RESTITUTION’S REALISM

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Abstract

In The Law and Ethics of Restitution (“LER”) I offered an account of the foundations of (significant parts of) the American law of restitution. I argued that this body of law can, and therefore should, be read as a contextual application of our commitments to autonomy, utility, and community in various situations of benefit-based liability or benefit-based recovery. LER shows that, because different restitutionary doctrines involve differing categories of interpersonal relationships, they invoke different interpretations and different balances of these values. And yet, maybe unsurprisingly, LER also demonstrates, at least at a high level of generality, how these core liberal values serve (or should serve) as the normative underpinnings of the law of restitution in its entirety.

Since LER’s publication in 2004, a number of review essays and book reviews have appeared. Reviewers have suggested interesting insights and several intriguing critiques. I appreciate these challenges, and have addressed them in this essay to rethink and, in some cases, defend some of LER’s main propositions more successfully. I am obviously unable to cover all the points raised in these reviews or do justice to all their subtleties, and have confined my discussion to several recurrent themes focusing on LER’s jurisprudential premises. These premises are legal realist, at least according to my reconstruction of this school’s lessons. Some of the critics argue that LER fails because it is too infused with realism; others complain that LER is not loyal enough to the realist legacy. In this essay, I discuss both sides. Before embarking in a dialogue with my kind critics, however, I outline my understanding of legal realism, explain the ways in which LER is indeed an exercise in legal realism, and provide a summary of LER’s analysis of the law of mistakes, on which many of my reviewers have focused.
RESTITUTION’S REALISM

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INTRODUCTION

In The Law and Ethics of Restitution\(^1\) ("LER") I offered an account of the foundations of (significant parts of) the American law of restitution. I argued that this body of law can, and therefore should, be read as a contextual application of our commitments to autonomy, utility, and community in various situations of benefit-based liability or benefit-based recovery. LER shows that, because different restitutionary doctrines involve differing categories of interpersonal relationships, they invoke different interpretations and different balances of these values. And yet, maybe unsurprisingly, LER also demonstrates, at least at a high level of generality, how these core liberal values serve (or should serve) as the normative underpinnings of the law of restitution in its entirety.

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\(^{1}\) HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION (2004)

\(^{2}\) Emily Sherwin, Rule-Oriented Realism, 103 Mich. L. Rev. 1578 (2005); Ernest A. Weinrib, Reviving Restitution, 91 Va. L. Rev. 861 (2005); Mark P. Gergen, A Thoroughly Modern Theory
I appreciate these challenges, and have addressed them in this essay to rethink and, in some cases, defend some of LER’s main propositions more successfully. I am obviously unable to cover all the points raised in these reviews or do justice to all their subtleties, and have confined my discussion to several recurrent themes focusing on LER’s jurisprudential premises. These premises are legal realist, at least according to my reconstruction of this school’s lessons. Some of the critics argue that LER fails because it is too infused with realism; others complain that LER is not loyal enough to the realist legacy. In what follows, I discuss both sides. Before embarking in a dialogue with my kind critics, however, I need to outline my understanding of legal realism, explain the ways in which LER is indeed an exercise in legal realism, and provide a summary of LER’s analysis of the law of mistakes, on which many of my reviewers have focused.

I. REALISM, RESTITUTION, MISTAKES

A. Legal Realism Reconstructed

The starting point of the realist account of law is its non-positivism. Although H. L. A. Hart’s response to the realist claim of doctrinal indeterminacy is frequently presented as decisive, it is rather beside the point. Through his distinction between core and penumbra in any given norm, Hart effectively addressed the problem of rule indeterminacy. But the realist claim that pure doctrinalism is a conceptual impossibility is not based on the

3 This section summarizes my account in Hanoch Dagan, The Realist Conception of Law, 57 U. TORONTO L.J. 607 (2007). As its title implies, rather than an account of intellectual history, the reconstruction that follows attempts to present a useful interpretation of legal realism, seeking to read realist texts in the best possible light and drawing from them a vision of law that is currently valuable.

indeterminacy of discrete rules. For legal realists, the profound and inescapable reason for doctrinal indeterminacy is the availability of multiple, potentially applicable doctrinal sources. More precisely, the irreducible choice among rules competing to control the case, all of which can be expanded or contracted, together with the many potential ways of interpreting or elaborating any legal concept, means that legal doctrine always “speaks with a forked tongue” and the judicial task is never one of static application.  

The realist claim concerning an inevitable gap between doctrinal materials and judicial outcomes evokes two major concerns: intelligibility and legitimacy. In other words, this claim opens up two questions. First, what can explain past judicial behavior and predict its future course? Second, and even more significantly, how can law constrain judgments made by unelected judges? How, then, can the distinction between law and politics be maintained despite the collapse of law’s autonomy in its positivist rendition? The legitimacy prong of the realist challenge is particularly formidable because, as legal realists show, it is bolstered by the insidious tendency of legal doctrinalism to obscure contestable value judgments made by judges and to entrench lawyers’ claim to an impenetrable professionalism.

Legal realists answer this challenge by insisting on a view of law as a going institution distinguished by the difficult accommodation of three constitutive yet irresolvable tensions: between power and reason, science and craft, and tradition and progress. They reject any conception of law that purports to dissolve these tensions, thereby obscuring at least one of the legal phenomenon’s irreducible characteristics.

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7 See FRED RODELL, WOE UNTO YOU, LAWYERS! 3-4, 6-7, 153, 157-58, 186, 189, 196, 198 (1939).
Although the realist conception of law finds room for both power and reason, it appreciates the difficulties of their cohabitation. Since Holmes’ *Path of the Law,* realists place coerciveness at the center of their conception of law. This preoccupation with coercion is justified not only by the obvious fact that, unlike other judgments, those prescribed by law’s carriers can recruit the state’s monopolized power to back up their enforcement. More significantly, it is also premised on the institutional and discursive means that tend to downplay at least some of the dimensions of law’s power. These built-in features of law—notably: the institutional division of labor between “interpretation specialists” and the actual executors of their judgments, together with our tendency, as lawyers and even as citizens, to “thingify” legal constructs and accord them an aura of obviousness and acceptability – render the danger of obscuring law’s coerciveness particularly troubling. They explain the realists’ wariness of the trap entailed in the blurring of law’s coerciveness. This risk is particularly high with respect to private law, which structures our daily interactions and tends to blend into our natural environment.

Not surprisingly, then, legal realists focus their attention on exposing the contingency of some core concepts of private law in an attempt to expose the ways in which the law applies its power.

But realists also reject as equally reductive the mirror image of law, which portrays it as sheer power (or interest, or politics). They insist that law is also a forum of reason, and that reason poses real—albeit elusive—constraints on the choices of legal decision-makers, and thus on the concomitant exercise of state power. Law is never *only* about interest or power politics; it is also an exercise in reason-giving. Furthermore, because so

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much is at stake in reasoning about law, legal reasoning becomes particularly urgent and rich, attentive, careful, and serious. Legal actors understand that reasons can justify law’s coercion only if they are properly—even if implicitly—grounded in human values. Realists are thus impatient with attempts to equate normative reasoning with parochial interests or arbitrary power. They also find such exercises morally irresponsible because they undermine both the possibility of criticizing state power and the option of marshalling the law for morally required social change.12

And yet, realists are also wary of the idea that reason can displace interest, or that law can exclude all force except that of the better argument. Realists claim that, because reasoning about law is reasoning about power and interest, the reasons given by law’s carriers should always be treated with suspicion. This caution accounts for the realists’ preference for value pluralism, as well as for their understanding of law’s quest for justification as a perennial process that constantly invites criticism of law’s means, ends, and other (particularly distributive) consequences.13

Legal realists do not pretend they have solved the mystery of reason, or that they have demonstrated how reason can survive in law’s coercive environment. Their recognition that coerciveness and reason are doomed to coexist in any credible account of the law is nonetheless significant. Making this tension an inherent characteristic of law means that reductionist theories employing an overly romantic or overly cynical conception of law must be rejected. This approach also steers us toward a continuous critical awareness of the complex interaction between reason and power. It thereby seeks to accentuate the distinct responsibility incumbent on the reasoning of and about law,


minimizing the corrupting potential of the self-interested pursuit of power and the perpetuation of what could end up as merely group preferences and interests.

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I turn now to the type of reasons realists invite into the legal discourse and thus introduce law’s second constitutive tension.

The forward-looking aspect of legal reasoning in its realist rendition relies on both science and craft. Realists recognize the profound differences between lawyers as social engineers who dispassionately combine empirical knowledge with normative insights on the one hand, and, on the other, lawyers as practical reasoners who employ contextual judgment as part of a process of dialogic adjudication. They nonetheless insist on preserving the difficulty of accommodating science and craft as yet another tension constitutive of law.

Realists identify three families of fact-finding pursuits that are of some importance to law: investigating the hidden regularities of legal doctrine in order to restore law’s intelligibility and predictability; studying the practical consequences of law in order to better direct the evolution of law and further its legitimacy; and responding to the prevailing social mores—the conventional morality—in order to further stabilize the objectivity and legitimacy of law.14 My prototype realists, however, reject any pretense that knowledge of these important social facts can be a substitute for political morality. They realize that value judgments are indispensable not only when evaluating empirical research, but also when simply choosing the facts to be investigated. Moreover, they are always careful not to accept existing normative preferences uncritically. Regarding all three empirical avenues, legal realists insist that neither science nor an ethics that ignores

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the data of science offers a valid test of law’s merits. Legal analysis needs both empirical data and normative judgments.\textsuperscript{15}

Because law affects people’s life dramatically, these social facts and human values must always inform the direction of legal evolution. Legal reasoning necessarily shares this feature with other forms of practical reasoning, but the realist conception of law also emphasizes that legal reasoning is, to some extent, a distinct mode of argumentation and analysis. Hence, realists pay attention to the distinctive institutional characteristics of law and study their potential virtues, while still aware of their possible abuse. The procedural characteristics of the adversary process, as well as the professional norms that bind judicial opinions, notably the requirement of a universalizable justification, provide a unique social setting for adjudication. These procedural characteristics establish the accountability of law’s carriers to law’s subjects and encourage judges to develop what Felix Cohen terms “a many-perspectived view of the world” that “can relieve us of the endless anarchy of one-eyed vision,” a “synoptic vision” that is “a distinguishing mark of liberal civilization.”\textsuperscript{16} Moreover, because the judicial drama is always situated in a specific human context, lawyers have constant and unmediated access to human situations and to actual problems of contemporary life. This contextuality of legal judgments ensures lawyers a unique skill in capturing the subtleties of various types of cases and in adjusting the legal treatment to the distinct characteristics of each category.\textsuperscript{17}

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The extended realist treatment of science and craft derives from the conviction that law is profoundly dynamic, hence my third constitutive tension. Law’s inherent dynamism


\textsuperscript{17} Herman Oliphant, A Return to Stare Decisis, 14 A.B.A.J. 71, 73-74, 159 (1928). See also, e.g., LLEWELLYN, A Realistic Jurisprudence: The Next Step, in JURISPRUDENCE, \textit{supra} note 5, at 3, 27-28, 32; Walter Wheeler Cook, Scientific Method and the Law, in AMERICAN LEGAL REALISM, \textit{supra} note 9, at 242, 246.
implies that the legal positivist attempt to understand law statically by sheer reference to verifiable facts, such as the authoritative commands of a political superior or the rules identified by a rule of recognition, is hopeless. In the realist conception, law is “a going institution”; it is, in John Dewey’s words, “a social process, not something that can be done or happen at a certain date.” As a going institution, law is structured to be an “endless process of testing and retesting”; thus understood, law is a great human laboratory continuously seeking improvement.

This quest “for justice and adjustment” in the legal discourse is invariably constrained by legal tradition. Law’s past serves as the starting point for contemporary analysis, and not only because it is an anchor of intelligibility and predictability. Legal realists always begin with the existing doctrinal landscape because it may (and often does) incorporate valuable though implicit, and sometimes imperfectly executed, normative choices. In other words, since the adjudicatory process so uniquely combines scientific and normative insights within a legal professionalism premised on institutional constraints and practical wisdom, its past yield of accumulated judicial experience and judgment deserves respect. Although legal realists do not accord every existing rule overwhelming normative authority, they do obey Karl Llewellyn’s “law of fitness and flavor,” whereby the instant outcome and rule always think “with the feel” of the case law system as a whole, and “go with the grain rather than across or against it.”

Indeed, realists celebrate the common law’s Grand Style, described by Llewellyn as “a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need,” mediating between “the seeming

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19 John Dewey, My Philosophy of Law, in MY PHILOSOPHY OF LAW 73, 77 (1941). See also, e.g., Karl L. Llewellyn, My Philosophy of Law, id., 183, 183-84; Max Radin, My Philosophy of Law, id., at 285, 295.

commands of the authorities and the felt demands of justice.”

They thus insist that law, or any specific segment of legal doctrine, can be properly understood only if we regain the realist appreciation of law’s most distinctive feature: the uneasy but inevitable accommodation of power and reason, science and craft, and tradition and progress.

**B. Restitution and Realism**

LER is profoundly affected by this account of legal realism. There are three conspicuous attributes of LER which reflect its legal realist stance.

The first and probably foremost realist feature is the choice to offer a charitable interpretation of the law, rather than a snapshot of its current rules on the one hand or an invention of the way it could have been in some ideal world on the other. Indeed, LER does not attempt to restate the law – a task aptly performed by the forthcoming Restatement (Third) of Restitution and Unjust Enrichment. Neither does it seek to invent a new doctrine by deriving restitutionary rules from first principles. Rather, LER uses the existing doctrine as a starting point and suggests its interpretation in a way that is normatively appealing. The conservative baseline of this approach derives not only from the pragmatic reality that existing rules cannot be abandoned completely, but also (as noted) from a recognition that existing law represents an accumulated judicial experience that is worthy of respect. The forward looking perspective of this endeavor, in turn, is premised on an understanding of law as a dynamic enterprise whose content is made and remade as it unfolds. It is also founded on the conviction that academic reflection should play an important role in this salutary process of constructive evolution in which law is constantly contested and refined in an attempt to make it evermore just and effective.

This outlook explains the “mixed results” of LER in terms of its evaluation of existing

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22 On this tripartite distinction, see *Michael Walzer, Interpretation and Social Criticism* 1-32 (1987).

23 See *Llewellyn, On the Good, the True, the Beautiful in Law, in Jurisprudence*, *supra* note 5, at 167, 211-12; *Edward A. Purcell, Jr., The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* 41-42 (1973).
law: in some contexts, I end up explaining and commending existing doctrine; in others, I raise suggestions for reform—quite radical in some cases, more moderate in others.

Another feature of LER that follows the realist legacy is its suspicion of the justification derived through the concept of preventing unjust enrichment. Orthodox accounts find the idea of preventing unjust enrichment as the one normative foundation of the law of restitution. By contrast, Chapter 2 of LER argues that the prevention of unjust (or unjustified) enrichment in one or another interpretation of this maxim either cannot or should not play this role. It further offers a much more modest function for this maxim as both “a loose common theme of the law of restitution,” and as an invitation to engage our normative commitments to autonomy, utility, and community in developing restitution’s divergent doctrines. This critical view of the conceptual language prevalent in the field is typical of realist accounts of the law; in fact, this realist critique of legal conceptualism is part and parcel of the realist critique of doctrinalism. Indeed, legal realists maintain that the idea of inevitable entailments from legal concepts is false. Instead, they assert that the elaboration of any legal concept can choose from a broad menu of possible alternatives.24 The heterogeneity of contemporary understandings regarding any given legal concept—including core private law concepts such as property, tort, contract, or unjust enrichment—within and without any given jurisdiction, as well as the wealth of additional alternatives that legal history offers, defy the formalist quest for conceptual essentialism.

The third main realist characteristic of LER is closely related to its rejection of unjust enrichment as the one foundation of the law of restitution. LER refuses to look at the law of restitution as one unified whole. While it acknowledges the existence of some shared qualities between the various restitutionary doctrines, LER emphasizes the need for a contextual analysis of the different doctrines bundled together under the umbrella of the law of restitution. This conviction of the importance of context explains the structure of LER, which dedicates most of its space to the discussion of the main categories of restitution cases, and frequently further subdivides these categories to more minute subcategories. The inclination to employ relatively narrow categories follows directly

24 See Cohen, supra note 9, at 820-21, 827-29.
from the realist commitment to assure that law indeed serves life,\textsuperscript{25} because our lives are divided into economically and socially differentiated segments,\textsuperscript{26} and each such “transaction of life” has some features that are of sufficient normative importance, that is, that gain significance from the perspective of some general principle or policy that justifies a distinct legal treatment.\textsuperscript{27} Narrow categories allow lawyers to develop the law while “testing it against life-wisdom”\textsuperscript{28} to produce “the discrimination necessary for intimacy of treatment.” Narrow categories hold lawyers and judges close to “the actual transactions before them” and thus encourage them to shape law “close and contemporary” to the human problems they deal with. When law’s categories are thus in tune with those of life so that an “alert sense of actuality checks our reveries in theory,” lawyers uniquely enjoy “the illumination which only immediacy affords and the judiciousness which reality alone can induce.”\textsuperscript{29}

\textsuperscript{25} LLEWELLYN, A Realistic Jurisprudence, supra note 17, at 27-28, 32; LLEWELLYN, Some Realism, supra note 5, at 59-60. To be sure, realists need not dispute—and should not ignore—the downside of categories that are too small: that there may be too many of them, and that litigation will simply be concerned with deciding which of these multiple small categories fits each case. Nor do realists offer any meta-theory dealing with the optimal size of legal categories. Instead, they simply argue that a pragmatic judgment, which considers both these difficulties and the problems of over-generalization emphasized in the text, pushes towards smaller categories than those currently in use.

\textsuperscript{26} See PETER BERGER ET. AL, THE HOMELESS MIND: MODERNIZATION AND CONSCIOUSNESS 63-82 (1973).


\textsuperscript{28} LLEWELLYN, The Current Recapture of the Grand Tradition, in JURISPRUDENCE, supra note 5, at 215, 217, 219-220. To be sure, the claim is not that “the equities or sense of the particular case or the particular parties,” should be determinative; rather, it is that decision making should benefit from “the sense and reason of some significantly seen type of life-situation.” Id.

C. The Law of Mistakes

Many LER reviewers use mistakes as at least one of their main examples. Therefore, before I turn to a discussion of their critiques, a brief restatement of LER’s main claims regarding this classic restitutionary doctrine may be helpful.

The mistakes that typically concern the law of restitution, namely, mistakes in the unilateral conferral of benefits (typically money), invoke two important values: autonomy and utility. Autonomy is relevant from the perspective of the mistaken party because, as involuntary transfers, they “invite the law’s corrective measures to reinstate the commands of a mistaken party’s will, thus expanding her freedom of action and securing her integrity of self” (LER, 38-39). But the autonomy of the recipient is also at stake in such cases, because “[i]f recipients were required to hold themselves always ready to give back any benefits they received, the security and stability of their affairs would be severely threatened” (LER, 45). Therefore, an autonomy-based law of mistakes must assign entitlements and liabilities based on a careful attempt to “reconcile our liberty to make mistakes with our aspiration for security and stability” (LER, 46).

Utility is also relevant to the way law should (ex ante!) assign entitlements to parties who find themselves in these types of cases. The law of mistake is likely to affect (at least at the margin) the efforts of both transferors and transferees of benefits in trying to avoid mistakes. In a world where, as in ours, both these efforts and the administration of the pertinent legal rule are costly (and borne by the parties), the humanistic injunction of utility calls for a careful application of a cost-benefit analysis of the possible legal rules.

Chapter 3 of LER puts these two perspectives to work in analyzing various subcategories of mistakes. It shows that, in many cases, the best rule—the most justified way of prescribing the scope of the entitlement to restitution of a mistaken party—leaves both sides in the legal drama with some risk of harm. But it also demonstrates that there are categories of cases—such as, for instance, those falling under what I call “institutional contexts” (think of mistaken payments by various institutional payers)—wherein the significant disparity in the parties’ avoidance capacities and in their ability to spread the costs of mistakes among the beneficiaries of the activity that generated those mistakes (e.g., the banking system), justify a unilateral allocation of that risk.
More specifically, my main doctrinal conclusions regarding the law of mistakes are quite divergent. On the one hand, my analysis confirms the desirability of the existing rules dealing with non-cash benefits and mistaken improvements of property. On the other, it calls for a rather radical reform insofar as improper tax payments are concerned. Not only is the case that there are no good reasons for the prevailing restrictive approach to restitution claims by mistaken taxpayers compared to other mistaken payers, but, in fact, the unique characteristics of this category require the adoption of a more liberal rule than the one governing other cases of mistaken payments, namely, a rule of unlimited restitution for improper tax payments.

In between these two poles are numerous other forms of mistaken payments. The conclusions of my inquiry here tend to refine rather than approve or reverse the current state of (American) law. I suggest that current law implicitly and imperfectly reflects the need, strongly vindicated by my normative analysis, to distinguish between mistaken payments in private contexts and mistaken payments in institutional ones. Regarding the former category, I suggest that the law of mistakes should follow in the footsteps of tort law and allocate the recipient’s detrimental reliance according to the parties’ comparative negligence (rather than based on the outdated test of relative fault adopted by the first Restatement of Restitution\(^\text{30}\)). By contrast, regarding the latter category, I offer a new reading of the existing defense of good faith creditor that, in line with my normative inquiry, can serve as a doctrinal home for a rule denying restitution of mistaken payments in institutional contexts where the mistaken party (a bank or some other financial institution) is, by and large, the cheapest cost-avoider and risk bearer.

II. TOO MUCH REALISM?

One group of reviewers finds LER too realist. This line of critique contends that LER deviates from the injunction of correlativity underlying the legitimacy of private law. In the same vein, these critics argue that my reliance on the three contested concepts of autonomy, utility, and community, renders the law of restitution hopelessly

\(^{30}\) See Restatement of Restitution §§ 69(2), 142(2) (1937).
indeterminate. Finally, the “too much realism” school is generally unhappy with my treatment of the maxim about preventing unjust enrichment, and with the entailed fragmentation of the law of restitution.

A. Realism and Correlativity

Ernest Weinrib criticizes LER “from the standpoint of corrective justice, that is, from as anti-realist a standpoint as imaginable.” Weinrib insists that “the central theoretical question for any liability regime” is “Why is it that the law connects a particular plaintiff with a particular defendant?” In the context of restitution, this question is translated into a requirement that the justification for liability must “embrace both parties by revealing why the plaintiff’s unilateral transfer of the benefit creates an obligation in the defendant.”

Weinrib argues that what LER fails in precisely this crucial test. In LER, he argues, the analysis is problematic because it focuses “on the normative position of each of the parties separately rather than on the relationship between them.” Thus, he criticizes my account of mistaken payments because it is guided “by one-sided considerations rather than by relational ones.” When a recipient has not changed her position, my focus on the mistaken payer’s autonomy cannot explain why her “mistake creates an obligation in the recipient.” By contrast, when the recipient has changed her position, it is not clear why, absent “an express or implied invitation to rely,” “the recipient’s reliance loss should affect the payer’s entitlement.” This failure is fatal, says Weinrib: “Basing liability on such considerations exemplifies the fallacy that what is unilaterally applicable to the plaintiff can have bilateral significance for the relationship of plaintiff and defendant.”

Weinrib’s challenge is fundamental to our understanding of private law. Weinrib is a proud advocate of the autonomy of private law, and adamantly opposed to the intrusion

31 Weinrib, supra note 2, at 863, 868.

32 Id. at 869-72. Weinrib criticizes my analysis of benefits conferred by good Samaritans along the same lines: “The underlying problem is that autonomy and altruism, each being directed to a different party, are one-sided rather than relational. No combination of one-sided justifications can produce a relational justification.” Id. at 874.
of “the instrumentalism that has been dominant since the days of the legal realists.”

In his view, no social purpose or social value, even if ostensibly desirable otherwise, can legitimately inform private law. Private law is a realm with its own inner intelligibility, isolated from the social, economic, cultural, and political realms. For Weinrib, as noted, this isolation derives from the bilateral logic of private law adjudication, understood as a unique forum for the vindication of infringed rights. As such, private law must comply with the injunction of correlativity, requiring both that the reasons underlying the plaintiff’s right be the same as the reasons that justify the defendant’s duty, and that these very reasons also explain the specific remedy inflicted on the defendant. The commands of correlativity are so robust in this view, that they leave no space for any other (social) value.

I agree that private law is not just a means for normative regulation, namely, that intrinsic features of private law constrain the types of rules it can legitimately promulgate. Brute instrumentalism, in which civil suits are just one “mechanism whereby the state authorizes private parties to enforce the law,” is misguided because, as any other aspect of state coercion implicated by law, the bipolar structure of private law litigation also entails some justificatory burden. Weinrib is thus correct when insisting that private law should be able to justify to defendants both the identity of the beneficiary of any liability imposed on them, and the exact type and degree (or magnitude) of that liability.

33 Id. at 862.
34 See, e.g., ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 3-14, 212, 214 (1995); Ernest J. Weinrib, Restitutionary Damages as Corrective Justice, 1 THEORETICAL INQUIRIES IN LAW 1, 3-5, 37 (1999). See also Klimchuk, supra note 2, at 240 (“A justification of a particular doctrine in terms of the value(s) it promotes cannot by itself justify the imposition through it of civil liability because that justification cannot answer the defendant’s complaint that she ought not to be used as an instrument to promote a social value or a particular interest of the plaintiff’s”).
36 On the dialectical relation between law’s coercion and its nature as a justificatory practice, see supra text accompanying notes 8-14.
Insofar as the correlativity requirement insists on the defendant’s liability and remedy corresponding to the plaintiff’s entitlement, it is indeed essential to the integrity of private law. But this correlativity between plaintiff’s entitlement and defendant’s liability should not obscure the rich social fabric that serves as the inevitable context for the parties’ relationship. *Pace* Weinrib, correlativity need not mean that private law has, or should have, an inner intelligibility decipherable without recourse to social values. Quite the contrary: the pivotal role of private law in defining our mutual legitimate claims and expectations in our daily interactions\textsuperscript{37} undermines the legitimacy of a private law regime that ignores these values. For this reason, the parties’ *ex ante* entitlements, from which this correlativity must be measured, are best analyzed by reference to our social values.\textsuperscript{38}

Refusing to isolate private law from social values does not render correlativity vacuous; it does not, in other words, collapse private law into just another form of regulation. After all, as Weinrib correctly insists, taking correlativity seriously precludes assertions that the plaintiff’s right is simply the “analytic reflex” of the defendant’s duty


On its face, there is another way: a division of labor between a private law that is strictly libertarian and a public law that remedies the entailed deficiencies in terms of other values. This is indeed Weinrib’s favorite legal architecture, in particular regarding property law and poverty law. *See* Ernest J. Weinrib, *Poverty and Property in Kant’s System of Rights*, 78 Notre Dame L. Rev. 795 (2003). I concede that those who find this scheme normatively appealing may well want to endorse the robust conception of correlativity, namely, the requirement of correlating not only entitlements but also reasons. (In this respect, I accept the critique in Weinrib, *supra* note 2, at 876-77.) I, for one, remain unconvinced. Delving into the evaluation of the details of this or other division of labor scheme requires separate discussion, but two conspicuous difficulties must be briefly mentioned here. *First*, I find Weinrib’s account of why property rights at the stage of unilateral acquisition must be absolute and need not be tempered by something like the Lockean proviso perplexing. *Second*, Weinrib’s scheme is heavily dependent on the optimistic assumption that public law can and does supplement private law with rules that adequately remedy its entailed injustices. In other words, to support the claim that private law doctrines should be founded on the absolutist conception of property, private law libertarians such as Weinrib need to face the (rather insurmountable) burden of showing that public law can and does supplement private law with rules that adequately remedy the injustices—both in terms of distribution and in terms of interpersonal dependence—of the libertarian private law they advocate.
Yet, understanding that correlativity is situated within a thick layer of social values does require a more modest formulation of the correlativity injunction.

In this formulation, correlativity prescribes that for a plaintiff to demonstrate the desirability of the state of affairs that would result were the type of complaint she raises to generate the remedy sought is not enough. Rather, a private law plaintiff has an additional justificatory burden: to give reasons why people in her predicament should be entitled to extract from people in the defendant’s category the kind of remedy she now requires. This additional hurdle is obviously crossed in some cases, as in the paradigmatic case of an injured plaintiff seeking remedy from a defendant who negligently caused her harm. But some cases are more challenging as, for instance, when the defendant can plausibly ask “why me?” (Why should she be forced to be the agent of remediying the plaintiff’s unjustified harsh predicament), or “why you?” (Why the plaintiff should be allowed to invoke the state’s machinery to remove an unjust privilege that the defendant currently holds). And even if the plaintiff has good answers to both questions, she still needs to justify her entitlement to the specific measure of recovery she seeks to impose on the defendant.

Weinrib goes even further, adding the requirement that the reasons for the parties’ entitlements (and not only the entitlements themselves) be correlative, namely, that these reasons themselves be entirely internal to the parties’ relationship. “Because the justifications that ground liability are constitutive of the normative relationship between the parties,” he says, “those justifications must themselves have a relational structure.” But this additional requirement of relational reasons is excessively demanding and unwarranted. The bipolar form of private law is only one (important) object of the justificatory burden prompted by the application of state coercion invoked by private law adjudication. Therefore, it should not be entitled to exclusivity in determining the types of normative considerations we must take into account; it should not, in other words, be allowed to overwhelm our justificatory inquiry. Hence, no fast and easy way is

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39 WEINRIB, supra note 34, at 124.
40 Weinrib, supra note 2, at 874.
41 As the text implies, cases in which the reasons for the parties’ entitlements are correlative are indeed easier, insofar as the integrity of private law is concerned. And yet, this neither does nor
available for determining the limits of private law. Each type of case requires a careful account of the reasons for and against recognizing the plaintiff’s entitlement vis-à-vis the defendant. These very reasons are of the kind Weinrib tries to exclude from private law, namely, whether law’s endorsement of such claims supports or distorts the ideal construction of the type of relationship under consideration, and whether using private law in this way is both necessary and overall conducive to the public purpose at hand.

The practical implications of this additional inquiry are limited but by no means trivial, and the conclusion in some cases is that allowing a private law claim of the sort required would be unjust, even when likely to bring about a desirable state of affairs. This is, for example, why I agree with Weinrib that, in most cases, the law of restitution—and private law more generally—should not allow recovery in excess to both the plaintiff’s harm and the defendant’s net profits. Such a recovery does more than vindicate the resource holder’s control. It also expresses society’s condemnation of the invader’s antisocial behavior, as evident in the punitive forfeiture of part of the defendant’s own net profits.

should imply that they are the only cases, or that we should a-priori assume that, even if the reasons are not correlative, their implications with respect to the parties’ entitlements will not sufficiently converge.

Indeed, as the text implies, special attention is at times called to the reasons for not allowing a private law claim, and not just to the reasons for allowing it. Thus, for instance, enforcing certain competition rules may admittedly be furthered by providing not only regulators (and consumers) but also competitors with a cause of action. See Ofer Grosskopf, Protection of Competition Rules Via the Law of Restitution, 79 Tex. L. Rev. 1981 (2001). But such an instrumentalist use of the law of restitution may be overall unfortunate if it facilitates bypassing the discretion of public officials, insofar as such discretion is aimed at continuously adjusting a policy of enforcing these rules so as to optimally serve the public interest.

Notice again that this does not collapse my view into brute instrumentalism because, unlike most instrumentalists, I take seriously the requirement that the plaintiff give reasons for why someone in her predicament should be entitled to extract from someone like the defendant the kind of remedy she now requires.

The language of the text is deliberately careful. Correlativity does not necessarily rule out all forms of aggravated damages from private law. Thus, because correlativity endorses compensation as an important goal of private law remedies, it also allows aggravated damages addressing the aggravated injury inflicted on the plaintiff by the defendant’s malevolence, which injures her feelings of dignity and self-worth. Similarly, because correlativity—in my account—accepts deterrence as a legitimate goal of private law remedies, it allows a seemingly confiscatory portion of a monetary award, if it is calculated in a way that confirms the plaintiff’s control, and given the systematic and significant probability of under-enforcement (of her own right!). In both cases, aggravated damages properly respond to the defendant’s wrong by establishing the plaintiff’s entitlement to (respectively) well-being and control. See LER, supra note 1, at 225-26.
estate. But condemnation, as Weinrib correctly insists, is mostly external to the parties’ relationship.45 Social condemnation cannot be easily condensed into the scope of the plaintiff’s entitlement, and we usually have no reason for assuming that the plaintiff is also entitled to society’s disapproval of the defendant’s behavior. Quite the contrary: absent any countervailing reason,46 the law is justified in sticking to its convention of endowing only state officials with the authority to condemn, stigmatize, and punish.47 Allowing private law plaintiffs to take over the task of social condemnation would in most cases distort our ideal construction of the relationship between wrongdoers and their victims, as well as undermine the public purpose of social condemnation.

By contrast, the sheer fact that the reasons supporting the plaintiff’s entitlement are not the same as those supporting the defendant’s liability should not necessarily prevent the complaint from proceeding, if the convergence between these two sides of the coin is sufficiently wide and if the justificatory burden of showing the desirability of allowing it in its private law form is, on balance, properly met.48 This, I argue, is exactly the case regarding the restitutionary category of mistaken payments. Because the rules governing such payments affect every payer and every recipient, it is important to set up the ex ante


46 As the text implies, I am not claiming that no such reasons could be adduced. See, e.g., Dan M. Kahan, Privatizing Criminal Law: Strategies for Private Law Enforcement in the Inner City, 46 UCLA L. REV. 1859 (1999).

47 See, e.g., CESARE BECCARIA, ON CRIMES AND PUNISHMENT 58 (Henry Paolucci trans., Bobbs-Merrill 1963) (1764) (“the right to inflict punishment is a right not of an individual, but of all citizens, or of their sovereign”); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 138 (1974) (“the victim occupies the unhappy special position of victim and is owed compensation, [but] he is not owed punishment”).

48 Furthermore, not only should private law allow, as a matter of course, such cases of substantial convergence of the prescriptions entailed by the reasons pertaining to the plaintiff and the defendant, but there may well be categories of cases in which the “justificatory deficit” of considering reasons that relate to the interests of third parties is outweighed by the significant normative superiority of allowing such cases in private law. (The most important example of this possibility in contemporary restitution law is the expansion of the doctrine governing self-regarding conferral of benefits to the innovative pattern of governments’ restitution claims against injurious industries for preventive and ameliorative costs spent due to the wrongs of these industries: LER, supra note 1, at 128-29, 155-63.) This proposition derives (again) from the fact that private law’s bipolarity is only one, albeit important object of the justificatory burden prompted by the application of state coercion. See generally Hanoch Dagan, The Limited Autonomy of Private Law, 56 AM. J. COMP. L. * (2008).
entitlements for these cases in a way that will be fair to both and also sensitive to their welfare concerns. As it turns out, the fairness and the welfare considerations by and large coincide.\(^{49}\) More significantly for our purposes is the fact that, for example, in private contexts, the plaintiff’s autonomy justifications for restitution are strongest when the defendant’s autonomy justifications for retention are weakest, that is, when there is no detrimental reliance, and vice-versa. Therefore, although the autonomy concerns of the parties are indeed different, a private law doctrine can promote both simultaneously by imposing a rather trivial burden (to make restitution) on a defendant who has not relied, and limiting the restitution of a payer who negligently caused detrimental reliance. A legal system adopting such a doctrine should have no real difficulty in explaining to the defendant why she, rather than … (who?), should be responsible (in the cases and to the extent that she is) for remedying the plaintiff’s harsh predicament, and why the plaintiff, of all people, is the one she should reimburse for the payment she mistakenly received.

\textit{B. Value Indeterminacy}

Another and somewhat related concern of the “too much realism” school is that LER’s mode of analysis may render the law of restitution hopelessly indeterminate. Thus, James Edelman describes LER’s approach as “a value laden formulation, but one which provides no means by which to determine what is meant by these values of autonomy, utility and community in contexts other than those discussed, or how to measure these values, or why other values do not count equally.”\(^{50}\)

One way to respond to this challenge is to look at the alternative approaches and examine how they fare on this front. At least insofar as classical legal formalism is concerned, this response is likely to ameliorate the critics’ concern. The reason is that, as

\(^{49}\) Although there is some divergence. \textit{See} LER, \textit{supra} note 1, at 64-65.

\(^{50}\) \textit{See} Edelman, \textit{supra} note 2, at 134. \textit{See also}, \textit{e.g.}, Saprai, \textit{supra} note 2, at 523. Saprai argues that “the indeterminacy of the values that … shape the law of restitution [according to LER’s analysis] makes the task of working out what the law is, or rather what it ought to be, extremely difficult.” He then adds, however, that “[i]f the law of restitution and unjust enrichment really is motivated by the concerns of autonomy, utility and community, so be it.” As the text below explains, I agree that such a normative analysis of the law of restitution is not easy. I also argue that we must face this challenge, not because the law “really is motivated” by these three values (I am not even sure what this requirement means), but rather because it \textit{should} be guided by them.
legal realists have aptly demonstrated, doctrinalist methods are so easily manipulable, despite their misleading façade, that they end up being even more indeterminate. Moreover, unlike their realist counterparts, these methods successfully hide their (inevitable) value choices. LER provides quite a few examples of this, but the most conspicuous is probably the tormented formalist attempts to account for the law of constructive trusts in bankruptcy and the sounding failure of them all.51

A second and more important response is that a jurisprudence based on value pluralism need not and should not yield significant doctrinal indeterminacy. To see why, note that, although value pluralism is premised on a healthy suspicion of universalism, it is very different from the (philosophically suspect) positions of relativism, skepticism, or nihilism that undermine any possibility of moral justification, evaluation, or, for that matter, criticism (thus undermining the idea of law itself62). Hence, alongside a laudable recognition of a broad menu of incommensurable human alternatives, value pluralists, including legal realists, justifiably acknowledge a minimal core of moral truths.53 In the context of LER, they include the moral significance of autonomy, utility, and community.54

51 See LER, supra note 1, at Section C of Chapter 9.
54 Weinrib complains that my treatment of these three values is inadequate. In particular, he asks (1) Whether “autonomy is to be conceived in terms of negative liberty, positive liberty, or something else” (see also Gergen, supra note 2, at 178); (2) “What does utility consist of and how is utility related to efficiency” (adding in a footnote that I “cryptically” remark that “utility is ‘frequently translated in law as efficiency’”); and (3) “What is community, and why should the coercive apparatus of the law sustain it” (suggesting in a footnote that any attempt to legally regulate community ipso facto undermines its value because it displays, by its own nature, distrust). See Weinrib, supra note 2, at 868. LER indeed does not attempt to provide original answers to these questions, but does rely on certain (quite conventional) answers to them. Briefly: (1) It conceives autonomy in terms of positive liberty, while recognizing the important role of negative liberty in promoting positive liberty (LER, supra note 1, at 97-100); (2) It understands utility in terms of preference satisfaction, and thus appreciates both the advantage of efficiency as a proxy to utility and the potentially regressive outcomes of this proxy (id. at 39, 98); (3) Finally, Chapter 6 of LER, dealing with restitution in contexts of informal intimacy, begins with a brief
In the abstract, recruiting these three values with no predetermined formula for their balancing is not much of an improvement. But as I emphasized in discussing LER’s third main realist characteristic, one of its main tenets is that context matters. Different types of human interactions, and thus different categories of restitutionary doctrines, call for different balances of these broad normative commitments. The entailed heterogeneity should not be interpreted as an open invitation to apply subjective preferences. Quite the contrary: here, as elsewhere, the requirement to explicitly apply judgment, which needs to be normatively and contextually justified, is a real constraint.

These responses may leave some of my readers unconvinced. After all, nothing in what I say excludes the possibility of cases where such a contextual normative inquiry leads to a standoff, with reason itself unable to adjudicate between two (or more) competing accounts. But the relevant question is not whether there may be such cases, since the sheer existence of hard cases hardly undermines the determinacy of law. Rather, it is whether these cases are prevalent enough so that they threaten the realist enterprise. I account of the liberal vision of community (id. at 164-65), and Chapter 3, in which I discuss other-regarding conferrals of benefits, explains in some detail why the law’s intervention does not necessarily undermine human virtues (id. at 103-06).

55 See supra text accompanying notes 25-29.

56 This explains the importance of legal taxonomy. See generally Legal Realism and The Taxonomy of Private Law, in STRUCTURE AND JUSTIFICATION IN PRIVATE LAW: ESSAYS FOR PETER BIRKS 147 (Charles Rickett & Ross Grantham eds., 2008). Edelman complains that LER’s taxonomy of the law of restitution creates “different and novel categories,” and also “requires dividing categories like mistake, failure of consideration or undue influence which the law treats as unitary into different contexts.” See Edelman, supra note 2, at 134. As the text implies, the optimal size of legal categories is indeed an interesting and important question. But I do not think there either is or can be any a priori correct answer to it, and I definitely do not see why being more “unitary” is necessarily an advantage (or disadvantage, for that matter). Rather, my view is that, to criticize any suggested taxonomy, one needs to point to its problems and/or to the advantages of the alternative. This applies both to LER’s suggestion to create a new “big” category—the law of informal intimacy, regarding which my main claim is that realizing the goal of facilitating such interactions brings unity to what may otherwise seem chaotic or unprincipled—and to LER’s insistence on dividing up existing categories into smaller ones—notably: the law of mistakes that, I argue, becomes much more principled once broken down into the subcategories LER outlines. I may be wrong in one of these suggestions (or elsewhere), but I cannot see how the sheer fact that my approach requires more categories or that some of my categories are new can effectively counter them.

57 See Joseph William Singer, Property Norms: Reflections on the Externalities of Ownership §§ 2.2.2-2.2.3 (unpublished manuscript).
believe that, in many cases, a sufficiently robust contextual normative account can have rather sharp doctrinal teeth, and I hope that LER provides enough examples of this persuasion. The detailed analysis of mistakes in Chapter 3 of LER, summarized in Section I.C above, can serve as one example. Although I obviously know that some of the book’s accounts are controversial, I fail to see how these accounts can be challenged by sheer reference to their nature as normative, to the difficulty of measuring autonomy, utility, and community, or to the possibility that there are other pertinent values that my account excludes. Rather than a blanket claim that a better account will always (or almost always) be available, challenging the realist account(s) of restitution requires a detailed demonstration of the superiority of such a competing normative account. By the same token, I agree that there are no magic formulae for dealing with the restitutionary categories not covered in LER, but here again, an evaluation of the competing alternatives requires a detailed normative account.

C. Respecting Unjust Enrichment

A third and last argument typical of the too-much realism line of critique is that LER fails to pay sufficient respect to the precept of unjust enrichment. “The real analytical puzzle of Dagan’s book,” writes Kit Barker, “is that it assembles rules which he accepts as bearing ‘family resemblances’ to one another under a ‘framework’ of unjust enrichment, whilst simultaneously refusing to refer to the family by its name.” Barker finds this feature of LER “hard to accept,” and suggests it is tantamount “to the denial of a birthright.” Because we should not deny “the group the very title which identifies the criterion according to which its membership is determined,” Barker insists, “all who collate restitutionary rules for analysis ought … to elevate the idea of unjust enrichment to their title pages” rather than minimize its significance as does LER.

59 Cf. RONALD DWORKIN, LAW’S EMPIRE 76-86 (1986) (responding to the challenge of “external critique”).
60 Barker, supra note 2, at 614-15. See also Goymour, supra note 2, at 458.
Objections along these lines to my realist treatment of the principle against unjust enrichment come, in fact, in two very different forms. The stronger version of this critique comes from Weinrib. Weinrib celebrates the fact that “the driving force in developing the law of restitution” was “the impulse to unify across transactions” and insists that there is “little point in unifying restitutionary recovery across transactions if the unifying idea was itself merely a pastiche of different normative considerations.” For Weinrib, the principle against unjust enrichment deserves this unifying role because it represents the idea of corrective justice between the parties, as captured in his strict interpretation of the correlativity constraint.\(^{61}\) Indeed, Weinrib’s critique of LER’s treatment of unjust enrichment derives from his interpretation of correlativity, and in particular, from his insistence on the correlativity of reasons and not only of entitlements. I have already explained why I find this interpretation undesirable,\(^{62}\) and the very same grounds also explain why I do not find the strong version of the unjust enrichment critique appealing.

The weaker form of this critique does not challenge my claim that unjust enrichment carries no justificatory role or the entailed fragmentation of the field, but still insists that LER overly marginalizes the role of unjust enrichment in the domain of the law of restitution.\(^{63}\) Thus, Dennis Klimchuk agrees that unjust enrichment “fail[s] as a

\(^{61}\) Weinrib, supra note 2, at 866-67, 877.

\(^{62}\) See supra section II.A.

\(^{63}\) Coming from the opposite direction (the claim that LER is not realist enough), Katrina Wyman argues that LER “does not explain why the resemblances that apparently link restitutionary doctrines” are sufficiently robust to justify the retention of “the legal category of restitution.” Wyman, supra note 2, at 699. I admit that the resemblances that hold restitution together as a field, such as its (loose) characterization as the law of benefits and thus the (rather banal) fact that dealing with benefits is different than dealing with harms, are not very thick. (One obvious example of such a resemblance is the concept of subjective devaluation. As I note at p.30 of LER, this concept is on its face relevant to the entire field; and yet, as I emphasize there, is somewhat beside the point in certain specific settings). But as I argue at LER (34-35), this is not at all unique to restitution. For example, property law is the law of holdings, and this rather mundane fact makes its status as a separate field reasonable, although by no means necessary. But when we come to analyze property, we should focus on its main manifestations—I call them “the institutions of property”—and study the values they (can) promote, rather than engage in an abstract discussion of what property “really” is. See Hanoch Dagan, The Craft of Property, 92 CALIF. L. REV. 1517, 1527-32 (2003). The real work in property and restitution (as well as in contracts and torts) is done by the application of these values—which are likely to be the same throughout private law in liberal settings—to the categories of cases they cover, rather than the
justification in the ways that [LER] argues it does,” but still insists that unjust enrichment should be our starting point because “[t]he idea that there is an action in unjust enrichment rests on the idea that there is a common structure to the claims collected in the law of unjust enrichment.”\(^{64}\) In elaborating on this point, Klimchuk explains that, while LER successfully criticizes the use of both unjust and unjustified enrichment as “justifications of liability in restitution,” it leaves intact the importance of the choice between these two approaches in structuring such action, that is, the question of whether claims should be oriented toward providing reasons for restitution (as in the common law tradition of unjust factors) or for denying the recipient’s grounds for retaining the disputed enrichment (as in its civilian counterpart).\(^{65}\)

Likewise, Barker does not challenge my claim that the injunction against unjust enrichment entails no independent justificatory force, or my contention regarding the heterogeneity of the doctrines covered under the umbrella of the law of restitution. Quite the contrary: in response to my critique of the role unjust enrichment plays in contemporary restitutionary discourse, Barker explicitly argues that there is “no reason why an abstracted, higher-level legal mandate against unjust enrichment need blind courts to context or obscure the diverse moral and policy concerns underpinning restitutionary rules.”\(^{66}\) As noted, however, Barker is still deeply disappointed by my treatment of unjust enrichment, which “denies the principle itself any active role in judicial reasoning and thereby overlooks its current role as a developmental tool.” In his view, “unjust enrichment is to be understood in the common law tradition both as a viable legal category and as a normative legal principle, albeit one which is the product of more than one ethical consideration.” For Barker, then, unjust enrichment “draws its moral force upward from the values underpinning the rules it associates,” and thus “has the

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\(^{64}\) Klimchuk, \textit{supra} note 2, at 230, 232.

\(^{65}\) \textit{Id.}, at 230-32. \textit{See also} Du Plessis, \textit{supra} note 2, at 942 (explaining how LER can fill a gap in civilian jurisprudence by assisting “in determining what values underlie the decision … that a benefit which is without legal ground in the narrow sense should ultimately be restored”).

\(^{66}\) Barker, \textit{supra} note 2, at 617. \textit{See also}, \textit{e.g.}, Saprai, \textit{supra} note 2, at 524.
potential to provide reasons for extending or otherwise adjusting particular, lower-level rules.’

Any disagreement I may have with the weak versions of defending unjust enrichment is bound to be quite nominal. Barker, Klimchuk, and I agree that unjust enrichment cannot do any independent justificatory work, and that the area of law at issue, whatever we may call it, is quite heterogeneous. Klimchuk insists that the choice between the different structures of restitutionary claims in the common law and civil law traditions is of consequence, and I see no reason to deny this. Barker believes that unjust enrichment can play a positive role as an intermediary between normative underpinnings and concrete legal rules. I am willing to concede this point if, but only if, we remember, with Barker, that if judges “are to obtain more precise normative guidance in any particular case” they “will naturally have to reflect carefully upon the reasons for the principle,”

that is, upon the real values (autonomy, utility, and community, in my account) underlying this area of the law. Precisely for this reason, I believe we should constantly remind ourselves of unjust enrichment’s secondary role, which also explains why I prefer to entitle our area of law restitution, instead of unjust enrichment.

### III. TOO LITTLE REALISM?

If the first group of reviewers argues that LER is too loyal to legal realism, the second argues that it is not sufficiently faithful to its main tenets. This section addresses two main features of LER that critics find as antithetical to core realist convictions: its strong endorsement of rule-based decision-making, and the fact that it rarely relies on empirical observations.

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67 Barker, supra note 2, at 613, 616, 617.

68 Id., at 617.

69 On its face, there is a third feature of LER that does not comply with legal realism: the distance between its prescriptions and the actual prevailing doctrine. Thus, Barker argues that the realism of LER’s approach is “questionable” because “a fair number of rules and doctrines as they stand” in English law cannot be explained by the values of autonomy, utility, and community. See Barker, supra note 2, at 624. Barker argues that I tend to “exaggerate the extent of the law’s current commitment” to these values, and underestimate the role currently played by “the individualistic value of consent.” Id. at 623. See also Sheehan, supra note 2, at 197. Barker is
A. Realism and Rules

Emily Sherwin correctly observes that LER is “by no means hostile to rules of law,” and indeed “most of [its] arguments either provide a normative defense of existing rules or propose new rules that are more sensitive to considerations of autonomy, efficiency, and community.” Yet, she holds that it is not easy for a realist to be “attentive to and respectful of doctrine” and present recommendations “in the form of rules.” In fact, Sherwin implies it may be impossible “to be a rule-oriented Realist.”

Rules, explains Sherwin, “are designed to translate the implications of normative values into concrete prescriptions for action or decision.” To do so effectively, rules “must be general, in the sense that they prescribe outcomes for classes of cases,” and they must be “sufficiently determinate that rule-appliers can understand what the rules prescribe without first resolving the very normative questions the rules are designed to settle.” In other words: for rules to function as rules they must be followed by their appliers “in all cases, without considering whether the local outcome of the rule conforms to the values the rule is supposed to advance.” But this, Sherwin writes, “seems contrary to the premises of Legal Realism,” or to the realist’s “skepticism about the capacity of rules to constrain judges.”

particularly doubtful about the possibility that judges will adopt LER’s position regarding Good Samaritans, even though he seems to agree that it is conducive to both autonomy and community. See Barker, id., at 623-24. (For another claim about a similar gap between my account and the existing doctrine, this time in the context of the law of mistakes, see Klimchuck, supra note 2, at 235-236). I do not think that this critique is particularly threatening. First, while my account may indeed be resisted in some jurisdictions, in others it may be welcomed. See O’Dell, supra note 2, at 426 (“Dagan’s analysis provides an excellent normative underpinning for [the emerging] position” of Irish law). See also Du Plessis, supra note 2, at 944 (same regarding civil law). For claims that mistakes law is gradually proceeding towards the model suggested in LER, see Gergen, supra note 2, at 182 (respecting American law); Tang Hang Wu, The Role of Negligence and Non-Financial Detriment in the Law of Unjust Enrichment, 2006 RESTITUTION L. REV. 55 (regarding English law). Second, and even more importantly, because law for realists is profoundly dynamic, they are always more interested in exploring proper ways for developing the law than in restating its current positions.

This is, in fact, the best response to Amy Goymour’s worries that “[b]y focusing on this trio”—the values of autonomy, utility, and community—LER may push “one very important value—certainty in the law—to the sidelines.” See Goymour, supra note 2, at 458.

Sherwin, supra note 2, at 1579, 1588.

Id., at 1589, 1590, 1591. See also Gergen, supra note 2, at 189.
But Sherwin confuses here the realist prescription for contextual inquiry mentioned above with an advocacy of ad-hoc judgments. Indeed, a small minority among realists does endorse the dubious nominalistic approach of case-by-case adjudication. Most realists, however, take a very different position. They realize that law’s use of categories, concepts, and rules is unavoidable, even desirable, and that many legal reasoners should in most cases simply follow rules, which is why realists indeed take pains to improve legal rules. In other words, a rule-oriented realism is not a contradiction in terms, as long as we remember that the (limited) stability of rules at any given moment relies on, and is thus contingent upon, a convergence of lawyers’ background understandings briefly introduced in Section I.A above, and not upon the determinacy of the doctrine as such.

Furthermore, pace Sherwin, a rule-oriented realist like myself need not subscribe to the problematic strategy of rule-sensitive particularism, which allows judges to depart from rules whenever the outcome of the particular case at hand so requires, while taking into account both substantive values and the value of preserving the rule’s integrity. Like many other realists, however, I merely argue that at least some legal actors, notably judges of appellate courts, should occasionally use new cases as triggers for an ongoing refinement of rules, as opportunities to revisit the normative viability of existing rules

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73 See supra text accompanying notes 25-29.
74 See, e.g., RODELL, supra note 7, at 169-174, 201-202.
75 See, e.g., Andrew Altman, The Legacy of Legal Realism, 10 LEGAL STUD. FORUM 167, 171-72 (1986); Todd D. Rakoff, The implied Terms of Contract: Of ‘Default Rules’ and ‘Situation Sense’, in GOOD FAITH AND FAULT IN CONTRACT LAW 191, 216 (Jack Beatson & Daniel Friedmann eds., 1995). See also Wyman, supra note 2, at 694 (“the original legal realists did not suggest that legal rules were irrelevant in determining judicial decisions, and Dagan does not do so either”).
77 As Sherwin herself notes, Karl Llewellyn, the most important legal realist, “was the principal draftsman of article 2 of the Uniform Commercial Code.” Sherwin, supra note 2, at 1589.
78 See ALEXANDER & SHERWIN, supra note 76, at 32-34.
79 Sherwin, supra note 2, at 1591-94.
qua rules, and to re-examine the adequacy of legal categorization. This explains, for instance, the claim I make in LER regarding the rules governing mistaken payments from institutions. Currently, judges torment the conventional doctrinal rules in order to reach outcomes befitting the normative considerations that govern this important type of cases. Instead, they should use these new challenges to openly reshape the doctrine by carving out this category and openly translating these normative concerns into general rules.80

B. Realism and Empiricism

Katrina Wyman claims that LER “does not entirely realize the legal realist objective of embedding restitution within the social context in which the law arises and operates,” and as such “retains a strong overlay of formalism.”81 The reason for this verdict is that “[the book’s] analysis of restitution remains largely internal, focusing on the legal rules that make up the doctrine and offering surprisingly little insight into the context in which the law operates.” In fact, Wyman contends that LER’s “inability to exorcise completely the ghost of formalism” makes it “a largely autonomous study of the law.”82

Wyman complains, more specifically, that “[n]otwithstanding LER’s insistence on the relevance of context, the book often analyses existing restitutionary rules, and makes proposals for changes, with remarkably little sense of the social, economic, and political circumstances in which restitutionary rules apply.”83 She points out that “Dagan is not the first legal realist to be committed to studying law in its social context and to analyse a particular branch of the law with limited understanding of that context. Indeed, he is in

80 LER, supra note 1, at 67-74. The same account explains my suggestion, in Chapter 6, prescribing specific rules for restitutionary claims between cohabitants. In other words, my suggestions in this context do not aim to twist existing rules in order to generate better outcomes in specific cases, as Sherwin interprets them (Sherwin, supra note 2, at 1592), but rather to improve the existing taxonomy of the law of restitution and prescribe rules that best implement the pertinent normative concerns.

81 Wyman defines formalism as “a methodological approach to legal scholarship which analyses law largely divorced from the social context in which law operates and which presupposes that law has its own internal logic.” Wyman, supra note 2, at 688 n.7.

82 Ibid., at 686, 692, 698.

83 Ibid., at 699.
excellent company.” Wyman refers here to Karl Llewellyn, “one of the most prominent original legal realists,” who—according to Alan Schwartz—“was not an empiricist when wearing his contract scholar . . . hat.” Wyman speculates that “[t]he inability of both Dagan and Llewellyn to move beyond largely autonomous considerations of legal doctrine in spite of their methodological commitments” and to collect data “about the context giving rise to legal rules and the effects of those rules” may derive from the resources needed for such empirical work as well as from an “inclination . . . to offer normative recommendations for change.”

Wyman’s observation about the scarcity of empirical work in LER is correct, but her classification of LER as an autonomous and acontextual—as a formalist—account of the law of restitution, is not. First, in sharp contrast to (classical) formalism, legal realism is committed, as noted, to two kinds of extra-doctrinal inquiries: normative and factual. Thus, the inclination to offer normative recommendations that Wyman accurately detects indeed entails, as she says, a tilt towards the normative at the expense of the factual. It does not, however, turn LER into an exercise in legal formalism. Moreover, no a priori way can determine whether LER’s lack of robust empirical inquiries undermines its realist mission. For realists, the amount and the content of empirical legal inquiries always depend on a pragmatic judgment of their expected benefit to the project at hand (compared, of course, as Wyman also implies, to their cost). This means that the significance of omitting such inquiries is itself an empirical question, which is furthermore likely to change from one chapter to the other.

The real question, therefore, is whether neglecting the empirical side in the context of each one of the paradigms of restitution discussed by LER is indeed troublesome. I


85 Wyman, supra note 2, at 686, 703-04.

86 This is also evident in my insistence that the doctrines of the law of restitution must be premised on values rather than on legal concepts. Compare Jaffey, supra note 2, who argues that restitutitional doctrines are premised on property, contracts, and torts, rather than on autonomy, utility and community. For a legal realist, this suggestion is a non-starter, since, exactly like unjust enrichment, these concepts inevitably rely on public values. See Dagan, supra note 48, at 34-35.
doubt whether an in-depth inquiry into the origins of the existing rules would have been significant to LER’s reconstructive task, but I do agree that, in some cases (notably that of the rules governing restitution claims by former unmarried cohabitants, which Wyman discusses), an examination of the doctrine’s consequences may well have been illuminating. I am not sure, however, that too many insights could have similarly been gained from such empirical inquiries in the other restitutionary contexts that LER covers.

Take our example of mistaken payments. Wyman suggests that “knowing more about who makes mistaken payments and their avoidance costs could affect the analysis of the appropriate fault standard.” I agree. In fact, this is exactly one of my major moves in Chapter 3 of LER, briefly sketched in Section I.C above, where I urge restitution lawyers to openly distinguish institutional cases from individual ones. One could respond that this is still an exercise in armchair sociology, and my portrayal of the mistaken individual and/or the mistaken institution does not enjoy the benefit of the more concrete (and verified) empirical information about the typical individuals and typical institutions.

As the text implies, such a neglect may well have been detrimental had my mission been more explanatory in nature.

Wyman criticizes the absence of an analysis of the history of these rules and of their actual real-world effects during ongoing relationships as well as after their dissolution. Thus, she hypothesizes that the rules’ historical origins “may suggest a very different message from the community-oriented one that Dagan takes away from them.” Likewise, she suggests that because “[m]any cohabitants may be unaware while they are living together of the availability of restitutionary recovery if their relationship dissolves,” these rules cannot function, as I argue in Chapter 6 of LER, to promote “reciprocity within cohabitation.” Finally, she contends that, at the point of dissolution, “rather than promoting community, the rules may instead frustrate the efforts of former partners who have little bargaining leverage to obtain funds that would help them re-establish themselves after the dissolution of a relationship.” Wyman, supra note 2, at 700-02.

While I am skeptical about the significance of the doctrine’s history, Wyman may be correct that my neglect to look at its effects undermines LER’s celebration of the existing rules. This may be the case if indeed the only, or the most dramatic, effect of the law here is at the point of dissolution. To be sure, this is again an empirical question on which the jury is still out. The prevalent ignorance of the doctrine’s specifics does not necessarily resolve this matter, because it may be that even without any knowledge about the content of specific rules, parties know enough about the “character” of a legal institution to be affected by the legal design. Cf. Carolyn J. Frantz & Hanoch Dagan, Properties of Marriage, 104 COLUM. L. REV. 75, 97-98 (2004). Be this as it may, the judgment that more empirical data would help the discussion of cohabitation law relies on the unique features of the setting in which this particular legal doctrine operates. So even if neglecting such an inquiry in this context is indeed detrimental, nothing necessarily follows to other contexts.

E-mail message to author, July 27, 2005 (on file).
that are currently engaged in this type of activity. But note that no one would claim we
need to study the realities of every type of bank or financial institution before we can
determine what the restitutionary rules should be. Thus, the question of whether (or,
rather, when) armchair sociology is good enough as a source of one’s knowledge of
social context ends up with the same pragmatic judgment mentioned above: choosing
directions of extra-doctrinal inquiries according to their expected yield. My (educated?)
guess is that the insight one could have gained from knowing more about the realities of
mistaken payments in these two different settings are rather marginal. Therefore,
although I would have been happy to use this data if it were already available, I believe
that the impressionistic information, on which I rely in chapter 3, meaning my
commonsensical observations regarding the typical avoidance capabilities of these
different typical actors, is good enough. I may of course be wrong about this, but I can
hardly see how this mistake can be demonstrated without either empirical data more
illuminating than I expected it to be, or a counter-impressionistic account that proves to
be more amenable to our common sense.90

90 A similar response applies to Gergen’s claim that LER “does not give a plausible instrumental
account of the law of mistake... because [it] consistently overestimates the regulatory impact of
private law and underestimates the costs of using private law to resolve disputes.” See Gergen,
supra note 2, at 173. (This asserted failure is pertinent not only to the utility-based analysis of
mistakes [id. at 181-82] but also to my autonomy-based account [id. at 178-80]). Gergen believes
that my insensitivity “to the cost of using the law to resolve disputes and its infirmities as a
regulatory tool” makes me “an apologist for much of the law of restitution.” Id. at 189. In
particular, he claims that such insensitivity renders my endorsement of the comparative fault test
(for private contexts of mistaken payments) “unfortunate” due to: (1) The costs of its factual
inquiries, and (2) Its limited ability to influence the parties’ behavior. Id. at 180-82. There are at
least three difficulties with Gergen’s critique. First, Gergen provides little (and quite anecdotal)
empirical support for his strong assertions regarding “the institutional imperfections of private
law” (id. at 173). Second, although he admits that much of his critique is familiar from the
parallel analysis of “principles imbibed in regularly handling negligence claims” (id. at 183),
Gergen does not explain why it should affect the law of mistaken payments more than the law of
negligence (where comparative negligence is prevalent). Finally, it is not clear what Gergen’s
conclusion is. At times, it seems as if he favors a simple all-or-nothing rule, which “casts any loss
on the payor without regard to his negligence unless the money is used for an ordinary
expenditure, in which case any loss is cast on the recipient without regard to his negligence.” Id.
at 181. Gergen is right in saying that this rule “has the virtue of simplicity,” but does not explain
in which sense it provides “rough justice.” Id. This omission may derive from the fact that,
although he criticizes the utility-based support for the comparative negligence rule, Gergen
concedes that given the analogy to negligence law “[a] shift to a comparative fault regime in
undoing mistaken transfers that result in a loss may be inevitable.” Id. at 182 (citing Bank of
Saipan v. CNG Financial Corp., 380 F.3d 836, 842 (5th Cir. 2004)). Gergen’s concession seems
Indeed, at least from the point of view of a legal realist, as opposed perhaps to that of a sociologist of law, the question of empiricism is not about social context writ large but rather about the amount, and even more so the type, of empirical information about it. Formalists are likely to abstract their discussion from the social context by deeming any information about it irrelevant and potentially distracting. For legal realists, social context is important, which explains my suggestion to subdivide the law of mistakes and many other moves along the way. The question then again turns out to be where my neglect of more robust empirical information emerges as significantly detrimental. I cannot prove it never does. As a legal realist, I actually do not even want to attempt such a claim. Instead, I am happy to invite a rebuttal of the (at times implicit) empirical conjectures of the book, which rest on my common sense and on my judgment of their sufficiency. Some reliance on commonsensical observations about social reality is inevitable, but I definitely concede that, in some cases, reality may turn out to be different from what we think it is. If this is shown to be the case (either due to the collection of some surprising empirical data or through a competing commonsensical account), I will be delighted to revisit my conclusions, precisely because I am not a formalist.

CONCLUDING REMARKS

Analyzing the law of restitution through the prism of legal realism offered by LER does not guarantee error-proof results. For many if not most restitutionary categories, however, the injunction to contextually scrutinize restitutionary doctrines against our commitments to autonomy, utility, and community is sufficiently robust to yield clear and normatively not only descriptive but also normative: comparative negligence, he acknowledges, may seem “fair,” even though one should remember the increased litigation costs it entails. Id. at 183. But this means that, even if my asserted neglect of private law’s “institutional imperfections” is indeed detrimental to my utility-based defense of comparative negligence, it is still inconsequential because, alongside this defense, I also offer a fairness-based one. See LER, supra note 1, at 50-51.

91 Just to mention a few examples, consider my insistence on paying attention to the two typical features of intimacy and informality in the types of cases covered in Chapter 6 of LER; the significance I pay to the characteristics of commercial transactions in Chapter 8; and the prominent role I attach, in discussing constructive trust cases in Chapter 9, to the predicament of tort victims of bankrupt parties.
desirable rules, even when our knowledge of the origins or the consequences of these doctrines is limited. Furthermore, these rules respond to the unique justificatory burden of private law, as long as we appreciate both the power and the limits of the injunction of correlating the parties’ entitlements. This applies even if this correlativity does not result from the application of one reason to both parties but from a sufficiently wide convergence between the implications of the reasons supporting the plaintiff’s entitlement and those supporting the defendant’s liability. If, but only if, the normative infrastructure of autonomy, utility, and community is put in place along these lines, the maxim of preventing unjust enrichment can harmlessly serve as a loose common theme of the law of restitution.