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## Introduction

Two of the most publicly salient litigation patterns of recent years – the claims of victims of slavery against corporations that benefitted from their slave labor, and the suits of governments against injurious industries for the prevention and amelioration costs they incurred in dealing with harms which were arguably caused to their citizens by the defendant industries – share one common denominator. Both invoke restitution, loosely defined in this book as the body of law dealing with benefit-based liability or benefit-based recovery.

This book discusses the American law of restitution in an attempt to expose and examine critically some of its underlying normative commitments. Writing a book on restitution in a US environment is a risky (but hopeful) enterprise. To be sure, “Americans led the way in the development of the modern law” of restitution and the “sense that they were at the frontier of the law of restitution endured into the 1950s and 1960s.”<sup>1</sup> In those days restitution was a hot topic in the American law school environment: a standard part of the upper-year curriculum, and a matter of considerable academic interest.<sup>2</sup> But this is no longer the case. Only a bare handful of American law schools offer a restitution course these days, and few academics write in this area. Restitution was subsumed under the general category of remedies or dissipated into the interstices of property, torts, and contract. As a consequence, many American lawyers and judges are unfamiliar with the law of restitution.<sup>3</sup>

The unhappy predicament of restitution in the American academic environment cannot be explained by a lack of practical implications.

<sup>1</sup> John H. Langbein, *The Later History of Restitution*, in *RESTITUTION – PAST, PRESENT AND FUTURE: ESSAYS IN HONOUR OF GARETH JONES* 57, 60 (W. R. Cornish et al. eds., 1998).

<sup>2</sup> See, e.g., Richard A. Epstein, *The Ubiquity of the Benefit Principle*, 67 S. CAL. L. REV. 1369, 1370–71 (1994).

<sup>3</sup> See *id.* at 1371; Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1195 & n.14, 1241 (1995); Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1277 (1989).

Lawyers in America (like in most other places) encounter restitution on a daily basis, and the law reports are full of cases – many of which will be discussed in these pages – of mistaken payments (such as mistaken wire transfers or the payment of taxes improperly imposed), performance of joint obligations or the protection of jointly held property interests, cohabitation, and profitable infringements of intellectual property, to mention only a few typical restitution issues. Moreover, the fall of restitution in the landscape of American legal academia is an extreme anomaly from a comparative perspective – as can be seen, for example, from the remarkable flourishing of restitution scholarship in the United Kingdom during the past few decades.<sup>4</sup> As one American commentator noted, “from afar, the subject sometimes seems to dominate legal intellectual life.”<sup>5</sup>

Recently there have been a few indications that the long period of decline in American restitution scholarship may soon come to an end. Two conferences were organized by two major law reviews,<sup>6</sup> and the American Law Institute has undertaken an important initiative of producing a new

<sup>4</sup> See, e.g., THE USE AND ABUSE OF UNJUST ENRICHMENT: ESSAYS ON THE LAW OF RESTITUTION (Jack Beatson ed., 1991); PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION (paperback ed. with revisions 1989); PETER BIRKS, UNJUST ENRICHMENT (2003); ANDREW BURROWS, THE LAW OF RESTITUTION (2d ed. 2002); JAMES EDELMAN, GAIN-BASED DAMAGES: CONTRACT, TORT, EQUITY AND INTELLECTUAL PROPERTY (2002); LORD GOFF OF CHIEVELEY & GARETH JONES, THE LAW OF RESTITUTION (Gareth Jones ed., 6th ed. 2002); STEVE HEDLEY, RESTITUTION: ITS DIVISION AND ORDERING (2001); PETER JAFFEY, THE NATURE AND SCOPE OF RESTITUTION: VITIATED TRANSFERS, IMPUTED CONTRACTS AND DISGORGEMENT (2000); THOMAS KREBS, RESTITUTION AT THE CROSSROADS: A COMPARATIVE STUDY (2001); CHARLES MITCHELL, THE LAW OF CONTRIBUTION AND REIMBURSEMENT (2003); CRAIG ROTHERHAM, PROPRIETARY REMEDIES IN CONTEXT: A STUDY IN THE JUDICIAL REDISTRIBUTION OF PROPERTY RIGHTS (2002); GRAHAM VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION (1999); ESSAYS ON THE LAW OF RESTITUTION (Andrew Burrows ed., 1991); THE LAW OF RESTITUTION (Steve Hedley & Margaret Halliwell eds., 2002); RESTITUTION – PAST, PRESENT AND FUTURE, *supra* note 1; RESTITUTION AND BANKING LAW (Francis Rose ed., 1998); RESTITUTION AND INSOLVENCY (Francis Rose ed., 2000); THE SEARCH FOR PRINCIPLE: ESSAYS IN HONOUR OF LORD GOFF OF CHIEVELEY (William Swadling & Gareth Jones eds., 1999); LIONEL SMITH, THE LAW OF TRACING (1997); ANDREW TETTENBORN, THE LAW OF RESTITUTION IN ENGLAND AND IRELAND (3d ed. 2002); UNJUSTIFIED ENRICHMENT: KEY ISSUES IN COMPARATIVE PERSPECTIVE (David Johnston & Reinhard Zimmermann eds., 2002); the RESTITUTION LAW REVIEW; PETER BIRKS & ROBERT CHAMBERS, RESTITUTION RESEARCH RESOURCE (2d ed. 1997).

<sup>5</sup> Langbein, *supra* note 1, at 61.

<sup>6</sup> 67 S. CAL. L. REV. 1369 (1994); 79 TEX. L. REV. 1763 (2001). See also 36 LOY. L.A. L. REV. 777 (2002).

(third<sup>7</sup>) Restatement of the Law of Restitution and Unjust Enrichment.<sup>8</sup> While these are preliminary signs, they may point to the possibility of a revival of restitution in American law schools, a renewed acknowledgment that “the common law coach runs not on three substantive wheels” – property, contracts, and torts – “but on four.”<sup>9</sup> In this book I wish to celebrate this renewed academic interest in restitution and contribute to the emerging debates it provokes.

I am not a legal historian. I do not purport to explain here why restitution fell out of favor with American academic lawyers.<sup>10</sup> And yet my starting point in this book is one suggested explanation of the decline. John Langbein analyzes this unfortunate development as part of “the terrible toll that the realist movement has inflicted on doctrinal study.” For Langbein, when doctrine is understood as “a smokescreen for the policies, politics, values, social forces, or whatever, that really motivate the decisions, the hard work of refining and articulating legal rules will not be regarded as an attractive enterprise.” The task of “producing, criticizing, reconciling, and improving” the law of restitution, he insists, “requires an environment that treats the study of legal doctrine with respect.” By supplying “alternative accounts of why cases get decided,” legal realism is inhospitable to such doctrinal work, thus undermining restitution scholarship.<sup>11</sup>

Langbein’s thesis as to the detrimental effects of legal realism on restitution is worth mentioning here not because I find it to be correct. On the contrary, one of my challenges here is to disprove the jurisprudential component of his claim. I intend to study the law of restitution in this book with respect, and to help refine, and at times improve, some of its rules. And yet, as the remainder of this introduction explains, the book largely follows the footsteps of mainstream legal realism, represented by

<sup>7</sup> After producing two tentative drafts, the Restatement (Second) of Restitution project did not proceed to completion. See *RESTATEMENT (SECOND) OF RESTITUTION* (Tentative Drafts, 1983–84).

<sup>8</sup> See *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* (Tentative Draft No. 1, 2001).

<sup>9</sup> Epstein, *supra* note 2, at 1371.

<sup>10</sup> The suggestion that it is the result of the expansion of public law at the expense of private law is probably part of the explanation. See Epstein, *supra* note 2, at 1371; Langbein, *supra* note 1, at 61.

<sup>11</sup> Langbein, *supra* note 1, at 62. See also David F. Partlett & Russell L. Weaver, *Restitution: Ancient Wisdom*, 36 *LOY. L.A. L. REV.* 975, 976–79, 981–82 (2003). Cf. Stephen A. Smith, *Taking Law Seriously*, 50 *U. TORONTO L.J.* 241, 249–50, 254–65 (2000).

the work of Karl Llewellyn and Felix Cohen. Against Langbein, I wish to show that paying attention to policies and values is a necessary component of the serious tasks of understanding, criticizing, and improving the law of restitution.

More specifically, this book offers an interpretation of American restitution law as a contextual application of our commitments to autonomy, utility, and community in various situations of benefit-based liability or benefit-based recovery. As any interpretation, my account is neither an invention of something that was not there before, nor a mere report of the current existing rules.<sup>12</sup> Law is a dynamic enterprise whose content is constantly made and remade as it unfolds. The point of an interpretive theory of law – like the one offered in these pages – is to help direct the future evolution of our present rules and precedents. My task is therefore to present existing restitutionary doctrine in its best normative light.<sup>13</sup> This constructive perspective shapes the outlook of this book. It also defines its limitations. This book does not purport to offer any explanatory wisdom. My account is silent about the intent of the myriad judges and legislators who molded the existing rules and precedents. It is also indifferent to the possibility that some part of the existing rules may be (or may have been) also placed in other social environments, which do not necessarily share one or more of the normative commitments to autonomy, utility, and community. My focus is only on the present and the future of the American law of restitution, leaving its past and its counterparts abroad to a later day (or another author).

I begin my journey with a typical realist move of doubting some of the prevailing language of the field. “Unjust enrichment at the expense of another” has long been the accepted currency of the law of restitution. Chapter 2 examines the use and abuse of this terminology. Its core claim is that, while the theme of unjust enrichment can be useful as a loose framework for restitutionary claims, the frequent reference to the principle against unjust (or unjustified) enrichment as the normative foundation of rules of restitution tends to be question-begging and to confuse, rather than clarify, both the doctrine and its normative underpinnings. (Readers who are less familiar with the field may prefer reading chapter 2 just before they reach the conclusion of this book, rather than after this introduction.)

<sup>12</sup> Cf. MICHAEL WALZER, *INTERPRETATION AND SOCIAL CRITICISM* 1–32 (1987).

<sup>13</sup> See RONALD DWORKIN, *LAW’S EMPIRE* 52–53 (1986).

Chapters 3–9 delve into the main (or at least the most distinctive) categories of restitution cases – mistakes, other-regarding (good samaritan) interventions, self-interested conferrals of benefits, conferral of benefits in contexts of informal intimacy, wrongful enrichments, breaches of contract, and restitution in bankruptcy. (The order of this presentation by and large follows the convention of the restitution literature; it also facilitates an orderly introduction of the major normative themes of the book.) Each chapter takes the existing doctrinal landscape of restitution as the starting point of its analysis. The existing doctrine matters not only because I doubt the option of wholesale abandonment of existing law, but also because it represents an accumulated judicial experience that is normatively valuable.<sup>14</sup> Judges may not have the time and resources to articulate fully the reasons for the rules they prescribe, and their normative judgment tends to be implicit and thus often imperfect. But, because adjudication – especially in an adversarial system – is a unique institutional environment, its yield, namely our case-law, is worthy of respect.

“The ancient wisdom of our common law” explained Felix Cohen, “recognizes that [people] are bound to differ in their views of fact and law, not because some are honest and others dishonest, but because each of us operates in a value-charged field which gives shape and color to whatever we see.” Only “a many-perspectived view of the world can relieve us of the endless anarchy of one-eyed vision.” The institutional structure of (common law) adjudication is meant to force judges to have a “synoptic vision” which is “a distinguishing mark of liberal civilization.”<sup>15</sup> Indeed, the authority of case-law does not derive from the judges’ unique characteristics as individuals, but rather, in the language of Karl Llewellyn, from “the office.” Judges are embedded in an institutional environment that inspires an attitude “toward understanding sympathetically [and] toward quest for wisdom in the result.” The two most important features of that environment are the adversarial process, in which “officers of the court” marshal the authorities “on each side in support of one persuasive view of sense in life, as well as one view technically tenable in law,” and the role of judicial opinions, which are aimed at persuading the parties, the bar, and the interested public. These features help make judges “experts in that

<sup>14</sup> See Thomas C. Grey, *Freestanding Legal Pragmatism*, 18 CARDOZO L. REV. 21, 26 (1996).

<sup>15</sup> Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 241–42 (1950).

necessary but difficult task of forming judgment without single-phased expertness, but in terms of the Whole, *seen whole*.<sup>16</sup>

And yet, as (I hope) a good legal realist, I am also disinclined to give each and every existing rule overwhelming normative authority. Rather, I approach the rules of restitution critically and contextually.

Legal realists call for 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. (I deliberately use the vague term “promote” in order to capture both the material as well as the expressive and constitutive or interpretive ways in which law can facilitate human values; a critical analysis must resort to all these ways, and properly recognize their mutual interdependence.<sup>17</sup>)

Because law is a coercive mechanism backed by state-mandated power, its prescriptions need to be justified in terms of their promotion of human values.<sup>18</sup> Therefore, restitutionary doctrines must be reevaluated in terms of their effectiveness in promoting their accepted values, and the continued validity and desirability of these values.<sup>19</sup> Thus, each chapter examines the normative choices that explain why the law of restitution finds a specific subset of enrichments unjust, and others just. In each chapter, I show how certain values – notably autonomy, utility, and community – importantly, although frequently implicitly, shape the specific doctrinal details.

<sup>16</sup> KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 45–47, 132 (1960) [hereinafter *COMMON LAW TRADITION*]; KARL N. LLEWELLYN, *American Common Law Tradition and American Democracy*, in *JURISPRUDENCE: REALISM IN THEORY AND IN PRACTICE* 282, 308–10 (1962) [hereinafter *JURISPRUDENCE*]. For a modern articulation of these institutional virtues, see Owen M. Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739 (1982).

<sup>17</sup> See Hanoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 *MICH. L. REV.* 134 (2000).

<sup>18</sup> On the power dimension of adjudication, see Robert Cover, *Violence and the Word*, in *NARRATIVE, VIOLENCE, AND THE LAW* 203 (Martha Minow et al. eds., 1992). On the dialectical relation between law’s coercion and its nature as a justificatory practice, see DWORKIN, *supra* note 13, at 261–62; Karl N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 *YALE L.J.* 1355, 1381–86 (1940). For other views as to the relationship between law’s coercion and its normativity – reductive, additive, and disjunctive – see generally Meir Dan-Cohen, *In Defense of Defiance*, 23 *PHIL. & PUB. AFF.* 24 (1994).

<sup>19</sup> See Thomas W. Bechtler, *American Legal Realism Revaluated*, in *LAW IN SOCIAL CONTEXT: LIBER AMICORUM HONOURING PROFESSOR LON L. FULLER* 3, 20–21 (Thomas W. Bechtler ed., 1978). See also, e.g., Grey, *supra* note 14, at 26, 41–42.

If this normative inquiry is to be properly critical and properly constructive, the values underlying restitution law – as well as its existing categorization – should be approached in a legal realist (anti-foundationalist) spirit. Therefore, I treat the normative underpinnings of the law of restitution as “pluralistic and multiple, dynamic and changing, hypothetical and not self-evident, problematic rather than determinative.”<sup>20</sup> And yet, with Don Herzog I believe that “[u]nlike preferences, our moral principles can be defended with reasons,” and that “the reasons are not irreducibly arbitrary,” but rather must relate to “such concepts as human interests . . . and not just anything can count as human interest.”<sup>21</sup> For this reason, the book sets aside skeptical doubts and explicitly engages in, as Justice Holmes recommended, a normative inquiry that makes judgments relating to “social ends” and “considerations of social advantage” inevitable.<sup>22</sup>

This normative analysis does not undermine law’s predictability; in fact it reinforces it. The positivist fear that value discourse undermines law’s certainty is premised on the view that rules discourse yields, in most cases, one legal answer. But as the legal realists have shown, this view is far from being true. To be sure, the narrower problem of rule indeterminacy has been effectively addressed by H. L. A. Hart’s distinction between the core and the penumbra of rules, and his insistence that “the core of any given rule is determinate enough to supply standards of correct judicial decisions.”<sup>23</sup> But as the legal realists showed, legal doctrine, strictly speaking, is hopelessly indeterminate, not – at least not mainly – because of the indeterminacy of discrete legal rules, but rather, because of the

<sup>20</sup> Hessel E. Yntema, *Jurisprudence on Parade*, 39 MICH. L. REV. 1154, 1169 (1941).

<sup>21</sup> DON HERZOG, WITHOUT FOUNDATIONS: JUSTIFICATION IN POLITICAL THEORY 232, 237–38 (1985). See also, e.g., Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, in PRAGMATISM IN LAW AND SOCIETY 359, 360 (Michael Brint & William Weaver eds., 1991).

<sup>22</sup> See OLIVER W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 184 (1920); OLIVER W. HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS, *id.*, at 210, 238–39. For some powerful statements of the inevitability of applying moral judgments as part of legal discourse (even in its most descriptive aspects), see, e.g., Roscoe Pound, *A Comparison of Ideals in Law*, 47 HARV. L. REV. 1, 2–3 (1933); Felix S. Cohen, *Modern Ethics and the Law*, 4 BROOK. L. REV. 33, 44–45 (1934); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 848–49 (1935). Referring to Justice Holmes and his *Path of the Law*, the text implicitly adopts an interpretation of Holmes’ (and the legal realists’) endorsement of the separation of law and morality as a strategic device, aimed at preserving our capacity for morally responsible and morally informed legal criticism, rather than as a manifestation of moral skepticism or of a libertarian persuasion. See Robin West, *Three Positivisms*, 78 B.U. L. REV. 791 (1998).

<sup>23</sup> H. L. A. HART, THE CONCEPT OF LAW 123, 141–42, 144 (1961).

multiplicity of doctrinal sources.<sup>24</sup> Nevertheless, as the realists insisted, this radical doctrinal indeterminacy does not imply unpredictability because it does not mean that the law as a whole is indeterminate.<sup>25</sup> Rather, the (dynamic) content of any doctrine is prescribed according to a contextual normative equilibrium.<sup>26</sup> Thus, a realist perspective facilitates, rather than undermines, law's predictability.<sup>27</sup>

This analysis is not an abstract inquiry into the universal principles of abstract justice. Rather, the normative inquiry in this book is – again following the legal realists' lead – contextual, looking at the specific categories of restitution, which are rooted in practice and custom, and reflective of existing patterns of human conduct and interaction. As opposed to some modern friends of unjust enrichment who embrace it as a sweeping underlying theme of the law of restitution, this book analyzes legal problems in relatively narrow categories, hoping to capture the factual subtleties of each type of case (each paradigm of restitution). As we will see, these subtleties are significant for the possible, as well as for the ideal, legal outcome. This contextual outlook is (again) inspired by legal realism. As Herman Oliphant and Karl Llewellyn claimed, narrow legal categories are to be preferred because our lives are divided into economically and socially differentiated segments. Each “transaction of life” has some features that are of sufficient normative importance to justify a distinct legal treatment.<sup>28</sup>

<sup>24</sup> See FELIX S. COHEN, *The Problems of Functional Jurisprudence*, in *THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN* 77, 83 (Lucy Kramer Cohen ed., 1960); JEROME FRANK, *LAW AND THE MODERN MIND* 138 (1930); KARL N. LLEWELLYN, *Some Realism about Realism*, in *JURISPRUDENCE*, *supra* note 16, at 42, 58; KARL N. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 45, 51 (Paul Gewirtz ed., Michael Ansaldi trans., 1933, 1989); FRED RODELL, *Woe Unto You, Lawyers!* 154, 160 (1939). See also EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 90 (1973); Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 *PHIL. & PUB. AFF.* 205 (1986).

<sup>25</sup> See KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 48 (1930); MICHAEL MARTIN, *LEGAL REALISM: AMERICAN AND SCANDINAVIAN* 39–40, 76 (1997).

<sup>26</sup> See LLEWELLYN, *COMMON LAW TRADITION*, *supra* note 16, at 19–61, 178–255.

<sup>27</sup> Cf. Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 *TEX. L. REV.* 267 (1997).

<sup>28</sup> See Herman Oliphant, *A Return to Stare Decisis*, 14 *A.B.A. J.* 71 (1928); LLEWELLYN, *A Realistic Jurisprudence: The Next Step*, in *JURISPRUDENCE*, *supra* note 16, at 3, 27–28, 32, 34–36; LLEWELLYN, *Some Realism*, in *JURISPRUDENCE*, *id.*, at 42, 56–57, 62, 73. For similar contemporary claims for contextuality, see MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983); ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 157 (1993); Grey, *supra* note 14, at 41.



In many cases, my contextual normative analysis largely reaffirms the existing rules, as in the chapter on wrongful enrichments. At times – the notable example here is my discussion of restitutionary recovery for breach of contract – it even gives reasons to resist some academic demands for the adoption of new, revolutionary rules which I find unsupportable. In other cases, as in my analyses of the self-interested conferral of unsolicited benefits and of restitutionary claims in contexts of informal intimacy, clarifying the normative underpinnings of the law helps focus the issues at stake and direct its future development by pointing to new rules that can further bolster and vindicate its underlying principles and policies. But there are also cases in which this inquiry points to “blemishes” in the existing doctrine: rules that undermine its most illuminating and defensible account, and should thus be reformed if we want the law of restitution to live up to its own (implicit) ideals.<sup>29</sup> This reformist potential may yield – as it does throughout many chapters of this book – different types of legal reform. In some cases, the relatively radical option of reversing the baseline norm of existing doctrine (as in my analysis of restitutionary claims of good samaritans) is in order. In other cases (as I suggest in the context of mistaken payments), the more moderate alternative of restating the doctrine in a way that brings its rules closer to its underlying commitment, removing in the process indefensible rules, seems appropriate. Finally, my discussion of restitution in bankruptcy shows the limits of this constructive methodology. Although it succeeds in deciphering a defensible normative premise for this troubled area of law, it openly admits that aligning the doctrine with this premise requires an overall reconstruction of bankruptcy law which is beyond the legitimate agenda of common law adjudication.

I present this book as an exercise in legal optimism; an attempt to explicate and develop the existing doctrines in a way that accentuates their normative desirability and is attuned to their social context.<sup>30</sup> This book reflects a conception of law – which was introduced by Karl Llewellyn and was later popularized (with some important modifications that are not adopted here<sup>31</sup>) by Ronald Dworkin – as a dynamic justificatory practice

<sup>29</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 118–23 (1977).

<sup>30</sup> On legal optimism, see BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 178–79 (1921); DWORKIN, *supra* note 13, at 400–13.

<sup>31</sup> Two important characteristics of Llewellyn’s jurisprudence, which are mentioned in the text, are unlikely to be shared by Dworkin. First, Llewellyn’s understanding of justice is dynamic, experimental, and contextual; in short: pragmatic. Dworkin, by contrast, casts

that evolves along the lines of fit and justification.<sup>32</sup> By this I hope to be loyal to the common law method of “a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need,” mediating between “the seeming commands of the authorities and the felt demands of justice.”<sup>33</sup> The title of this book – *The Law and Ethics of Restitution* – should not be read as suggesting two distinct inquiries of restitution: one legal; the other normative. Rather, in what follows, the normative discourse is integrated into the legal discourse. Normative values are the spokes of restitution, as they are of the other three wheels of private law. Without recognizing their central role, our legal inquiry could not move forward.

himself as a critic of pragmatism: RONALD DWORKIN, *What Justice Isn't*, in *A MATTER OF PRINCIPLE* 214 (1985). (This difference may account for another difference – which is irrelevant for our purposes – regarding the issue of judicial review.) Second, unlike Dworkin, Llewellyn did not treat the dimension of fit (“fitness” as he called it) as a global imperative, and thus advocated the use of smaller categories to analyze legal questions. In contemporary terms, Llewellyn was talking about “local coherence,” namely: pockets of coherence that reflect clusters of cases which are sufficiently similar in terms of the pertinent principles governing them and the appropriate weights of those principles and thus should be governed by a unified normative framework. See JOSEPH RAZ, *The Relevance of Coherence*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 261, 281–82, 294–304 (1994).

<sup>32</sup> See LLEWELLYN, *COMMON LAW TRADITION*, *supra* note 16, at 36–38, 44, 49, 60, 194–95, 222–23; DWORKIN, *supra* note 13, at 164–258.

<sup>33</sup> LLEWELLYN, *COMMON LAW TRADITION*, *supra* note 16, at 37–38.