will take care of themselves; obviously a system based on rational conduct will work better if people will behave rationally.²³ To some extent self-reliance cuts costs. The pricing of goods and services may reflect the risk of liability for representations if that risk is imposed. There is also the cost of more social machinery to deal with bargaining if people will not protect themselves and instead look to courts to take care of them in all of their transactions. More of this kind of machinery may mean more regulation of bargaining which, in turn, may mean a limitation on the number of choices available to bargainers and consumers. The legal system's refusal to adjust many disputes over alleged misrepresentation

21. *E.g.*, some cases hold that one may not rely on statements the facts of which are open to ordinary observation. *Kaiser v. Nummerdor*, 120 Wis. 234, 97 N.W. 932 (1904). Also, it is generally held that a buyer has no right to rely upon dealers' talk ("puffing"). *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 Fed. 853 (2d Cir. 1918).

22. Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699, 713 (1936).

23. The question remains as to what the legal system should do if individuals cannot or will not behave rationally. *Cf.*: "A pathetic spectacle is the show of zeal the husband will affect when reading a sales contract; it wouldn't make the slightest difference what outrageous provisions were inserted, he will still read on, comprehending nothing. Among young people there seems to be a strong faith that the protective legislation of the last twenty years, such as the small-loan acts, has somehow reversed the law of *caveat emptor*." WHYTE, *THE ORGANIZATION MAN* 359 (Anchor ed. 1956).

or economic duress may tend to encourage settlement and adjustment through other means. The parties themselves, if forced to handle the matter, often can work out a better solution to a dispute than could be given by judges and juries not expert in the details of the transaction which caused the trouble. On the other hand, an adjustment more desirable than case by case relief may come through association of individuals for the purpose of obtaining bargaining or political power.

(2) The second and probably the dominant theme of bargaining is that the legal system should facilitate rational planning for profit and protect against losses caused by reliance on such plans when expectations are not realized.²⁴ Rational planning is at best exceedingly difficult; ideally it requires a precise knowledge of the wants and desires to be achieved, and it requires an accurate prediction of what course of action will achieve these goals. Accurate prediction, in turn, requires a knowledge of the properties of goods and services and their power to satisfy wants. Planning for profit requires, in addition, a knowledge of the exchange opportunities which are open and an ability to bargain relatively free from coercion.²⁵ The difficulties are magnified in some types of transactions where it is necessary, or where it is the practice, to make these decisions quickly and on incomplete knowledge. The legal system can make rational planning easier by minimizing these difficulties in making free and informed choices. They will be minimized if transactions resulting from undue coercion are overturned. They will be minimized also if bargainers can deal on the basis of representations without painstaking investigation, and if bargainers are not held to contracts resulting from mistakes unless one bargainer has misled the other carelessly or has assumed the risk of loss caused by lack of knowledge or an incorrect prediction of the future. Rational planning for profit also is made easier if one can rely on a bargain once made. It must be noted that in facilitating rational bargaining, judges and jurors must work with a polarity of values.²⁶ Often, for example, a decision requires judgment as to the relative strength of the "pull" of responsibility only for free and

24. "[T]he notion of unjust enrichment includes the most significant common law and equitable limitations on freedom of contract." Address by Malcolm P. Sharp, Thirty-fifth Meeting of Association of American Law Schools, December 29, 1937, in 8 AM. L.S. REV. 1044, 1046 (1938). It is sometimes necessary to limit free contract to promote free and rational planning. See KESSLER & SHARP, *op. cit. supra* note 18, at 1-9, 249-311, 344-72.

25. On the presuppositions of rational planning see, Knight, *The Ethics of Competition*, in THE ETHICS OF COMPETITION AND OTHER ESSAYS 19, 49-58 (1935). See also COMMONS, INSTITUTIONAL ECONOMICS 331-39 (1959); Taylor, *Economic Theory and Certain Non-Economic Elements in Social Life*, in ECONOMICS AND LIBERALISM 116, 124-28 (1955).

26. See COHEN, A PREFACE TO LOGIC 86-89 (Meridian ed. 1956).

intelligent choice and some competing value such as protection of reliance or change of position by others affected by the transaction.²⁷

Much of the law of restitution emphasizes the ideal of free bargaining and seeks to facilitate it. One ought to have the chance to make a choice between alternatives relatively free from coercion; restitution responds, perhaps a little weakly, with the volunteer, duress and the still developing business compulsion doctrines. One ought to have the information and knowledge needed for choice, risk assumption and prediction: restitution's remedies for misrepresentation and mistake afford some relief when information and knowledge are lacking or where there has been reliance on an erroneous assumption. One's choice ought to be properly recorded if it is reduced to writing: reformation of instruments corrects some errors. Finally, one ought to be able to rely, to perform and receive return performance from the other party: restitutionary remedies serve to return performances given by mistake or because of trick. Likewise, they serve to return some part performances (or their "value") given before breach by either the aggrieved or the defaulting party.

Compromises with the ideal of free and intelligent choice are required to reflect the "pull" of other values. In many transactions one must be able to rely on appearances. A bargainer who carelessly misleads another often destroys a whole chain of plans. Moreover, choice must be proved in litigation by appearances or self-serving statements. As a result courts sometimes apply an objective theory of contract, treating one who *looks like* he has made a choice as if he had.²⁸ This consideration, perhaps too often, limits relief for mistake.²⁹ Similar thoughts about reliance on appearances have prompted some courts to hold one for his negligent or even innocent misrepresentations in bargaining. Rational bargaining is also facilitated by standard allocations of risk in certain common or important transactions. One can then bargain about the important question of price without bothering about other things. For example, relief for mistake is seldom given in bargains for sales of securities. One who takes or gives a warranty or quitclaim deed has accepted certain standardized risks.

Other compromises are dictated by the fact that as time goes on it becomes harder to back up a bargain and adjust the economic balance in

27. Of course, the three categories suggested in fact overlap to some degree. A decision holding one to a bargain may be based on both self-reliance and rational planning policies; a decision upsetting a bargain may be based on both the rational planning and sympathy themes.

28. See HURST, *LAW AND THE CONDITIONS OF FREEDOM* 14, 22 (1956); Sharp, *Promissory Liability*, 7 U. CHI. L. REV. 1, 4-5 (1939).

29. Compare Patterson, *Equitable Relief for Unilateral Mistake*, 28 COLUM. L. REV. 859 (1928), with Sharp, *Williston on Contracts*, 4 U. CHI. L. REV. 30, 31-39 (1936).

a sensible manner.³⁰ "We must get on. We cannot be forever reopening." ³¹ Much restitution doctrine reflects the possibility that reliance, new expectations or third party interests can outweigh the value of protecting choice. Relief can be refused, although otherwise warranted, for laches, inability to restore the defendant to the *status quo*, affirmance of the transaction by the complaining party, change of position by one who has received a benefit conferred by mistake, waiver or the intervening rights of third parties.

(3) Both of the themes sketched, self-reliance and protection for rational planning, require losses to be taken when risks have been assumed.³² The difference is largely in the definition of the risks of a bargain. The self-reliance policy tends to place all risks on the bargainers: one who has promised should perform and not make excuses. A system seeking to protect rational bargaining as far as possible must make more precise distinctions as to what risks were assumed or what risks ought to be imposed. In contrast, the third theme running through commercial law opposes the demand of both of the other themes for responsibility for choice. This theme, which usually operates as a very quiet counterpoint to the others, lets people out of bad bargains. It is based on ethical ideals of our society, and psychological urges, about pressing an advantage too far and making undue profit. It reflects ideals about helping someone in need when it is not "fair" to hold him to his promise.³³ Few judicial opinions are openly based on this policy

30. "The transaction is two or more wills giving, taking, persuading, coercing, defrauding, commanding, obeying, competing, governing, in a world of scarcity, mechanism, and rules of conduct. The court deals with will-in-action. Like the modern physicist or chemist, its ultimate unit is not an atom but an electron, always in motion—not an individual but two or more individuals in action. It never catches them except in motion. Their motion is a transaction. A transaction occurs at a point in time. But transactions flow into another over a period of time. . . ." COMMONS, *op. cit. supra* note 12, at 7-8.

31. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 735 (1931).

32. "[I]f the individual is to be free to choose, it is inevitable that he should bear the risk attaching to that choice and that in consequence he be rewarded, not according to the goodness or badness of his intentions, but solely on the basis of the value of results to others. We must face the fact that the preservation of individual freedom is incompatible with a full satisfaction of our views of distributive justice." HAYEK, *Individualism: True and False*, in INDIVIDUALISM AND ECONOMIC ORDER 1, 21-22 (1948).

33. "The market community as such is the most impersonal relationship of practical life into which humans can enter with one another. . . . Where the market is allowed to follow its own autonomous tendencies, its participants do not look toward the persons of each other but only toward the commodity; *there are no obligations of brotherliness*. . . . The partner to a transaction is expected to behave according to rational legality and, quite particularly, to respect the formal inviolability of a promise once given. These are the qualities which form the content of market ethics." WEBER, *op. cit. supra* note 14, at 192. (Emphasis added.) See also *id.* at 308-09; GERTH & MILLS, *FROM MAX WEBER* 312-13 (Galaxy ed. 1958); WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Parsons transl. 1958). Obviously, our society is not totally committed to what Weber calls market ethics. Cf. SELEKMAN, *POWER AND MORALITY IN A BUSINESS SOCIETY* 90-92 (1956); SHARP & FOX, *BUSINESS ETHICS* 11 (1937).

of sympathy, although this may be what is meant when a court talks about justice without defining the term. Yet responsibility for a poor choice can be undercut through the discretion given to judges and juries by the nature of many of restitution's rules which let people out of bad bargains. Risk taking has great economic importance, but not all men are professional risk takers or want to take risks.³⁴ For example, there may be a disparity between the bargaining skill and the eagerness to take chances of an insurance adjuster and an injured factory worker. The relative instability of insurance releases may be explained, although not necessarily justified, by widely held reactions against pressing an advantage too far, especially against one whose risk assumption was not too skillful or willing to begin with.³⁵ Of course, the relative frequency with which these releases are overturned may reflect nothing more than an attempt by judge or jury to redistribute wealth. The third theme, in addition to tempering responsibility for choice, also imposes responsibility where there has been no choice or fault. Welfare may be promoted if the party best able to spread losses is saddled with risks not assumed in fact. Arguably, this consideration is present in restitutionary thinking, although it is not emphasized.

Enrichment resulting from a bargaining transaction will be just or unjust depending on a judge's or juror's judgment as to the proper emphasis to give these overlapping themes and sub-themes. The problem is usually one of proportion.³⁶ The conclusion reached often will be influenced by the type of transaction involved. Rules of restitution are applied differently in cases involving, for example, sales of goods, sales of land, building contracts and service contracts. Some of this is due to history and accident and makes no sense. Yet differential treatment sometimes can be explained in terms of the themes and sub-themes discussed, since the need for speed and reliance on appearances, the chance to investigate with care, the skill of typical bargainers, and the consequences of placing the full loss on one party will differ significantly from one type of transaction to another. The legal system ought to respond, also, to the differing efficiency of the non-legal sanctions in various types of transactions. In some areas the desire for good-will undoubtedly is more important in policing business conduct than legal rules about fraud, warranty and mistake. Yet else-

34. Cf. COMMONS, *op. cit. supra* note 12, at 306; GALBRAITH, *THE AFFLUENT SOCIETY* 100-10 (1958); Knight, *supra* note 23, at 63-66.

35. Cf. *Doyle v. Teasdale*, 263 Wis. 328, 57 N.W.2d 381 (1953); DAWSON & PALMER, *CASES ON RESTITUTION* 686-88 (1958); Sharp, *supra* note 18, at 787-88 & n.14.

36. Cf. Knight, *Intelligence and Social Policy*, 67 *ETHICS* 155, 158 (1957).

where the non-legal sanctions are weak and need shoring up by the legal. It is only a slight exaggeration to say that the major subject matter of restitution is sales of houses, lots and farm animals; all situations where non-legal sanctions are flimsy at best.

These problems of context created by a strict organization based on restitution alone are not too difficult to solve, provided they are recognized. Materials can be provided to enable students to see the full range of legal doctrine brought into play by the basic transactions with which restitution deals. Attention also should be given to purpose and policy. Restitution cases themselves establish without too much trouble that judges have a great deal of discretion but that it is not unlimited. Yet this is only the first step in thinking about how law can help or hinder many kinds of economic activity. One must also have a picture of the particular social institution involved—gift, bargain, property and the like—and some appreciation of the values involved in that institution. This picture can be sketched in restitution casebooks by text notes or excerpts from appropriate non-legal materials which point up both the factual setting for the transaction and the values involved. Of course, an editor always could take the radical step of arranging the cases and materials around these institutions and values.

WADE, CASES AND MATERIALS ON RESTITUTION

Dean Wade's casebook maximizes the gains to be derived from studying restitution as a unit and minimizes the losses fairly well, but one can raise several questions of emphasis. The book is primarily concerned with presenting settled general rules in a logical order. This is not to say that other aspects are ignored, but only to state an impression that they are very much subordinated. The casebook does not attempt much by way of fitting restitution into its total legal setting. The material on rescission for fraud only mentions the tort of deceit in a few scattered sentences, and if implied warranties are touched on, I overlooked it. The material on reformation is not fitted into the complementary and conflicting parol evidence rule ideas. The material on economic duress does not consider the degree to which the law handles the same problem by the consideration doctrine in contracts. Of course, one might assume that students will do the job of relating this material to what is studied in other courses. Yet the task of relating restitution to other subjects is not an easy one.

The casebook provides some of the policy context in which restitution operates, but not as much as I would like. Policy considerations are sometimes presented in the judicial opinions re-

produced. For example, Judge Frank's concurrence in *Ricketts v. Pennsylvania R.R.*³⁷ presents one view on the utility of the objective theory of contract in relation to relief for unilateral mistake, and argues for more open judicial treatment of economic duress caused by situations where bargaining power is unequal. However, the casebook does not print anything taking the opposite position on either of these issues, such as Professor Sharp's analysis of Judge Frank's comments on inequality of bargaining power.³⁸ The notes after the main cases at times reprint or restate policy arguments relevant to the problem. For example, Professor Corbin's scornful remarks about denying restitution to one in "wilful" breach of contract³⁹ are set forth (p. 502) and Fuller and Perdue's analysis of the interests protected by any system of remedies for breach of contract—the expectation, reliance and restitution interests⁴⁰—is summarized in one sentence (p. 445). Often the casebook, without even a one sentence summary, cites law review articles which do contain useful material on policy issues. For example, the section on restitution for benefits conferred in performance of a contract discharged because of impossibility contains no mention of the many suggestions that loss splitting may be a more sensible solution than restitution of rather artificial "benefits." A student comment in the *Michigan Law Review*⁴¹ which does present these ideas is cited (p. 551).

Arguably, policy material ought not be included; lawyers ought to stick to their last (to mix a metaphor). This material is difficult, it provides no clear cut answers, and perhaps law students and law teachers do not have the background to handle it.⁴² Yet if decisions turn on risk assumption,⁴³ how can lawyers discuss these decisions

37. 153 F.2d 757, 760-70 (2d Cir. 1946).

38. Sharp, *Promises, Mistake, and Reciprocity*, 19 U. CHI. L. REV. 286, 294-96 (1952).

39. 5 CORBIN, CONTRACTS § 1123 (1951).

40. Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 373 (1936).

41. Comment, 46 MICH. L. REV. 401 (1948). It is interesting to note that, in the casebook, loss splitting is offered as the solution to another problem. WADE, CASES ON RESTITUTION 682 (1958).

42. "The volume [PATTERSON, CASES AND MATERIALS ON CONTRACTS II (1935)] begins with several long opinions on the inferences with respect to sanity to be drawn from specific evidence, and ends with several extracts from psychiatrists. While these are no doubt instructive reading, one wonders how much is to be learned by a classroom discussion of them between teachers who are not psychiatrists and students who have no means or intention of becoming such. . . . Discussion might be centered on the really doctrinal decisions, leaving the others to be read." Gardner, Book Review, 45 YALE L.J. 1153, 1154 (1936).

43. "Assumption of Risk" is a major heading in the index to the casebook. WADE, *op. cit. supra* note 41, at 899.

without some understanding of the conflicting economic ideas about risk? How can lawyers consider restitution for a plaintiff in default on a contract without some understanding of the not always consistent ethical ideas about breaking promises? Ethical and economic assumptions are a necessary part of the course; the question is whether or not to examine them openly as distinguished from talking about the fairness or justice of a result without defining what one means by fair or just in the particular case.⁴⁴ A great deal of material on these issues is not required. Much can be accomplished by questions designed to point out the policy assumptions of the main cases, some well written text, and an organization which allows some development of ethical and economic assumptions.⁴⁵

Placing these criticisms to one side, Wade, *Cases and Materials on Restitution* is a good casebook. The opinions reprinted are well selected to prompt discussion. One who studies these materials ought to know the general outlines of what the courts have done. He should also see some of the degree of flexibility left by the rules in certain situations and the rigid, set, and not necessarily intelligible answers found in other places. He should have an appreciation of the importance of history in molding the treatment of unjust enrichment and the variety of overlapping restitution remedies left to us by that history. The organization of the casebook is easy to see, which aids study and enables other teachers to adapt the book to their tastes or curriculum needs. The book is rich in citations to law review materials and has a most useful bibliography.

44. Cf. HURST, *THE GROWTH OF AMERICAN LAW* 265-66 (1950).

45. Cf. FULLER, *BASIC CONTRACT LAW* (1947); DAWSON & HARVEY, *CASES ON CONTRACTS AND CONTRACT REMEDIES* (1958); KESSLER & SHARP, *op. cit. supra* note 18.