
CHAPTER TWO

THE FUTURE OF RESTITUTION AND EQUITY IN THE DISTRIBUTION OF FUNDS RECOVERED FROM PONZI SCHEMES AND OTHER MULTI-VICTIM FRAUDS

The term “Ponzi scheme” refers to a class of frauds in which the fraudster promises above-market returns on investments in an investment fund or business enterprise.¹ Unbeknownst to victims, the fraudster’s fund or enterprise exists only on paper: no trades are being made, no goods are being produced or sold.² Instead, the fraudster fabricates records or other evidence documenting the purported success of the fund or enterprise. Because the nature of a Ponzi scheme is to operate in a state of prolonged insolvency, the collapse of a Ponzi scheme frequently results in bankruptcy proceedings.³

At this denouement in the Ponzi scheme, the law of unjust enrichment assumes great significance in at least two respects. First, individuals who withdrew more money than they “invested” in the Ponzi scheme may be subject to a restitution suit from a bankruptcy receiver, for the value of that surplus.⁴ Such money is often held in a bankruptcy estate or receivership fund.⁵ Second, the contents of this fund are distributed to claimants, with the principles of restitution determining an order of priority among victims and general creditors.⁶

The law of unjust enrichment can therefore have billions of dollars of practical consequences for fraud victims. When the Bernie Madoff Ponzi scheme collapsed in 2008, many of the thousands of victims hoped for redress through the ensuing bankruptcy proceedings, alleging losses collectively totaling in the billions.⁷ Here, with respect to the first issue, courts ultimately rejected restitution claims that would have added six billion dollars to the total funds available for distribution.⁸

This Chapter revisits restitution at the second stage of the proceedings, namely the distribution of the bankruptcy estate to victims. In imposing a distribution, courts face a recurring problem. Because Ponzi

¹ Office of Investor Education and Advocacy, *Ponzi Schemes*, U.S. SEC. & EXCHANGE COMM’N (Oct. 9, 2013), <https://www.sec.gov/fast-answers/answersponzihtm.html> [<https://perma.cc/G8FC-BVSB>].

² *Id.*

³ R. Alexander Pilmer & Mark T. Cramer, *Swindlers’ List*, L.A. LAW., June 2009, at 22, 24.

⁴ See Mallory A. Sullivan, Note, *When the Bezzle Bursts: Restitutionary Distribution of Assets After Ponzi Schemes Enter Bankruptcy*, 68 WASH. & LEE L. REV. 1589, 1626 (2011).

⁵ See Pilmer & Cramer, *supra* note 3, at 24.

⁶ See Andrew Kull, *Common-Law Restitution and the Madoff Liquidation*, 92 B.U. L. REV. 939, 940 (2012).

⁷ *Id.* at 939.

⁸ *Id.* at 957.

schemes typically commingle the funds of their investors, some victims may be able to “trace” their assets and identify them in the commingled funds, but others will not.⁹ How is the deciding court to reason about what the rules of restitution and equity entail? Recently, a trend has emerged of courts emphasizing their broad discretion to adopt a “sharing” solution, according to which each victim recovers a pro rata share of his investment in the Ponzi scheme, regardless of whether or not he can identify his property.¹⁰ This Chapter examines said trend and finds it, on the whole, a branch cut off from the vine.

To justify the imposition of sharing distributions, many courts have invoked unstructured notions of equity, with an easy certitude that belies their tension with the common law tradition of restitution.¹¹ In particular, the centrality of tracing, a venerable doctrine in the restitution canon,¹² is commonly ignored. Serious consequences follow.

From an external perspective, over the medium- and the long-term, this way of disposing of multi-victim fraud distributions is maladapted to achieving the law’s ends. To the extent the exercise of open-ended discretion undermines the coherence of the law of restitution, the law’s aims of procedural and substantive justice are also undermined.

From an internal perspective, this mode of judicial decisionmaking — equating equity with discretion unbounded by the law of restitution — is damaging to the practice of judging. “Practice” is used here in its MacIntyrian sense,¹³ to emphasize the way in which these decisions embody or neglect the values essential to the flourishing of judging as a distinct sphere of intrinsically valuable activity.

Ponzi schemes are a now-notorious, and surprisingly frequent, form of fraud,¹⁴ in which victims and bankruptcy trustees bring claims in restitution. Courts in the United States, however, decide these highly complex cases in ways that are unmoored from traditional restitution doctrines. The consequence is an unstable jurisprudence that does not clearly serve the internal or external ends of the law. Reconnecting

⁹ See Claire Seaton Rosa, Note, *Should Owners Have to Share? An Examination of Forced Sharing in the Name of Fairness in Recent Multiple Fraud Victim Cases*, 90 B.U. L. REV. 1331, 1333 (2010). Investors who have wired cash to a Ponzi account are much less likely to be able to trace their funds than are, for example, those who have transferred signed stock certificates.

¹⁰ See *id.*; see also Andrew Kull, Essay, *Ponzi, Property, and Luck*, 100 IOWA L. REV. 291, 298 (2014).

¹¹ See, e.g., *United States v. Durham*, 86 F.3d 70, 72 (5th Cir. 1996); *SEC v. Elliott*, 953 F.2d 1560, 1570 (11th Cir. 1992).

¹² See Kull, *supra* note 10, at 294–98.

¹³ See ALASDAIR MACINTYRE, *AFTER VIRTUE* 187–88 (2d ed. 1984).

¹⁴ See Amy Sepinwall, *Righting Others’ Wrongs: A Critical Look at Clawbacks in Madoff-Type Ponzi Schemes and Other Frauds*, 78 BROOK. L. REV. 1, 6 (2012); Sullivan, *supra* note 4, at 1591–92.

judicial decisionmaking to the rich body of restitution doctrine that already exists — especially the orthodox tracing doctrines — will reequip judges to render “equitable” judgments more coherently and effectively.

A. Tracing Rules for the Distribution of Ponzi Funds

The fundamental distinction between unjust enrichment and other areas of private law, such as torts, is that claims sounding in unjust enrichment aim at restitutionary remedies, which turn on the evaluation of gains, not harms. Nor is intentional wrongdoing essential to claims in restitution.¹⁵ This section will briefly canvas three restitution doctrines necessary to understand the basic Ponzi scheme case law. All three are “tracing rules.”¹⁶

The first doctrine, which allows restitution from “identifiable property,” is foundational. It explains how the law of restitution provides a remedy for unjust enrichment in the simplest case, where the victim’s property or its product is easily picked out from the fraudster’s property. The second doctrine, the rule of the lowest intermediate balance, addresses a question common once the victim’s and the fraudster’s funds become commingled: namely, as the balance of the fund fluctuates over time, how much of it should be deemed the property of the victims, taken as a group, and how much the property of the fraudster. Finally, the third “doctrine” is actually a collection of rules that distinguishes the remedy due to victims who cannot trace their property through commingled funds from the remedy due to those victims who can.

i. Restitution from Identifiable Property. — In the paradigmatic case, where a claim for restitution is successful, the plaintiff is entitled to a return of the “identifiable property” in virtue of which the defendant was unjustly enriched.¹⁷ If this property is both distinctive and in the same form as when the defendant assumed possession of it, then its return poses no special difficulty.¹⁸ For example, if farmer *F1* was found unjustly enriched in the amount of 100 of farmer *F2*’s branded cattle, then all that must be done is to separate *F2*’s branded cattle from the remainder of *F1*’s herd and return them to *F2*.

What does the law of restitution require, however, if *F1* has sold *F2*’s branded cattle in exchange for gold bullion? According to the Restatement (Third) of Restitution and Unjust Enrichment: “A claimant entitled to restitution from property may obtain restitution from any traceable product of that property, without regard to subsequent changes of form.”¹⁹ That *F1* has sold *F2*’s branded cattle, then, poses no bar to

¹⁵ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. f (AM. LAW INST. 2011).

¹⁶ See Rosa, *supra* note 9, at 1341.

¹⁷ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 58 cmt. a.

¹⁸ See *id.*

¹⁹ *Id.* § 58(1).

F2's recovery against *F1* for the gold bullion. *F1*'s gold bullion is the "traceable product" of *F2*'s branded cattle, and so, as long as *F2* can identify the gold bullion as such, *F2* may recover it in restitution for *F1*'s unjust enrichment with respect to his branded cattle.

2. *Lowest Intermediate Balance.* — Although tracing is a straightforward exercise in the stylized barter scenario described above, real-world restitution cases often involve a more complex set of actions. The rule of intermediate balance governs when the funds in an individual's account increase as a consequence of a single instance of unjust enrichment, but then later rise and fall as that individual engages in a series of unrelated transactions.

The rule states that "[a]fter one or more withdrawals from a commingled fund, the portion of the remainder that may be identified as the traceable product of the claimant's property may not exceed the fund's lowest intermediate balance."²⁰ The law of restitution presumes that, for tracing purposes at least, an individual spends down all the funds to which he is entitled prior to spending the funds to which he is not.²¹

To recalibrate the above example: *F1* sells *F2*'s cattle for \$10,000, payment for which is deposited in a previously empty checking account. *F1* then makes a withdrawal of \$5,000 to finance personal consumption. Finally, *F1* deposits \$15,000 of his own funds in the account, raising the total to \$20,000. The lowest intermediate balance in *F1*'s account over the course of this period is \$5,000. If, then, *F2* succeeds in a claim of restitution at the end of this period, the court will deem *F1* as holding \$5,000 in constructive trust²² for *F2*. The remaining \$5,000 will be owed to *F2* as an unsecured claim in restitution.

3. *Other Rules for Tracing Through Commingled Funds.* — In certain cases, one claimant will contribute to a fund that also contains funds contributed by other claimants and by the wrongdoer himself. In such cases, the rule of the lowest intermediate balance applies to determine which funds in the account belong to the wrongdoer and which belong to the claimants.²³ Once the amount to which claimants are jointly entitled is determined, the claimants share ratably based on the amounts of their contributions.²⁴

Consider, for example, the case in which a fraudster induces three individuals, *A*, *B*, and *C*, to make deposits of \$1,000, \$2,000, and \$3,000 respectively into the fraudster's account, which had already contained \$10,000. After *C* made his deposit, the fraudster withdrew a total of

²⁰ *Id.* § 59(2)(c).

²¹ See *Cunningham v. Brown*, 265 U.S. 1, 12 (1924) (citing *Knatchbull v. Hallett* [1879] 41 LT 186 (Ch) at X (Eng.)).

²² A constructive trust is a remedy whereby the wrongdoer is deemed to hold what he possesses unjustly vis-à-vis his victim for that victim's benefit. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 59. This property is then returned to the victim.

²³ *Id.* § 59(2)(c).

²⁴ *Id.* § 59(4)(b).

\$13,000 to finance personal consumption, drawing the balance down to \$3000. Applying the rule of lowest intermediate balance, the \$13,000 withdrawn by the fraudster is presumed to contain the \$10,000 of the fraudster's own money. The remaining \$3000 is shared ratably, resulting in recovery of \$500, \$1000, and \$1500, to *A*, *B*, and *C* respectively.

It is important to note, however, that tracing rules will not necessarily determine priority among restitution claimants if, seeking to recover from a commingled fund, the claimants' interests are "otherwise indistinguishable," or their "equitable position is identical."²⁵

All being innocent victims of the same fraud, however, does not automatically render claimants' equitable positions identical. As the Restatement explains, "The law of unjust enrichment does not impose a rule of contribution or loss-sharing between the victims of common or related injuries . . ."²⁶ Claimants' ability or inability to trace their property into a commingled fund can, for example, represent a significant difference in their equitable positions, even if their injuries all share a common cause.²⁷

B. The Present Paradigm: Cunningham v. Brown and Its Prodigal Sons

This Chapter argues that present restitution jurisprudence is in a counterproductive rupture with the tradition that these black letter tracing doctrines represent. Accordingly, this section looks to the undisputed embodiment of the tradition in this area: *Cunningham v. Brown*,²⁸ a 1924 Supreme Court case positioned at the bankruptcy stage of the first ever Ponzi scheme. This section then looks to *SEC v. Elliott*²⁹ and *United States v. Durham*,³⁰ two similar cases from the 1990s that, despite featuring approving citations to *Cunningham*, Professor Andrew Kull and others have identified as establishing a new paradigm.

i. Cunningham v. Brown. — *Cunningham* is the original Ponzi case³¹ and remains the keystone precedent for judicial reasoning about restitution in the context of multi-victim frauds.³² In December 1919, Charles Ponzi orchestrated the beginnings of what would become a fraud of tremendous proportions.³³ He advertised his involvement in a

²⁵ *Id.* § 59 cmt. g. The precise extension of this rule is subtle and will be the subject of further discussion through this Chapter's treatment of the relevant Ponzi scheme cases.

²⁶ *Id.*

²⁷ *Id.*

²⁸ 265 U.S. 1 (1924).

²⁹ 953 F.2d 1560 (11th Cir. 1992).

³⁰ 86 F.3d 70 (5th Cir. 1996).

³¹ Kull, *supra* note 10, at 304.

³² *See id.* at 304–05; *see also Elliott*, 953 F.2d at 1570; *United States v. Gettel*, No. 16-CR-01099, 2017 WL 3966635, at *5 (S.D. Cal. Sept. 7, 2017).

³³ *Cunningham*, 265 U.S. at 7.

profitable business enterprise, namely of “buying international postal coupons in foreign countries and selling them in other countries at 100 per cent. profit.”³⁴ Every \$100 investors loaned, Ponzi promised, he would repay for \$150 in ninety days.³⁵ His scheme was wildly successful: “Within eight months he took in \$9,582,000, for which he issued his notes for \$14,374,000.”³⁶ An exposé of Ponzi’s scheme published by a well-circulated Boston newspaper precipitated a “wild scramble” of investors seeking to withdraw their funds before Ponzi’s account was utterly emptied.³⁷ In the ensuing bankruptcy proceedings, bankruptcy trustees brought actions in equity against six victims who, trustees argued, had received sums from the Ponzi account that constituted an “unlawful preference[]” under the Bankruptcy Act.³⁸ The lower courts held that the defendants’ receipt of funds was not unlawful, because their funds were traceable under the rule of lowest intermediate balance.³⁹

Chief Justice Taft, writing for the Court, held that the law of restitution foreclosed the lower court’s holding.⁴⁰ The Court characterized the rule of lowest intermediate balance as a device fixing how much of a fund belonged to victims as a whole, rather than as identifying the funds of any particular victim.⁴¹ In the case of a commingled fund, using the intermediate balance rule to draw distinctions among victims who were all “equally innocent” and equally incapable of “identify[ing] their payments” would be inequitable.⁴² Therefore, the Court’s resolution of this case under the maxim of “equality is equity” explicitly treated the traceability of victims’ funds as essential, not incidental, to determining equity.⁴³

2. *The Elliott-Durham Approach.* — Fissures in the orthodoxy represented by *Cunningham* did not appear with any prominence until the 1990s, with *SEC v. Elliott*.⁴⁴ Charles Elliott operated a Ponzi scheme that defrauded thousands, including by fraudulently inducing victims to deposit stock certificates in the Ponzi account.⁴⁵ Defendants argued *inter alia* that they were entitled to a return of their certificates under the law of restitution, because Elliott obtained them fraudulently.⁴⁶ Such

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 8.

³⁷ *Id.*

³⁸ *Id.* at 7.

³⁹ *Id.* at 12.

⁴⁰ *Id.* at 9–11.

⁴¹ *Id.* at 13.

⁴² *Id.*

⁴³ *Id.* at 13–14.

⁴⁴ Kull, *supra* note 10, at 298.

⁴⁵ *SEC v. Elliott*, 953 F.2d 1560, 1565 (11th Cir. 1992).

⁴⁶ *Id.* at 1569.

certificates were marked with defendants' names and so subject to specific identification.⁴⁷

Nevertheless, the circuit court upheld the district court's decision to disallow the application of tracing rules, agreeing that "[t]o allow any individual to elevate his position over that of other investors similarly 'victimized' by asserting claims for restitution . . . would create inequitable results."⁴⁸ Reasoning that "[a]ll investors were defrauded [and] [a]ll investors were cleverly persuaded to part with their securities," the circuit affirmed that "all of the former securities owners occupied the same legal position" — and that, therefore, *Cunningham's* "equality is equity" pronouncement supported the holding of the district court.⁴⁹

Durham centered around a multi-victim fraud in which a "total of \$806,750 was defrauded from thirteen entities or individuals."⁵⁰ By the time of the fraudster's arrest, only around \$83,000 of that money remained.⁵¹ Of that \$83,000, uncontested evidence established that approximately \$71,000 could be traced to plaintiff Claremont Properties.⁵² The lower court declined to apply tracing, however, and distributed the \$83,000 to claimants pro rata.⁵³ Citing *Elliott*, the court reasoned that applying the tracing rules was not necessary because "[s]itting in equity, the district court is a 'court of conscience.'"⁵⁴ The district court was within its discretion because "all the fraud victims were in equal positions" and "it seemed inequitable to allow Claremont to benefit merely because the defendants spent the other victims' funds first."⁵⁵

3. *Comparative Analysis.* — The outlook for the *Elliott-Durham* approach as a faithful interpretation of *Cunningham* is bleak. *Cunningham* directly observed the significance of tracing rules,⁵⁶ and held that restitution required a pro rata distribution of the Ponzi accounts on the principle that, with all victims similarly incapable of tracing the funds of which they were defrauded, no basis in equity existed for preferring any one claimant over any other.⁵⁷ It is in this sense that Chief Justice Taft wrote: "[E]quality is equity."⁵⁸ *Elliott-Durham*, on the other hand, folded this legal aphorism into a fig leaf for covering exercises of discretion unstructured by doctrine or tradition. Even

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 1569–70.

⁵⁰ *United States v. Durham*, 86 F.3d 70, 71 (5th Cir. 1996).

⁵¹ *Id.*

⁵² *Id.* at 72.

⁵³ *Id.*

⁵⁴ *Id.* at 73 (quoting *Wilson v. Wall*, 73 U.S. (6 Wall.) 83, 90 (1867)).

⁵⁵ *Id.*

⁵⁶ *Cunningham v. Brown*, 265 U.S. 1, 11 (1924).

⁵⁷ *Id.* at 11, 13.

⁵⁸ *Id.* at 13.

where victims' property was indisputably traceable through the commingled funds, the *Elliott-Durham* judges arrogated to themselves the authority to ignore tracing doctrine. *Elliott-Durham* constructed its vision of equity on the notion that differences in ability to trace funds are arbitrary, because the ability to trace one's investments through a commingled fund is the consequence of fortuity.⁵⁹

But whither does this principle come? This asserted relation between fortuity and arbitrariness in equity is not an analytic truth.⁶⁰ As observed above, neither is it a relation supported by *Cunningham*.⁶¹ If the *Elliott-Durham* courts are channeling any other legal sources in restitution, they are doing so without naming them, and thus fail to distinguish their supposed acts of judging from private determinations about what is fair.

It might be argued, however, that this conclusion is premature because bankruptcy law, not just restitution, plays a role in the disposition of these cases. Although these cases regularly unwind in a bankruptcy context where judges do possess equitable discretion,⁶² this reply is principally misdirected. In his discussion of the Madoff bankruptcy, Kull articulates the fundamental relationship between restitution and bankruptcy: bankruptcy imposes a "procedural overlay" on equitable property interests — creatures of restitution belonging to "the state-law background."⁶³ The proper operation of bankruptcy law, therefore, takes what is due in restitution as its predicate; it does not undermine or rewrite the substance of restitution or the property interests it protects.⁶⁴

But even if such were not the case, bankruptcy would still not support the kind of discretion *Elliott-Durham* requires. Mallory Sullivan observes that the spirit of the Bankruptcy Code is the equal treatment of similarly situated creditors.⁶⁵ But it does not assume that all victims are similarly situated. Sullivan argues, for example, that because net winners reasonably rely on the legitimacy of their withdrawals, they are not similarly situated to investors who failed to withdraw. The Bankruptcy Code's "equal treatment" dictum, therefore, does not support receivership "clawbacks."⁶⁶ Professor Amy Sepinwall argues for the same conclusion, on the basis that the code's dictum unfairly treats

⁵⁹ See, e.g., *Durham*, 86 F.3d at 72.

⁶⁰ Kull, *supra* note 10, at 319.

⁶¹ *Id.* at 305–06.

⁶² Kathy Bazoian Phelps, *Handling Claims in Ponzi Scheme Bankruptcy and Receivership Cases*, 42 GOLDEN GATE U. L. REV. 567, 572–77 (2012).

⁶³ Kull, *supra* note 6, at 940.

⁶⁴ *Id.*

⁶⁵ Sullivan, *supra* note 4, at 1607.

⁶⁶ *Id.* at 1634.

the net winners as “mere means” to compensate net losers.⁶⁷ If the Bankruptcy Code does not demand “clawbacks” from net winners, then it certainly does not demand pro rata sharing of traceable property.

Neither can these courts find refuge in background property norms. In fact, as Kull persuasively argues, these courts’ rulings actually fundamentally rework said norms.⁶⁸ The combined effect of *Elliott-Durham* is to “advance the moment of irretrievable loss for the fraud victim: from the point at which a lost asset can no longer be retrieved, back to the point at which the victim first parted with it.”⁶⁹ Such an approach misunderstands restitution as adapted to “allocate losses” rather than to “return[] property to its owners.”⁷⁰ This allowance is a “radical” use of equity to *remake* the ownership norms essential to the law of property,⁷¹ rather than recognizing that equity must instead *follow* the law.⁷²

C. No Momentary Dalliance: A Reaffirmation of Elliott-Durham

There would be no special reason for concern over this rupture, however, if the trend was merely a fad. Yet Kull’s *Ponzi, Property, and Luck* identifies a number of cases from the 2000s that self-consciously follow in *Elliott-Durham*’s footsteps.⁷³ This section examines the cases that have been decided since the 2014 publication of *Ponzi, Property, and Luck* and finds that the case law has largely continued to build on the *Elliott-Durham* approach.

1. *The Progeny of Elliott and Durham*. — Since 2014, a number of district courts have affirmed the *Elliott-Durham* framework. A representative example is *SEC v. Bivona*,⁷⁴ a Ponzi scheme case in which defendant TeleSoft argued that pro rata distribution should not apply to it because its own funds were “traceable and identifiable.”⁷⁵ The court concluded that even if TeleSoft could identify its funds through tracing, it would be inequitable to allow the application of such tracing to rule out full pro rata distribution.⁷⁶

In reaching this decision, the court cited *Cunningham* for the proposition that tracing cannot be used to recover assets from a common fund

⁶⁷ Sepinwall, *supra* note 14, at 37.

⁶⁸ Kull, *supra* note 10, at 298.

⁶⁹ *Id.* at 319.

⁷⁰ *Id.*

⁷¹ *Id.* at 298.

⁷² See Roscoe Pound, *On Certain Maxims of Equity*, in *CAMBRIDGE LEGAL ESSAYS* 259, 270 (Percy H. Winfield & Arnold D. McNair eds., 1926).

⁷³ See Kull, *supra* note 10, at 305 n.31.

⁷⁴ No. 16-cv-01386, 2017 WL 4022485 (N.D. Cal. Sept. 13, 2017).

⁷⁵ *Id.* at *11.

⁷⁶ *Id.* at *6–7, *11.

“at the expense of similarly-situated victims.”⁷⁷ Citing *Elliott*, the court explained the application of that principle to the instant case by arguing that tracing through a commingled fund is often just a matter of luck and that luck is not an “equitable basis to favor some claims over others, particularly where doing so would harm other investors.”⁷⁸ Finally, the court leaned on *Durham* for its coup de grâce to tracing, by stating that, even where tracing is possible, courts generally retain “equitable discretion” to distribute funds without reference thereto.⁷⁹ Thus, the *Elliott-Durham* framework, along with its particular reading of *Cunningham*, is reproduced in all its essentials over a decade later. Substantially identical reasoning supported a similar judgment in *SEC v. McGinn, Smith & Co.*⁸⁰ and then again in *SEC v. Alleca*,⁸¹ the latter of which was, if anything, perhaps even terser in justifying a pro rata distribution than its predecessors were.

2. *Minority Decisions.* — Nevertheless, the full record of development is not entirely uniform; there are a few cases that have rejected *Elliott-Durham*’s overbroad interpretation of *Cunningham*, and returned to an embrace of tracing and other traditional equity doctrines. Notably, in *United States v. Gettel*⁸² the court stated that, under *Cunningham*, a claimant could prevail under a constructive trust theory as long as it could trace its property.⁸³ Likewise, in *United States v. \$822,694.81 in United States Currency*,⁸⁴ another case of multi-victim fraud, the court recognized that forcing the victim with traceable property to recover pro rata would be “contrary to basic property rights.”⁸⁵

D. Adopting an Elliott-Durham Framework Is Poor System Design

This section describes the first prong of this Chapter’s argument against the *Elliott-Durham* approach. More specifically, it attacks the *Elliott-Durham* line’s use of a mode of judicial reasoning, and particularly an approach to discretion, that will tend to erode restitution’s capacity to deliver either procedural or substantive justice to victims of multi-victim frauds.

1. *A System-Level Look at the Law of Restitution.* — Presumably, there are a wide array of possible distributions a judge might impose or

⁷⁷ *Id.* at *6.

⁷⁸ *Id.* at *7.

⁷⁹ *Id.* at *8.

⁸⁰ No. 10-cv-457, 2016 WL 6459795, at *3 (N.D.N.Y. Oct. 31, 2016).

⁸¹ No. 12-cv-3261, 2017 WL 4174217, at *4–5 (N.D. Ga. Sept. 21, 2017).

⁸² No. 16-CR-01099, 2017 WL 3966635 (S.D. Cal. Sept. 7, 2017).

⁸³ *Id.* at *5–6.

⁸⁴ No. 13-CV-00545, 2015 WL 13765353 (D. Conn. July 24, 2015).

⁸⁵ *Id.* at *5 (quoting *United States v. Ovid*, No. 09-CR-216, 2012 WL 2087084, at *7 (E.D.N.Y. June 8, 2012)).

approve for any commingled Ponzi account with insufficient remaining funds to cover victims' claims. Some of these distributions will approach the ideal of fairness more closely than will others.⁸⁶ Because the law of restitution is action-guiding for judges, it should be framed so as to promote a form of judicial reasoning that is more likely, on the whole, to direct judges to distributions that are equitable in light of the property and other norms structuring equity.

Focusing on the system of judicial reasoning will foster “efficiency, fairness, justice, and virtue promotion”⁸⁷ in the spheres of property and restitution. For Professor Henry Smith, these qualities are emergent features of an entire system of property; each of a system's parts may be adapted to a particular function, and so to expect that each doctrine “will serve these values individually and separably” is a mistake.⁸⁸ Professor Emily Sherwin also emphasizes the importance of attending to the entire “set of outcomes,” rather than to individual cases, noting that even good rules may require bad outcomes in certain cases.⁸⁹ The analysis here, then, will focus on the qualities of the regime of judicial decisionmaking a given approach to restitutionary equity is likely to produce, rather than on whether judges will be empowered to achieve an apparently fair, or even an actually fair, outcome in every single case. A freedom or rule allowing a judge to realize fairness in a single case may prove disastrous on the very same metric if allowed to inform an entire system.

2. *Judges as System Administrators.* — Judges are legal actors of limited competence. Modern legal education is typically limited and relatively specialized.⁹⁰ Formal training normally consists predominantly of the study of legal cases, doctrines, and statutes. Advanced study in history, philosophy, economics, sociology, or other subjects of potential relevance is the exception rather than the rule. Furthermore, judges are resource-constrained. Especially during periods in which a judge's caseload is significant, the judge, even with the help of a handful of clerks, has a limited period of time to familiarize himself with the facts of the case, research the relevant law, and arrive at and articulate

⁸⁶ See Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083, 2092 (2001).

⁸⁷ See Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1719 (2012).

⁸⁸ *Id.*

⁸⁹ Emily Sherwin, *Equity and the Modern Mind*, in EQUITY AND LAW: FUSION AND FISSION 353, 354–55 (John C.P. Goldberg, Henry E. Smith & P. G. Turner eds., 2019).

⁹⁰ See Nicholas Mercuro, *The Jurisprudential Niche Occupied by Law and Economics*, 2 J. JURIS. 61, 62 (2009) (“Today, much of the conventional study of law is organized around modern doctrinal principles and concepts drawn from legal theory and political theory.”).

a judgment.⁹¹ Under these circumstances, one might reasonably expect judges to be better suited to parsing cases and applying doctrine, where their training and daily work has honed their expertise, than they are to crafting rules directed to fairness, where steep time constraints and knowledge gaps lead to a relatively high likelihood of misstep. Nor does judicial training immunize judges against the tendency to overweight the immediate, personal consequences of their decisions as compared with their more remote, systemic effects, especially in zones of high discretion.⁹² Under a hypothetical judicial system in which the educational or working conditions of judges were different, this characterization of judicial capacities would require revision, but there is no reason to expect the dawning of this new system any day soon.

To make explicit an important underlying premise, deciding whether a distribution is fair is nonobvious and controversial. It is worth recalling, along with Sherwin, that because inquiries into equity are difficult, they present significant opportunity for mistake.⁹³ Just as a judge may apply black letter law incorrectly, so too may he misread the equities.⁹⁴ As a practical matter, this problem is especially pressing at a time, like today, in which the shared moral understandings of an already pluralist society appear to be thinning.⁹⁵ In *Durham*, that the property in question belonged to the claimants was “[u]ncontroverted,”⁹⁶ and yet the court denied them full recovery.⁹⁷ For some, this result will appear obviously wrong as a matter of first-order fairness.⁹⁸ The rancher who finds his branded cattle in a fraudster’s herd of stolen cattle should clearly be entitled to take back the whole of what is his, not just a proportion depending on the number of other victims. For others, such as the *Durham* court, however, loss sharing will appear the very soul of fairness.⁹⁹ Under such cultural conditions, the notion that individual judges might have easy, intuitive access to what is “really fair” in the distribution of receivership assets, much less to rules for producing fair distributions, should be viewed with suspicion.

⁹¹ See e.g., Douglas A. Lee & Thomas E. Davis, *Nothing Less than Indispensable: The Expansion of Federal Magistrate Judge Authority and Utilization in the Past Quarter Century*, 16 NEV. L.J. 845, 931–32 (2016).

⁹² Sherwin, *supra* note 89, at 355–56.

⁹³ Sherwin, *supra* note 86, at 2092.

⁹⁴ *Id.*; see also Sherwin, *supra* note 89, at 373.

⁹⁵ See *Political Polarization in the American Public*, PEW RES. CTR. (June 12, 2014), <https://www.people-press.org/2014/06/12/political-polarization-in-the-american-public> [<https://perma.cc/UJA9-T7DR>].

⁹⁶ *United States v. Durham*, 86 F.3d 70, 72 (5th Cir. 1996).

⁹⁷ *Id.* at 73.

⁹⁸ See, e.g., Sullivan, *supra* note 4, at 1626.

⁹⁹ Cf. Dale A. Oesterle, *Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC § 9-306*, 68 CORNELL L. REV. 172, 185–86 (1983) (calling tracing “largely unprincipled” and arguing its use should be “curtail[ed]”).

3. *The System-Level Pitfalls of Discretion.* — The *Elliott-Durham* approach to restitution proceeds in two parts. First, the opinions affirm the judge’s authority to sit as a “court of conscience” and to act with broad discretion, including to ignore tracing doctrine.¹⁰⁰ Second, the opinions impose pro rata distribution, regardless of whether or not certain victims’ property was traceable.¹⁰¹ Kull has already argued compellingly that this second part is based on an understanding of when property rights run out that is both different from and less defensible than the understanding embodied in *Cunningham* and the pre-*Cunningham* common law of property and restitution.¹⁰² Taking instead the first part, this Chapter argues that courts’ assumption of broad discretion is a maladaptive response to the concerns and realities discussed above.

First, conferring such broad discretion on judges, under a slogan as ambiguous as “equality is equity,” invites judges on an expedition for which they are poorly equipped. As mentioned above, understanding what first-order fairness requires is challenging. Even structuring the inquiry is difficult: Is consulting moral intuition enough? Is consultation of formal bodies of knowledge like philosophy and sociology necessary? If so, what parts, and in what combination? Across many potentially relevant domains of information, judges have no special training or knowledge. In a comparison of American and English courts’ handling of cases in restitution, Professor Chaim Saiman observes: “I am unaware of any English court that displays the level of agnosticism towards asset distribution as found in cases like *Durham* [and] *Elliott*”¹⁰³

The lack of rigor in these cases is perhaps a predictable consequence. One of the perennial refrains of the *Elliott-Durham* cases, for example, was that all victims were “similarly situated,” and so it would be arbitrary, and hence inequitable, to confer priority in distribution to a subset.¹⁰⁴ When courts influenced by the *Elliott-Durham* approach describe victims as similarly situated, they typically mean that victims are all alike in being defrauded by the same scheme.¹⁰⁵ However, it is equally true that many of the victims are not similarly situated in a number of other respects. For example, some victims can trace their investments through the commingled funds; others cannot. Some victims will attach a high marginal value to every additional dollar they

¹⁰⁰ See, e.g., *Durham*, 86 F.3d at 73 (quoting *Wilson v. Wall*, 73 U.S. (6 Wall.) 83, 90 (1867)).

¹⁰¹ See, e.g., *id.*

¹⁰² See Kull, *supra* note 10, at 319.

¹⁰³ Chaim Saiman, *Restitution and the Production of Legal Doctrine*, 65 WASH. & LEE L. REV. 993, 1041 (2008).

¹⁰⁴ See, e.g., *SEC v. Bivona*, No. 16-cv-01386, 2017 WL 4022485, at *7 (N.D. Cal. Sept. 13, 2017); Kull, *supra* note 10, at 319 & n.65.

¹⁰⁵ See *SEC v. McGinn, Smith & Co.*, No. 10-cv-457, 2016 WL 6459795, at *3 (N.D.N.Y. Oct. 31, 2016).

recover from a receivership fund; others will attach a low marginal value. Are either of these differences relevant with respect to achieving an outcome that is equitable? Some judges ruling on the distribution of receivership assets have determined that one or both are.¹⁰⁶ *Elliott-Durham* indicates that they are not, but provides no basis for this position.

Second, solving the problem of restitution from commingled accounts in cases of multi-victim frauds with a grant of such broad discretion is an obstacle to system-wide uniformity and consistency. With such broad discretion granted to judges, especially in a pluralist society, it is probable that like cases will be treated differently and different cases will be treated alike. Especially when judges' explanations of their reasoning is so sparse, convergence toward a common solution, or even toward agreement on which facts are significant to equity and which are not, seems unlikely. Procedural justice, or the "internal morality of the law,"¹⁰⁷ is thereby threatened. Uniformity, predictability, and promulgation are all values undermined through the allowance of unstructured discretion,¹⁰⁸ especially given that judges systematically underweight the benefits of these procedural values when deciding specific cases.¹⁰⁹ In *Foskett v. McKeown*,¹¹⁰ a landmark restitution case in the United Kingdom, Lord Millet warned that rigor would be a price worth paying for procedural justice: "Cutting corners in the interest of simplicity is tempting, but in my opinion the temptation ought to be resisted."¹¹¹ Otherwise, "anomalies and inconsistencies will inevitably follow. . . . There is an enormous variety of financial instruments. For present purposes they form a seamless web."¹¹²

More substantively, progress toward the goal of restitution is also arrested. Even if an individual judge muddles through the wilds of full discretion to discover a rule of distribution that closely approaches first-order fairness, a system of full discretion is one in which the worthiness of the holding is least likely to be appreciated and reproduced.

*SEC v. Huber*¹¹³ is an illustration of the interplay of these issues. Judge Posner used his discretion to approve rising tide,¹¹⁴ on the

¹⁰⁶ See *SEC v. Huber*, 702 F.3d 903, 907 (7th Cir. 2012).

¹⁰⁷ LON L. FULLER, *THE MORALITY OF LAW* 4 (1964).

¹⁰⁸ *Id.*

¹⁰⁹ Sherwin, *supra* note 89, at 355–56.

¹¹⁰ [2000] 1 AC 102 (H.L.) (U.K.).

¹¹¹ *Id.* at 145.

¹¹² *Id.*

¹¹³ 702 F.3d 903 (7th Cir. 2012).

¹¹⁴ Rising tide is a method of distribution according to which the amounts victims withdraw from a Ponzi scheme count against the totals they are eligible to receive in the final pro rata distribution. *Id.* at 905.

grounds that rising tide was likely to result in a utility-maximizing distribution.¹¹⁵ In this same spirit, he indicated that, perhaps in circumstances other than the one before him, a net-loss method would be utility maximizing, and so should be adopted instead.¹¹⁶ With the generous discretion afforded him, Judge Posner worked from an understanding of equity tightly bound up with utility maximization. The ultimate fairness, stability, and administrability of a system of restitution that adopted the Posnerian approach are dubious at best. For now, it sits in uneasy tension with the less utilitarian visions of equity and property manifest in the *Elliott-Durham* line. What an individual claimant in another circuit might reasonably expect is, of course, unclear.

Huber also raises questions about exactly how wide the presently permissive regime of restitutionary equity has opened the door for judges. Although ultimately declining to adopt it, *Huber* briefly flirted with an idea for restitutionary reform that Professor Saul Levmore presented at Boston University's 2012 Symposium on Restitution and Unjust Enrichment.¹¹⁷ Levmore argued that courts should reward exits from Ponzi schemes, and hence hasten their collapse, by allowing investors to keep their principal "plus a reasonable rate of return."¹¹⁸ Judge Posner appeared to dismiss Levmore's approach primarily because he believed the empirical evidence was inconclusive.¹¹⁹ Should a radical reform of fundamental property understandings hang on a thread so tenuous as one judge's semi-empirical utility calculations?

E. Elliott-Durham Decisions Erode Intrinsic Values

This section describes the second prong of this Chapter's argument. This prong attacks *Elliott-Durham* for failing to meet standards internal to the practice of judging. The arguments that follow recognize judging as a distinct sphere of human community and excellence and contend that *Elliott-Durham* erodes this practice.

This practice-centered perspective is valuable because it captures certain aspects of *Elliott-Durham* that other perspectives will not. Practices are essential to the flourishing of society and its individual members, as are, therefore, the pursuit of the internal goods that constitute them and the preservation of the structures that make such pursuit possible. Nevertheless, the unique value of these internal goods is comprehensible only from a perspective internal to the practice. For this reason, a practice-centered approach to judging emphasizes the values and goods proper to judging as such, rather than reducing judging to

¹¹⁵ *Id.* at 907.

¹¹⁶ *Id.*

¹¹⁷ *Id.*; Saul Levmore, *Rethinking Ponzi-Scheme Remedies in and out of Bankruptcy*, 92 B.U.L. REV. 969, 969 n.* (2012).

¹¹⁸ Levmore, *supra* note 117, at 983.

¹¹⁹ See *Huber*, 702 F.3d at 907.

the external ends it serves or to the political structures of which it is a part. Specifically, this section analyzes judging as a MacIntyrian “practice” to examine *Elliott-Durham*’s relation to judging’s intrinsic values.

This MacIntyrian theory of judging is controversial. The reader need not accept it to find this Chapter’s functionalist critique compelling. Nor must the reader accept it to recognize that the discretion *Elliott-Durham* confers upon judges may stand in tension with the constraints his own preferred theory of judging sets for judicial decision-making. This section is, accordingly, illustrative of one kind of threat *Elliott-Durham* poses to judging rather than exhaustive of all such threats.

1. *Judging Is Plausibly Understood as a MacIntyrian Practice.* — The foundation of this argument is to show that judging is what MacIntyre calls a “practice” and, hence, is the sort of thing apt for MacIntyrian analysis. In *After Virtue*, Professor Alasdair MacIntyre defines a “practice” as a (1) complex social activity (2) that enables participants to gain goods internal to that activity, which goods are partially definitive of the practice.¹²⁰ (3) Participants, therefore, display excellence in a practice by gaining the goods internal to it, and (4) achieving excellence systematically extends social understanding of the practice, the goods of the practice, and the possibility of achieving excellence in the practice.¹²¹ Teacher-student authority, with its norms of humility, deference, and honesty, occupies a central position in the life of any practice.¹²² Also essential is an understanding on the part of its members that the practice possesses an enduring history and tradition that discloses certain principles of normative significance to any proposed changes in or reforms of the practice.¹²³ MacIntyre specifically identifies chess, biology, and music as practices.¹²⁴ Does judging also belong on such a list?

Judging is a complex social activity. A moment’s reflection on the Matryoshkan rules, structures, and conventions that govern judicial opinions on cases and controversies suffices here.

Judging also contains an array of internal goods. MacIntyre explains his nomenclature as follows: “We call them internal for two reasons: first . . . because we can only specify them in terms of [the practice] and by means of examples from [the practice]; and secondly because they can only be identified and recognized by the experience of participating in the practice”¹²⁵ Although these “goods” may seem more like acts than things, they are aptly described as goods when performed well, in

¹²⁰ MACINTYRE, *supra* note 13, at 187.

¹²¹ *Id.* at 187, 193.

¹²² *See id.* at 190.

¹²³ *Id.* at 190, 194.

¹²⁴ *Id.* at 187–88.

¹²⁵ *Id.* at 188–89.

that same sense in which Aristotle writes that the “good” for man is rational activity performed in accordance with the virtues.¹²⁶ Internal goods are contrasted with external goods such as wealth, status, and prestige that are unanchored to any particular practice.¹²⁷

Judging incorporates many goods that fit this description. Among the deepest and broadest of these internal goods are interpreting statutes and crafting case-based analogies. The identification of a “proximate cause” in a complex torts case, the application of the rule against perpetuities in a property dispute, and the determination of unconscionability in contract formation are all also examples of goods achievable and fully appreciable only from a perspective internal to judging.

Achievement of these internal goods is what constitutes the excellence of judges *qua* judges.¹²⁸ To the extent that a judge conspicuously fails to achieve these goods, his judicial actions are degraded, and sometimes even subject to nullification by other members of the practice.

Excellence in judging is systematically extensive of judging as a whole. When judges manifest excellence in deciding novel disputes, understanding of the internal goods manifest is broadened and can become the foundation for further judicial decisionmaking. Society at large is better apprised of what it means to judge well, especially within the implicated domains, and such decisions become models for the future.

Teacher-student authority is even more deeply entrenched in the practice of judging than in most other practices. Modern legal education is probative of this point: the essence of the case method is the minimally filtered exposure of initiates to examples of judicial reasoning in which the achievement of these internal goods is on full display, especially at flashpoints in which the achievement of these goods represents a significant alteration or extension of the practice.¹²⁹

Finally, judging has a rich conception of itself as possessing a history and tradition that guide the development of the practice. For MacIntyre, “[t]o enter into a practice is to enter into a relationship not only with its contemporary practitioners, but also [with] . . . those whose achievements extended the reach of the practice to its present point.”¹³⁰ Again, the observance of a precedential system is telling here. Consonance with past decisions and understandings serves as a metric by which members of the practice evaluate the judicial acts of other members.¹³¹

¹²⁶ See ARISTOTLE, *NICOMACHEAN ETHICS* bk. I, ch. 6, at 11 (W.D. Ross trans., Batoche Books 1999) (c. 384 B.C.E.).

¹²⁷ MACINTYRE, *supra* note 13, at 190.

¹²⁸ See *id.* at 189–90.

¹²⁹ See generally Edwin W. Patterson, *The Case Method in American Legal Education*, 4 J. LEGAL EDUC. 1 (1951).

¹³⁰ MACINTYRE, *supra* note 13, at 194.

¹³¹ See Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1031–32 (2003).

2. *Legal Sources Are the Cornerstones of Judicial Practice.* — Having identified judging as a practice, the next step in the analysis is to consider the relationship between judging's internal goods and its standards of excellence. Most noteworthy is the need for a judge to base his judicial actions on legal-type reasons for his judicial actions.¹³² This standard is integral to the possibility of achieving goods internal to the judging practice because it is their precondition.

Just as setting up a discovered attack or weaving a mating net in chess are achievable only through coordination of one's pieces in accordance with the conventions regarding how many squares and in what direction each piece can move, the judge's ability to achieve any internal goods, including those related to restitution for unjust enrichment, depends on his constraining himself to decide on legal bases. A chess player who contemplates a complex discovered attack that depends on his rook being able to capture on a diagonal may be contemplating a feat of staggering brilliance, but it is not a feat of excellence in chess. Likewise, a judge relying on nonlegal reasons or modes of justification could not achieve the goods internal to judging.

Primary reliance on legal-type reasons is essential to judicial opinions that manifest achievement of judging's internal goods because such reliance is one of the most important marks distinguishing judging from the kinds of activity that occur within other practices, or outside of practices altogether.¹³³ Another basis for recognition of the importance of this standard to the achievement of the internal goods proper to judging is the reaction of judging's practitioners to this standard's derogation. Judges react to opinions insufficiently grounded in legal reasoning as unworthy of being regarded as persuasive authorities in future cases.¹³⁴

3. *Elliott-Durham Decisions Are Insufficiently Structured by Legal Sources.* — If judging is a practice, and judges' achievement of the internal goods of that practice, including those related to Ponzi distributions in restitution and equity, depends on judges' appropriate reliance on legal sources, then the next step in the MacIntyrian analysis should be to consider their engagement with legal sources. Ultimately, this engagement is not satisfactory. The consequence is not only failure to achieve the relevant internal goods but also the obscuring of judges' self-understanding and the undermining of the tradition meant to scaffold its future development.

¹³² Because this standard is so important, a rich tradition of reason-giving exists in the United States, even in those instances where supplying the legal bases of one's decision is not required. See Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 491–93 (2015).

¹³³ Cf. MACINTYRE, *supra* note 13, at 187.

¹³⁴ Federal judges, in fact, observe a duty to write their opinions in a way that enables review. See Cohen, *supra* note 132, at 532–35.

The universe of legal sources that the *Elliott-Durham* cases use to impose pure pro rata distributions is limited. *Elliott* cites *Cunningham* as the sole authority sounding in unjust enrichment for the proposition that judges have the discretion to ignore tracing rules, and for the proposition that tracing is contrary to equity because whether any given claimant may trace his property is a matter of luck.¹³⁵ As shown above, these interpretations are contrary to *Cunningham*, which explicitly treats the traceability of assets as the essential issue.¹³⁶ This treatment of *Cunningham* is not so much use of a legal source as it is abuse of a legal source. As such, *Elliott* is a rupture with rather than a development of the tradition of restitution and equity that *Cunningham* represents.

What about the cases that may not reference *Cunningham* but that rely on the logic of *Elliott* and *Durham* for their major premises?¹³⁷ On the one hand, these cases often cite *Elliott* and *Durham* and so are not quite so clearly an abuse of legal sources. On the other hand, when these cases engage with *Elliott* and *Durham*, their engagement is shallow and tends not to extend to the preceding tradition. This fact takes on magnified significance given that: (1) *Elliott*'s and *Durham*'s treatment of *Cunningham* is also quite abbreviated; and (2) *Elliott* and *Durham* were in each case persuasive rather than binding authority. Accordingly, the *Elliott-Durham* progeny, though perhaps not based on direct abuse of legal sources, used legal sources recklessly, with similar consequences.

It remains, then, to articulate the ways in which this flaw in the *Elliott-Durham* line is ramified throughout the practice, by returning to the criteria outlined in section E.1. The first parts of the practice impacted are the internal goods, or goods of excellence. The internal goods at least presumptively aimed at here included crafting a case-based analogy and deciding upon an equitable distribution. Not aimed at but equally at stake were the internal goods related to the skillful application of tracing doctrines. Because the *Elliott-Durham* decisions were unsupported, or only recklessly supported, by legal sources, the judges writing them failed to achieve these internal goods.

The second part of the practice impacted is the extension and clarification, or lack thereof, of the practice's self-understanding. *Elliott-Durham* holdings only further deepen the confusion in an already confused area of the law. What counts as an effective case-based analogy to the facts of *Cunningham*, an equitable distribution of Ponzi scheme funds, and an appropriate application of tracing rules are all obscured. *Elliott-Durham*, therefore, diminishes the practice's understanding of its own internal goods and standards, rather than extending them.

¹³⁵ See SEC v. Elliott, 953 F.2d 1560, 1570 (11th Cir. 1992).

¹³⁶ *Cunningham v. Brown*, 265 U.S. 1, 11 (1924).

¹³⁷ See, e.g., SEC v. Alleca, 12-cv-3261, 2017 WL 4174217 (N.D. Ga. Sept. 21, 2017); SEC v. Bivona, No. 16-cv-01386, 2017 WL 4022485 (N.D. Cal. Sept. 13, 2017); SEC v. McGinn, Smith & Co., No. 10-cv-457, 2016 WL 6459795 (N.D.N.Y. Oct. 13, 2016).

The final parts of the practice impacted are those related to the centrality of the teacher-student relationship and to the practice's unwinding of a tradition that should shape its development. The *Elliott-Durham* decisions rewrite *Cunningham*, a Supreme Court decision embodying a great deal of the doctrine and tradition of restitution, with nary more than a wave of the hand. In its stead, the courts made unstructured judgments about what might count as equitable that, however plausible they might have sounded in a vacuum, did not engage closely with the legal sources on restitution and equity.¹³⁸ The attitude manifest in *Elliott-Durham*, then, is opposed to a recognition of the weight to be placed on the judgments of masters and to a desire to labor at an outworking of principles already embedded within the tradition.

One might, however, object as follows: the foregoing analysis may be suitable for law, but equity is different. Equity is an extralegal mode of judicial decisionmaking in which the usual rules are relaxed, so that the judge can ensure a substantively just result.¹³⁹ Once the case has entered equity, and especially equity in restitution,¹⁴⁰ discretion is king and the judge may disregard doctrine and grasp directly at what is right.

This objection is an oversimplification. The objection recalls the Aristotelian notion of equity, according to which equity is "a correction of law where it is defective owing to its universality."¹⁴¹ This Aristotelian vision of equity appears in the English common law tradition. In the fourteenth century, the King's Chancellors, sitting as a Chancery Court, "began to hear and grant petitions for special relief, first in response to failures of procedural justice . . . and later in response to more substantive forms of unfairness."¹⁴² This occurred around the time that the existing "common-law forms of action" were becoming "increasingly rigid,"¹⁴³ suggesting a motivation aligned with the Aristotelian story.

The oversimplification is that, at the present stage of Anglo-American legal development, the moral, multiply realizable principles of equity have become crystallized in specific legal forms. As Professor Frederic Maitland wrote of the relation between equity and the common law: "At every point equity presupposed the existence of common law. . . . Equity without common law would have been a castle in the air, an impossibility."¹⁴⁴ Hence, the birth of that venerable maxim, "equity follows the law." In a related vein, Professor Henry Smith has

¹³⁸ See, e.g., *United States v. Durham*, 86 F.3d 70, 73 (5th Cir. 1996); *Elliott*, 953 F.2d at 1570.

¹³⁹ For different variations on this basic theme, see Sherwin, *supra* note 86, at 2091-104.

¹⁴⁰ *Id.* at 2095-96.

¹⁴¹ ARISTOTLE, *supra* note 126, bk. V, ch. 10, at 89.

¹⁴² Sherwin, *supra* note 86, at 2092.

¹⁴³ *Id.*

¹⁴⁴ F.W. MAITLAND, *EQUITY: A COURSE OF LECTURES* 19 (A. H. Chaytor & W. J. Whitaker eds., rev. ed. 1936).

described equity as a “second-order safety valve” that functions to address opportunistic or bad faith conduct that would otherwise bedevil a system consisting primarily of rules.¹⁴⁵ Nevertheless, within a stable, sophisticated safety-valve module,¹⁴⁶ some structure is required; confusing equity with “all-things-considered fairness review” is a recipe for “flattening” the “bi-level” structure envisioned by traditional equity.¹⁴⁷ A second-order function, while flexible, cannot be formless or untethered from the first-order baseline.

An analogy to the relationship that natural law theorists assert governs the relationship between natural and positive law is illustrative of this crystallization thesis. According to Professor John Finnis, the natural law is a set of first principles of practical rationality and certain other relatively general moral principles that can be inferred from them.¹⁴⁸ These principles may be adequately realized in an array of concrete legal and political arrangements.¹⁴⁹ Through the action of a lawmaking authority, called *determinatio*, these moral principles are cast into one such concrete form and become a part of the positive law.¹⁵⁰

Likewise, the doctrines of restitution and equity may be understood as providing determinate form to first-order moral principles in a concrete legal medium.¹⁵¹ In terms of the present analogy, judges developing doctrine over time at common law are engaged in their own limited forms of *determinatio*. On this understanding, it is facile to equate equity with a judge’s discretion to reach back to primal justice unmediated by the doctrines that the judging practice has developed precisely as a way of working out justice through law. An incremental shifting of this tradition through the opinions in which judging’s internal goods are achieved is permissible; rupture precipitated by private judgment is not, even if that judgment is conscience’s *cri de coeur*.

F. A “Reform” Proposal for Restitution

The first step in reforming restitution in multi-victim frauds is to return to the venerable doctrines of the common law tradition. Many of these doctrines have fallen into disuse, in part because so few lawyers have received a proper education in the common law of restitution.¹⁵² However, a return to these doctrines, and especially to tracing, promises

¹⁴⁵ Henry E. Smith, *Fusing the Equitable Function in Private Law*, in PRIVATE LAW IN THE 21ST CENTURY 175–76 (Kit Barker, Karen Fairweather & Ross Grantham eds., 2017).

¹⁴⁶ *Id.* at 184.

¹⁴⁷ *Id.* at 187.

¹⁴⁸ JOHN FINNIS, NATURAL LAW & NATURAL RIGHTS 284–89 (2d ed. 2011).

¹⁴⁹ *See id.*

¹⁵⁰ *See id.* at 289.

¹⁵¹ *Cf.* Sherwin, *supra* note 86, at 2108 (noting that the standard for judicial decision in the law of restitution has been derived from “common-law processes” to carry out the idea of unjust enrichment).

¹⁵² *See* Kull, *supra* note 10, at 292.

a reconnection to tradition that can ameliorate the internal and external dilemmas that restitution faces under an *Elliott-Durham* regime.

I. *The External, Functional Axis.* — A significant part of the function of a practice and its tradition is to remedy the limitations attendant upon individual practitioners, limitations on competence, memory, productivity, knowledge, lifespan, and foresight. Participation in a robust practice and tradition, then, supplies exactly what is missing in the case of individual judges, especially where there is a strong temptation to undervalue the structural impact of judicial decisionmaking when it conflicts with what may appear “fair” from the perspective of an individual litigant in a particular case.¹⁵³ On account of the weaknesses detailed above, individual judges are wont to err in attempts to reach back to first principles unaided; nevertheless, their decisions are responsible for shaping the expression of those principles in the law. Yet, as Saiman concludes in his study of English courts, “conceptual analysis of private law” can be an effective means of appropriately constraining judicial discretion.¹⁵⁴ By returning to rigorous application of the doctrine and embracing a spirit of incrementalism with respect to alterations in property, restitution, and equity, judges actually solve the problem of the short reach of individual discretion by laboring to contribute to a practice whose reach back to first principles and to their administrable expression in law is orders of magnitude longer. The humility inherent in incrementalism is more likely to improve understanding of the animating principles in property and restitution at stake and preserve individual judges from error. It will also produce a restitution regime that is more stable, uniform, and predictable, while providing a foundation for future organic developments.

The tracing doctrines have been a tried-and-true part of this tradition for centuries.¹⁵⁵ As discussed above, they embody a normatively defensible view of equitable property interests. These principles have found expression in doctrinal rules that judges are relatively well-equipped to apply by virtue of their experience and training. In certain cases, the application of these tracing doctrines may occasionally produce an outcome that appears unfair; however, the defensibility of the basic principles and the stability and uniformity with which it guides the application of said principles render it likely that such a system would be more generative of equitable outcomes on the whole than a system in which unstructured discretion rules the day. The understandings embodied in the tracing doctrines may not be ideal, but the costs of

¹⁵³ See Sherwin, *supra* note 89, at 355–56.

¹⁵⁴ Saiman, *supra* note 103, at 1041.

¹⁵⁵ Sherwin, *supra* note 86, at 2092.

a discretion-centric system are non-negligible. A strategy of incrementalism will help manage these costs as the practice as a whole moves forward more steadily and surely than any individual judge could manage through his own discretion.¹⁵⁶

2. *The Internal Axis.* — Adopting a more thoroughgoing commitment to restitution doctrine will restore restitution's place within the practice of judging, and in so doing, the goods of excellence respecting restitution and equity will be more widely achieved and understood. As a result, the legal traditions of restitution and equity, even as they change incrementally, will retain their continuity in a way conducive to the practice's coherent extension and self-understanding. Before its period of dormancy, the restitution for unjust enrichment was a flourishing part of the American common law that could trace its genealogy back to the early days of English common law.¹⁵⁷

The abandonment of doctrines like tracing and flight into unstructured discretion is a kind of prodigality from which judges may yet return. Learning the doctrine and treating it rigorously, rather than viewing it as an artifact from a misty past, will promote the sense of continuity with an enduring tradition that is essential to the vitality of a practice.¹⁵⁸ The internal goods of applying these complex doctrines properly and of analogizing to *Cunningham* and pre-*Cunningham* cases with appropriate subtlety will be realized more frequently. With this bond to a less decadent period of the American common law of restitution reformed, these exercises of judicial excellence will again systematically extend the pertinent domains of the judging practice.

Returning to a rigorous application of the tracing doctrines, where tracing is possible, is thus advisable as some small way of restoring a long-neglected part of the judging practice — and ensuring that participating in the judging practice is just what judges are doing when they decide cases of restitution in multi-victim frauds. This hope for a return to health of the judging practice touching on restitution is eloquently reflected in Karl Llewellyn's "Grand Style of the Common Law": "[T]he better and best law is to be built on and out of what the past can offer; the quest consists in a constant re-examination and reworking of a heritage."¹⁵⁹ The vision is not one in which the standards are "immune from criticism," but one in which development is organic and preserves the basic structures of the practice.¹⁶⁰

¹⁵⁶ *Id.* at 2100–01; see also Lionel Smith, *Legal Epistemology in the Restatement (Third) of Restitution and Unjust Enrichment*, 92 B.U. L. REV. 899, 902 (2012).

¹⁵⁷ Sherwin, *supra* note 86, at 2092–95.

¹⁵⁸ See MACINTYRE, *supra* note 13, at 190.

¹⁵⁹ KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 36 (1960); see also Smith, *supra* note 156, at 902–03.

¹⁶⁰ See MACINTYRE, *supra* note 13, at 190, 193.