LOVE, MONEY, AND JUSTICE: RESTITUTION BETWEEN COHABITANTS

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The principle of unjust enrichment is susceptible to varying interpretations, which reflect importantly different conceptions of how courts should decide cases and develop law. The consequences of different possible interpretations of the unjust enrichment principle are nicely illustrated by a group of cases involving restitution claims between former cohabitants. Claims of this kind are endorsed by the new Restatement (Third) of Restitution and Unjust Enrichment *(now in preparation). In recognizing these claims, the Restatement adopts an "equitable" interpretation of unjust enrichment for this category of cases, one that licenses courts to disregard rules and engage in particularistic decision-making. This is surprising in light of the generally rule-oriented approach to restitution endorsed in the initial sections of the Restatement. It also carries with it a number of dangers, which are evident in the context of cohabitant claims.*

INTRODUCTION

When two people have lived together for a long time expecting never to split, their finances are likely to be entangled. In many cases, one party will have legal title to the lion's share of assets, either by chance or because the other is less sophisticated in business matters or placed more faith in the relationship. If the couple is married, extensive legal machinery is available to adjust the parties' positions. If they are not married, they may simply be left with whatever they legally own.

One way in which disappointed cohabitants have sought legal relief is through claims to restitution. The American Law Institute ("ALI") is currently at work on a new *Restatement (Third) of Restitution and Unjust Enrichment*,[1] the tentative draft of which allows a former cohabitant to

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1. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT [hereinafter RESTATEMENT (THIRD)] (currently comprising Discussion Draft (2000); Tent. Draft No. 1 (2001); Tent. Draft No. 2 (2002); Tent. Draft No. 3 (2004); Tent. Draft No. 4 (2005)). The draft RESTATEMENT (THIRD) is referred to in the text of this article as "the *Restatement*," or

claim the value of significant contributions he or she made to a partner's assets.[2] Although cohabitation cases occupy only a small corner of the law of restitution, they have important implications for the field and for the new *Restatement.* In particular, restitution claims by former cohabitants test the scope and meaning of the concept of unjust enrichment.

Restitution is widely associated with the morally charged maxim that one person should not be unjustly enriched at another's expense. This principle of unjust enrichment, however, is susceptible to varying interpretations, which reflect different views of the nature of judicial authority. Recognition of cohabitants' claims to restitution requires courts to disregard two traditional constraints on restitution: the principle that restitution is not available for recovery of voluntary transfers and the principle that restitution is not available to claimants who reasonably could have negotiated a consensual exchange. Accordingly, recognition of cohabitant claims depends on a broad understanding of unjust enrichment and, more generally, on the role of courts in deciding cases and developing law.[3] My own view, developed below, is that despite the genuine appeal of many cohabitant claims, courts should resist the temptation to treat unjust enrichment as an open-ended decisional principle that authorizes them to give relief against behavior that strikes them as unfair. Rather than expand the law of restitution to cohabitant claims, courts should either address such claims in other ways or leave the parties to protect themselves by contractual means.

My analysis begins with a discussion of restitution and the current debates about the principle of unjust enrichment. I then turn to cohabitation cases and their place within the law of restitution. In the final sections, I offer a more general and theoretical assessment of particularistic legal decision-making in cases of seeming unfairness in intimate relations. The dangers of particularistic decision-making lead me to conclude that courts should not rely on the concept of unjust enrichment to provide relief to disappointed cohabitants.

"the new *Restatement,*" or by its full title, as clarity requires. The author is a member of the advisory committee for the new *Restatement.*

2. *See id.* § 28, at 24 (Tent. Draft No. 3, 2004).

3. I have addressed possible understandings of the principle of unjust enrichment in previous work. *See* Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment,* 79 TEX. L. REV. 2083 (2001).

I. UNJUST ENRICHMENT

A. The Problem of Unjust Enrichment

Restitution has ancient roots, but it was not recognized as a field of law until 1937, when the ALI published its first *Restatement of Restitution*.[4] The Reporters for the original *Restatement*, Warren Seavey and Austin Scott, proposed that a variety of recognized legal and equitable claims followed a common pattern, summarized in the axiom that one person should not be unjustly enriched at the expense of another.[5] Seavey and Scott proceeded to restate these various claims as a unified body of law, and in doing so launched a popular and attractive theory of legal recovery.[6]

As is often the case with bold designs, Seavey and Scott's presentation of the law of restitution leaves some important questions unresolved. Among these is the juristic nature of the principle forbidding unjust enrichment. For some, unjust enrichment appears to be a mechanism for particularized justice, cutting across private law. When rules of law dictate unsatisfactory outcomes, the principle of unjust enrichment permits courts to "do equity" by reversing their results.[7] This use of unjust enrichment is consistent with the program of Legal Realism, which seeks to

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4. RESTATEMENT OF RESTITUTION (1937).

5. *See id.* § 1. *See also* Warren A. Seavey & Austin W. Scott, *Restitution*, 213 L.Q.R. 29, 29–32 (1938) (explaining the project).

6. Prevention of unjust enrichment is generally assumed to be a morally virtuous objective. On close examination, this assumption is open to question: it is at least arguable that unjust enrichment relies on a comparative notion of justice that is closely tied to resentment. For versions of this argument, see JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 5 (1951) (noting that the idea of unjust enrichment was employed "by Karl Marx, who tapped an inexhaustible supply of resentment with the aid of his labor theory of value"); Christopher T. Wonnell, *Replacing the Unitary Principle of Unjust Enrichment*, 45 EMORY L.J. 153, 175–90 (1996) (arguing that the principle of unjust enrichment is normatively unattractive and akin to envy); Emily Sherwin, *Reparations and Unjust Enrichment*, 84 B.U. L. REV. 1443, 1444 (2005) (linking unjust enrichment to resentment). *See also* Steve Hedley, *Justifying the Law of Unjust Enrichment*, 79 TEX. L. REV. 2177 (2001) (raising further questions about the normative foundations of unjust enrichment). Nevertheless, I shall assume here that legal remedies against unjust enrichment, if not in fact morally virtuous, are at least useful as outlets for common sentiments of comparative injustice.

7. *See, e.g.*, Peter Linzer, *A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695, 700–02, 773–75 (2001) (advocating an interpretation of unjust enrichment that permits courts to do "rough justice"); Stewart Macaulay, *Restitution in Context*, 107 U. PA. L. REV. 1133, 1134–35 (proposing that courts deciding restitution cases should adjudicate in the manner of administrative agencies with "power to base decision[s] on unexplained expertise").

free courts from artificial rules and allow them to refer directly to relevant policies and values.[8]

Alternatively, unjust enrichment is sometimes treated as a principle of law: a tenet that, although morally inspired, serves as a source of legal authority for courts. If the defendant has obtained a benefit at the plaintiff's expense, and the court finds that this state of affairs is "unjust," then the court must order restitution.[9] This understanding of unjust enrichment is consistent with the view that courts decide cases by elaborating and applying principles inherent in the body of law.[10]

Practically speaking, the first two interpretations of unjust enrichment lead to similar results. The first invites courts to engage openly in particularistic evaluation of individual cases, setting aside legal rules and asking instead what outcome is best, all things considered. The second asks courts to deduce the outcomes of disputes from a purportedly legal principle: prevention of unjust enrichment. Yet the principle is too broad

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8. *See, e.g.*, EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING 1–6 (1949) (discussing the method of distinguishing cases on their facts and reasoning by analogy); KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 66–69 (1981) (discussing the role of precedent in legal decision-making); Brian Leiter, *American Legal Realism*, *in* THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY (W. Edmundson & M. Golding eds., 2004) (explaining that, although Legal Realists were not uniformly hostile to rules, they had in common the belief that existing legal rules failed to constrain judicial decisions and masked the considerations that actually influenced judges).

9. *See, e.g.*, Moses v. Macferlan, (1760) 97 Eng. Rep. 676 (K.B.) (finding a defendant to be "obliged by the ties of natural justice and equity" to repay money); Salzman v. Bachrach, 996 P.2d 1263, 1265–66 (Colo. 2000) ("[A] plaintiff seeking recovery for unjust enrichment must prove: (1) at plaintiff's expense (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain the benefit without paying."); LORD GOFF OF CHIEVELEY & GARETH JONES, THE LAW OF RESTITUTION 12 (Gareth Jones ed., 5th ed. 1998) (1966) (describing unjust enrichment as a "principle of justice which the law recognises and gives effect to in a wide variety of claims"). *See also* J. BEATSON, THE USE AND ABUSE OF UNJUST ENRICHMENT 1–2 (1991) (raising the possibility of enactment of the principle of unjust enrichment).

10. Arguments for adjudication according to legal principles immanent in prior decisions and other legal materials can be found in RONALD DWORKIN, LAW'S EMPIRE 240–50, 254–58 (1986); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22–31 (1978); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW lxxix–lxxx, 545–96 (prepared for publication from the 1958 Tentative Edition by William N. Eskridge, Jr. & Philip P. Frickey, 1994); Roscoe Pound, *Survey of the Conference Problems*, 14 U. CIN. L. REV. 324, 328–31 (1940) (Conference on the Status of the Rule of Judicial Precedent). Principles, in this view, are not necessarily conclusive reasons for decision, but they have authoritative "weight" for courts. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra*, at 25–27 (a principle "states a reason that argues in one direction, but does not necessitate a particular decision"); Pound, *supra*, at 329 ("[A] principle doesn't lay down any definite detailed state of facts and doesn't attach any definite legal consequence."). It is not clear that either Hart and Sacks or Pound would have endorsed a principle as broad as the principle of unjust enrichment as a ground of decision, although Dworkin probably would. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra*, at 23–31 (discussing Riggs v. Palmer, 22 N.E. 188 (1899) and endorsing the principle that no one should profit from a wrong).

to provide real guidance; ultimately, courts must rely on their own sense of what is just in particular factual settings. For purposes of this article, I shall treat these two understandings of the principle of unjust enrichment alike and refer to them together as "equitable" interpretations of restitution and unjust enrichment.[11]

A third possibility is to treat unjust enrichment as a description of the common features of a variety of more specific rules of restitution developed by courts over time.[12] The practical content of unjust enrichment, on this view, depends on judicially developed rules that both define classes of cases in which restitution is available and place limits on restitution. The principle of unjust enrichment is helpful because it provides a framework for analysis as courts encounter new cases and design new rules.[13] It does not, however, displace settled rules, either by authorizing courts to depart from rules in particular cases or by establishing injustice as an overriding basis for decision.

This third understanding of unjust enrichment is in keeping with the view that law consists of properly posited rules and the related view that courts ordinarily should treat such rules as binding.[14] A rule-based approach to adjudication does not prevent courts from overruling obsolete rules or from developing new rules of liability in ungoverned cases,[15] but

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11. The two approaches are analytically distinct in that they presuppose different conceptions of law. *See* Leiter, *supra* note 8, at 29–30 (suggesting that Legal Realists assumed the existence of a discrete body of posited "law," but doubted its capacity to constrain, while Dworkin rejects positivism and assumes a continuity between law and morality).

12. *See* PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 19 (1989) (arguing that the principle of unjust enrichment should be understood as "downward-looking to the cases"); HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 23–34 (2004) (recommending that the principle of unjust enrichment be treated, at most, as a "loose framework" for analysis); Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1196 (1995) (describing unjust enrichment as a unifying theme of restitution but not a standard of decisions for judges); Seavey & Scott, *supra* note 5, at 31–32 (describing unjust enrichment as a "postulate" underlying restitution but maintaining that the law of restitution must take the form of more specific rules).

13. *See* BIRKS, *supra* note 12, at 19–22 (suggesting that unjust enrichment provides a "shared and stable pattern of reasoning" that helps to identify similarities among cases); *see also* DAGAN, *supra* note 12, at 26–33 (suggesting refinements to Birks' analytical scheme).

14. *See generally* H.L.A. HART, THE CONCEPT OF LAW (1961); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LIFE AND LAW (1991). *See also* LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW 53–95 (2001) (arguing that rule-based decision-making is both desirable and irrational).

15. If the rule of recognition accepted by legal officials permits courts to posit new rules or to substitute new rules in the place of obsolete ones, as it surely does in our legal system, those rules count as law. *See* HART, *supra* note 14, at 106–14 (explaining the rule of recognition and its role in positivist theory). When no rule governs a particular case, courts are free to (and must) decide the outcome on the basis of ordinary moral reasoning. *See id.* at 121–32 (discussing the open texture of rules).

it does tend to yield a more conservative law of restitution than its competitors. With no special license to override rules and no broad legal authority to do justice, courts are likely to respect traditional limitations on restitution and to develop new rules at an incremental pace.[16]

The unjust enrichment principle, with its appealing moral tone, has flourished in American courts. Yet the role it plays or should play in judicial decision-making is seldom directly addressed. Meanwhile, as a topic of study, restitution has received little attention recently in American law.[17] As a result, the law of restitution is both potent and poorly understood.[18] In these circumstances, it seems appropriate to recall Professor Dawson's warning that when "formulated as a generalization, [unjust enrichment] has the peculiar faculty of inducing quite sober citizens to jump right off the dock."[19]

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16. The slower pace of rule-oriented decision-making may be due to courts' sensible reluctance to announce broad new rules when operating in the context of a single case, or it may be due to the practice of "analogical reasoning." I have written elsewhere that I am skeptical that analogies to prior outcomes can in fact constrain reasoning; however, a habitual practice of seeking analogies is useful because it may reduce the errors of unconstrained reasoning. *See* Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179 (1999). *See also* Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57 (1996) (rejecting analogical reasoning); Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument By Analogy*, 109 HARV. L. REV. 923 (1996) (attempting to explain the process of analogical reasoning).

17. *See* RESTATEMENT (THIRD), *supra* note 1, Reporter's Introductory Memorandum, at xv–xvi (Discussion Draft, 2000); Kull, *supra* note 12, at 1195 ("To put it bluntly, American lawyers today (judges and law professors included) do not know what restitution is."). American scholarship on the subject of restitution subsided in the later part of the twentieth century, particularly after the death the great restitution scholar John P. Dawson. In contrast, legal scholars in England and other Commonwealth countries have given considerable attention to restitution and unjust enrichment in recent years. Some notable Commonwealth sources are: BEATSON, *supra* note 9; BIRKS, *supra* note 12; GOFF & JONES, *supra* note 9; STEVE HEDLEY, RESTITUTION: ITS DIVISION AND ORDERING (2001); ESSAYS ON THE LAW OF RESTITUTION (Andrew Burrows ed., 1991); RESTITUTION (Lionel Smith ed., 2000); RESTITUTION: PAST, PRESENT, AND FUTURE: ESSAYS IN HONOUR OF GARETH JONES (W.R. Cornish ed., 1998). There has been some resurgence of interest recently among American scholars. *See, e.g.*, Kull, *supra* note 12; Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65 (1985); *Symposium on Restitution*, 67 S. CAL. L. REV. 1369 (1994); *Symposium: Restitution and Unjust Enrichment*, 79 TEX. L. REV. 1763 (2001). Another excellent treatment can be found in DAGAN, *supra* note 12.

18. An attempt by the American Law Institute to clarify the law of restitution in the mid-1980s was not successful. *See* RESTATEMENT (SECOND) OF RESTITUTION (Tent. Draft No.1, 1983; Tent. Draft No. 2, 1984).

19. DAWSON, *supra* note 6, at 8.

B. The Restatement (Third) of Restitution and Unjust Enrichment

The new *Restatement* is an attempt to rationalize restitution and to make it accessible as well as normatively appealing.[20] Unjust enrichment continues as the hallmark of restitution, appearing in both the title of the project and its first section.[21] Accompanying comments, however, adopt a distinctly positivist interpretation of the term, despite some marks of compromise. Unjust enrichment is not a commission to do what is just, but a "term of art" reflecting "those forms of enrichment that the law treats as 'unjust' for purposes of imposing liability."[22]

By way of clarification, the *Restatement* comments suggest that unjust enrichment could helpfully be redescribed as *unjustified enrichment*, meaning "enrichment that lacks an adequate legal basis."[23] Unjustified enrichment is not an entirely satisfactory concept. It presents ambiguities of its own,[24] and it seems to contemplate no substantive role for the law of restitution except to retrieve assets in the defendant's possession when the rules of property, tort, and contract fail to confer ownership.[25] Yet the alternative phrase is useful as a reminder that unjust enrichment, as employed by the *Restatement*, does not authorize courts to disregard legal rules and refer directly to justice.

The *Restatement* reinforces its comparatively narrow view of unjust enrichment by reciting a distinct set of limits on benefit-based liability. Two of these have prominent roles in the cases discussed in this article.

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20. *See* RESTATEMENT (THIRD), *supra* note 1, Reporter's Introductory Memorandum, at xv–xvi (Discussion Draft, 2000) (setting out goals). The views and aspirations of the reporter, Andrew Kull, are set out in Kull, *supra* note 12.

21. *See* RESTATEMENT (THIRD), *supra* note 1 (Discussion Draft, 2000).

22. *Id.* §1 cmt. b, at 1–2 (Discussion Draft, 2000).

23. *Id.* at 3. The comments reject the view that unjust enrichment authorizes a "direct appeal to standards of equitable and conscientious behavior as a source of obligation." *Id.* at 2. Interpreted this way, unjust enrichment is "at best, a name for a legal conclusion that remains to be explained; at worst, an open-ended and potentially unprincipled charter of liability." An attempt at compromise, or possibly mollification, can be seen in the somewhat confusing remarks that "*unjust enrichment* and *unjustified enrichment* are precisely coextensive" and that "[i]n no instance does the fact or extent of liability in restitution depend on whether the source of liability is conceived or described as unjust enrichment, as unjustified enrichment, or as a combination of the two." *Id.* at 4. It is difficult to see how these statements can be true unless one has already settled on a positivist interpretation of *unjust* enrichment.

24. For example, the *Restatement* recognizes restitution claims based on mistaken improvement of land, explaining that the transfer of value is involuntary and "has not been validated by contract." *Id.* § 1 cmt. b, illus. 3; § 10. Yet, it is arguable that the transfer has a "legal basis" in the rule of property law that assigns chattels affixed to real property to the owner of the land. *See* 5 A. JAMES CASNER, THE AMERICAN LAW OF PROPERTY 34–37 (1952); HERBERT HOVENKAMP & SHELDON F. KURTZ, THE LAW OF PROPERTY 59 (5th ed. 2001).

25. *See* DAGAN, *supra* note 12, at 18–23 (questioning the coherence of the notion of unjustified enrichment).

First, restitution is not appropriate if the claimant conferred a benefit on the defendant consensually, through a valid gift or contractual exchange. Second, restitution is not appropriate if the claimant was an "officious intermeddler" who could reasonably have contracted for payment in return.[26]

For the most part, the new *Restatement* has done an admirable job of clarifying and explaining the law of restitution and imposing some discipline on the principle of unjust enrichment. Occasionally, though, it falters. In my view, it has done so in addressing the topic of restitution claims between unmarried cohabitants. By authorizing a restitution remedy in these cases, the *Restatement* necessarily embraces an equitable interpretation of unjust enrichment that could set the field on a dangerous course.

II. LEGAL RELIEF FOR COHABITANTS

Restitution claims between former cohabitants typically arise when, at the end of a long-term relationship, one party holds title to assets that are attributable, at least in part, to the other's contributions of property or domestic support.[27] To make the case simpler, I shall assume a couple of opposite sex, who might have married if both had been so inclined.[28] If they had in fact married, the claimant would now be entitled to an "equitable division" of assets accumulated during the marriage, often proceeding from the premise that marital wealth should be divided into

26. *See* RESTATEMENT (THIRD), *supra* note 1, § 1 cmt. b, at 3 (gifts, consensual exchange), § 2(2); at 14 (nonconsensual transfer); § 2(4), at 14 (circumstances do not excuse negotiation for contractual exchange) (Discussion Draft, 2000). Traditionally, the requirement that the plaintiff seek a contractual exchange when circumstances permit has been expressed in the maxim that "officious intermeddlers" are not entitled to restitution. *See id.* § 2 cmt. f, at 21–22. The *Restatement* does a significant service by clarifying this idea. A further limitation, not pertinent here, is that there is no claim for benefits not recognized by law as a subject of entitlement, such as unpatented inventions, gains obtained in fair competition, or incidental benefits a plaintiff's land use confers on neighbors. *See id.* § 2 cmt. e, at 18–21.

27. Much has been written on this subject. *See, e.g.*, DAGAN, *supra* note 12, at 165–83; Robert C. Casad, *Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?*, 77 MICH. L. REV. 47 (1978); *Symposium: Unmarried Partners and the Legacy of* Marvin v. Marvin, 76 NOTRE DAME L. REV. 1261 (2001). For a comprehensive summary of cases, see George Blum, *Property Rights Arising from Relationship of Couple Cohabiting without Marriage*, 69 A.L.R. 219 (5th ed. 2004).

28. This may soon be the case for same sex couples. To the extent it is not, the case against recovery is harder because options are limited. But at least some of the problems remain the same.

equal shares.[29] As an unmarried cohabitant, the claimant typically has no statutory entitlement to any part of the other's assets.

Aggrieved cohabitants have asserted claims against one another on various grounds, with mixed success. Factually, the cases are always colorful and often appealing. Some suggest an actual agreement between the parties to share assets but keep title in the name of one (not always for honest reasons).[30] In others, there is no suggestion of contract, but the comparative positions of the parties following their break-up make the claim attractive.[31] Still other cases read like Darwin Awards for the economically naive: how could the claimant have been so foolish?[32]

In addition to other rights and remedies, a number of courts have recognized restitution claims between ex-cohabitants on the ground of unjust enrichment.[33] The new *Restatement* endorses this form of relief. Specifically, the *Restatement* provides that if one former cohabitant "owns a specific asset to which the other has made substantial, uncompensated contributions in the form of property or services, the person making such contributions has a claim in restitution against the owner of the asset as necessary to prevent unjust enrichment."[34]

Although many cohabitant cases have strong appeal from the standpoint of fairness and decency, I believe that a remedy based on unjust enrichment represents a wrong turn in the law of restitution. To grant relief to disappointed cohabitants, courts must disregard the rules that traditionally have marked the boundaries of restitution and endorse an expansive reading of the unjust enrichment principle. This move is inconsistent with the premises of the new *Restatement* and jeopardizes the task of

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29. *See generally* JOHN DEWITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 369–73, 412–14 (2d. ed. 2001); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.09 (2000) [hereinafter ALI PRINCIPLES]. An ex-spouse may also be entitled to alimony. *See generally* GREGORY ET AL., *supra*, at 294–304. Alimony is less common than it once was, *see id.* at 289, but the idea of continuing spousal support is revived in the ALI PRINCIPLES, *supra*, §§ 5.03, 5.10 (2)(a).

30. *See, e.g.*, *In re* Estate of Eriksen, 337 N.W. 671 (Minn. 1983) (cohabitants purchased a house with joint funds but title was placed in the name of one cohabitant to avoid a loss of the other's welfare benefits).

31. *See, e.g.*, Sullivan v. Rooney, 533 N.E.2d 1372 (Mass. 1989) (plaintiff moved and took an inferior job to cohabit with defendant, then contributed to household expenses and assumed domestic responsibilities while defendant completed law school; home was titled in defendant's name); Omer v. Omer, 523 P.2d 957 (Wash. Ct. App. 1974) (couple married, then divorced in order to enter into sham marriage to expedite American citizenship; plaintiff gave defendant her earnings, which defendant applied to the purchase of real estate in his name).

32. *See, e.g.*, Sharp v. Kosmalski, 40 N.Y.2d 119 (1976) (plaintiff deeded his farm to defendant, who refused to marry him and ultimately evicted him).

33. *See, e.g.*, Salzman v. Bachrach, 966 P.2d 1263 (Colo. 2000); Sullivan v. Rooney, 533 N.E.2d 1372 (Mass. 1989); Evans v. Wall, 542 So. 2d 1055 (Fla. Dist. Ct. App. 1989); Blum, *supra* note 27; 69 A.L.R.5th at 248–63, 323–38; Casad, *supra* note 27.

34. RESTATEMENT (THIRD), *supra* note 1, § 28, at 24 (Tent. Draft No. 3, 2004).

rationalizing and taming the field of restitution. It also has practical consequences that illustrate the costs of too much "equitable" particularism on the part of courts. It may be that disappointed cohabitants should have other avenues for relief, such as status-based claims to a division of assets. But restitution remedies in cases of failed domestic relationships undermine the internal limits that are necessary to make restitution a manageable field of law.

A. Alternative Claims for Cohabitants

Restitiution for the value of property or services is only one part of the picture of legal rights and duties between cohabitants. Before discussing claims to restitution, it may be helpful, by way of contrast, to consider other possible forms of redress. As indicated by the *Restatement*, restitution claims typically involve significant, identifiable transfers of value from one cohabitant to the other. In addition to contribution-based restitution, some courts have ordered a division of some or all assets on the ground the parties agreed, expressly or impliedly, to share ownership.[35] Courts in two jurisdictions, Washington and Oregon, have gone even further and extended the protection of marital property laws to unmarried cohabitants in relationships deemed similar to marriage.[36]

Inspired by the Washington and Oregon decisions, a recently approved ALI project entitled Principles of the Law of Family Dissolution ("ALI Principles") recommends a comprehensive change in the rights of unmarried cohabitants.[37] Domestic partners, meaning persons "who for a significant period of time share a primary residence and a life together as a couple,"[38] would be entitled to most rights of spouses.[39] Among these rights are a presumptively equal division of all property accumulated during the relationship and "compensatory payments" for special losses (in effect, alimony).[40] Compensable losses include, for example, loss of earning capacity by a partner who cared for children and dispro-

35. *See* Blum, *supra* note 27, at 344–62 (highlighting decisions enforcing express promises), 372–84 (highlighting decisions enforcing implied promises).

36. *See* Connell v. Francisco, 898 P.2d 831, 834–35 (Wash. 1995); Wilbur v. DeLapp, 850 P.2d 1151, 1153 (Or. Ct. App. 1993).

37. ALI PRINCIPLES, *supra* note 29, Introduction, at 31–34 (advocating a shift from contract-based to status-based rights and obligations); *id.* ch. 6. The Reporter's Notes accompanying the provisions on domestic partners commend the decisions in Washington and Oregon. *Id.* § 6.03, Reporter's Notes cmt. b, at 933–34.

38. *Id.* § 6.01(1).

39. *Id.* § 6.05. Couples with children are deemed to be domestic partners after a fixed period of cohabitation to be set by state law; couples without children are presumed to be domestic partners after a period to be set by state law. *Id.* § 6.03(2)–(3).

40. *Id.* §§ 4.09, 4.10, 5.03, 6.06.

portionate loss of standard of living upon termination of the relationship.[41] In other words, the ALI Principles propose a thorough sharing of earned and potential wealth between unmarried cohabitants who enter into what appears to be a stable domestic relationship.[42] Apart from the Washington and Oregon decisions mentioned above, this proposal has not found its way into law and may not do so for some time. But the ALI project will certainly play a role in the continuing debate over cohabitant rights.

Recent academic writing on the legal rights of cohabitants has addressed the questions whether cohabitant claims should be based on contract or on status (the approach of the ALI Principles) and, if status-based, whether the rights attaching to cohabitation should be equivalent to or less comprehensive than the rights of married couples.[43] Arguments for attaching full marital rights and obligations to the status of domestic partnership focus on the demographic frequency and increasing acceptance of unmarried cohabitation, the incompatibility of contractual negotiation with mutual trust and romance, and the harmful effects of traditional domestic responsibilities on women.[44] Arguments in favor of

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41. *Id.* §§ 5.04, 5.13.

42. The only distinction drawn between married couples and unmarried couples who qualify as domestic partners is that in the case of marriage, the separate assets of each spouse are recharacterized as marital property subject to the sharing principle after a period of time. *Id.* § 6.04(3).

43. *See, e.g.*, Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1302–09 (2001) (preferring a status-based approach as better suited to the welfare function of family law); Cynthia Grant Bowman, *Legal Treatment of Cohabitation in the United States*, 26 LAW & POL'Y 119, 126–29, 145–47 (2004) (favoring a multi-status regime); David L. Chambers, *For the Best of Friends and for Lovers of All Sorts, A Status Other than Marriage*, 76 NOTRE DAME L. REV. 1347, 1352–54 (2001) (favoring a limited and optional status for "designated friends" but leaving financial obligations between unmarried partners to private agreement); Ira Mark Ellman, *"Contract Thinking" Was* Marvin's *Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1367, 1377–78 (2001) (favoring status-based rights similar to those of spouses); Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1402–06 (2001) (preferring status-based rights similar to those of spouses); J. Thomas Oldham, *Lessons from* Jerry Hall v. Mick Jagger *Regarding U.S. Regulation of Heterosexual Cohabitants or, Can't Get No Satisfaction*, 76 NOTRE DAME L. REV. 1409, 1421–33 (2001) (favoring limited status-based rights after an initial trial period); Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1449–64 (2001) (favoring limited status-based rights); David Westfall, *Forcing Incidents of Marriage on Unmarried Cohabitatants: The American Law Institute's Principles of Family Dissolution*, 76 NOTRE DAME L. REV. 1467, 1468–70, 1490 (2001) (opposing status-based rights); *cf.* Casad, *supra* note 27, at 49–62 (questioning a contract-based approach and preferring restitution in the absence of legislation creating status-based rights); DAGAN, *supra* note 12, at 165–83 (preferring the "contribution-based" approach of restitution).

44. *See, e.g.*, Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1163 (1981) (citing unequal bargaining power and the difficulty of exit); Bowman, *supra* note 43, at 127–29 (citing difficulty and unlikelihood of con-

a contractual approach include the lesser commitment associated with cohabitation, the need for options for couples who wish to remain financially independent, the intrinsic value of freedom and self-determination, and the possibility that legal equivalence between marriage and cohabitation will devalue and discourage marriage.[45] Lesser commitment, the value of options, and the possibility of adverse effects on marriage may also point to an intermediate status for cohabitants that carries fewer financial obligations.[46] Under a status-based regime of any kind, however, domestic partners would have less reason to clarify property arrangements and, more generally, less reason to protect themselves against the contingencies of life. A status-based approach that contemplates judicially administered divisions of assets and award of compensation at the end of every domestic partnership could also be very costly both to parties and to the taxpayers who fund courts.

Restitution and other remedies available to cohabitants are, of course, interrelated. Restitution serves some of the same goals as status-based sharing regimes. Restitution for special contributions can alleviate the hardship imposed on a subordinate cohabitant without the need to establish a contract. By providing a fallback, it may also encourage mutual trust and generosity.[47] Thus, if full sharing between cohabitants became the legal norm, there might be less demand for restitution.[48]

In other respects, restitution remedies may be at odds with a status-based regime. Restitution doctrine, with its requirement of significant contributions to identifiable assets, deliberately avoids the full accounting entailed in an equitable and presumptively equal division of assets.[49]

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tracting); Ellman, *supra* note 43, at 1367–79 (citing reasons why contracts are uncommon and undesirable among cohabitants); Estin, *supra* note 43, at 1384–91, 1406 (citing prevalence of cohabitation and similarity to marriage).

45. *See, e.g.*, Chambers, *supra* note 43, at 1354–57 (citing the state's obligation to facilitate choice); Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 BYU L. REV. 1189, 1226–27 (citing discouragement of marriage); Westfall, *supra* note 43, at 1469–70, 1476–78 (citing contractual freedom and options for those who do not wish to marry).

46. *See, e.g.*, Oldham, *supra* note 43, at 1426–27 (citing studies indicating a lesser commitment between cohabitants); Regan, *supra* note 43, at 1442–49, 1464–66 (citing lesser commitment, a need for options, and the importance of private ordering, but also favoring some status-based rights).

47. *See* DAGAN, *supra* note 12, at 173–75 (explaining that restitution "serves as an anti-opportunistic device that can reassure prospective parties that they will not be abused for cooperating").

48. *See* RESTATEMENT (THIRD), *supra* note 1, § 28 cmt. a, at 5–6 (Tent. Draft No. 3, 2004) (suggesting that restitution claims between cohabitants might be superceded by the ALI principles if those principles were widely adopted).

49. *See* DAGAN, *supra* note 12, at 171–74 (suggesting that restitution between cohabitants achieves long-term reciprocity but no "immediate and equivalent *quid pro quo*").

Moreover, the very notion of restitution for special contributions between cohabitants assumes individual control of assets, which a sharing regime seeks to curtail. With a full sharing regime in place, therefore, restitution might be ruled out of order or confined to "separate" property.[50]

In this article, I shall set aside the debate over status and contract and the desirability of marriage-like sharing between cohabitants. My concern is with the law of restitution and the process of judicial decision-making involved in applying the principle of unjust enrichment. I may return at times to status-based property rights as a point of comparison, but for the most part, a status-based sharing regime is pertinent only insofar as it provides an alternative means of protecting cohabitants against hardship if restitution claims are denied.

B. Restitution

Whatever conclusion one may draw about the desirability of some form of legal remedy for disappointed cohabitants, relief on the basis of unjust enrichment is a significant departure from both the traditional law of restitution and the framework established in the new *Restatement*. As noted above, introductory sections of the *Restatement* identify several limiting principles intended to apply to all restitution claims.[51] These limiting principles define and regulate the field of restitution.

The first limitation relevant to cohabitation cases holds that restitution responds to nonconsensual transfers: if the claimant intended a gift, or conferred value on the defendant according to the terms of a valid contract, the claimant has no right to restitution.[52] Legal enforcement of gifts honors the intentions of donors and permits them to enjoy the satisfaction that comes with altruism or support of family and friends.[53] En-

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50. Although the draft *Restatement* acknowledges that a sharing regime might displace restitution in cohabitant cases, it maintains that the two approaches are not inconsistent. RESTATEMENT (THIRD), *supra* note 1, § 28 cmt. a, at 25 (Tent. Draft No. 3, 2004).

51. *See supra* note 26 and accompanying text.

52. *See* RESTATEMENT (THIRD), *supra* note 1, § 2(2) & cmt. c, at 15–16 (Discussion Draft, 2000). *See also id.* § 1 cmt. b, at 3 (a valid gift cannot support a claim of "unjustified" enrichment). Section 2(2) states somewhat reservedly that "transactions that give rise to a liability in restitution are *primarily* nonconsensual." *Id.* § 2(2), at 14 (emphasis added). The accompanying comment, however, is more emphatic, stating that "[i]t is a common feature of *every* transaction giving rise to a liability in restitution that a benefit has been conferred or obtained outside the consensual framework that would ordinarily govern both the transfer and any claim for compensation." *Id.* § 2 cmt. c, at 15–16 (emphasis added).

53. *See* Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821, 842–49 (1997) (discussing the affective value of gifts); Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39, 59–65 (1992) (noting that gifts, like other voluntary transfers, are presumptively beneficial to the parties).

forcement of contracts protects and encourages reliance on bargained-for promises, permits optimal timing of transfers, and confirms the moral value of consent.[54]

The second limiting principle holds that restitution is not available as an alternative to contract.[55] If the claimant conferred a benefit on the defendant in the hope of payment, and could reasonably have negotiated for payment but failed to do so, the claimant has no right to restitution. Consent is a much superior gauge of the value of the transfer to the defendant than the price fixed by a court in an award of restitution.[56]

Restitution between former cohabitants ignores these limiting rules. Most transfers of property or services from one cohabitant to another are consensual acts of generosity, performed with no expectation of reimbursement. They are voluntary transactions, free from fraud or mistake (apart from mistaken assumptions about the future course of the relationship, which provide no ground for relief). They are, in other words, valid gifts.

Consider, for example, *Sharp v. Kosmalski*,[57] which provides the basis for one of the *Restatement*'s illustrations.[58] Following the death of his wife, the claimant, a 56-year-old farmer, became enamored of a 40-year-old schoolteacher.[59] The claimant repeatedly proposed marriage, which the schoolteacher repeatedly declined.[60] He also made a series of gifts of escalating value, culminating in a deed of his farm.[61] The two may or may not have cohabited on intimate terms. Ultimately, the relationship ended and the schoolteacher ousted the claimant from the farm.[62] The outcome certainly looks unfair: he is destitute; she is enjoy-

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54. *See, e.g.*, CHARLES FRIED, CONTRACT AS PROMISE 16–17 (1981) (linking contract enforcement to autonomy); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 94–95 (6th ed. 2003) (citing the need to curb opportunism and facilitate optimal timing of transfers); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 296–300 (1986) (citing the moral force of consent); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 54, 57–66 (1936) (explaining the importance of facilitating reliance).

55. RESTATEMENT (THIRD), *supra* note 1, § 2(4) & cmt. f, at 21 (Discussion Draft, 2000).

56. *See id.* ("Contract is incomparably superior to restitution as a means of regulating most voluntary transfers because it eliminates, or minimizes, the fundamental difficulty of valuation."); POSNER, *supra* note 54, at 32–34 (discussing the economic value of private property and the importance of a right of transfer).

57. 351 N.E.2d 721 (N.Y. 1976).

58. *See* RESTATEMENT (THIRD), *supra* note 1, § 28 cmt. d, illus. 3, at 33 (Tent. Draft No. 3, 2004).

59. *Sharp*, 351 N.E.2d at 722.

60. *Id.*

61. *Id.*

62. *Id.* at 723. The court imposed a constructive trust, in order "to prevent unjust enrichment." *Id.* at 724. The court listed a promise to pay as a prerequisite to a constructive

ing a farm she did nothing to deserve; she appears to have been extraordinarily unkind. But the sorry state of affairs is a consequence of deliberate, if very unwise, choices by a grown and apparently competent man. He made a gift.

Stirring in a bit of fictitious intent, it may be possible to characterize gifts between cohabitants as conditional gifts, dependent on the parties' remaining together or on reciprocity over time.[63] Yet, if the transferor expected reimbursement, a claim to restitution runs afoul of the requirement that the claimant negotiate for payment before making a transfer. The requirement of prior negotiation is sometimes excused, but only if there is some good reason why the claimant should be allowed to bypass the normal process of obtaining consent.[64]

The section of the *Restatement* immediately preceding its provisions for restitution between cohabitants, entitled "Frustrated Expectation of Ownership," illustrates the possibility of excuse from prior negotiation.[65] According to this section, a claimant who spends money to improve property may claim restitution from the property owner if the claimant reasonably expected that the value of the improvement would accrue to himself. For example, the owner may have indicated to the claimant that he intended to give or devise the property to the claimant at some future time and invited the claimant to make improvements. If the claimant completes the improvements and the owner never makes the gift, the claimant may be entitled to restitution from the owner or the owner's eventual donee.[66] To succeed in this claim, however, the claimant must establish that he reasonably expected to become the owner of the property and did not assume the risk of losing his investment.[67]

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trust, but the promise evidently was implied-in-law. *See id.* at 723 (explaining the defendant's promise was "implied or inferred from the very transaction itself").

63. *See* RESTATEMENT (THIRD), *supra* note 1, § 28, cmt. b, at 27 (Tent. Draft No. 3, 2004) ("A transaction that might appear to be purely donative if judged at the time may thus (in effect) be recharacterized, after the fact, as an interrupted exchange or a conditional gift.").

64. The *Restatement* recites this requirement as a general rule of restitution in its introductory sections, and repeats the requirement in its section on Expectation of Benefit from Property, discussed in the text below. RESTATEMENT (THIRD), *supra* note 1, § 2(4), 14 (Discussion Draft, 2000); *id.* § 27, cmt. d, at 11 (Tent. Draft No. 3, 2004).

65. RESTATEMENT (THIRD), *supra* note 1, § 27, at 3 (Tent. Draft No. 3, 2004).

66. *See id.* cmt. d, illus. 12 & 13 (involving representations to expectant heirs or donees). The illustrations accompanying this section include three types of cases: (1) cases in which the claimant's expectation of benefit is based on a contract or conveyance that is set aside in a later judicial proceeding; (2) cases such as the example in the text, in which the claimant's expectation is based on a representation by the current owner; and (3) cases in which the claimant's expectation is based on a seemingly reliable ongoing relationship such as a lease. *See id.* cmts. c, d, & e.

67. *Id.* § 27, cmts. a, c & d. Comments repeatedly emphasize that the claimant's expectation of benefit must be reasonable. *See, e.g., id.* cmt. a, at 4 (referring to an "unanticipated turn

This type of claim is itself rather close to the line. The claimant might have bargained with the donor for an agreement to reimburse the costs of the improvement if the donor had a change of heart. Yet proof that the claimant's expectation of ownership and decision to act were "justifiable" implies that the contingency was too remote to warrant a costly bargain. Further, a donor who leads a potential donee to make improvements probably is better situated than the donee to prevent the donee's loss; therefore liability in restitution provides an appropriate incentive.[68] Moreover, the claimant must demonstrate not only the reasonableness of his expectations, but the absence of an assumption of risk, and the overall justification for his decision to confer benefits without first seeking an agreement to pay.[69]

The *Restatement*'s cohabitant provisions are far more lenient in allowing claimants to seek restitution without explaining their failure to bargain for payment.[70] Unmarried cohabitants may expect to share wealth for the foreseeable future, but data on the duration of this type of relationship suggest that the expectation is more a matter of hope or blind faith than of reason.[71] At the least, an unmarried cohabitant who contributes to assets titled in the name of his or her partner assumes some risk that the assets will not always be shared.

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of events"); *id.* cmt. f, at 16 (emphasizing that both the expectation and the decision to act on it must be justifiable). However, some of the illustrations appear close to the line. *See, e.g., id.* illus. 20 (explaining that children improve property in hope of inheriting property held in tenancy by entireties by estranged father and by mother who requested improvements and; their expectations of inheritance are disappointed when father survives mother).

68. The comments suggest that in cases involving a representation by the owner of the property that the claimant will eventually succeed to ownership, the rationale is similar to that of estoppel. *See id.* cmt. d, at 11.

69. See *supra* note 67 and accompanying text.

70. Comments to the *Restatement's* cohabitation provisions acknowledge the discrepancy between these two sections. The comments also point out that that family members or friends who share a residence but not "a life together as a couple" are subject to the more stringent requirements imposed by the section on expectation of benefits. RESTATEMENT (THIRD), *supra* note 1, § 28 cmt. b, at 26–27 (Tent. Draft No. 3, 2004). This raises the question, why should sex make such a marked difference in legal rights and responsibilities? Close friends and relatives who share a home also place faith in one another, and assume that their relationships will survive. If anything, the added feature of sexual intimacy increases the chances of a future split. *Cf.* Chambers, *supra* note 43, at 1349–57 (proposing an optional status for "pairs of adults").

71. *See* Oldham, *supra* note 43, at 1422 (citing studies indicating that about half of opposite sex cohabitants marry, but that of the remaining half, only 10% are still together five years after their cohabitation began); Pamela J. Smock & Wendy D. Manning, *Living Together in the United States: Demographic Perspectives and Implications for Family Policy*, 26 LAW & POL'Y 87, 90 (2004) (commenting that most cohabitation arrangements that do not end in marriage are of short duration, and that marriages following cohabitation are more likely to fail).

Now, it might be argued that negotiation is simply out of place in the context of an intimate, trusting relationship.[72] If the contemplated agreement is a comprehensive blueprint for division of assets in case the relationship comes to an end, this may be true. Complex negotiations over asset division may also place too great a burden on the less sophisticated and more generous and trusting of two parties. But in a typical restitution case, negotiating for payment is not necessarily a daunting prospect. When one cohabitant makes a distinct contribution to an asset titled in the other's name, frequently all that is needed is an off-the-rack legal arrangement such as a joint ownership or a loan.

For example, a number of cohabitation cases involve restitution claims based on contributions to the purchase of real property held in the name of one cohabitant. The *Restatement* provides an illustration based on *Salzman v. Bachrach*.[73] Salzman and Bachrach met through a personal ad. After living separately for a number of years, they purchased a lot, taking title together. Bachrach, a skilled draftsman, designed a house. Bachrach also paid about one-third of the cost of constructing the house, and oversaw the project.

After the house was complete, Bachrach quitclaimed his interest in the property to Salzman, in part to head off inquiries by Salzman's ex-husband, who was paying court-ordered support.[74] The relationship between Salzman and Bachrach then deteriorated. Less than two years after Bachrach moved in, Salzman changed the locks and posted a no-trespass sign stating, "This means you Erwin."[75]

Bachrach sued, seeking restitution for his contributions to the house. The trial court found that Bachrach did not intend a gift.[76] The Colorado Supreme Court concluded that Bachrach had established a claim of unjust enrichment by showing that Salzman received a benefit at his ex-

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72. Comments in the *Restatement* appear to endorse this argument, stating that negotiation for consent is either excused or assumed to be impracticable between cohabitants. RESTATEMENT (THIRD), *supra* note 1, § 28 cmt. b, at 27 (Tent. Draft No. 3, 2004). *See also* Casad, *supra* note 27, at 49, 56–58 (finding restitution more plausible than contract-based remedies because the parties "may fear that even mentioning such mundane matters would debase other, more important, non-economic aspects of their association"). Advocates of status-based protection for cohabitants frequently make this argument as well. *See, e.g.*, Blumberg, *supra* note 44, at 1163 (citing unequal bargaining power and the difficulty of exit); Ellman, *supra* note 43, at 1367–78.

73. 996 P.2d 1263 (Colo. 2000). *See* RESTATEMENT (THIRD), *supra* note 1, § 28 cmt. d, illus. 5 (Tent. Draft No. 3, 2004).

74. The title arrangement facilitated financing, provided Salzman with tax benefits, and also permitted Bachrach to assure the ex-husband that he and Salzman were financially independent. *Salzman*, 996 P.2d at 1265.

75. *Id.*

76. *Id.* at 1266 n.5.

pense, "under circumstances that would make it unjust for defendant to retain the benefit without paying."[77] It made no mention of the possibility that Bachrach might have sought an agreement from Salzman to reimburse him for contributions.

In this setting, however, a specification of rights does not seem either unduly burdensome or likely to undermine mutual trust. The parties are already engaged in a real estate transaction that requires legal documentation. They can take title as tenants in common; alternatively, they can keep a simple record of a loan. Both these transactions were evidently within the competence of the parties in *Salzman v. Bachrach*. Of course, formal acknowledgment of Bachrach's rights might have jeopardized Salzman's support payments, but misleading her ex-husband about the extent of their financial entanglement is not the type of circumstance that ought to justify a decision to confer benefits without seeking prior agreement.[78]

When the claimant's contribution consists of services, negotiations may be more problematic, depending on the nature of the case. In another of the illustrations provided in the *Restatement*, the claimant left her husband to cohabit with the defendant, who owned a tennis club.[79] The claimant divorced her husband; the defendant did not divorce his wife. Over the next six years, the claimant worked at the defendant's club, eventually as a full-time manager. The defendant occasionally paid money to the claimant, but the sum of these payments was significantly less than the market value of her labor. When they split, the claimant sued for the value of her services as manager, and the court approved the claim.[80]

When, as here, the claimant performs services in a business setting, a requirement of prior negotiation seems quite reasonable. The negotia-

77. *Id.* at 1265–66. The court remanded the case for consideration of the value of Bachrach's contributions and the possibility of "unclean hands" in connection with the title arrangement. *Id.* at 1269.

78. *Cf.* RESTATEMENT (THIRD), *supra* note 1, § 27, cmt. d, at 11 (Tent. Draft No. 3, 2004) (requiring proof of justifying circumstances). Misleading third parties is a recurrent theme in cohabitant cases. *See, e.g.*, Sullivan v. Rooney, 533 N.E.2d 1372 (Mass. 1989) (holding that a title arrangement enabled defendant to obtain full financing through a Veterans Administration loan); Estate of Eriksen, 337 N.W.2d 671 (Minn. 1983) (holding that a title arrangement avoided creating rights in plaintiff's estranged husband and preserved her AFDC entitlement). Misbehavior toward third parties probably does not count as "unclean hands" for purposes of a suit between cohabitants, but it also should not count as a reason to bypass negotiation for payment. *See* DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 69 (2d ed. 1993) (discussing the necessary relation between a defense of unclean hands and the claim to which it applies).

79. The example is based on *Burns v. Koellmer*, 527 A.2d 1210 (Conn. App. Ct. 1987). *See* RESTATEMENT (THIRD), *supra* note 1, § 28 cmt. d, illus. 9 (Tent. Draft No. 3, 2004).

80. *Burns*, 527 A.2d at 1212.

tion involved is not complex; the claimant need only request a standard salary. Indeed, in the case on which the illustration is based, the claimant did demand payment, the defendant promised to pay, and the court based its favorable decision at least in part on an implied-in-fact contract to pay the claimant the market value of her work.[81] This aspect of the case is excised (rightly) from the *Restatement*'s illustration: to the extent the claim is based on an actual promise, it is a contract claim rather than a restitution claim.[82] Working instead from the facts of the *Restatement* illustration, in which no promise was made, the critical question is whether the claimant expected to be paid. If she did, there was no serious obstacle to negotiation. If she did not expect to be paid, her services were a gift, made to someone who turned out to be unworthy.

Domestic services present a harder case. Suppose our couple cohabits for fifteen years. During that time, the female cohabitant assumes most domestic responsibilities, including primary care of the couple's child, while the male cohabitant completes his education and develops a career. When they split, the male cohabitant holds title to a number of assets, mostly purchased from his earnings.[83]

In these circumstances, an obligation to negotiate for payment seems out of place. To adequately cover what has occurred, a contract between parties would have to provide in detail for ownership of potential assets, based on an evolving division of labor. Negotiations would be complicated, speculative, and unlikely to promote harmony.

The claim involved here, however, is not really a claim to restitution, at least not as restitution between cohabitants is described in the

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81. *Id.* at 1215 (describing quantum meruit as "a remedy available to a party when the trier of fact determines that an implied contract for services existed between the parties").

82. The *Restatement*, at least, takes the position that a claim based on an enforceable promise should not be treated as a claim in restitution. *See* RESTATEMENT (THIRD), *supra* note 1, § 1 cmt. c, § 2(2) & cmt. c (Discussion Draft, 2000). This position is a sensible one: subsuming both contracts "implied-in-fact" and contracts "implied-in-law" under the single heading of restitution has led to hopeless confusion. *See generally* DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 384–86 (2d ed. 1993) (distinguishing contracts implied-in-fact from obligations based on unjust enrichment); ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 23–25 (2004). For a contrary view, see Linzer, *supra* note 7, at 699 (suggesting that contracts implied-in-fact and contracts implied-in-law serve similar juristic purposes).

83. This example is an amalgam of a number of cases, including *Sullivan v. Rooney*, 533 N.E.2d 1372 (Mass. 1989); *Carlson v. Olson*, 256 N.W.2d 249 (Minn. 1977); *Pickens v. Pickens*, 490 So. 2d 872 (Miss. 1986); *Omer v. Omer*, 523 P.2d 957 (Wash. Ct. App. 1974) (in which a Washington court applied divorce laws by analogy); and *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987). *See also* RESTATEMENT (THIRD), *supra* note 1, § 28 cmt. c, illus. 1 (Tent. Draft No. 3, 2004) (based on *Pickens*, 490 So. 2d. 872).

black letter provisions of the *Restatement*.[84] The claimant is not seeking reimbursement for a discrete contribution to assets; her claim is to an equitable division of assets in light of the couple's long period of interdependence. In other words, a case of this kind presents exactly the dilemma that has led to debate over status and contract approaches to cohabitation: should we treat couples in a marriage-like relationship as if they were married, or preserve more legal options and channel those who want protection into marriage?[85] In lay terms, the male cohabitant may have been unjustly enriched, but a contribution-based restitution remedy does not fit the problem.

Another group of cases in which restitution has intuitive appeal are those in which one cohabitant pays for the other's education. The couple lives together for a comparatively short time, during which one works and the other goes to school. When they split, the defendant has a much-increased earning capacity and the claimant has nothing to show for his or her time.[86] The case is hard for several reasons. If the relationship lasted only a few years, status-based remedies, if any, are unlikely to apply. The couple probably was young and unsophisticated when they began, and the more sophisticated of the two has come out far ahead. Meanwhile, a cash contribution is well-defined and evidently valuable, so that the reasons for insisting on negotiation are less compelling. Yet, the contractual option is not extremely burdensome—a simple loan will do.[87] In the absence of even an informal agreement to pay, paying for someone else's education is a risky undertaking that probably should be construed as either a gift or a gamble.

III. RESTITUTION AND PARTICULARISTIC ADJUDICATION

The illustrations just provided, all drawn from the *Restatement*, show that in case after case, restitution between cohabitants breaks the

84. In *Pickens v. Pickens*, the case selected as an illustration in the *Restatement*, both parties contributed earnings, a fact that makes the case more easily amenable to an award of restitution. However, rather than measuring monetary contributions, the court noted that the male earned more money but the female did housework. Accordingly, it found that the parties had "contributed substantially to the care and maintenance of the family and themselves" and ordered an equal division of assets. *Pickens*, 290 So. 2d at 874. The *Restatement* also recommends an equal division of assets, but relief in this form seems at odds with the black letter criteria of "substantial, uncompensated contributions" to a "specific asset." RESTATEMENT (THIRD), *supra* note 1, § 28, at 24 (Tent. Draft No. 3, 2004).

85. *See supra* text accompanying notes 43–46.

86. *See* RESTATEMENT (THIRD), *supra* note 1, § 28 cmt. d, illus. 8, at 35–36 (Tent. Draft No. 3, 2004).

87. *See id.* § 28 cmt. e, at 18–21. Real-life claims to restitution may be rare because there typically is at least an informal agreement to repay money lent for tuition.

rules that ordinarily limit the field. Courts allow claims based on transfers that were intended at the time to be gifts, or they excuse claimants from the requirement of prior negotiation. When courts detach themselves in this way from the limiting rules of restitution, there is nothing to guide them but their own unanchored sense of injustice. What moves the courts to give relief? Sometimes, as in the case of the farmer and the schoolteacher, hardship plays a major role because the claimant is now destitute. More often, the claimant's disadvantage is comparative[88] and the motivating feature of the case is the sense that the defendant has behaved very badly. A fair-minded person would have insisted on reimbursing his or her former cohabitant; the defendant, in contrast, is a mean-spirited opportunist who took advantage of another's love and trust.

Another way to put this is that when courts set aside the limiting rules, they necessarily embrace an equitable interpretation of the principle of unjust enrichment. Unjust enrichment either licenses courts to respond as they believe best to particular facts, or instructs them to apply a broad legal principle that incorporates their understanding of injustice. As noted earlier, either of these interpretations of unjust enrichment leads to purely particularistic adjudication: courts grant relief when they believe, based on all the available facts, that the existing state of affairs is unjust.[89] In its section on claims between cohabitants, the *Restatement* appears to have adopted this approach.[90] Some will welcome this devel-

88. *See supra* note 6 and accompanying text.

89. *See supra* note 11.

90. Restatements are supposed to restate the law applied by courts, or at least were originally so conceived. The *Restatement (Third) of Restitution and Unjust Enrichment* tries to adhere to this definition of its mission, *see* RESTATEMENT (THIRD), *supra* note 1, Reporter's Introductory Memorandum, at xvi (Discussion Draft, 2000), and it might be argued that the courts have already gone down the path of restitution between cohabitants. However, despite suggestions otherwise, *see, e.g.*, DAGAN, *supra* note 12, at 167–68; Estin, *supra* note 43, at 1384, judicial acceptance of this type of restitution claim is not universal among modern courts. Some courts have rejected the possibility of unjust enrichment claims between cohabitants; others have denied relief on the facts without conclusively rejecting unjust enrichment claims but with indications of disapproval. *See, e.g.*, Jordan v. Mitchell, 705 So. 2d 453 (Ala. Civ. App. 1997); Arwood v. Sloan, 560 So. 2d 1251 (Fla. Dist. Ct. App. 1990); Ayala v. Fox, 564 N.E.2d 920 (Ill. App. Ct. 1990); Shold v. Goro, 449 N.W.2d 372 (Iowa 1989); Slocum v. Hammond, 346 N.W.2d 485 (Iowa 1984); Snell v. Meyers, 2001 WL 732082 (Mich. Ct. App. 2001) (unpublished opinion); Davis. V. Davis, 643 So. 2d 931 (Miss. 1994); Malone v. Odom, 657 So. 2d 1112 (Miss. 1995); Kohler v. Flynn, 493 N.W.2d 647 (N.D. 1992); Tarry v. Stewart, 649 N.E.2d 1 (Ohio Ct. App. 1994); Seward v. Mentrup, 622 N.E.2d 756 (Ohio Ct. App. 1993); Mitchell v. Moore, 729 A.2d 1200 (Pa. Super. Ct. 1999); Roberson v. Cavis, 580 A.2d 39 (Pa. Super. Ct. 1990). Moreover, in many of the cases that award restitution, there is a strong suggestion of actual agreement to reimburse or to share ownership of a particular asset. *See, e.g.*, Salzman v. Bachrach, 996 P.2d 1263 (Colo. 2000) (title arrangement designed to facilitate financing and mislead defendant's ex-husband); Burns v. Koellmer, 527 A.2d 1210,

opment, but it does not rationalize the law of restitution in the manner envisioned in the initial sections of the project.

The appeal of particularistic decision-making—doing what is right in the circumstances of the case—is especially strong in cohabitation cases. The defendant appears to have met trust and intimacy with greed and opportunism, the claimant has been left, at least comparatively, in a state of hardship, and an equitable interpretation of unjust enrichment offers a way to make things right. Yet, the dangers of this form of decision-making are also apparent in the setting of failed cohabitation.

An initial problem is that particularism undercuts the ability of law to secure long-term benefits through rules. Limiting restitution to non-consensual benefits protects the institution of gift-giving, and so ensures that donors can derive altruistic satisfaction through binding transfers of property.[91] Requiring claimants who intentionally confer benefits on others to bargain for payment allows owners to judge the value of their assets, and so protects the institution of private property and the various values it serves.[92] These advantages will be most secure if the limits on restitution operate as rules—that is, if courts apply them consistently without reconsidering the wisdom of the outcomes they require in particular cases. A court engaged in particularistic decision-making can and should treat potential harm to the institutions of gift and private property as a relevant consideration in determining what outcome is best, all things considered.[93] Yet, if courts treat the limits on restitution as optional or advisory, they may err in their calculations.[94] In any given case, the effect of a single award of restitution on gift-giving or bargaining for consent may appear minor in comparison with the claimant's plight. Moreover, in the context of adjudication, the situation of the parties is likely to be more salient in the mind of a judge than the background values associated with donative transfer and negotiated ex-

1215 (Conn. App. Ct. 1987) (finding of promise to pay for services); *In re* Estate of Eriksen, 337 N.W.2d 671 (Minn. 1983) (title arrangement designed to protect plaintiff's welfare entitlement); Blum, *supra* note 27 (describing cases involving implied agreements). At least this is the case outside the marriage-like situations that, I have argued, do not belong in the category of restitution in any event. Since Lord Mansfield's decision in *Moses v. MacFerlan*, (1760) 97 Eng. Rep. 676 (K.B.), courts have muddied the distinction between contracts implied-in-fact and obligations implied-in-law on the basis of unjust enrichment, but the *Restatement* should not carry this confusion forward. On contracts implied-in-fact and in-law, see *supra* note 82.

91. *See supra* note 53 and accompanying text.

92. *See supra* note 54 and accompanying text.

93. *See* SCHAUER, *supra* note 14, at 94–100 (discussing "rule-sensitive particularism").

94. *See id*; ALEXANDER & SHERWIN, *supra* note 14, at 61–68 (discussing the errors of rule-sensitive particularism).

change.[95] If, overall, limits on restitution prevent more error by preempting miscalculation than they cause by requiring some unnecessarily harsh results, courts are better off treating them as binding constraints.[96]

Claims arising out of failed domestic relationships also raise questions about the capacity of courts to assess what is just between parties. Once limiting rules are set aside, the question for the court comes down to whether the defendant has done something *nasty*, and whether the outcome for the claimant is *unfair*. In the circumstances of an intimate relationship, the answers to these questions depend on all the details of the parties' relationship, day to day, from its inception to its end. What really went on between the farmer and the schoolteacher? Did she entice him to turn over his assets one by one, then banish him? Or did he do something—threaten her, mistreat her, wear her down—that left her feeling perfectly justified in ousting him from the farm? Did Salzman encourage Bachrach to invest time and money in her house, then decide he was no longer useful? Or was he an autocrat who pushed her to live with him and build a house she did not really want? Did he lie, cheat, or manipulate? What led her to write "This means you Erwin" on her no-trespass sign?

An equitable interpretation of unjust enrichment that authorizes courts to look for "injustice" makes all these matters relevant.[97] If, as is likely, the courts shy away from a full accounting of injustices between parties, they are not living up to their task.[98] If they pursue all relevant evidence, different problems arise. As an initial matter, full inquiry into the details of an intimate relationship raises questions about how far the state should intrude into the personal lives of individuals. Some will argue that privacy is not a valid concern: respect for privacy merely gives dominant parties in relationships deemed private a free rein to exploit the weaknesses of others.[99] Setting aside the debate over privacy, a compre-

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95. *See* Amost Twersky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 163–78 (Daniel Kahneman et al. eds., 1982) (explaining the tendency of reasoners to overvalue salient facts in comparison to background regularities).

96. *See* ALEXANDER & SHERWIN, *supra* note 14, at 55–60 (explaining the value of rule-following); SCHAUER, *supra* note 14, at 131–33, 149–55 (same).

97. Comments to the *Restatement's* cohabitation provisions confirm that "a conclusion about unjust enrichment [on which these cases turn] is potentially influenced by all of the circumstances both of the parties' cohabitation and of its termination." RESTATEMENT (THIRD), *supra* note 1, § 28 cmt. c, at 27–30 (Tent. Draft No. 3, 2004).

98. There is little evidence of this sort of inquiry in the cases, despite the courts' broad definitions of the unjust enrichment.

99. *See, e.g.*, Katherine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475, 475 (1999) (summarizing the position); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1540–49 (discussing dangers of privatization).

hensive investigation of injustice between parties is likely to be costly and inconclusive. The field of inquiry is virtually unlimited; the parties are sure to have widely differing perceptions of the facts, and most of the story will be known only to the disputants themselves.[100]

In contrast, divorce proceedings have tended to become more objective over time. All states now recognize no-fault divorce.[101] Spousal support determinations are based primarily on need.[102] Marital fault may or may not play a role in equitable division of assets, but a number of states and the Uniform Marriage and Divorce Act have excluded consideration of fault.[103] Similarly, status-based approaches to cohabitant claims avoid detailed inquiry into the parties' behavior toward one another.[104] Under the ALI Principles, parties who qualify as domestic partners are automatically entitled to the property rights of spouses.[105] A finding of domestic partnership depends primarily on objective features of the relationship such as duration and joint residence,[106] and the introductory commentary makes clear that fault should not affect the parties' financial rights and obligations.[107] Accordingly, courts have comparatively little occasion to explore the emotional and psychological details of the parties' life together.

Finally, particularistic decision-making undermines the settlement function of law. Determinate rules, consistently applied, settle potential controversies within the range of their application.[108] Settlement, in this

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100. On the matter of differing perceptions, see Michael Ross & Fiore Sicoly, *Egocentric Biases in Availability and Attribution, in* JUDGMENT UNDER UNCERTAINTY, *supra* note 95, at 179, 183–85 (presenting data showing that spouses' combined assessments of responsibility for various domestic tasks, obtained separately from each spouse, almost always add up to more than 1.0).

101. *See* GREGORY ET AL., *supra* note 29, at 222–24.

102. *See id.* at 289, 294–97 (noting an increasing role for "fairness" but a decreasing role for fault).

103. *See* UNIFORM MARRIAGE AND DIVORCE ACT § 307 (1987); ALI PRINCIPLES, *supra* note 29, at 43–49 (finding no-fault allocation to be the "dominant" position in division of assets); GREGORY ET AL., *supra* note 29, at 416–17.

104. *See* Blumberg, *supra* note 43, at 1298–99 (arguing that the ALI Principles minimize fact-finding).

105. *See supra* notes 38–39 and accompanying text.

106. *See* ALI PRINCIPLES, *supra* note 29, § 6.03. Presumptions of domestic partnership arise when the couple reside together for fixed periods of time, and the more intricate inquiry into the parties' "life together as a couple" appears to come into play only when the presumptions do not apply. *See id.* § 6.03 cmts. d & e.

107. *See id.* Introduction, at 43 (citing "the core tenet that the dissolution law provides compensation for only the *financial* losses arising from the dissolution of marriage"). *See also id.* § 6.02(1)(a)–(b) (stating as a goal the establishment of principles "that are consistent and predictable in application").

108. See ALEXANDER & SHERWIN, *supra* note 14, at 11–15 (discussing the settlement function of law).

general sense, avoids disputes, minimizes uncertainty, and allows individual actors to coordinate their conduct to the benefit of all involved.[109] Rules of law also facilitate settlement in the narrower sense of private resolution of lawsuits. The more easily parties to a threatened or pending litigation can predict its outcome, the more likely they are to agree on a compromise.[110] When the outcome is uncertain, negotiation becomes difficult, particularly between parties who are inclined to act strategically or to take an exaggerated view of the merits of their own claims.

Comments in the *Restatement* acknowledge that the outcome of an inquiry into unjust enrichment between cohabitants is inherently unpredictable.[111] Parties do not know where they stand in advance, and when disputes arise, there is no framework for compromise. This not only imposes costs on the legal system,[112] but also raises some interesting questions about what cases will reach the courts: which claimants will sue and which defendants will refuse to settle? Celebrities may go to court because they can afford to.[113] Beyond this, the optimistic view is that the costs of litigation will isolate for trial those cases in which one cohabitant has been seriously mistreated. Those who have suffered most, however, may lack the resources to press their claims; and if they do prosecute, a defendant obviously in the wrong should be inclined to settle. A less optimistic prediction is that the heartbreak cases most likely to come to trial are disputes between parties who are very, very angry. If so, then courts are providing, at considerable social cost, a forum for airing resentment against former intimates. Resentment also calls forth the darker, comparative side of the supposed moral principle of unjust en-

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109. On the coordination value of rules, see JOSEPH RAZ, THE MORALITY OF FREEDOM 49–50 (1986); SCHAUER, *supra* note 14, at 137–45, 162–66; Mark C. Murphy, *Surrender of Judgment and the Consent Theory of Political Authority*, 16 LAW & PHIL 115, 125–27 (1997); Gerald J. Postema, *Coordination and Convention at the Foundation of Law*, 11 J. LEGAL STUD. 165 (1982).

110. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 13–15 (1984). Priest and Klein link predictability of outcome, and therefore likelihood of settlement, to the proximity of the parties' dispute to the applicable decisional standard. Their premise, however, is that unpredictability inhibits settlement.

111. RESTATEMENT (THIRD), *supra* note 1, § 28 cmt. c, at 29 (Tent. Draft No. 3, 2004) ("outcomes cannot be safely predicted apart from the facts of a particular case").

112. A large percentage of civil litigation in state courts—as much as one-half by some accounts—arises from domestic disputes. *See* GREGORY ET AL., *supra* note 29, at 225 (citing RICHARD NEELY, THE DIVORCE DECISION: THE LEGAL AND HUMAN CONSEQUENCES OF ENDING A MARRIAGE 1 (1984)). The overall volume of litigation in any jurisdiction may depend on docket congestion. *See* George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 534 (1989) (discussing the effects of congestion on the expected value of judgments). Even so, if one class of cases is particularly likely to generate trials, it may displace other classes of cases, perhaps of greater importance to society, or more likely to generate rules of law and accompanying coordination benefits.

113. *See* Marvin v. Marvin, 557 P.2d 106 (Cal. 1976).

richment: a claim to gains or wealth perceived as unjust is closely akin to an expression of envy.[114]

Again, status-based approaches to cohabitant claims differ markedly. The rules outlined in the ALI Principles standardize the consequences of cohabitation.[115] Under the ALI regime, more cases may arise, but more are likely to settle without trial, and passions will be minimized by the financial orientation of the governing rules.

CONCLUSION

It is easy to see why judges have been moved to give relief of various kinds in cohabitation cases. Taking financial advantage of love and trust is reprehensible, and it is hard to sit back and watch the seeming wrongdoer flourish. Hanoch Dagan has argued eloquently that restitution is an appropriate solution in these cases because it promotes an ideal of liberal community.[116] That is, it reinforces trust in intimate relationships without imposing on unmarried parties the ethic of egalitarian sharing that accompanies the deeper commitment undertaken by spouses. I have taken the less charitable view that restitution between former cohabitants violates important limits on restitution and, in doing so, unleashes dangerous misunderstandings of the principle forbidding unjust enrichment.

In particular, I have argued that cohabitant claims are out of place in the new *Restatement (Third) of Restitution and Unjust Enrichment*, which otherwise has been at pains to contain the notion of unjust enrichment. The *Restatement* sets out to give the law of restitution a coherent structure that will guide and inform lawyers and courts. It defines restitution as benefit-based recovery in certain situations that are identified by law and conform to limiting rules. Among other limits, restitution is not available in cases of consensual transfer by gift or valid contract, and it is not available when the claimant conferred benefits without first pursing reasonable opportunities to negotiate an exchange.

Restitution between cohabitants does not fit within this framework. In the case of identifiable contributions to assets, either the transferor intended (at the time) to make a gift, or the transferor declined to pursue fairly simple legal means of securing a right to reimbursement. When the transfer of value between cohabitants is more diffuse, the claim is not

114. *See supra* note 6.
115. *See supra* notes 105–07 and accompanying text.
116. *See* DAGAN, *supra* note 12, at 172–79.

properly conceived of as a claim for restitution, and the remedy, if any, should be a status-based division of assets.

When courts abandon the limiting rules of restitution and grant relief based on their sense that the defendant has misbehaved, they are not applying the law of restitution. Instead, they are interpreting the principle of unjust enrichment as a decisional principle that licenses them either to "do equity" in particular cases without regard to rules of gift, property, and contract, or—what amounts to the same thing—to reverse transfers they deem to be "unjust." Under either of these interpretations, they are deciding cases according to their own unconstrained judgment of what outcome the facts require, all things considered.

I do not mean to suggest that judicial decision-making is or should be entirely a matter of applying rules. There are situations in which, for one reason or another, particularism is desirable.[117] But when courts engage too generally in particularistic decision-making, overriding rules when they believe the outcomes the rules prescribe are unjust, they sacrifice the benefits of error-reduction, coordination, and settlement that rules can secure. For reasons I have outlined, heartbreak cases illustrate not only the allure of particularism, but the dangers it poses.

117. *See* HART, *supra* note 14, at 127–30 (suggesting circumstances in which delegation of decision-making according to a broad standard is preferable to establishment of a determinate rule); Louis Kaplow, *Rules v. Standards: An Economic Analysis*, 42 DUKE L. J. 557 (1992) (discussing the choice between rules and standards); William J. Powers, Jr., *Structural Aspects of the Impact of Law on Moral Duty Within Utilitarianism*, 26 UCLA L. REV. 1263, 1270–93 (1979) (identifying disutilities of rules).