
CHAPTER ONE

THE INTELLECTUAL HISTORY OF UNJUST ENRICHMENT

This Chapter charts the intellectual history of unjust enrichment, showing that many legal systems in the Western tradition identify unjust enrichment as a source of personal obligation separate from contract or tort. In the United States, unjust enrichment developed in law and equity, suffered through a period of instability in the post-fusion legal landscape, and has experienced a recent resurgence. The idea of “unjust enrichment” researched for this Chapter includes any treatment of an unequal transfer of value that operates as a source of obligation separate from obligations arising from consent or wrongdoing. This separate source of obligation can be identified as far back as the Roman Empire. The definition of “unjust enrichment” that seems to best fit this source of obligation is that of the Third Restatement: any unequal transfer of value without an adequate legal basis.¹

Given that both contract and tort are sources of obligation recognized within the common law tradition, one might think that unjust enrichment would fall squarely within the common law, but the story is more complex. The American legal tradition inherited the English distinction between “common law” and “equity.”² Although separate common law and equity jurisdictions were mostly abolished by the early twentieth century, American courts have struggled to determine how much to “fuse” them.³ Unjust enrichment developed as a common law source of obligation and as an equitable principle,⁴ and it now occupies an uncomfortable space in American jurisprudence. In some ways this is surprising, since unjust enrichment would seem to be the prime candidate for perfect fusion. However, the half steps taken by the American fusion of law and equity, and the particularities of how this fusion occurred, have contributed to uncertainty about how to employ unjust enrichment.

The confusion over characterization has impacted plaintiffs who might be in a position to bring an unjust enrichment claim. After the fusion of law and equity, unjust enrichment was predominantly categorized as “equitable.”⁵ This label has caused unjust enrichment to become unpopular and misunderstood in the United States, in contrast to

¹ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (AM. LAW INST. 2011).

² See Samuel L. Bray, *Equity: Notes on the American Reception*, in EQUITY AND LAW 31, 36–37 (John C.P. Goldberg et al. eds., 2019). This Chapter uses the term “equity” to describe the legal reasoning employed by the courts of equity in the Anglo-American tradition. In contrast, the rules of law employed by common law courts are termed “common law” rules.

³ *Id.* at 38–39.

⁴ See *infra* pp. 2081–82; see also, e.g., cases cited *infra* note 71.

⁵ See, e.g., cases cited *infra* note 161.

the vibrant unjust enrichment scholarship in other countries.⁶ Some state courts, misinterpreting unjust enrichment as a purely equitable claim, have put up barriers, such as the rule that equity does not step in if there is an adequate remedy “at law.”⁷ This Chapter will highlight better theoretical approaches to unjust enrichment in a post-fusion world.

Section A explores the early common law and equity roots of unjust enrichment in the Western tradition. Section B demonstrates that pre-1900 American jurisprudence employed the doctrine in common law and equity courts. Section C explores attempts to fuse the law and equity sides of unjust enrichment and misapplication of these attempts after the fusion of law and equity in the United States. Finally, section D addresses recent developments here and abroad, as well as different options for theorizing unjust enrichment in the post-fusion landscape.

A. *The Common Law and Equity Roots of Unjust Enrichment*

This section explores the early history of the principle of unjust enrichment and finds that the concept was employed in the civil traditions of Rome, Germany, Scotland, and other parts of Europe. These legal systems recognized interpersonal obligations, such as unjust enrichment, that did not flow solely from the consent of the parties or wrongdoing. In the British tradition, unjust enrichment can be found in both common law jurisprudence and equity cases. This early history demonstrates that categorizing unjust enrichment as purely equitable in character would be a mistake.

1. *The Civil Law Tradition.* — Roman law did not have a distinction between law and equity⁸ because it used a civil law system, like those still favored in continental European countries.⁹ In Roman law, unjust enrichment can be identified as a source of obligation,¹⁰ but only in scattered examples.

The second-century jurist Gaius said that all obligations arose from contracts, torts, and other events, which included quasi-contracts and quasi-torts.¹¹ Later, in the sixth century, the Institutes of Justinian listed four categories of obligations: contracts, torts, quasi-contracts (*quasi ex*

⁶ See Chaim Saiman, *Restitution in America: Why the US Refuses to Join the Global Restitution Party*, 28 OXFORD J. LEGAL STUD. 99, 99–100 (2008).

⁷ See Eric J. Konopka, *Hey That's Cheating! The Misuse of the Irreparable Injury Rule as a Shortcut to Preclude Unjust-Enrichment Claims*, 114 COLUM. L. REV. 2045, 2045–47 (2014).

⁸ See W.W. BUCKLAND, EQUITY IN ROMAN LAW 1–3 (1911).

⁹ See *The Common Law and Civil Law Traditions*, BERKELEY LAW 2, <https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf> [<https://perma.cc/K3D7-BKD6>].

¹⁰ See JAMES EDELMAN & ELISE BANT, UNJUST ENRICHMENT 9 (2d ed. 2016).

¹¹ Peter Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, 26 U. W. AUSTRAL. L. REV. 1, 9 (1996); Max Radin, *The Roman Law of Quasi-Contract*, 23 VA. L. REV. 241, 242–43 (1937).

contractu), and quasi-torts.¹² The strongest evidence of the doctrine of unjust enrichment is within *quasi ex contractu* obligations.

Roman law imposed obligations *ex contractu* in cases where parties voluntarily entered into a relationship with each other.¹³ Obligations that were imposed on involuntary relationships were classified as *quasi ex contractu*¹⁴ and included obligations that were based on concepts of unjust enrichment, such as those that arose when one inadvertently received money not due from another.¹⁵ These parties had neither voluntarily entered into a relationship nor committed a wrong, and yet the law imposed obligations.

The Roman *quasi ex contractu* cases, such as those of mistaken payments, illegal contracts, and frustrated contracts,¹⁶ looked so familiar to scholars of unjust enrichment in the late nineteenth and early twentieth century, that for a time the law of unjust enrichment was called “quasi-contract.”¹⁷ These examples tell us little, however, about the principle behind these obligations. While one can find the principle that “[n]atural justice requires that no-one should be enriched at the expense of another” in the Digest of Justinian,¹⁸ Roman law did not tie this principle analytically to the examples above.¹⁹

The civil law tradition springs from Roman law, but only in a few countries did the general principle that no one should be enriched by another’s loss or injury²⁰ become recognized as a source of obligation of equal stature with obligations arising from contract and wrongdoing. The countries that led this recognition were Scotland, Germany,²¹ and

¹² Birks, *supra* note 11, at 9; Radin, *supra* note 11, at 242.

¹³ Radin, *supra* note 11, at 248.

¹⁴ *Id.*

¹⁵ *Id.* at 246.

¹⁶ Roman law provided the action of “*condictio*,” which allowed recovery in situations including payments of nonexistent debts (such as mistaken payments), payments made on an immoral or unlawful ground (such as illegal contracts), and payments made for a purpose that was subsequently not realized. See Barry Nicholas, *Unjustified Enrichment*, 36 TUL. L. REV. 605, 613 (1962); see also Radin, *supra* note 11, at 253–54.

¹⁷ See WILLIAM A. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS 5–7 (1893).

¹⁸ See Nicholas, *supra* note 16, at 605 (quoting DIGEST OF JUSTINIAN 12.6.14).

¹⁹ See WILLIAM J. STEWART, THE LAW OF RESTITUTION IN SCOTLAND 8 (1992); Dot Reid, *Thomas Aquinas and Viscount Stair: The Influence of Scholastic Moral Theology on Stair’s Account of Restitution and Recompense*, 29 J. LEGAL HIST. 189, 192–93 (2008).

²⁰ Robert Feenstra, *Grotius’ Doctrine of Unjust Enrichment as a Source of Obligation: Its Origin and its Influence in Roman-Dutch Law*, in UNJUST ENRICHMENT 197, 197–200 (Eltjo J.H. Schrage ed., 2d ed. 1999); Nicholas, *supra* note 16, at 605.

²¹ Germany has given the doctrine an expansive and clear reading since the early twentieth century in the German Civil Code. While the German view is founded upon the Roman action of *condictio*, it represents a broad reading, extending *condictio* to its logical conclusion. See Nicholas, *supra* note 16, at 614–15; D.P. O’Connell, *Unjust Enrichment*, 5 AM. J. COMP. L. 2, 16 (1956).

South Africa.²² In other countries, the concept of unjust enrichment was recognized by courts but took many decades to develop.²³

Scottish law seems to have had a particular influence on British and American understandings of unjust enrichment. The Scottish system is a “mixed” legal system that has been shaped by both the civil law and British common law traditions, although it has never had separate courts of law and equity.²⁴ Unjust enrichment was first recognized in Scotland by James Dalrymple, the Viscount of Stair, in his treatise, *Institutions of the Law of Scotland*, published in 1681.²⁵ Stair saw himself as capturing the *jus commune*²⁶: “The law of Scotland (as of all other nations) at first could be no other than *aequum et bonum*, Equity and Expediency.”²⁷ Stair drew not only on Roman Law, but also on Aquinas and, through him, Aristotle.²⁸ Stair saw two mainsprings of obligation: obligations arising from consent (based on human will) and “obediential” obligations whose source is the will of God.²⁹ These obediential obligations include those founded on delict, restitution, and recompense.³⁰

Later Scottish writers like Lord Kames took up Stair’s project and the doctrine of unjust enrichment.³¹ Lord Kames’s discussion of unjust enrichment may have influenced the most famous case in the history of unjust enrichment: *Moses v. Macferlan*,³² written by Lord Mansfield in England.³³ Lord Mansfield had a “wide knowledge of continental law”

²² See Feenstra, *supra* note 20, at 236; Nils Jansen, *Farewell to Unjustified Enrichment?*, 20 EDINBURGH L. REV. 123, 123–24 (2016).

²³ France, which influenced Italy and the Netherlands, took a narrower view, codifying some Roman legal actions but not the principle of unjust enrichment. Instead, this principle was developed through judicial interpretation. See Feenstra, *supra* note 20, at 236; Paolo Gallo, *Remedies for Unjust Enrichment in the History of Italian Law and in the Codice Civile*, in UNJUST ENRICHMENT, *supra* note 20, at 275, 275–76; Christoph H. Schreuer, *Unjustified Enrichment in International Law*, 22 AM. J. COMP. L. 281, 282 (1974).

²⁴ See Daniel J. Carr, *Are Equity and Law in Scotland Fused, Separate or Intertwined?*, in EQUITY AND LAW, *supra* note 2, at 179, 181; Hector L. MacQueen & W. David H. Sellar, *Unjust Enrichment in Scots Law*, in UNJUST ENRICHMENT, *supra* note 20, at 289, 289.

²⁵ MacQueen & Sellar, *supra* note 24, at 289; see Carr, *supra* note 24, at 181–82.

²⁶ That is, the invariable principles of law common to all countries. This is a concept known to civil law jurists, and historically has been thought to comprise a combination of canon and Roman law. See Reid, *supra* note 19, at 191–92.

²⁷ Stair, INSTITUTIONS 1.1.16.

²⁸ Reid, *supra* note 19, at 196–97.

²⁹ MacQueen & Sellar, *supra* note 24, at 292.

³⁰ *Id.* at 293–95. Stair defined restitution as an obligation arising when “that which is anothers com[es] into our power, without his purpose to gift it to us, and yet, without our fault, ought to be Restored.” Stair, INSTITUTIONS 1.7.1. In Stair’s view recompense arises when “we are enriched by anothers Means, without purpose of Donation” because “it is against Nature, for a Man, upon anothers Damage, to increase his Profit.” *Id.* at 1.8.6.

³¹ See MacQueen & Sellar, *supra* note 24, at 289.

³² (1760) 97 Eng. Rep. 676; 2 Burr. 1005.

³³ See MacQueen & Sellar, *supra* note 24, at 315.

and “sympathy for the natural law tradition.”³⁴ Lord Mansfield was a Scot and had read Lord Kames’s *Principles of Equity*.³⁵ The opinion in *Moses v. Macferlan* is reminiscent of Stair’s and Kames’s vision of law as reflecting *aequum et bonum*.³⁶ Citations to Scottish understandings of unjust enrichment crop up in later American case law as well.³⁷

2. *English Development and Moses v. Macferlan*. — A distinctive feature of English law is that England developed courts of equity, known as the Courts of Chancery, that were separate from the courts of law.³⁸ The reasons for this development are contested, but an early and popular theory is that equity courts represented the conscience by giving relief from the rigor of general rules in particular cases.³⁹ There were many limits on equity courts’ discretion, including the maxim that Chancery courts provided relief only where there was no remedy at common law.⁴⁰ Relief at common law was considered a “right,” while equitable relief was discretionary.⁴¹ The types of remedies that courts of equity could give were much more varied than the money awards available from the courts of law.⁴² Moreover, at common law, plaintiffs submitted claims using forms of action that organized facts into elements that proved a cause of action.⁴³ This would produce an issue for the jury to decide.⁴⁴ In equity, however, the plaintiff would submit a narrative that attempted to demonstrate that equitable principles — admittedly undefined and potentially unlimited — had been infringed.⁴⁵

Unjust enrichment was a creature of both common law and equity; both traditions recognized sources of legal obligation outside the sphere of contract and tort. Medieval England had no doctrinal conception of “unjust enrichment”; indeed, the medieval English jurists Bracton, Britton, and Fleta divided the law of personal obligations into only two categories: those arising *ex contractu* and *ex delicto*.⁴⁶ However, some cases indicate that medieval English common law did recognize a source

³⁴ O’Connell, *supra* note 21, at 4.

³⁵ See MacQueen & Sellar, *supra* note 24, at 315–16.

³⁶ 97 Eng. Rep. at 680; see *infra* p. 2083.

³⁷ See, e.g., *infra* p. 2086.

³⁸ See P.G. Turner, *Fusion and Theories of Equity in Common Law Systems*, in EQUITY AND LAW, *supra* note 2, at 1, 3–5.

³⁹ See *id.* at 9–11.

⁴⁰ See *id.* at 11–12.

⁴¹ *Id.* at 21.

⁴² See Bray, *supra* note 2, at 34–35.

⁴³ See Turner, *supra* note 38, at 19–20.

⁴⁴ *Id.* at 20.

⁴⁵ *Id.*

⁴⁶ See H.D. Hazeltine, *Editor’s Preface* to R.M. JACKSON, THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW, at ix, xi (Harold Dexter Hazeltine ed., 1936); David Ibbetson, *Unjust Enrichment in England Before 1600*, in UNJUST ENRICHMENT, *supra* note 20, at 121, 121.

of obligation based on neither consent nor wrongdoing.⁴⁷ In approximately 1292, a woman brought a claim against her ex-husband who refused to return goods that her father had given them jointly as a marriage gift.⁴⁸ The ex-husband claimed that the father had transferred the goods as a gift, while the plaintiff asserted that the gift was conditional on the marriage.⁴⁹ The court allowed the woman to bring the suit, showing that the basis of recovery was not a contract, which would have been between the father and the ex-husband.⁵⁰ In addition, the courts of equity stepped in to supply remedies for unjust enrichment when the common law would not. In 1438, the Court of Chancery allowed an action by a woman who had paid a man thirty-six pounds in the expectation that he would marry her.⁵¹ She had not made a “contract of matrimony” and thus could not recover the money based on a contract.⁵²

The seventeenth century saw the rise of the action of *indebitatus assumpsit*, which overtook older actions of debt, *assumpsit*, and account.⁵³ *Indebitatus assumpsit* had many “common counts” that together captured many forms of unjust enrichment: money had and received, quantum meruit, quantum valebant, and money paid to the use of the defendant.⁵⁴ At first, this action aided only plaintiffs who could show that the defendant was indebted to them and had made an express promise to repay.⁵⁵ Over time, however, the court implied in fact a subsequent promise to repay even if the contract did not include an express provision.⁵⁶ The implied-in-fact idea later made way for a duty to repay solely implied in law.⁵⁷ *Indebitatus assumpsit* transformed to provide relief in cases where there was no contract made at all, such as when someone took a room at an inn without signing an express contract, or dropped off clothes at a tailor.⁵⁸ Cases like these can be read two ways: One reading is based on contract, albeit one implied in fact, where the

⁴⁷ See Ibbetson, *supra* note 46, at 124–25.

⁴⁸ *Id.* at 126.

⁴⁹ See *id.*

⁵⁰ See *id.* Common law courts sometimes provided remedies even when contracts were unenforceable. See *id.* at 141. Defendants were required to pay for the reasonable cost of goods received despite the fact that the contract was unenforceable due to its being made by a minor or a monk (who was considered civilly dead). *Id.* at 142–43.

⁵¹ *Id.* at 129 & n.43; J.B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 14–15 (1888).

⁵² Ibbetson, *supra* note 46, at 130 n.46; see *id.* at 129. She pleaded that she had no remedy at law, which may indicate a narrowing of common law jurisdiction in the fourteenth and fifteenth centuries. *Id.* at 129.

⁵³ See EDELMAN & BANT, *supra* note 10, at 9–10; EMILY SHERWIN & SAMUEL L. BRAY, REMEDIES 318, 729 (2020). The Latin term of *indebitatus assumpsit* means “being indebted he promised.” SHERWIN & BRAY, *supra* at 318.

⁵⁴ EDELMAN & BANT, *supra* note 10, at 46.

⁵⁵ See JACKSON, *supra* note 46, at 40–41.

⁵⁶ J.B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 53, 53–54 (1888).

⁵⁷ See *id.* at 54.

⁵⁸ See *id.* at 58.

court assumes a tacit agreement between the parties. Another reading is that these are unjust enrichment cases, where there was a transfer of unequal value without justification. Other situations make it clearer that *indebitatus assumpsit* cases acknowledged a source of obligation other than contract and tort, such as when money was paid by mistake, by compulsion, or because of an illegal contract.⁵⁹ Through *indebitatus assumpsit*, common law courts began to provide remedies for some claims that had previously found a home only in the Chancery courts.⁶⁰

The most influential case in the history of unjust enrichment was a 1760 decision written by Lord Mansfield.⁶¹ This was *Moses v. Macferlan*, in which Moses won back money from Macferlan, who had been enriched by a lawsuit he had improperly brought against Moses.⁶² These facts did not exactly match other cases that had succeeded under *indebitatus assumpsit*, so Lord Mansfield looked for an organizing principle that could explain past and future cases.⁶³ Lord Mansfield explained that “[t]his kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex aequo et bono*, the defendant ought to refund.”⁶⁴ He named other examples such as mistaken payment; failure of consideration; and receipt of money obtained through imposition, extortion, oppression, or undue influence.⁶⁵ Lord Mansfield concluded that “the gist of this kind of action is, that the defendant . . . is obliged by the ties of natural justice and equity to refund the money.”⁶⁶ Blackstone in his commentaries, published between 1765 and 1770, cites *Moses v. Macferlan* when documenting English law on implied contracts, following Lord Mansfield’s vision in its entirety.⁶⁷

Some jurists view Lord Mansfield’s point about unjust enrichment being an “equitable action” as evidence that the doctrine had surreptitiously found a place in the jurisdiction of common law courts.⁶⁸ However, against the long common law background of unjust enrichment and Lord Mansfield’s extensive understanding of the civil law tradition — and as we saw above, the potential influence of Scottish

⁵⁹ JACKSON, *supra* note 46, at 43, 51, 58, 89–91.

⁶⁰ See JAMES BARR AMES, LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 161–62 (William S. Hein Co. 1986) (1913).

⁶¹ See W.M.C. Gummow, *Moses v. Macferlan 250 Years On*, 68 WASH. & LEE L. REV. 881, 882 (2011).

⁶² (1760) 97 Eng. Rep. 676, 680; 2 Burr. 1005, 1011.

⁶³ See Gummow, *supra* note 61, at 883–84.

⁶⁴ 97 Eng. Rep. at 680.

⁶⁵ See *id.* at 680–81.

⁶⁶ *Id.* at 681.

⁶⁷ 3 WILLIAM BLACKSTONE, COMMENTARIES *162.

⁶⁸ See Edward T. Bishop, *Money Had and Received, An Equitable Action at Law*, 7 S. CAL. L. REV. 41, 41–43 (1933).

thinkers — a fairer reading is that Lord Mansfield was pointing to natural law to provide an organizing principle for a common law claim.⁶⁹

The history of *indebitatus assumpsit* shows that English law recognized a source of interpersonal obligation at common law other than contract (an agreement enforceable at law) or tort, although it gave this source of obligation the formal guise of a contract implied in law.⁷⁰

B. Early American Doctrine of Unjust Enrichment

This section canvasses early U.S. cases to show that unjust enrichment was well-established in eighteenth- and nineteenth-century common law and equity courts. As in earlier legal systems, these courts recognized a source of obligation that arose when one person enriched himself at the expense of another.⁷¹ This section also highlights the role of academics in early debates about unjust enrichment.

1. *Common Law.* — Lord Mansfield's influence is apparent in early U.S. case law.⁷² In *Northrop's Executors v. Graves*,⁷³ the Supreme Court of Errors of Connecticut required the defendant to return money, with interest, mistakenly paid to her.⁷⁴ In deciding the case, the court made clear it was “establish[ing] no new principle, nor depart[ing] from any well settled doctrine of the common law.”⁷⁵ The court held that the common law action of *indebitatus assumpsit* provided a remedy to the plaintiffs, tracing this conclusion back to Lord Mansfield and Blackstone.⁷⁶

Many courts came to the same conclusions without relying on Lord Mansfield. In *Duncan v. Baker*,⁷⁷ Solomon Duncan hired Jeremiah Baker to work for him for seven months, but Baker quit after two.⁷⁸

⁶⁹ See *id.* at 43–45.

⁷⁰ See JACKSON, *supra* note 46, at 119.

⁷¹ See, e.g., *Pickens' Ex'rs v. Walker's Heirs*, 33 Ky. (3 Dana) 167, 169 (1835) (“To impose such a liability . . . would be unjustly to enrich one party at the expense of the other.”); *Booker's Adm'r v. Bell's Ex'rs*, 6 Ky. (3 Bibb) 173, 176 (1813) (“[T]he inevitable result would be to enrich the one, to the prejudice of the other, contrary to the maxim both of the civil and common law, that *nemo debet locupletari aliena jactura*.”); *Mickles v. Dillaye*, 17 N.Y. 80, 92 (1858) (“[H]e should not be allowed, in a court of equity, to enrich himself at the expense of one who has acted innocently.”); *Preston v. Brown*, 35 Ohio St. 18, 28 (1878) (“[O]ne person will not be permitted, in equity, to enrich himself by the loss or at the expense of another”); *Whitney v. Richardson*, 31 Vt. 300, 306–07 (1858); *Effinger v. Hall*, 81 Va. 94, 102 (1885) (“[O]ne shall not be permitted unjustly to enrich himself at the expense of another.”); *Cadwallader v. Mason*, 1 Wythe 188, 189 (Va. Ch. 1793) (“[T]he mortgager . . . may [not] thus justly enrich himself out of the mortgagees loss.”).

⁷² Andrew Kull, *James Barr Ames and the Early Modern History of Unjust Enrichment*, 25 OXFORD J. LEGAL STUD. 297, 311–13 (2005) [hereinafter Kull, *History*].

⁷³ 19 Conn. 548 (1849).

⁷⁴ See *id.* at 554, 561.

⁷⁵ *Id.* at 554.

⁷⁶ *Id.* at 555.

⁷⁷ 21 Kan. 99 (1878).

⁷⁸ *Id.* at 104.

Duncan refused to pay him for the full two months because Baker had breached the contract and the contract did not contemplate payment on a pro rata basis.⁷⁹ The Kansas Supreme Court implied a promise to pay because “if the other party have derived a benefit from the part [of the contract] performed, it would be unjust to allow him to retain that without paying anything.”⁸⁰ For this proposition, the court relied on the scholarly work of Theophilus Parsons, a justice on Massachusetts’s highest court, and on the “leading case,” *Britton v. Turner*.⁸¹

A Supreme Court case from 1860, *Dermott v. Jones*,⁸² provides further evidence of the widespread recognition of an unjust enrichment principle within the common law. The Court proclaimed that “[s]uch is the law now in England and in the United States”⁸³ that “it would be unjust to allow [a party] to retain [the benefit of labor completed] without paying anything” despite the inability to bring a contractual claim.⁸⁴

2. *Equity*. — The principle of unjust enrichment was clearly articulated in early American equity cases. In *Cadwallader v. Mason*⁸⁵ in 1793, Virginia’s High Court of Chancery considered a case where a mortgagor had wrongfully remained in possession of land rightfully owned by the mortgagee.⁸⁶ The plaintiff demanded that the defendant deliver not only possession of land but also any profits during the period of wrongful possession.⁸⁷ The court provided both remedies because the mortgagor could not “justly enrich himself out of the mortgagee[’s] loss.”⁸⁸

In one of the most influential cases on equity, *Bright v. Boyd*,⁸⁹ Justice Story allowed the plaintiff, an innocent purchaser without knowledge of his defective title, to recover from the true owner the amount by which he had improved the land.⁹⁰ Justice Story saw himself as expanding a common law concept into the courts of equity: “[U]pon

⁷⁹ See *id.* at 104–05.

⁸⁰ *Id.* at 105 (citing THEOPHILUS PARSONS, 2 PARSONS ON CONTRACTS 523 (6th ed.)).

⁸¹ *Id.* (citing *Britton v. Turner*, 6 N.H. 481 (1834); PARSONS, *supra* note 80, at 523). The principle endured in similar cases. See, e.g., *Sch. Dist. No. 46 v. Lund*, 33 P. 595, 596 (Kan. 1893) (“[I]f a party has derived a benefit from the part [of the contract] performed, it would be unjust to allow him to retain that without paying anything.”).

⁸² 64 U.S. (23 How.) 220 (1860).

⁸³ *Id.* at 234.

⁸⁴ *Id.* at 233–34 (holding that the laborer could maintain an *indebitatus assumpsit* action).

⁸⁵ 1 Wythe 188 (Va. Ch. 1793).

⁸⁶ *Id.* at 188.

⁸⁷ *Id.*

⁸⁸ *Id.* at 189.

⁸⁹ 4 F. Cas. 134 (C.C.D. Me. 1843) (No. 1876).

⁹⁰ *Id.* at 135.

the maxim of the common law, ‘*nemo debet locupletari ex alterius incommodo*’⁹¹ or, as it is still more exactly expressed in the Digest of Justinian, ‘*jure naturae aequum est, neminem cum alterius detrimento et injuria fieri locupletiozem*.’⁹² Justice Story did not stop with this reference to Roman law, but pulled from a long civil law history: Vinnius, Pothier, the French Civil Code, Spanish law, Grotius, Puffendorf, and Thomas Rutherforth.⁹³ Justice Story also relied on Scottish thinkers like Stair: “The law of Scotland has allowed the like recompense to bona fide possessors, making valuable and permanent improvements.”⁹⁴

In arriving at a similar conclusion, the Georgia Supreme Court in 1874 saw itself as drawing on longstanding equitable principles: “The equitable right of a trespasser to be allowed the value of his improvements made on the land . . . is clearly recognized by our law [T]his is not a new principle introduced into our Code; it was a principle recognized by courts of equity in England long anterior to 1776.”⁹⁵

Mistaken improvement cases have often quoted the Roman maxim Justice Story highlighted. In *Griswold v. Bragg*,⁹⁶ a Connecticut court in 1880 relied upon the doctrine of unjust enrichment: “There is a natural equity which rebels at the idea that a *bona fide* occupant and reputed owner of land in a newly-settled country . . . should lose the benefit of the labor and money which he had expended in the erroneous belief that his title was absolute and perfect.”⁹⁷ The court continued, “[t]he maxim, often repeated in the decisions upon this subject, *nemo debet locupletari ex alterius incommodo*, tersely expresses the antagonism against the enrichment of one out of the honest mistake, and to the ruin, of another.”⁹⁸

3. *Identifying “Unjust Enrichment.”* — Although some court cases used the phrase “unjustly to enrich” in the mid-nineteenth century,⁹⁹ it was Harvard Law Professors James Barr Ames and William Keener

⁹¹ “No one ought to be enriched at the expense of another.” The phrase can be traced to a twelfth-century case as documented by Jenkins’s *Eight Centuries of Reports*. JENKINS, EIGHT CENTURIES OF REPORTS 4 (1777). It is similar to the phrase used by Lord Kames in his book on equity. See HENRY HOME, LORD KAMES, PRINCIPLES OF EQUITY 90 (Michael Lobban ed., Liberty Fund 2014) (1760); see also *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 83 (1823).

⁹² *Bright v. Boyd*, 4 F. Cas. 127, 133 (C.C.D. Me. 1841) (No. 1875). The translation from Latin is: “By natural law it is just that no one be enriched through the loss or injury of another.”

⁹³ See *id.* at 133–34.

⁹⁴ *Bright*, 4 F. Cas. at 134.

⁹⁵ *McPhee v. Guthrie & Co.*, 51 Ga. 83, 88–89 (1874).

⁹⁶ 48 F. 519 (C.C.D. Conn. 1880).

⁹⁷ *Id.* at 520–21.

⁹⁸ *Id.* at 521.

⁹⁹ E.g., *Pickens’ Ex’rs v. Walker’s Heirs*, 33 Ky. (3 Dana) 167, 169 (1835); *Effinger v. Hall*, 81 Va. 94, 102 (1885). The *Pickens* case sadly concerns a transaction involving enslaved people. In modern times, unjust enrichment is being used to seek slavery reparations. See generally Symposium, *The Jurisprudence of Slavery Reparations*, 84 B.U. L. REV. 1135 (2004).

who brought the label “unjust enrichment” to life. In the very first article of the *Harvard Law Review*,¹⁰⁰ published in 1887, Ames explained that the “comprehensive principle” behind constructive trusts and quasi-contracts is that “it is unconscientious for [one] to retain [an advantage] at another’s expense.”¹⁰¹ That same year, Keener published a collection of cases that “depend[ed] on the theory of unjust enrichment.”¹⁰² The next year, in an article tracing the history of implied *assumpsit*, Ames identified that “[q]uasi-contracts are founded . . . upon the fundamental principle of justice that no one ought unjustly to enrich himself at the expense of another.”¹⁰³ He noted that constructive trusts (enforced in equity) also “grow[] out of the principle of unjust enrichment.”¹⁰⁴ In the *Harvard Law Review* and in the lecture halls,¹⁰⁵ Ames and Keener concurrently described “a law of unjust enrichment in which law and equity were conjoined.”¹⁰⁶

In 1893, Keener published an influential treatise on quasi-contract, which divided contracts into three categories: express contracts, contracts implied in fact, and contracts implied in law (labeled “quasi-contracts”).¹⁰⁷ He insisted that this last category should not be viewed as a type of contractual obligation because: “[I]t is not scientific to treat as one and the same thing, an obligation that exists in every case because of the assent of the defendant, and an obligation that not only does not depend in any case upon his assent, but in many cases exists notwithstanding his dissent.”¹⁰⁸ In other words, implied-in-law contracts were different from contract because contract was understood through the lens of the will theory of contract.¹⁰⁹ Notably, the will theory of contract was relatively new, gaining prominence in the 1850s.¹¹⁰ If contractual obligations are based on the parties’ will, then categorizing obligations implied in law as contractual ones makes little sense.

¹⁰⁰ J.B. Ames, *Purchase for Value Without Notice*, 1 HARV. L. REV. 1 (1887).

¹⁰¹ *Id.* at 3.

¹⁰² WILLIAM A. KEENER, 1 A SELECTION OF CASES ON THE LAW OF QUASI-CONTRACTS, at v (1888).

¹⁰³ Ames, *supra* note 56, at 64.

¹⁰⁴ *Id.*

¹⁰⁵ See class notes of Austin Wakeman Scott on Trusts taught by Dean Ames (1906) (on file with the Harvard Law School Library).

¹⁰⁶ Kull, *History*, *supra* note 72, at 306.

¹⁰⁷ KEENER, *supra* note 17, at 3. He noted that “[u]njust enrichment [is] the most important source of the quasi-contractual obligation.” *Id.* at 19.

¹⁰⁸ *Id.* at 3–4. He was not the first to critique the theory of an “implied-in-law contract.” See *id.* at vi; see also *Hertzog v. Hertzog*, 29 Pa. 465, 467 (1857).

¹⁰⁹ “Will theories maintain that commitments are enforceable because the promisor has ‘willed’ or chosen to be bound by his commitment.” Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 272 (1986).

¹¹⁰ EDELMAN & BANT, *supra* note 10, at 16; DAVID IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 220 (1999).

Keener's and Ames's label "unjust enrichment" quickly made its way into the practice of law and to the courts. In a case against the U.S. government for taking of land in conjunction with a dam breach, the government defended itself against the claim of unjust enrichment by citing Keener's treatise.¹¹¹ In a New York appeals court case in 1898, the court rejected a plaintiff's quantum meruit claim, disagreeing that the "doctrine of 'unjust enrichment'" applied on the facts.¹¹² The court cited Keener's treatise on quasi-contract for the doctrine.¹¹³

Two academics sparred in the *Harvard Law Review* over the emerging theory of unjust enrichment. Professor Everett Abbot wrote that Keener "brought to the exploding point the uneasy consciousness of many legal writers that the usual division of obligations into [contract and tort] is inadequate, if not erroneous."¹¹⁴ But he objected that calling an enrichment "unjust" was not a principle upon which legal and illegal acts could be differentiated.¹¹⁵ Furthermore, Abbot thought the subject addressed should be best thought of as a subject categorized by the remedy of restitution offered in the cases: "[T]here is a remedy, differing from, but alternative with, damages, granted by courts of law upon legal wrongs . . . [It can] be conveniently called by a single name. For this remedy restitution seems to be the most apt designation."¹¹⁶

In a rebuttal entitled *Restitution or Unjust Enrichment*, Judge Learned Hand defended the idea of unjust enrichment as an alternative source of obligation to contract and tort, rather than a subject identified by a restitutionary remedy.¹¹⁷ Judge Hand defended reliance on an indefinite standard in crafting legal rules: "It can make no difference that . . . the concept of a promise [in contract cases] is more easily grasped than that of injustice. That may be a reason of refusing to recognize the rule of 'unjust enrichment' as a legal rule at all, but if so, it is a reason of policy, not of logic."¹¹⁸ Judge Hand also rejected Abbot's idea that unjust enrichment could be better explained as instances of restitutionary remedies given to breach of contract or torts. He explained that in many cases, such as those of mistake or of illegal contracts, there is no contract or tort that could plausibly explain the source of the obligation to make restitution.¹¹⁹ In these cases there is no breach of consensual obligation nor is there any wrongdoing, but "the defendant

¹¹¹ *Morris v. United States*, 30 Ct. Cl. 162, 168 (1895).

¹¹² *Young v. Farwell*, 52 N.Y.S. 283, 284 (N.Y. App. Div. 1898).

¹¹³ *See id.*

¹¹⁴ Everett V. Abbot, *Keener on Quasi-Contracts*, 10 HARV. L. REV. 209, 209 (1896).

¹¹⁵ *See id.* at 222.

¹¹⁶ *Id.* at 227.

¹¹⁷ Learned Hand, *Restitution or Unjust Enrichment*, 11 HARV. L. REV. 249, 257 (1897).

¹¹⁸ *Id.* at 249.

¹¹⁹ *Id.* at 257.

now simply holds what he has wrongfully, *ex aequo et bono*; that is the whole story.”¹²⁰

A 1938 Ohio Supreme Court case, *Hummel v. Hummel*,¹²¹ shows how extensive the understanding of “unjust enrichment” had become in practice.¹²² The case dealt with an oral contract between father and son for which the son had promised to hold the father’s insurance policy proceeds for the benefit of the father, but the son later refused to give these proceeds back.¹²³ The statute of frauds made the oral contract claim impossible.¹²⁴ The Ohio Supreme Court analyzed the father’s unjust enrichment claim extensively, quoting Keener, Woodward, Ames, and even Lord Mansfield.¹²⁵ It concluded: “[T]he law does not allow [the son] to retain the money to his unjust enrichment but recognizes a legal obligation, quasi ex contractu”¹²⁶

C. Attempted Fusion Across Law and Equity

Given unjust enrichment’s development in both common law and equity, it became a compelling candidate for fusion. This section traces the history of this attempt, arguing that the fusion of law and equity in the United States plays an explanatory role in unjust enrichment’s relative lack of popularity. A bridge between equitable remedies and the common law doctrine of quasi-contract was underway in the late-nineteenth century within U.S. courts. Scholars built on early decisions to fashion a theory of unjust enrichment that straddled both common law and equity, culminating in the 1937 First Restatement of Restitution. The timing coincided with the realist-driven fusion of common law and equity in federal and state courts, which may have contributed to a mischaracterization of unjust enrichment as primarily an equitable doctrine. Unjust enrichment came to be seen as a product of the judge’s conscience, rather than a source of interpersonal obligations equally as rooted in our law as contract and tort.

There is much at stake in deciding whether to treat unjust enrichment as an equitable or legal principle. In many ways the merger of law and equity remains elusive in the United States, and equity is still viewed as “subordinate, extraordinary, or unusual.”¹²⁷ Equitable doctrines gained a reputation as too expansive, ill-defined, and discretionary, and equity stopped being taught as a required course in American

¹²⁰ *Id.* at 255.

¹²¹ 14 N.E.2d 923 (Ohio 1938).

¹²² *See id.* at 926–27.

¹²³ *Id.* at 924, 927.

¹²⁴ *Id.* at 925.

¹²⁵ *Id.* at 926–27.

¹²⁶ *Id.* at 927.

¹²⁷ Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 693 (1990).

law schools.¹²⁸ The law is also littered with “remnants of equitable tests that continue to operate as prerequisites for access to certain remedies.”¹²⁹ The irreparable injury rule is sometimes applied to deny plaintiffs a remedy for unjust enrichment.¹³⁰ The irreparable injury test “commands that no equitable remedy will flow if adequate legal remedy exists.”¹³¹ But applying the irreparable injury rule makes little sense in the context of unjust enrichment if unjust enrichment was itself a “legal remedy” stemming from common law. Misclassification has further consequences given that only litigants with common law claims have a right to a jury trial.¹³²

The bridge between equitable remedies and common law quasi-contract began in the nineteenth century with American courts, which responded in varying degrees to legislative mergers of law and equity.¹³³ In an 1885 Indiana Supreme Court case, *Peirce v. Higgins*,¹³⁴ the court provided an equitable remedy for a quasi-contractual claim.¹³⁵ First the court explained that subrogation, the requested remedy, is an equitable one: “[T]he right results more from equity than from contract or *quasi* contract.”¹³⁶ Nevertheless, “[T]he principles of equity entered into that contract as a silent but potent factor . . . [The] parties in contracting assume that the law is one of the elements of their contract.”¹³⁷ Another early example of attempted fusion is a federal case from 1887 in which the court viewed the equitable remedy for mistaken improvers as an equitable defense to an action at law.¹³⁸ The court explained it had the power to combine equity and common law because the state legislature had “obliterated the line between equitable and legal defenses.”¹³⁹

Despite the scholarship of Ames and Keener, twentieth-century scholarship and case law most often considered unjust enrichment in quasi-contract and equity separately; even so, scholars increasingly

¹²⁸ Bray, *supra* note 2, at 43.

¹²⁹ Caprice L. Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 WASH. & LEE L. REV. 1027, 1032 (2011).

¹³⁰ See Konopka, *supra* note 7, at 2046–47.

¹³¹ *Id.*

¹³² See Roberts, *supra* note 129, at 1031–32.

¹³³ Some states, like Georgia, had not had separate equity courts since the founding. Other states, like Indiana, merged law and equity procedurally starting in the 1840s with statutes known as the Field Codes. See Charles T. McCormick, *The Fusion of Law and Equity in United States Courts*, 6 N.C. L. REV. 283, 284 n.2, 285 (1928); see also Kellen Funk, *The Union of Law and Equity, in EQUITY AND LAW*, *supra* note 2, at 46, 52.

¹³⁴ 101 Ind. 178 (1885).

¹³⁵ *Id.* at 181.

¹³⁶ *Id.* (quoting *Hodgson v. Shaw* (1834) 40 Eng. Rep. 70, 73).

¹³⁷ *Id.*

¹³⁸ See *Doe v. Roe*, 31 F. 97, 98 (C.C.S.D. Ga. 1887).

¹³⁹ *Id.*

noted similarities in the subjects.¹⁴⁰ In 1937, the American Law Institute officially recognized the unity between contracts implied in law and equitable remedies based on the principle of unjust enrichment in the First Restatement of the Law of Restitution: Quasi Contracts and Constructive Trusts.¹⁴¹ The original name included the “Law of Restitution and Unjust Enrichment,” but this was considered too long of a title.¹⁴² The name has been almost universally disparaged. Professor Peter Birks critiqued it best:

The series ‘contract (or, larger, consent), wrongs, unjust enrichment, and other causative events’ is on its face a well-dressed series in which every term is of the same kind. It is a classification of the events which generate legal rights and duties. When we substitute restitution for unjust enrichment, we appear to have invited a cuckoo into the nest. One term now refers, not to a cause, but to an effect.¹⁴³

Despite the blunder in name, the First Restatement was an important advancement and had a tremendous impact in the United States and abroad. The choice of organization separated quasi-contract from the Restatement on Contracts, and separated constructive trusts from the Restatement on Trusts.¹⁴⁴ Sitting side by side, these two fields represented the law of “restitution,” straddling both common law and equity. The Reporters, Professors Austin Scott and Warren Seavey, explained this unification thus: “In bringing these situations together under one heading, the Institute expresses the conviction that they are all subject to one unitary principle which heretofore has not had general recognition. In this it has recognized the tripartite division of the law into contracts, torts and restitution”¹⁴⁵ The Reporters were attuned to criticism that unjust enrichment was “so broad as to be meaningless.”¹⁴⁶ They responded that tort law turns on the definition of broad terms such as “wrong” that have been defined through an extensive set of rules, many of which are attributed more to history than to logic.¹⁴⁷ The same could be said for “unjustified” within the law of unjust enrichment. As for unclear doctrinal boundaries such as cases where facts could give rise to a claim in both contract and unjust enrichment or in

¹⁴⁰ Kull, *History*, *supra* note 72, at 307–09; John W. Wade, *The Literature of the Law of Restitution*, 19 HASTINGS L.J. 1087, 1087–91 (1968).

¹⁴¹ Kull, *History*, *supra* note 72, at 297–98.

¹⁴² *Id.* at 299–301.

¹⁴³ Peter Birks, *Misnomer*, in RESTITUTION: PAST, PRESENT AND FUTURE 1, 1 (W.R. Cornish et al. eds., 1998).

¹⁴⁴ Andrew Kull, *Three Restatements of Restitution*, 68 WASH. & LEE L. REV. 867, 868–70 (2011) [hereinafter Kull, *Three Restatements*].

¹⁴⁵ Warren A. Seavey & Austin W. Scott, *Restitution*, 54 LAW Q. REV. 29, 31 (1938).

¹⁴⁶ *Id.* at 36.

¹⁴⁷ *Id.*

both tort and unjust enrichment,¹⁴⁸ they argued that the plaintiff could choose which claim to bring based on what elements could be proven or the remedies available.¹⁴⁹

Many scholars of the history of unjust enrichment have spoken of a golden age after the First Restatement during which scholars and courts increased their interest in the field.¹⁵⁰ This golden age is said to have been followed by a decline around the 1970s.¹⁵¹ The decline is often attributed to the increased focus on public law in American law schools.¹⁵² However, it may be that the golden age of unjust enrichment never took place. A survey of law school curricula shows that contract and tort, but not unjust enrichment, were required first-year courses between 1949 and 2010.¹⁵³ Courses on equity were popularly required until at least 1950, but then largely disappeared from required curricula by 1969.¹⁵⁴ Some note the availability of electives, such as Harvard's restitution course taught almost every year between 1902 and 1978,¹⁵⁵ but the existence of an elective hardly shows that law schools contributed to a widespread understanding of unjust enrichment as a source of

¹⁴⁸ See *infra* ch. II, pp. 2101–23.

¹⁴⁹ Seavey & Scott, *supra* note 145, at 37.

¹⁵⁰ See Kull, *Three Restatements*, *supra* note 144, at 870; Saiman, *supra* note 6, at 101–02.

¹⁵¹ See Kull, *Three Restatements*, *supra* note 144, at 870; Saiman, *supra* note 6, at 102.

¹⁵² See John H. Langbein, *The Later History of Restitution*, in *RESTITUTION: PAST, PRESENT AND FUTURE*, *supra* note 143, at 57, 61. Tellingly, in the 1960s, the American Association of Law Schools advocated that “[c]ontracts can be made responsible for the material in restitution.” *Report of the Curriculum Committee: The Wasted Year in Legal Education*, in *ASSOCIATION OF AMERICAN LAW SCHOOLS 1960*, at 166, 173–74 (1960).

¹⁵³ AM. BAR ASS’N, *A SURVEY OF LAW SCHOOL CURRICULA: 2002–2010*, at 33, 41, 53, 66 (Catherine L. Carpenter ed., 2012); E. GORDON GEE & DONALD W. JACKSON, *FOLLOWING THE LEADER? THE UNEXAMINED CONSENSUS IN LAW SCHOOL CURRICULA 21–27* (1975). If we assume that it was included in a course on equity or remedies, even then what was taught would represent only a partial, and hasty, overview of the subject.

¹⁵⁴ GEE & JACKSON, *supra* note 153, at 21–27; see also Bray, *supra* note 2, at 43 (“‘The merger of law and equity practice led the profession . . . to the practical conclusion that equitable doctrine could be ignored.’ Meanwhile, in law schools, the Equity course disappeared from the curriculum, with only parts of it being incorporated into the new Remedies course.” (footnote omitted) (quoting Andrew Kull, *The Simplification of Private Law*, 51 J. LEGAL EDUC. 284, 290 (2001))).

¹⁵⁵ See Harvard’s course catalogues: HARVARD LAW SCH., *Harvard Law School Catalog*, HARV. LIBR., <https://listview.lib.harvard.edu/lists/drs-8508871> [<https://perma.cc/75M6-ARJJ>] (through 2006); HARVARD LAW SCH., *Law School of Harvard University, Announcements: Courses of Instruction*, HARV. LIBR., <https://listview.lib.harvard.edu/lists/drs-9045568> [<https://perma.cc/6E5Z-RZZZ>] (through 1970). The year after the First Restatement was published, 1938, marks the shift from calling this course “Quasi-Contract” to calling it “Restitution.” *Id.* In the 1890s and early 1900s, since so few courses were offered, it is likely that most law students would have taken the course on quasi-contracts. See *id.* However, as the range of electives dramatically increased throughout the twentieth century, it is unclear how many students would have taken a course on restitution. See *id.* In 2011, 2017, and 2020, Harvard has once again offered a course on restitution. See *Course Catalog*, HARV. L. SCH., <https://hls.harvard.edu/academics/curriculum/catalog/index.html> [<https://perma.cc/HM2J-WTSZ>].

private obligation akin to contract and tort. The relative paucity of relevant required courses can be observed in the following table¹⁵⁶:

	1949–50	1969–70	1974–75	2010–11
Required by 75–100% of law schools	Contracts* Torts* Property* Criminal Law*	Contracts* Torts* Property* Criminal Law* Civil Procedure* Constitutional Law	Contracts* Torts* Property* Civil Procedure* Criminal Law* Research & Writing* Constitutional Law	Contracts* Torts* Property* Civil Procedure* Criminal Law* Constitutional Law* Research & Writing* Evidence Legal Profession
Required by 50–75% of law schools	Legal Bibliography* Civil Procedure* Agency	Research & Writing* Evidence Legal Profession Legal Method/Process*	Legal Profession	Legal Writing
Required by 25–50% of law schools	Constitutional Law Introduction to Law* Equity Evidence Bills and Notes Trusts Wills & Administration Domestic Relations Sales	Business Organizations Taxation Commercial Transactions Remedies Estates	Legal Method/Process* Evidence Business Organizations Taxation	Business Organizations Criminal Procedure

Between the 1840s and 1940s, most state courts haltingly merged equity and law procedurally, and in 1938 so did federal courts.¹⁵⁷ This meant that courts could address common law claims and equitable claims as they arose in the same case without the jurisdictional and procedural hurdles that would normally accompany asking for a “second look” in equity.¹⁵⁸ The First Restatement, with its extensive references to legal technicalities based on the distinction between common law and equity, was lost in translation in a world governed by the new rules of civil procedure.¹⁵⁹ But the changes in procedure, instead of making it

¹⁵⁶ This data is taken from AM. BAR ASS’N, *supra* note 153, and GEE & JACKSON, *supra* note 153, at 27. * denotes courses that are required for 1Ls in over 50% of the schools requiring the course.

¹⁵⁷ See Funk, *supra* note 133, at 69; McCormick, *supra* note 133, at 285.

¹⁵⁸ See Henry E. Smith, *Equity as Second-Order Law: The Problem of Opportunism* 1–3 (Harvard Pub. Law, Working Paper No. 15-13, 2015), <https://ssrn.com/abstract=2617413> [<https://perma.cc/5LCF-EFNV>].

¹⁵⁹ See Kull, *Three Restatements*, *supra* note 144, at 871.

easier to access the equity side of the court system, may have discouraged the use of equitable principles.¹⁶⁰

Meanwhile, after the law-equity fusion of unjust enrichment in the First Restatement, courts struggled to understand the extent to which “unjust enrichment” should be categorized as an equitable action.¹⁶¹ The Kentucky Supreme Court, in a 2017 case where a building owner failed to pay a contractor, and thus a subcontractor’s work went uncompensated, considered unjust enrichment to be an equitable, not a legal claim: “Because unjust enrichment is rooted in equity and ‘law trumps equity,’ courts frequently note that ‘unjust enrichment is unavailable when the terms of an express contract control.’”¹⁶² The court ultimately decided that the circumstances supported the invocation of equity.¹⁶³ However, the court could have avoided this hurdle if it had considered unjust enrichment’s common law roots.

The fusion of the common law and equity sides of unjust enrichment created ambiguity that would not otherwise have been possible. The role of legal realism in the late twentieth century is crucial here. Realists questioned the validity of legal categories, preferring to see through them to find what was driving outcomes.¹⁶⁴ The categories of equity and law meant little beyond providing the cloak that dresses judges’ decisions. Debates about the true meaning of equity take on a more theoretical tone when the formal jurisdictional boundary between law and equity no longer exists.¹⁶⁵ Unjust enrichment, therefore, could more easily be seen as an equitable doctrine in a common law disguise, especially when the aspirational, natural law underpinnings are emphasized.

¹⁶⁰ I single out “equitable principles” because while courts “entirely lost the sense of equity” as an alternative mode of decisionmaking to common law, they enthusiastically embraced non-damage remedies like injunctions. See Bray, *supra* note 2, at 39–40.

¹⁶¹ See, e.g., *In re Light Cigarettes Mktg. Sales Practices Litig.*, 751 F. Supp. 2d 183, 194–96 (D. Me. 2010) (tracing confusion about whether unjust enrichment is an equitable remedy or an action at law and concluding that “unjust enrichment is a separate cause of action under Mississippi state law,” *id.* at 196); *In re Wal-Mart Wage & Hour Emp’t Practices Litig.*, 490 F. Supp. 2d 1091, 1116–26 (D. Nev. 2007) (analyzing Alaska, Hawaii, Idaho, Montana, Nebraska, Nevada, and Utah law and determining that in each of these states unjust enrichment is an equitable doctrine, not a legal one); *City of Cleveland v. Ohio Bureau of Workers’ Comp.*, 109 N.E.3d 84, 118–19 (Ohio Ct. App. 2018); *R.I. Hosp. Tr. Co. v. R.I. Covering Co.*, 190 A.2d 219, 220–21 (R.I. 1963) (“[U]njust enrichment is equitable in its nature, and generally it is applied . . . under some legal principle recognized in equity.”).

¹⁶² *Superior Steel, Inc. v. Ascent at Roebing’s Bridge, LLC*, 540 S.W.3d 770, 774–75, 778 (Ky. 2017) (citation omitted) (first quoting *Bell v. Commonwealth*, 423 S.W.3d 742, 748 (Ky. 2014); and then quoting *Furlong Dev. Co. v. Georgetown-Scott Cty. Planning & Zoning Comm’n*, 504 S.W.3d 34, 40 (Ky. 2016)). Notably, this case was also decided after the publication of the Third Restatement, suggesting that the Third Restatement has not clarified this issue for the courts.

¹⁶³ *Id.* at 781–82.

¹⁶⁴ Saiman, *supra* note 6, at 107.

¹⁶⁵ See for example the transformation and decline of the “equity will not” doctrines. See generally Samuel L. Bray, *Equity Will Not . . .* (Nov. 2019) (unpublished manuscript) (on file with the Harvard Law School Library).

Professor Emily Sherwin has argued that many cases in the postrealist world associated unjust enrichment with equity “in a broader sense” despite its common law origins, attributing this to unjust enrichment’s Roman antecedents and Lord Mansfield’s “expansive” use of the principle.¹⁶⁶ Professor Caprice Roberts has addressed this issue, writing: “The ghosts of equity loom over unjust enrichment and restitution law.”¹⁶⁷ She warns that “[o]ne should not mistakenly assume that restitution liability or remedies are inherently equitable.”¹⁶⁸

Scholars writing on the subject in the 1950s and 1960s vacillated between viewing unjust enrichment in its fully “aspirational” form and viewing it in its narrower form where unjust enrichment corrects the application of rigid rules in specific circumstances. Both these flavors of unjust enrichment seem to emphasize the “equitable” side of unjust enrichment, rather than its role as a source of interpersonal obligation. Professor John Dawson wrote in the 1950s that unjust enrichment was “both an aspiration and a standard for judgment.”¹⁶⁹ But he also thought that it was too broad to be treated as a rule of law and could never be fully realized in judicial decisions.¹⁷⁰ Professor Barry Nicholas, writing in the 1960s, characterized unjust enrichment as a corrective, or supplement, to rules of law.¹⁷¹ However, he considered this to be the “principal difficulty” of the doctrine: “[W]hat may to one man seem corrective may to another seem simply disruptive of the settled structure of the law.”¹⁷² In the 1970s, Professor George Palmer took a view of unjust enrichment that was broad and “equitable”: “Unjust enrichment is an indefinable idea in the same way that justice is indefinable This wide and imprecise idea has played a creative role in the development of an important branch of modern law.”¹⁷³ The scholarly debates on the essence of unjust enrichment may have contributed to judicial confusion about whether to treat unjust enrichment as an equitable, and therefore discretionary, doctrine, or a common law source of obligation.

D. Recent Developments

This section examines recent developments in the law of unjust enrichment, emphasizing contrasts between the doctrine in England and

¹⁶⁶ Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083, 2086–87, 2087 n.12 (2001) (collecting cases).

¹⁶⁷ Roberts, *supra* note 129, at 1043.

¹⁶⁸ *Id.* at 1043–44.

¹⁶⁹ JOHN P. DAWSON, UNJUST ENRICHMENT 4–5 (1951).

¹⁷⁰ *Id.* at 7.

¹⁷¹ Nicholas, *supra* note 16, at 607–10.

¹⁷² *Id.* at 607.

¹⁷³ GEORGE E. PALMER, 1 THE LAW OF RESTITUTION 4, 5 (1978).

the doctrine in the United States. Combining lessons from these contrasts, this section concludes by offering possible ways to theorize unjust enrichment more effectively.

I. English Development. — In England, judges and scholars concentrated on defining the source of the obligation itself, treating unjust enrichment as a legal concept and as its own category of law.¹⁷⁴ The first judicial recognition of “unjust enrichment” took place in 1942, in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*,¹⁷⁵ by Lord Wright, a judge who had written a glowing review¹⁷⁶ of the First Restatement of Restitution a few years earlier. The court case involved a Polish company that paid for machinery from Britain but never received the product because of the outbreak of war.¹⁷⁷ Lord Wright found that an obligation to return the payment to the Polish company arose from the circumstances: “The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort, though it resembles contract rather than tort.”¹⁷⁸ Lord Wright contended that “any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment.”¹⁷⁹

Despite Lord Wright’s 1942 recognition of unjust enrichment, English courts largely rejected the principle until the 1990s.¹⁸⁰ Academics like Professors Robert Goff, Gareth Jones, and Peter Birks were critical in bringing unjust enrichment to England and Commonwealth countries.¹⁸¹ They viewed unjust enrichment as a “principle of justice which the law recognises and gives effect to in a wide variety of claims.”¹⁸² Goff explained, “I see the law of restitution gradually developing towards the acceptance of a fully-fledged principle of unjust enrichment . . . with the emphasis changing from the identification of specific heads of recovery to the identification and closer definition of the limits to a generalized right of recovery.”¹⁸³

¹⁷⁴ See EDELMAN & BANT, *supra* note 10, at 13; see also Gummow, *supra* note 61, at 885.

¹⁷⁵ [1943] AC 32 (HL) (appeal taken from Eng.); see also EDELMAN & BANT, *supra* note 10, at 11–12.

¹⁷⁶ See Lord Wright, *Restatement of the Law of Restitution*, 51 HARV. L. REV. 369, 383 (1937) (book review).

¹⁷⁷ *Fibrosa*, [1943] AC at 33–34.

¹⁷⁸ *Id.* at 62.

¹⁷⁹ *Id.* at 61.

¹⁸⁰ See *Kleinwort Benson Ltd v. Lincoln City Council*, [1999] 2 AC 349 (HL) 406 (appeal taken from Eng.); *Orakpo v. Manson Invs. Ltd.*, [1978] AC 95 (HL) 104 (appeal taken from Eng.) (statement for the appellant company); *Holt v. Markham*, [1923] 1 KB 504 at 513 (Ct. App.).

¹⁸¹ See Steve Hedley, “Unjust Enrichment,” 54 CAMBRIDGE L.J. 578, 579 (1995); Langbein, *supra* note 152, at 61.

¹⁸² LORD GOFF OF CHIEVELEY & GARETH JONES, *THE LAW OF RESTITUTION* 13 (Gareth Jones ed., 7th ed. 2007).

¹⁸³ Robert Goff, *Appendix: The Search for Principle*, in *THE SEARCH FOR PRINCIPLE* 313, 324 (William Swadling & Gareth Jones eds., 1999).

Birks continued this project by advocating strenuously that unjust enrichment must be viewed as a causative event different from contract and tort.¹⁸⁴ Birks argued that “restitution” must mean “gain-based recovery”¹⁸⁵ and that this gain-based remedy can arise from contract, tort, and fiduciary relationships, as well as from unjust enrichment.¹⁸⁶ In Birks’s view, the works of Scott and Seavey, Goff and Jones, and Palmer had attempted to address all instances of cases where the law provided a “gain-based recovery.”¹⁸⁷ Birks proposed instead that:

[E]very right which can be realized in court arises either from a manifestation of consent such as a contract or independently of consent, as from a wrong, from an unjust enrichment (in the narrow sense) or from some other event. . . . [Unjust enrichment] includes only those enrichments at the expense of the claimant in which the reason for restitution is not contract or wrong. In other words, it includes mistaken payments and all other events materially identical to that central figure.¹⁸⁸

Birks’s perspective was that unjust enrichment never occurred as a result of a wrong. If the wrongdoing is considered the causative event, then the source of obligation is the wrong, and the claim should be resolved with the law of tort.¹⁸⁹ When a gain-based remedy is given due to wrongdoing, “[i]t is not the law of unjust enrichment which steps in. It is the law of restitution operating within the law of the wrong itself. Restitution is gain-based recovery. All that is happening is that gain-based recovery is made available for the wrong.”¹⁹⁰

Perhaps as a result of the focus on the source of obligation in unjust enrichment, the doctrine has become popular in the Commonwealth countries.¹⁹¹ Professor Chaim Saiman has also highlighted the extensive doctrinal treatment of unjust enrichment in English courts as an important factor in unjust enrichment’s vibrancy overseas.¹⁹²

2. *American Developments.* — In the late twentieth and early twenty-first centuries, the United States has seen a renewed interest in unjust enrichment. There has been increased attention in the academy, as measured by the rise in the number of scholars engaged in research and writing on the topic.¹⁹³ In 2011, the American Law Institute published the Third Restatement of the Law of Restitution and Unjust

¹⁸⁴ PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 17 (1985); Peter B.H. Birks, *A Letter to America: The New Restatement of Restitution*, GLOBAL JURIST FRONTIERS, 2003, vol. 3, issue 2, art. 2, at 1, 3.

¹⁸⁵ Birks, *supra* note 184, at 5.

¹⁸⁶ *Id.* at 5–10.

¹⁸⁷ *Id.* at 4, 11.

¹⁸⁸ *Id.* at 13.

¹⁸⁹ *See id.* at 17.

¹⁹⁰ *Id.*

¹⁹¹ *See* Saiman, *supra* note 6, at 99–100.

¹⁹² *Id.* at 103.

¹⁹³ *See* Roberts, *supra* note 129, at 1040–41.

Enrichment. Some anticipated that the Third Restatement would be “a Cinderella moment” for the law of restitution.¹⁹⁴ Roberts has called the Third Restatement the “primary catalyst” for the current “restitution revival.”¹⁹⁵

Unjust enrichment has been litigated in creative ways in the United States. Holocaust survivors have brought restitutionary claims in U.S. courts with increasing success.¹⁹⁶ There has also been renewed interest in claims for restitution by descendants of enslaved people and by Native Americans.¹⁹⁷ The doctrine has been leveraged in settlements between tobacco companies and state governments¹⁹⁸ and considered in recent opioid litigation.¹⁹⁹ It has also been used in cases between unmarried, cohabitating partners who end up parting ways after building a family and careers together.²⁰⁰

Saiman attributes some of the success to American embrace of the “natural law underpinnings” that “stress substantive justice over analytic theory.”²⁰¹ He contrasts this with Birksian scholarship that “sees restitution’s association with equity as simply a historical accident from the days of the divided bench.”²⁰² Roberts has identified positive and negative aspects of the broad natural law view of unjust enrichment, namely that it “simultaneously display[s] beauty while threatening an early demise of the American restitution revival. Beauty exists in the ability of restitution doctrine to adapt and aid cases with unusual fact patterns and unforeseen circumstances.”²⁰³

The Third Restatement offers a unique response to historical debates over unjust enrichment. The Restatement rejects the English focus on analyzing the source of the obligation, partly because it seems like an intractable question: “It is by no means obvious, as a theoretical matter, how ‘unjust enrichment’ should best be defined; whether it constitutes a rule of decision, a unifying theme, or something in between; or what

¹⁹⁴ James Steven Rogers, *Restitution for Wrongs and the Restatement (Third) of the Law of Restitution and Unjust Enrichment*, 42 WAKE FOREST L. REV. 55, 55 (2007).

¹⁹⁵ Roberts, *supra* note 129, at 1029.

¹⁹⁶ Michael J. Bazylar, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT’L L. 11, 13–14 (2002).

¹⁹⁷ See, e.g., *In re African-American Slave Descendants Litig.*, 471 F.3d 754 (7th Cir. 2006); see also *infra* ch. IV, pp. 2148–71.

¹⁹⁸ Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 GA. L. REV. 847, 848 (1999).

¹⁹⁹ E.g., *In re Actiq Sales & Mktg. Practices Litig.*, 307 F.R.D. 150, 163–64 (E.D. Pa. 2015).

²⁰⁰ See, e.g., *Salzman v. Bachrach*, 996 P.2d 1263, 1265–66 (Colo. 2000); see also *infra* ch. III, pp. 2124–47.

²⁰¹ Saiman, *supra* note 6, at 114–15.

²⁰² *Id.* at 114.

²⁰³ Roberts, *supra* note 129, at 1044 (footnote omitted).

role the principle would ideally play in our legal system.”²⁰⁴ The Third Restatement avoids a direct answer to the meaning of unjust enrichment and its doctrinal boundaries: “Such questions preoccupy much academic writing on the subject. This Restatement has been written on the assumption that the law of restitution and unjust enrichment can be usefully described without insisting on answers to any of them.”²⁰⁵

As a response to the instability produced in the post-fusion world, the Third Restatement’s rhetoric is decisively against a broad and expansive view of unjust enrichment.²⁰⁶ The Third Restatement worries that usually “natural justice and equity do not in fact provide an adequate guide to decision.”²⁰⁷ “[I]t is difficult to avoid,” it goes on, “the objection that sees in ‘unjust enrichment,’ at best, a name for a legal conclusion that remains to be explained; at worst, an open-ended and potentially unprincipled charter of liability.”²⁰⁸ But perhaps the Third Restatement’s reaction to the dangers of a broad, equitable principle is too extreme. Its approach may make the doctrine overly dependent on historical usages. The definition used by the Third Restatement is “enrichment that lacks an adequate legal basis.”²⁰⁹ The “legal basis” lies in other sources of law: contract, trusts, gifts, and so on. Unjust enrichment, then, merely fills in the space around consensual transfers of wealth. While this provides more guidance than a broad theory of natural law, it severely restricts the occasions when a “legally” valid contract can be invalidated by unjust enrichment.²¹⁰

Similarly, the Third Restatement relies on tort’s definition of wrong to decide whether restitution for a wrong should be granted: “Restitution [for wrongs] is an alternative to damages. The claimant is free to choose restitution when it offers a more favorable recovery, but he may not have both restitution and damages for the same wrong.”²¹¹ It leaves unjust enrichment as purely “‘parasitic’ on other law for the basic judgment of right and wrong.”²¹² As Professor James Rogers argued while the Third Restatement was being drafted: “The black-letter text of the current proposed Restatement might be read as neutral on the question whether restitution is an independent basis of liability.”²¹³ However, the

²⁰⁴ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a (AM. LAW INST. 2011).

²⁰⁵ *Id.*

²⁰⁶ See Roberts, *supra* note 129, at 1045.

²⁰⁷ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (AM. LAW INST. 2011).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ See *id.* § 2 cmt. c.

²¹¹ *Id.* ch. 5 at 3.

²¹² Rogers, *supra* note 194, at 67.

²¹³ *Id.* at 62.

comments and reporter's notes "are very clear in stating that the determination of rightful versus wrongful conduct is to be based solely on other law; that is, the unjust enrichment principle plays no independent substantive role."²¹⁴

In sum, the Third Restatement often ties unjust enrichment to other sources of obligation and assumes that if a gain-based remedy has been given, then the principle behind the remedy is unjust enrichment.

Conclusion & Lessons Learned

Organizing the source of obligation in law around consent and wrongdoing has long been recognized as inadequate. How can we characterize obligations in the space beyond? Perhaps unjust enrichment provides the background rules against which the will theory of contract emerges. It operates as a form of "Aristotelian justice," which aims to maintain "an equilibrium of goods among members of society."²¹⁵ If a party would seek to skew that balance, it must justify an unequal transfer of wealth. For too long, U.S. academic writing has displayed little concern for the analytic theory of unjust enrichment.²¹⁶ One way forward is to refocus on unjust enrichment as a source of obligation independent from consent and wrongdoing.

Another way forward is to study in more depth the precise strains of unjust enrichment that were employed at common law and those that were employed in the courts of equity.²¹⁷ By redividing unjust enrichment between law and equity, scholars could give courts a clearer footing as to when they are acting in a discretionary and equitable capacity and when they are applying formal, common law rules. In some ways, this path might make unjust enrichment more easily accessible in the U.S. courts of a post-fusion world.

²¹⁴ *Id.* at 63.

²¹⁵ Roberts, *supra* note 129, at 1045 n.98 (quoting L.L. Fuller & W.R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 *YALE L.J.* 52, 56 (1936)).

²¹⁶ See Saiman, *supra* note 6, at 117.

²¹⁷ *Cf.* Bray, *supra* note 2, at 44–45.