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Rule-Oriented Realism

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THE LAW AND ETHICS OF RESTITUTION. By *Hanoch Dagan*. Cambridge: Cambridge University Press. 2004. Pp. xxi, 374, $90.

In his new book *The Law and Ethics of Restitution*, Hanoch Dagan[1] undertakes to explain and justify the American law of restitution. He offers a broad theoretical account of this poorly understood subject, designed not only to fortify the substantive law of restitution but also to clarify the role and methodology of courts in developing the field. Dagan's book also provides lively discussion of the role of restitution in some of the most highly publicized legal developments of recent years. Those who think of restitution as an obscure branch of "legal remedies" may be surprised to read about the role restitution has played in tobacco litigation, slavery reparations, and rights following the breakup of unmarried cohabitants.

Dagan describes himself as a Legal Realist in the style of Karl Llewellyn and Felix Cohen (pp. 3-4). Realism, for Dagan, entails "an ongoing (albeit properly cautious) process of identifying the human values underlying existing legal doctrines and trying to promote them in the best way possible."[2] Accordingly, he subjects established rules across the field of restitution to a "normative" analysis based on the values of autonomy, utility, and community (p. 4). Working within this

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1. Professor of Law, Tel Aviv University Law School. The book expands and refines the analysis presented in Dagan's previous book on restitution, HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES (1997), and a number of articles on the subject.

2. Dagan also refers at times to the interpretative approach of Ronald Dworkin. *See* pp. 4, 9, 160. Dworkin's project, however, is very different from that of the American Legal Realists. Picking up on some of the suggestions put forth by Henry Hart and Albert Sachs, Dworkin envisions a method of decisionmaking according to "legal principles." Legal principles are legal in that they possess a dimension of "fit" with existing legal material, but also moral in that they interpret legal material in its "best" light. *See* RONALD DWORKIN, LAW'S EMPIRE 240-50, 254-58 (1986); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22-31 (1978). The Legal Realists, in contrast, varied in many ways but believed in common that "law" and "legal" reasons do not constrain judicial reasoning. By implication, their understanding of what counts as law is narrower than Dworkin's. *See Brian Leiter, American Legal Realism*, *in* THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY 50, (W. Edmundson & M. Golding eds., 2004). Moreover, Dworkin's dimension of "fit" is at odds with the Realists' core position. Arguably, Dworkin's scheme combines the artificiality that Realists dislike with the judicial power that positivists dislike.

framework, he sometimes defends existing rules, sometimes proposes refinements to rules, and sometimes argues for significant reforms.

Dagan's book is a major contribution. He approaches restitution with a combination of doctrinal expertise and theoretical sophistication that is rare in writing on private law. His arguments are careful, consistent, and, most often, persuasive. Despite the overall success of the project, however, there are ambiguities in Dagan's jurisprudence. In particular, he maintains throughout the book an ambivalent attitude toward legal rules and their role in common law decisionmaking. Dagan is an avowed Realist, yet he is attentive to and respectful of doctrine and often presents his own recommendations in the form of rules. This raises the question: is it possible to be a rule-oriented Realist?

I. REALISM AND RESTITUTION

A. *Autonomy, Utility, and Community*

As noted, Dagan analyses the law of restitution in terms of three values that are prevalent in liberal societies: autonomy, utility, and community. Autonomy, for Dagan, means the power of self-determination (not to be confused with negative liberty, which is only an instrument of autonomy) (p. 100). Utility means human welfare, typically elaborated through the proxy of economic analysis (p. 39). The value of community is somewhat more mysterious, although it plays an undeniable part in modern ethics. At times Dagan uses the term community to capture the ideals of cooperation, mutual support, and a limited form of altruism that accords value to the interests of others but does not require individuals to suppress all interests of their own (pp. 101-02). At other times, he uses the term to denote voluntary associations that contribute to the identity and welfare of individuals and can be facilitated by appropriate use of restitution (pp. 164-65).

Dagan applies these values "contextually," that is, within the different classes of human situations in which restitution claims arise (pp. 8-9). He does not, however, recommend that judges simply balance the implications of autonomy, utility, and community in particular cases that come before them. Rather, he proposes that the rules of restitution should respond to the interplay of these three values in certain classes of cases. Later in this Review, I shall address the question what this means for judges.

B. *Unjust Enrichment*

The second chapter of Dagan's book, entitled Preventing Unjust Enrichment, does a major service to the law of restitution by demystifying the notion of unjust enrichment. In the 1937

Restatement of Restitution, Warren Seavey and Austin Scott assembled a variety of legal rules that appeared to exemplify a common principle, that no one should be unjustly enriched at another's expense.[3] Since that time, the unjust enrichment principle has dominated both scholarly discussion of restitution and judicial analysis of gain-based legal claims.[4] There are, however, significant differences of opinion about the role this principle plays or should play in judicial decisionmaking. Dagan, to his credit, prefers to minimize the role of unjust enrichment in legal reasoning and instead define restitution more simply as a field of law concerned with the recovery of gains. Unjust enrichment, in his view, is not "a legal argument" (p. 12).

The principle forbidding unjust enrichment is susceptible to a variety of interpretations, with very different implications for how judges should resolve disputes. Most radically, it can be understood as a decisional principle authorizing judges to carry out "justice."[5] As an example of this approach, Dagan cites Lord Mansfield's famous conclusion in *Moses v. Macferlan* that the defendant was "obliged by

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3. RESTATEMENT OF RESTITUTION § 1 (1937); *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (Discussion Draft 2000). The unjust enrichment principle, which is traceable at least to Roman law, had already been identified with quasi-contract by James Barr Ames and William Keener. *See* WILLIAM A. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS 16 (1893); J.B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 53, 66, 69 (1888); J.B. Ames, *Purchase for Value Without Notice*, 1 HARV. L. REV. 1, 3 (1887) (referring to "a comprehensive principle which lies at the foundation of constructive trusts and other equitable obligations . . . namely, that a court of equity will compel the surrender of an advantage by a defendant whenever, but only whenever, upon grounds of obvious justice, it is unconscientious for him to retain it at another's expense"). For an excellent history of the law of restitution, see Andrew Kull, *James Barr Ames and the Early Modern History of Unjust Enrichment*, 25 OXFORD J. LEGAL STUD. (forthcoming 2005). On the Roman origins of unjust enrichment, see JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 42-63 (1951).

4. For discussions of unjust enrichment in some of the leading treatises on restitution and remedies, see, for example, PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 16-22 (1985); DAN B. DOBBS, LAW OF REMEDIES § 4.1(2), at 557-58 (2d ed. 1993); LORD GOFF OF CHIEVELEY & GARETH JONES, THE LAW OF RESTITUTION 12 (5th ed. 1998); and 1 GEORGE E. PALMER, THE LAW OF RESTITUTION § 1.1, at 5 (1978). A new Restatement now under way is entitled the Restatement (Third) of Restitution and Unjust Enrichment, and nearly became the Restatement of Restitution. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (currently comprising Discussion Draft, 2000; Tentative Draft No. 1, 2001; Tentative Draft No. 2, 2002; Tentative Draft No. 3, 2004) [hereinafter RESTATEMENT (THIRD)]; author's correspondence with Reporter Andrew Kull (on file with the author).

5. Palmer's treatise states that "[u]njust enrichment is an indefinable idea in the same way that justice is indefinable." 1 PALMER, *supra* note 4, § 1.1, at 5. For expansive interpretations, see, for example, GOFF & JONES, *supra* note 4, at 12, describing unjust enrichment as a "principle of justice which the law recognizes and gives effect to in a wide variety of claims," and Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695, 700-02, 773-75 (2001), which advocates an interpretation of unjust enrichment that permits courts to do "rough justice." *See also* J. BEATSON, THE USE AND ABUSE OF UNJUST ENRICHMENT 1-2 (1991) (raising the possibility of enactment of the principle of unjust enrichment).

the ties of natural justice and equity" to repay money.[6] Dagan argues cogently that, employed in this way, the unjust enrichment principle is incapable of constraining or even guiding judicial decisionmaking. It simply licenses "unprincipled adjudication," which Dagan rejects.[7]

Dagan maintains that the values he invokes in his own analysis of restitution — autonomy, utility, and community — are "qualitatively different" from unjust enrichment. Dagan argues that, although vague, they have sufficient content to "serve as standards for principled adjudication" (p. 16). I have doubts about the capacity of these values, particularly the value of "community," to guide case-by-case adjudication in a useful way. Yet the line Dagan wishes to draw between Mansfield's version of unjust enrichment and the values he invokes seems unnecessary to me. Unjust enrichment, as applied by Mansfield, is a standard of decision: if it is "unjust" for the defendant to keep certain assets, then the judge should hold for the plaintiff. As I understand Dagan, he does not intend that autonomy, utility, and community should serve as "if, then" decisional standards for judges; rather, they are values judges and other lawmakers should consult in fashioning more determinate rules of decision.

Another, somewhat narrower, understanding of unjust enrichment, which Dagan also rejects, instructs courts to reverse unjust enrichment-by-impoverishment, meaning enrichment that is linked to a corresponding loss suffered by the claimant.[8] Dagan finds this version of unjust enrichment less dangerous as a decisional principle, but normatively unattractive because the linkage between the claimant's loss and the defendant's gain evokes the sentiment of envy (p. 16). The relative positions of claimant and defendant, rather than

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6. Pp. 14-15 (citing Moses v. Macferlan, 97 Eng. Rep. 676, 681 (K.B. 1760) (Mansfield, J.)). I have distinguished two ways of interpreting unjust enrichment to support this form of decisionmaking. *See* Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083, 2091-118 (2001). The principle of unjust enrichment might be read to define restitution as a special zone of equity within law, in which courts are free to disregard established rules in the interest of particularized justice. As Dagan recognizes, however, there is nothing about restitution, in comparison to other branches of private law, that makes "equity" in this sense specially appropriate. *See* p. 14; Sherwin, *supra*, at 2084. Alternatively, unjust enrichment can be read as a Dworkinian "legal principle" instructing judges to prevent enrichment that is "unjust." As Dagan rightly argues, a principle of this sort is much too broad to guide decisionmaking: it has no determinate content apart from the court's own intuition about what result is best, all-things-considered. These two understandings of unjust enrichment lead to the same end point: "unbridled discretion" of the sort Dagan condemns. P. 16.

7. *See* pp. 15-17; *see also* Stewart Macaulay, *Restitution in Context*, 107 U. PA. L. REV. 1133, 1134-35 (1959) (proposing that courts deciding restitution cases should adjudicate in the manner of administrative agencies with "power to base decisions on unexplained expertise").

8. Pp. 17-18; Mark P. Gergen, *What Renders Enrichment Unjust?*, 79 TEX. L. REV. 1927, 1953-55 (2001).

the fact of enrichment, become the basis of the claim. A conception of injustice that plays on resentment of comparative outcomes is out of place in Dagan's project of shaping and defending restitution as a positive force in law.[9]

Next, Dagan considers and discards an interpretation drawn from civil law, which equates "unjust enrichment" with "unjustified enrichment."[10] Unjustified enrichment is a transfer of wealth from one person to another that "lacks an adequate legal basis," or, more particularly, is not legally effective as a transfer of ownership.[11] This interpretation appeals to my own sympathies in favor of rule-oriented decisionmaking, because it relies on background rules of law to give content to unjust enrichment. Yet, Dagan's criticism poses some significant problems for the concept of unjustified enrichment. Dagan argues that to make sense of unjustified enrichment, one must refer either to a particular conception of "property," to the entire body of legal rules external to restitution, or to the doctrinal rules that currently comprise the law of restitution. Property, in Dagan's view, is too contestable an idea to define what transfers should count as effective (pp. 21-22). A formulation that refers to rules outside restitution to define what counts as an adequate legal basis for enrichment implies that restitution itself has nothing to say about entitlements, an implication that is belied by the rules authorizing recovery of mistaken payments (pp. 19, 22). This leaves the doctrine of restitution itself. Dagan's objection to this version of unjustified enrichment is that it may inhibit judicial development and refinement of the law.[12]

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9. The connection to envy (or resentment) may be an inescapable ingredient of gain-based claims, whatever their theoretical basis. *See* DAWSON, *supra* note 3, at 5 (noting that the idea of unjust enrichment was employed "by Karl Marx, who tapped an inexhaustible supply of resentment with the aid of his labor theory of value"); Christopher T. Wonnell, *Replacing the Unitary Principle of Unjust Enrichment*, 45 EMORY L.J. 153, 175-90 (1996) (arguing that the principle of unjust enrichment is normatively unattractive and akin to envy). I have argued that while resentment and restitution are linked, this is not a reason to exclude restitution claims from law. A legal system probably will function more effectively if it provides outlets for common human sentiments that, while not virtuous, are not positively vicious. *See* Emily Sherwin, *Reparations and Unjust Enrichment*, 85 B.U. L. REV. (forthcoming 2005).

10. Pp. 18-25; *see* RESTATEMENT (THIRD), *supra* note 4, § 1 cmt. (b) (Discussion Draft 2000) (suggesting that unjust enrichment can be equated with unjustified enrichment); *see also* Barry Nicholas, *Unjustified Enrichment in the Civil Law and Louisiana Law*, 36 TULANE L. REV. 605 (1962) (explaining the civil law standard of unjustified enrichment).

11. RESTATEMENT (THIRD), *supra* note 4, § 1, cmt. b (Discussion Draft 1999).

12. Pp. 22-23. Dagan refers to this as "the positivist trap." P. 18. This seems an unwarranted indictment of positivism, which can easily accommodate development of new rules by judges, provided that judicial rulemaking is authorized by the applicable rule of recognition. *See* H.L.A. HART, THE CONCEPT OF LAW 92-93, 106-114 (1961) (explaining the rule of recognition).

Yet another understanding of unjust enrichment refuses to accord it any status as a decisional principle. Instead, unjust enrichment is a description of common features of restitution claims that may serve as an aid to analysis but does not authorize particular results.[13] Dagan is sympathetic to this interpretation, provided that the features suggested by the term unjust enrichment are not taken too literally as a blueprint for evaluating cases.[14] His own formulation treats unjust enrichment as a "loose framework," to be understood as a "placeholder for arranging and classifying legal rules that involve benefit-based liability" (p. 26). Accorded any greater authority than this, unjust enrichment will tend both to oversimplify a "complex and diverse" body of law and to result in decisions "by fiat, rather than by reason, obscuring the choices the law of restitution must make" (p. 25).

Dagan's hard-headed treatment of unjust enrichment is refreshing and persuasive. Dagan does succumb to the temptation of unjust enrichment at one point when he suggests that the reference to justice can serve as an "invitation" to normative analysis (pp. 35-36). Yet he does not make the mistake of suggesting that restitution has properties that uniquely invite a Realist approach to law. For the most part, the role of unjust enrichment in Dagan's analysis is descriptive and organizational rather than authoritative.

C. *Topics in Restitution*

The ensuing chapters of Dagan's book apply the normative analysis he has outlined to well-known and emerging topics in restitution. He does not cover every problem that might take shape as a claim to restitution, but he does provide a comprehensive overview of important debates within the field.

Dagan first takes up recovery of mistaken payments, a subject of interest in recent cases involving very large wire-transfer mistakes among banks. Here, Dagan focuses on the values of autonomy and utility: mistakes are involuntary transfers that threaten both the

13. Pp. 26-33; BIRKS, *supra* note 4, at 18-25 (arguing that the principle of unjust enrichment should be understood as "downward-looking to cases"); Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1195-96 (1995) (describing unjust enrichment as a unifying theme of restitution but not a standard of decisions for judges); Warren A. Seavey & Austin W. Scott, *Restitution*, 54 L. Q. REV. 29, 31-32 (1938) (describing unjust enrichment as a "postulate" underlying restitution but maintaining that the law of restitution must take the form of more specific rules); Sherwin, *supra* note 6, at 2108-12 (discussing, favorably, an interpretation of unjust enrichment as "organizing idea" for decisionmaking).

14. Pp. 27-28 (cautioning that Peter Birks's use of unjust enrichment as an analytical framework may "obscure the need for a contextual normative analysis").

transferor's interest in free choice and the transferee's need for a stable basis for planning. They are also accidents that call for legal rules that will minimize their costs (pp. 38-39). This analysis leads Dagan to approve of the broad outline of current law, but also to suggest a number of context-sensitive refinements, such as a distinction between institutional transfers and individual transfers (pp. 54-55). He also proposes significant reform in the area of taxes paid under statutes that are later held invalid. Contrary to the very limited recovery traditionally allowed, Dagan supports a rule of full restitution, based on the autonomy interests of the taxpayer and the government's superior ability to bear a loss (pp. 74-80).

Many of Dagan's proposals for the law of mistakes take the form of rules. For example, he recommends a one-sided rule, which might be either no restitution or unlimited restitution, for mistaken transfers between institutions (in part to reduce administrative costs) and a rule of comparative fault for mistaken transfers between individuals (pp. 51-52, 55-60, 73). Dagan's rules make contextual distinctions not explicit in the prevailing common law, but the grounds for decision he suggests are considerably more concrete than autonomy-in-context or utility-in-context.

Dagan next addresses the Good Samaritan problem: restitution claims based on the claimant's efforts to protect the life, health, or property of others. Dagan favors a significant expansion of restitutionary relief, based on a contractarian analysis of the transferee's autonomy and a version of the communitarian value of altruism that does not demand unmitigated self-sacrifice (pp. 99-103). In this context, Dagan appears to prefer comparatively indeterminate decisional standards over the more rule-like formulations of the common law. For example, he proposes a standard of "reasonable diligence" in place of the prevailing requirement of successful avoidance of harm to property, and a requirement that the claimant be "the most competent person [available] to act" in place of the prevailing limitation to professional rescuers (pp. 111, 114). At the same time, these proposals are not completely open-ended; they do not simply direct the court to balance autonomy and altruism.

Dagan's next topic is restitution for gains the claimant conferred on the defendant for reasons of self-interest or self-protection. Here, Dagan's principal aim is to offer a rationale for traditional doctrine, which permits only certain recognized classes of claims, such as claims between co-owners of property, claims to contribution and indemnity between joint tortfeasors, and subrogation claims by insurers. Dagan's explanation for recovery in these situations is that when parties have interlocking interests restitution can help solve collective action problems, particularly problems of free-riding, which might otherwise deter mutually beneficial acts (pp. 131-36). On this basis, Dagan argues, restitution can advance both autonomy and utility, if sufficient

attention is paid to problems of subjective valuation (the defendant may not value the supposed benefit) and conflicts of interest (special interests of the claimant create problems of agency cost).[15] In borderline cases, restitution may also be warranted because of its "third-party effects," such as facilitation of prompt payments by insurers to tort victims (pp. 152-55). This last consideration justifies, for Dagan, government claims against tobacco companies for restitution of expenses incurred in aid of smokers (pp. 155-63).

In his discussion of self-interested benefits, Dagan argues quite explicitly that a rule-based system of liability is preferable to a system that employs indeterminate standards of liability. The free-rider problem is hidden in cases that reach the courts: if the prospect of free-riding had in fact deterred the claimant from acting, there would be no claim. Yet, the potential for deterrence of other actors remains unless there is a reliable prospect of restitution. In response to the view expressed by some commentators that legislatures are better suited to deal with problems of free-riding, Dagan suggests that courts can manage such problems if they employ determinate rules. Determinate rules will enable actors who might otherwise be frustrated to proceed in ways that produce collective benefits (pp. 138-39).

The next chapter, "Restitution in Contexts of Informal Intimacy," takes up three doctrinal categories in which restitution claims have been controversial: claims between cohabitants, claims based on supplies of necessities (typically to the defendant's spouse), and rescission claims based on undue influence. Dagan argues that all three types of claims are justified by an interest in encouraging reciprocity and trust within "informal liberal communities" (p. 173). Restitution between cohabitants allows intimate parties to behave cooperatively without imposing an ethic of equal sharing that is more appropriate to marriage (pp. 173-80). Rules permitting restitution for necessities function as an indirect way to enforce equal control of marital property in states that do not recognize community property.[16] The doctrine of undue influence, as interpreted by Dagan, protects expectations of reciprocity within long-term, trust-based relationships by allowing parties who have shared such a relationship with a donor or testator to avoid transfers to newcomers (pp. 194-202). Some of Dagan's recommendations for promotion of informal

15. Pp. 139-52 (discussing subjective devaluation and agency costs).

16. Pp. 185-87. Necessities include supplies such as food, clothing, and medical care. P. 184.

communities are couched in vague terms,[17] but in most instances he relies on comparatively specific doctrinal devices to promote informal communities.[18]

Dagan next discusses restitution remedies for wrongful appropriations. As Dagan rightly observes, the availability and measurement of restitution remedies for wrongful appropriations affect not only when appropriation is legally permitted, but also how much control an owner of resources can exercise over appropriations that are not permitted by law. For example, a remedy requiring disgorgement of all profits allocates full control to the owner, while a remedy measured by the fair market value of what was taken protects only the owner's level of well-being.[19] Dagan employs this framework to evaluate possible remedial responses to a series of high-profile cases, including claims by descendants of slaves against corporate entities alleged to have wrongfully appropriated their ancestors' labor.[20] As in other sections of the book, Dagan's solutions often involve the establishment of remedial rules for classes of situations.[21]

The burden of Dagan's chapter on wrongful appropriation is to reconcile his approach with Ernest Weinrib's "correlativity thesis."[22] Weinrib argues that in a system of private law, a claimant's right to recover must correspond (in a justificatory sense) to the defendant's duty to pay.[23] Dagan accepts this proposition, but rejects Weinrib's further argument that "the idea of property," rather than normative analysis, determines the extent of the claimant's right.[24] In Dagan's view, property itself is a normative construct and defining the content

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17. For example, rescission for undue influence would be available to "people with whom the transferor had a trust-based, family-like relationship for a significant period of time." P. 195.

18. *See, e.g.*, pp. 172-74 (requiring that cohabitant claims meet "a threshold of extraordinary benefits"); pp. 188-89 (discussing alternative forms of liability for necessities furnished to a spouse).

19. Pp. 213-17; Guido Calabresi & A. Douglas Melamud, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (discussing the consequences of different means of protecting entitlements).

20. Pp. 249-56. Other topics are joint infringement of patents, publication in violation of fiduciary duty, and appropriation of cell lines. In my view, Dagan's analysis is generally persuasive, although sometimes muddied by an unfortunate neo-Hegelian conception of property rights. P. 222.

21. Pp. 238-39 (approving the use of "ancillary" requirements to enforce fiduciary duties of loyalty).

22. P. 218 (describing Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQ. L. 1, 3-5 (1999)).

23. Pp. 217-19 ("Thus, 'the reasons that justify the protection of the plaintiff's right [must be] the same as the reasons that justify the existence of the defendant's duty,'" such that "the plaintiff must be 'entitled to receive the very sum that the defendant is obligated to pay.'") (quoting Weinrib, *supra* note 22, at 3-5).

24. Pp. 219-220 (quoting Weinrib, *supra* note 22, at 6-7, 12, 24).

of entitlements necessarily involves choosing among competing values. A normative analysis of entitlements that takes into account deterrence and efficiency as they pertain to the resource-holder's control and well-being is consistent with the requirements of the correlativity thesis.

Dagan's next topic is restitution in contractual settings. Here, Dagan outlines two competing views of the normative goals of contract law: economic efficiency and a cooperative sharing of burdens and benefits. These two views lead to different resolutions of the classic question whether restitution of profits should be generally available as a remedy for breach of contract. The economic approach (to which Dagan seems partial in this context) leads Dagan to the conclusion that restitution should not be allowed, due to the difficulty of proving profits in ordinary contract cases. A sharing approach, on the other hand, leads to the conclusion that gains from breach should be allocated between the parties. In his analysis of this and other contractual problems,[25] Dagan typically ends by proposing a reasonably determinate default rule which the parties can alter contractually if they wish.[26]

Dagan's last topic is the role of restitution in bankruptcy. Recognition of constructive trust claims based on state restitution law in bankruptcy has become controversial because of the automatic priority this remedy accords to certain classes of claims. Dagan is uncomfortable with both the prevailing approach, which relies without further analysis on non-bankruptcy criteria for awarding a constructive trust remedy, and the alternative view that constructive trusts are a legal fiction that should not affect ratable distribution of assets in bankruptcy. Dagan points out that all entitlements are, in effect, legal artifacts; therefore the "fiction" argument against constructive trusts is irrelevant. On the other hand, he finds merit in only one argument offered in favor of constructive trust priority: that constructive trust claimants are, to varying extents, involuntary creditors.[27] The difficulty with this argument is that it justifies not only

25. Other subjects covered are losing contracts and restitution claims by subcontractors. Pp. 282-96.

26. *See* p. 281 (suggesting that a fixed rule for gain-splitting is preferable to case-by-case evaluation of the parties' desert).

27. One defense of constructive trusts that Dagan rejects is my own, offered fifteen years ago. Emily Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. ILL. L. REV. 297 (1989). Reconsidering the subject, I would not now rely, as I did then, on the term "unjust enrichment" in support of priority. The term served as shorthand for the thought that constructive trust claimants have contributed assets to the pool available to creditors, so that creditors will not be made worse off if the claim is allowed. Dagan may be correct that contribution has no normative significance. P. 320. As of the time of the bankruptcy petition, any unpaid claim has a causal effect on the sum of available assets. It is possible that contribution has psychological significance that should be recognized by law. Apart from

priority for constructive trust claimants, but priority for all tort claimants. Dagan is inclined to support this priority, but recognizes that a move of this kind would require a radical reshaping of overall bankruptcy policy (pp. 324-27).

II. REALISM, RESTITUTION, AND RULES

As noted, Dagan explicitly aligns himself with "mainstream" American Legal Realism (pp. 3-4). As described by Brian Leiter, the "core claim" of American Legal Realism is that legal rules do not constrain judicial decisionmaking: "judges respond primarily to the stimulus of the facts of the case, rather than to legal rules and reasons."[28] Judicial response to facts may be predictable, and it presumably is based on justifying reasons.[29] But the reasons that drive and justify judicial decisions are not *legal* reasons. Rather, they derive from a normative analysis of the type Dagan applies to the law of restitution: "[b]y emphasizing the indeterminacy of law and legal reasoning, and the importance of non-legal considerations in judicial decisions, the Realists cleared the way for judges and lawyers to talk openly about the political and economic considerations that in fact affect many decisions."[30]

Dagan is by no means hostile to rules of law; most of his arguments either provide a normative defense of existing rules or propose new rules that are more sensitive to considerations of autonomy, efficiency, and community. Only occasionally does he recommend that judges eschew rules and decide what is best case-by-case. His endorsement of rules, however, does not necessarily remove him from the Realist

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this, however, I find Dagan's analysis persuasive, although I might diverge from his conclusion that all involuntary creditors should have priority.

28. Leiter, *supra* note 2, at 6-7; *see also* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 178-84 (3d Ed. 2003) (associating American Legal Realism with belief in the indeterminacy of legal rules, formalism, hostility to abstract legal concepts, and the view that decisions are "underdetermined by legal rules").

Leiter describes Realism as "a naturalized jurisprudence," marked by "normative quietism." That is, most Realists assume that neither law nor jurisprudence can influence judges, therefore it is pointless to prescribe the methods by which judges should reach decisions. Jurisprudence can only hope to describe rather than justify the pattern of decisions. *See* Leiter, *supra* note 2, at 14-15, 18. Of course, this does not mean that judges themselves eschew normative analysis.

29. Leiter writes:

> The thesis of the Sociological Wing Realists like Llewellyn, Oliphant and Moore — that judges enforce the norms of commercial culture or try to do what is socio-economically best on the facts of the case — should not be confused with the idea that judges decide based, for example, on how they feel about the particular parties or the lawyers.

Leiter, *supra* note 2, at 12; *id.* at 17 ("the crux of the Realist position (at least for the majority of Realists) is that non-legal reasons (e.g., judgments of fairness, or considerations of commercial norms) *explain* the decisions").

30. *Id.* at 21-22.

camp. Not all Realists were opposed in principle to legal rules; for some, at least, the objection was only to abstract and artificial rules that bore no relation to real disputes.[31] Llewellyn, after all, was the principal draftsman of article 2 of the Uniform Commercial Code. Like Dagan, he and others worked to design rules that reflected a reasoned normative response to facts.[32] Accordingly, it would seem that Dagan can be a Realist and still proceed, as he does, to recommend rules for most classes of restitution cases. A rule-oriented Realist like Dagan, however, must answer some difficult questions about how these rules should function in legal reasoning.

To explain this point, some groundwork is needed on the subject of rules. Rules are designed to translate the implications of normative values into concrete prescriptions for action or decision.[33] To function effectively, rules must be general, in the sense that they prescribe outcomes for classes of cases.[34] They must also be sufficiently determinate that rule-appliers can understand what the rules prescribe without first resolving the very normative questions the rules are designed to settle.[35]

From the point of view of a governing authority seeking to advance shared values such as autonomy, utility, and community, a rule has significant advantages over unconstrained decisionmaking, provided that it is regularly applied. If the rule-maker possesses information not easily accessible to rule-appliers, or if rule-appliers are prone to systematic biases (for example, a tendency to overvalue salient facts in comparison to background probabilities), regular application of the rule can reduce error.[36] Rules also allow individuals

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31. *See* Leiter, *supra* note 2, at 8, 11, 14 (referring to "Realists who envisioned a refashioned regime of legal rules that really would describe and predict judicial decisions, precisely because they would take account of the particular factual contexts to which courts are actually sensitive").

32. *See, e.g.*, KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 159 (1960) ("Every opinion must be directed forward, it must make sense and give guidance for tomorrow for the *type of situation* in hand") (emphasis in original); Leiter, *supra* note 2, at 8-9 (discussing Llewellyn and Herman Oliphant).

33. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 1-12, 23-27, 54 (1991) (defining rules and describing them as "instantiations" of background values).

34. *See id.* at 77-78 (distinguishing decisionmaking according to general rules and particularistic decisionmaking).

35. *See* LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW 1-17, 30 (2001) (discussing settlement and determinacy); SCHAUER, *supra* note 33, at 53-62 (defending the possibility of determinate rules); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 520-32 (1988) (defending the capacity of rules to constrain decisionmaking).

36. On the expertise function of rules, see, for example, TOM CAMPBELL, THE LEGAL THEORY OF ETHICAL POSITIVISM 51, 58 (1996), and SCHAUER, *supra* note 33, at 150-52, 158-59.

to coordinate their actions with the actions of others, if they can predict with reasonable certainty that others will follow the rules. Coordination, in turn, advances welfare by resolving prisoners' dilemmas and other problems of collective action.[37] Finally, rules can minimize the time and effort spent in deciding what to do.[38] These benefits, and particularly the benefits that arise from coordination, depend on a reasonably high level of compliance with the terms of the rule.

Of course, regular application of rules also produces error. Because rules are general, they run the risk of over- and under-inclusiveness when applied to particular cases.[39] Most rules, in other words, will sometimes prescribe the wrong result. Nevertheless, the use of rules is justified whenever the rule in question, applied to all cases that fall within its terms, will result in fewer normative errors than all-things-considered reasoning.[40]

When a rule is justified in this sense, a governing authority will prefer that the actors or decisionmakers who apply the rule follow it in all cases, without considering whether the local outcome of the rule conforms to the values the rule is supposed to advance.[41] The reason for this preference is that individual decisionmakers may err in attempting to judge what these values require. They may lack information, be subject to bias, or fail to appreciate the need for coordination. These defects of reasoning were, after all, precisely what led the authority to enact a rule. Therefore, if regular compliance with the rule "banks should not be permitted to claim restitution for mistaken payments to other banks" will yield better results in the run of cases (judged by background standards such as autonomy and utility), the governing authority will prefer that all judges always follow the rule, even when it appears to reduce autonomy or utility in a particular case.

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37. On the coordination function of rules, see, for example, JOSEPH RAZ, THE MORALITY OF FREEDOM 49-50 (1986), SCHAUER, *supra* note 33, at 163-66, Heidi M. Hurd, *Justifiably Punishing the Justified*, 90 MICH. L. REV. 2203, 2293-301 (1992), Mark C. Murphy, *Surrender of Judgment and the Consent Theory of Political Authority*, 16 LAW & PHIL. 115, 125-27 (1997), and Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165 (1982).

38. A rule gives actors no reason to assume that others will act according to the rule, and no coordination-based reason to conform to the rule unless the rule is generally obeyed. For further explanation of this point, see ALEXANDER & SHERWIN, *supra* note 35, at 65-66.

39. *See* SCHAUER, *supra* note 33, at 31-34, 47-52 (discussing the underinclusiveness and overinclusiveness of rules).

40. *See* RAZ, *supra* note 37, at 70-80 (discussing the "normal justification" of rules).

41. See ALEXANDER & SHERWIN, *supra* note 35, at 54 (explaining the rationality of "serious" rules from the point of view of a rulemaking authority); SCHAUER, *supra* note 33, at 131-33 (arguing that a governing authority may be justified in discouraging individual judgment); Larry Alexander, *Law and Exclusionary Reasons*, 18 PHIL. TOPICS 5, 9-11 (explaining why an authority has reasons to require individuals to follow rules).

This attitude, however, seems contrary to the premises of Legal Realism: how can we expect a judge to comply with a rule he or she thinks will lead to the wrong result? Perhaps Dagan would say that Realism, and the normative analysis it makes possible, should be practiced only by those who design the rules and not by those who are charged with applying them. Once sound rules are in place, judges should follow them. Realism, however, is a theory about judicial decisionmaking, which rests in part on skepticism about the capacity of rules to constrain judges.[42] Moreover, Dagan's theory of restitution is a theory of the common law, envisioning a continuing process of legal development that rests in the hands of judges.[43] It is highly unlikely, therefore, that he would wish to bind judges to apply existing rules without further reflection on the fairness of the rules' outcomes.

A more likely interpretation of rule-oriented Realism is that judges should (and do) approach rules with the attitude Frederick Schauer describes as rule-sensitive particularism.[44] A rule-sensitive particularist decides what outcome is best according to all available reasons. In a case governed by the terms of a rule, these reasons include both substantive values (autonomy, utility, and community, for example), and the value of preserving the integrity of the rule. That is, the rule-sensitive particularist bears in mind the effect that a departure from the rule may have on the rule's capacity to reduce error and facilitate coordination in future cases.[45] Rule-sensitive particularism does not treat rules as *constraints* on judicial reasoning; rather, it calls on judges to give appropriate weight to the value of rules in the process of unconstrained moral reasoning.

This seems a plausible description of the approach Dagan takes to rules. He enlists rules as means for advancing normative values and shows considerable appreciation for the benefits of rule form, but he is also willing to depart from existing rules as those values require. Consider, for example, Dagan's conclusion in chapter five that restitution should be available for substantial transfers between

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42. *See* BIX, *supra* note 28, at 178 (noting the Realist focus on adjudication); *supra* notes 28-32 and accompanying text (discussing Realist skepticism about rules). Leiter distinguishes between Conceptual Rule-Skepticism and Empirical Rule-Skepticism, meaning skepticism about whether judges will in fact comply with rules. *See* Leiter, *supra* note 2, at 25-33. I am talking here about the more reasonable position of Empirical Rule-Skepticism.

43. *See* p. 6 (referring to the "ongoing . . . process" of normative development of law).

44. *See* SCHAUER, *supra* note 33, at 94-100.

45. Schauer puts it this way:

> Given that result *a* is indicated by rule *R*, you (the rule subject) shall reach result *a* unless there are reasons for not following rule *R* in this case that outweigh the sum of the reasons underlying *R* and the reasons for setting forth those underlying reasons in the form of a rule.

Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J. L. & PUB. POL'Y 645, 676 n.66 (1991).

cohabitants who later split. Dagan employs a relatively concrete requirement of "significant asymmetric contribution" to define cohabitant claims in a way that will promote "liberal community" but stop short of imposing an egalitarian ideal on cohabitants who have chosen not to marry (pp. 168, 173-80). Yet, his endorsement of restitution in this context requires him to disregard several limits on restitution that he probably would endorse in other circumstances. Established rules, applicable across the field of restitution, hold that neither a consensual transfer (such as a gift) nor an officious transfer (one in which the transferor has bypassed reasonable opportunities to negotiate for payment) will support a claim.[46] In the context of cohabitation, transfers from one cohabitant to the other are often understood at the time as gifts. If the transferor does not intend a gift, but instead expects reimbursement, the transfer arguably is officious.[47] Thus, to support cohabitant claims, Dagan must make exceptions to the established limits on restitution. The exceptions he makes can be explained as an exercise in rule-sensitive particularism: encouraging communitarian behavior by cohabitants is sufficiently important (in Dagan's view) to overcome not only the reasons of autonomy and utility underlying traditional limits on restitution, but also the harm that an exception for cohabitants may do to the reasons for casting these limits as rules.

Larry Alexander and I have argued elsewhere that, despite its initial appeal, a strategy of rule-sensitive particularism is not likely to succeed in preserving the value of rules.[48] Put briefly, if a rule is justified by the rulemaker's superior information, expertise, or impartiality, a rule-sensitive particularist who understands that rules are typically overbroad and believes the rule to be overbroad in his or her case will not accord the rule much epistemic weight. In the more common case in which the rule is justified as a solution to coordination

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46. *See* RESTATEMENT (THIRD), *supra* note 4, § 1, cmt. b, at 3 (gifts, contractual exchange) (Discussion Draft 1999); *id.*, § 2(2) (consensual transfer); *id.*, § 2(4) (circumstances do not excuse negotiation for contractual exchange).

47. The draft Restatement, which also endorses this type of claim, recognizes that recovery in these circumstances requires an exception to the normal limits on restitution. *See* RESTATEMENT (THIRD), *supra* note 4, § 28, cmt. c, at 27 (Council Draft No. 4 2002). Dagan and others suggest that negotiation is inherently out of place in the context of cohabitation. *See* p. 170; Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA. L. REV. 1125, 1163 (1981) (citing unequal bargaining power and the difficulty of exit); Robert C. Casad, *Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?*, 77 MICH. L. REV. 47, 49, 56-58 (1978) (suggesting that contract is not a realistic alternative for cohabitants); Ira Mark Ellman, *Unmarried Partners and the Legacy of* Marvin v. Marvin*: "Contract Thinking" Was* Marvin*'s Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1367-78 (2001) (arguing that contracts are uncommon and undesirable among cohabitants). *But see* Emily Sherwin, *Unjust Enrichment and Heartbreak Cases* (unpublished manuscript) (suggesting that in the settings in which restitution claims are most likely to arise, a requirement of negotiation is not overly burdensome).

48. *See* ALEXANDER & SHERWIN, *supra* note 35, at 61-68.

problems, a rule-sensitive particularist will recognize that deviating from the rule could impair public perception of the rule as a reliable predictor of decisions and conduct. For several reasons, however, the rule-sensitive particularist is likely to discount this potential harm. First, the potential harm that any one deviation from the rule will cause to rule values such as coordination and error reduction is likely to appear small, particularly to a decisionmaker distracted by the facts of the case.[49] Second, in a community of rule-sensitive particularists, each rule-applier will know that other rule-appliers are also rule-sensitive particularists. Therefore each rule-applier will expect other rule-appliers to assess all underlying reasons for a decision (including rule values). Given the limits on human reasoning and the distracting effects of salient and appealing facts, each rule-applier will expect some rule-appliers to decide erroneously to deviate from the rule. Each rule-sensitive rule-applier also will anticipate that other rule-appliers will make the same calculation — that is, each will conclude that fellow rule-sensitive rule-appliers may err. The expectation that others will err reduces the coordination value of the rule, which in turn reduces the harm done by any single deviation. At some point in the iteration of this reasoning, there is no longer any reason to expect general conformity to the rule and no reason for a rule sensitive rule-applier to accord any weight in his or her decision to the coordination value of the rule.

Again, cohabitant cases provide an illustration. Whether the communitarian benefits of restitution between cohabitants overcome the reasons that support limits on recovery for consensual or officious transfers (including the reasons for maintaining those limits as rules) is a difficult calculation to make. From the point of view of a judge confronting a dispute between ex-cohabitants, the impact of a single exception to the normal limits on restitution may appear minor. Meanwhile, the human appeal of a deserted cohabitant's claim may dwarf disembodied concerns such as damage to the integrity of donative transfers. Thus it is easy — possibly too easy — to conclude that the balance of reasons favors relief. If over the run of cases this conclusion is mistaken, the traditional limits on restitution may no longer be credible and whatever protection they furnish to values of autonomy and utility may be lost.

In a functioning legal system, it seems unlikely that all decision-makers will be rule-sensitive particularists. Simplicity, habit, and possibly indoctrination will lead at least some actors and judges to

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49. *See* Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 163 (Daniel Kahneman et al. eds., 1982) (explaining the tendency of reasoners to overvalue salient facts in comparison to background regularities).

follow rules without question, at least some of the time. As a result, rules may retain their value despite scattered instances of rule-sensitive particularism, and, accordingly, rule-sensitive particularists will often have reason to follow rules. Yet if rule-sensitive particularism becomes widespread and visible, it may endanger the value of rules. This presents a dilemma for a rule-oriented Realist such as Dagan: rules can serve as effective means for carrying out normatively attractive programs only if the truth of Legal Realism, and the scope of rule-sensitive particularism, are kept from general view.

CONCLUSION

Dagan has written an excellent book on a difficult subject. His analysis of restitution is careful, readable, extremely well-informed,[50] and normatively attractive. It succeeds very well in presenting restitution as an accessible and appealing field of law.

I have expressed some doubts about the viability of Dagan's approach to legal rules, which I have described as rule-oriented Legal Realism. Given Dagan's unusually modest, open-minded, and temperate scholarly disposition, rule-oriented Legal Realism as he practices it may produce admirable results. Yet the approach carries with it dangers and difficulties that might cause problems in other, less skillful hands.

50. The bibliography lists over 230 books. I am persuaded that Dagan has *read* these books.