

## Restitution, Tort, and Contract

Restitution, tort, and contract are related bodies of law, each addressing cases where people's entitlements have gotten out of alignment—cases where one person has caused losses to another or has gained at another's expense, and so is obliged to make things right. Lawyers are trained early to spot such situations by looking for the first pattern just mentioned. They quickly observe that someone has suffered losses for which compensation may be due from whoever caused them. The losses may result in a tort claim if they involve damage to the victim's person or property, or in a contract claim if they arise from a broken promise. This book views the whole spectrum of obligations through the opposite lens, which more often is overlooked: the rights that arise not when one person has caused an unjustifiable loss to another, but when the defendant has unjustifiably *gained* at the plaintiff's expense. Those cases are matters for the law of restitution. Sometimes searching out wrongful gains will catch the same cases found by looking for actionable losses, because a gain to one person is a loss to another (they are just two ways of looking at the same event—say, a theft); but the search for gains also turns up a great many distinctive problems and solutions of its own, which form much of our subject here.

### Types of Restitution Claims

Let us begin by asking how it is that one person ever does gain at another's expense. We can divide all such situations into four rough families according to the consent or intent of the parties to a transfer of property; this book is organized mostly around these groupings. Each of them

gives rise to its own claims for restitution with their own difficulties, and in each case we can consider how restitution compares to other kinds of lawsuits as a source of relief.

1. *Mistakes*. Neither party might have intended the transfer. This typically results in a case of mistake, as when someone pays money he doesn't owe. The law of restitution is the exclusive source of recovery in all such cases and has a well-developed apparatus for dealing with the complications that can arise—mistakes that are only partial, or a party who makes a payment while assuming the risk that it is mistaken, and so forth.

2. *Conferrings*. The giver might have intended the transfer, but the recipient did not, or in any event didn't intend to pay for it—as when one person confers benefits on another in an emergency where there is no chance to negotiate. Another sort of conferring occurs when one person does something necessary for himself and can't help benefiting another in the process. Perhaps the plaintiff paid a tax bill that could have been collected from either him or the defendant. In that sort of case the benefit might not seem to be conferred on the defendant “intentionally”; it would be more precise, however, to just say that the plaintiff was not *motivated* by a desire to benefit the defendant. The plaintiff's act in paying the bill was deliberate, and the benefits that accrued to the defendant were neither wished for nor accidental. They were side effects of actions the plaintiff took for other reasons. Again the law of restitution is the only source of help in such circumstances and provides doctrines for separating the good cases for recovery from the bad (typically asking whether the giver's failure to seek a contract for conferral of the benefits was excusable or was a foisting that the law should not reward).

3. *Takings*. The recipient might have intended the transfer while the giver did not. In other words, one person takes benefits from the other. In these cases restitution tends not to be the only body of law that addresses the problem. The victim of a fraud, for example, can choose whether to seek return of the benefits that the defrauder obtained (by way of a restitution claim) or damages for his losses (by way of a tort claim). Sometimes the choice may not matter, but in many cases one of those measures will be larger than the other. And even when the victim does bring a claim for restitution, tort law—and for that matter criminal law—will often remain relevant. A taking only entitles the victim to recover in restitution if the taking was in some way wrongful, and much of the time the law of restitution defers to tort and criminal law for answers to that question. Sometimes restitution does go further than tort or criminal law in

recognizing misconduct that requires gains to be returned. We will touch on those cases. But since restitution law makes only modest contributions of its own to the problem of defining what takings are wrongful, the most interesting questions in this branch of the subject tend to involve measurement of the plaintiff's recovery.

4. *Failed contracts.* Both parties might have intended the transfer, but it nevertheless resulted in unjust enrichment because the intentions of either side, or both, were in some way frustrated or contaminated. It was a defective contract or gift. (Using "failed contracts" as shorthand for this category is rough because a gift may be a transfer intended by both sides, and so fit into this category, and yet not involve a contract.) Maybe one side or the other was not competent to execute the transfer or was forced into it by duress. Or the intended enrichment of one side was conditioned on an intended enrichment of the other that did not occur, as when the parties had a contract and one side breached. The right to restitution may then depend on familiar points of contract law, just as it may depend on points of tort or criminal law in a case that involves a taking. But here, as there, restitution has plenty of its own work to do, for in many cases that arise from efforts at trade the point is that there *is* no contract between the parties. Whatever agreement they made is invalid. So contract law is no help, yet one side has been enriched unjustly. The result is a claim for restitution—not as a remedy for breach of contract, but as a freestanding claim of its own.

The categories just offered are informal, and some situations might be sorted into more than one of them. Transfers made under duress could be viewed as extractions made by a wrongdoer without consent (a taking) or as cases where both sides intended the transfer but the consent of one of them shouldn't count (a failed contract). Or cases where the defendant got the plaintiff's assets by fraud or duress could be put with cases where the defendant got them by mistake, because in both cases there was no meaningful consent to the transfer by the plaintiff. (That last pairing is a conventional way for many students of restitution to speak but not the approach used in this book.) Straightening out all these problems conclusively would require precise definitions of "intent," but we don't need to bother about that because in the law of restitution nothing depends on the organization set out above. The actual doctrines used to decide restitution cases are fashioned at a lower level of abstraction than the divisions just shown. In each of the cases just mentioned as ambiguous from the standpoint of intent, for example, there are clear and distinctive rules

for decision. The categories merely are convenient for purposes of this book because they organize all gains by one person at the expense of another into typical patterns that are easier to grasp, that tend to be treated according to related principles or logic, and that are useful to learn about together.

With that disclaimer made, the framework just shown does mean to offer a way of looking at restitution that allows the field to be seen more or less whole, and not viewed as merely miscellaneous. Some may insist that the law of restitution really *is* miscellaneous, but it is not a matter for insistence; the question is not whether restitution “really” is one thing or another. It is whether a way of looking at the subject allows the viewer to better understand it, appreciate it, and see a related logic in its various parts. Whether those effects are achieved by the description of restitution sketched here and elaborated in the chapters to come, the reader will judge.

### **The Scope of Restitution Compared to the Scope of Tort and Contract**

In addition to clarifying the different sorts of restitution claims that can arise, the four-part apparatus described above can serve as a helpful starting point in comparing the scope of restitution on the one hand and the more familiar scope of tort and contract law on the other. Notice that we could have asked how *losses* of wealth ever happen, and then made a sorting that looks much like the one just shown: Losses can occur (a) that nobody intends, as by accident. These usually are cases of negligently inflicted injury, but self-inflicted losses, such as property mislaid by the owner and found by someone else, also might go here. Or a loss may occur (b) by giving away wealth deliberately or otherwise conferring a benefit on someone else. This doesn't give rise to a legal claim when viewed as a loss. In other words it is not a source of tort liability, though it may create a good claim for restitution, as noted earlier. Or a loss may occur (c) when one party intentionally takes wealth away from another. These usually amount to intentional torts, so the victim can choose between recovering his losses (in tort) or demanding return of the other side's gains (in restitution). This category also can include extractions by the government that may or may not turn out to be wrongful. Or, last, a loss can occur (d) because a party makes an intentional trade that goes awry in some way. If

the attempted trade ripens into a valid and enforceable contract, the loss that results is remedied by a suit for breach of that contract, with recovery usually measured in terms of the victim's damages. When the attempted trade doesn't ripen into a contract, the loss can only be remedied by a restitution claim, with recovery measured in terms of the defendant's gains.

As that exercise shows, most transactions, voluntary or not, can be viewed as occasions for either gain or loss; it just depends on how you look at them. But notice that restitution law gives a more complete account of gains than tort and contract law give of losses. If I defraud you out of \$500, you can bring a tort claim or a restitution claim as you prefer. If you mistakenly send me \$500 that you meant to send to your plumber, however, there is both a loss to you and a gain to me, but tort law has no comment to make, while the law of restitution is just as interested as ever. The reason for the asymmetry is that restitution is the remedy for unjust enrichment, which is a very broad category, whereas tort is not quite a remedy for unjust losses. It is the remedy for *wrongs* one person commits against another, which is a smaller set of events. Contract law likewise is not about all unjust losses, or even all losses that can arise from voluntary exchanges that go wrong. It is only concerned with losses that arise from properly formed contracts, which again is a smaller category. Contract and tort law can afford to be narrow precisely because the law of restitution picks up the slack in many cases of misallocation that they don't cover.

But it would be a mistake to infer from this that restitution just exists to give plaintiffs some recourse in cases that tort and contract law miss. It might be closer to the truth to think of tort and contract law as exceptional. Recovery is generally available for unjust enrichment that one party makes at another's expense. Granted, "unjust enrichment" is a term with particular legal meaning; there is a great deal of profitable injustice in the world that the law of restitution leaves alone. But principles of restitution law do speak in detail to all four types of problems outlined a moment ago—mistakes, conferrings, takings, and failed contracts—and provide a remarkable array of tools to rectify them. Then come tort and contract law, which provide some special and additional rules that also allow plaintiffs to recover for their *losses*, even without reference to whether anyone else has gained—but only in a fairly narrow set of cases when particular requirements are satisfied, and then usually by a simple remedy. The plaintiff just presents the defendant with a bill.

It would be tempting and tidy to say that restitution law has the potential to speak to every case covered by tort and contract law (if the

cases from those areas are viewed from the standpoint of gains rather than losses) and then many others as well. But it would be a little misleading. In theory, any instance of unjust enrichment can indeed be addressed with a restitution claim. In practice, though, there are occasional types of unjust enrichment that never result in restitution claims because our legal traditions have committed the resolution of them to a different rubric. After a breach of contract, the plaintiff might, in principle, be able to sue in restitution, claiming that the defendant was unjustly enriched by the breach. But this never happens in practice because the law handles those problems as “contract cases”—within which, however, “restitution” is a label given to one possible remedy that operates much like (though not exactly like!) a restitution suit would. And if I steal your goods and you want them back, this too might in principle seem to call for a restitution claim. I certainly have been unjustly enriched. But it just happens that these facts traditionally have been addressed by a suit for replevin rather than restitution. Restitution does become relevant if I have sold your goods and you want the money I obtained for them. These wrinkles might make the scope of restitution sound confusing, but the general result they produce can be stated simply enough. Almost any case of unjust enrichment can be addressed with a restitution claim. There are just a few types that are addressed in some other way, and the two most prominent of them have now been mentioned.

While the scope of restitution law is wider than the scope of tort or contract law, tort and contract undeniably have a more constant practical importance. First, in the cases that tort and contract law cover, plaintiffs usually prefer claims under those headings to restitution claims because their losses are greater than the defendant’s gains. In a car accident, for example, the gains to the defendant from skipping whatever precautions he should have taken are minimal, while the losses to the plaintiff are large. The same more or less goes for a punch in the nose. So those incidents invariably result in tort rather than restitution claims. Nobody even thinks of restitution as a plausible line of recovery for them.

The other and larger reason for the greater importance of tort and contract law involves the natural incentives of potential defendants, and the problems those incentives create. Skipping a precaution or not keeping a promise—the stuff that tort and contract claims are made of—usually is easier and cheaper than taking the victim’s interests to heart. That is why those types of invasions are common, along with tort and contract suits to redress them. Many classic types of restitution cases are less likely to in-

volve temptations of that sort. If I mistakenly pay you money that I owe to someone else, I have blundered at my own expense, not yours, so I have a built-in reason to be careful not to do it. Likewise, a breach of contract is a more common thing than an invalid contract, because a breach is tempting for one side to commit but an invalid contract is not usually tempting for either side to make. If a contract ends up invalid and useless, it is usually in spite of the original intentions of both parties. In short, tort and contract law get used more, despite covering less ground than restitution, because opportunism is a more powerful force than the altruism, self-injuring carelessness, and other forces that give rise *only* to claims of unjust enrichment.

So restitution shows up behind tort and contract law in practical importance, but not too far behind, for its reach is vast and covers a lot of situations that come up often enough. People make mistakes, reasonable or unreasonable, about whom or how much to pay. They perform disputed obligations that turn out not to exist. They confer benefits on others in emergencies. They do things for themselves that incidentally make others better off, too. They steal and then resell property or commit other wrongs and greatly enrich themselves in the process. They exchange things without enforceable contracts. Those all are cases for the law of restitution, and the patterns they involve can arise not only on their own but in the thick of other cases that may appear at first glance to be matters for some other body of law. The seasoned expert on restitution sees occasions for it that are easily overlooked by the lawyer overly habituated to look for losses, who asks when confronted with any misallocation whether it somehow can be crammed into the law of contract or tort.

## **Roots and Foundational Principles**

The law of restitution can be viewed as advancing a number of different values, some of them utilitarian in character and some not. The case law on the subject descends in a line from Lord Mansfield, who regarded the principles governing the subject as “natural justice and equity.”<sup>1</sup> John Dawson identified the law of restitution with a maxim that goes back farther—indeed, two thousand years: “For this by nature is equitable, that no one be made richer through another’s loss.”<sup>2</sup> To this day, the origins of restitution law in notions of good conscience give it a useful flexibility and versatility as well as an attractive moral footing. As a procedural matter,

restitution was available from both law and equity courts, and the influence of equity principles still can show up at every stage of a restitution case now. Contract and tort law, by contrast, were primarily matters for law courts, and this is reflected both in the simplicity of the remedies usually available for such claims—that is, money damages—and in the often more clear-cut rules of entitlement and defense that govern them.

One branch of development from those origins has been theoretical, with scholars and some judges attempting to state master principles that explain what counts as unjust enrichment. It would take a different type of book to provide a fair account of those efforts (the interested reader is referred to the sources mentioned in the notes).<sup>3</sup> The other branch of development has been doctrinal and is the primary subject of the chapters to come. We will see that the doctrines are sometimes complex but often follow from a compact set of principles: that defendants should not benefit from their own wrongdoing; that an innocent recipient of a benefit should be protected against a forced exchange; that a party who confers an unrequested benefit on another should recover only when proceeding by contract was not feasible; that stolen or otherwise misappropriated property can be followed into different shapes and forms until it comes into the hands of a bona fide purchaser. Each of these principles, and many others that we will encounter soon, can be explained in terms of fairness and respect for the parties' autonomy. Each can also be explained on functional grounds, of which more in a moment.

The law of restitution, especially on the remedial side, involves an additional recurring theme that is worth mentioning at the outset: the identification and management of property rights. As noted in the preface, restitution claims often demand that defendants pay for benefits they have received, but sometimes such claims are used for the important and distinct purpose of getting back something the defendant has in his possession that belonged to the plaintiff, and perhaps still does. When a wrong involves taking someone's money or other property, it can matter a great deal whether the victim merely has a right to the value of what was taken (like anyone else to whom the defendant owes money), or whether the victim has a property right in what the defendant now possesses—and thus a right to take back that very thing, or to seize whatever money it produced when it was sold, or to force the defendant or someone else to hand over some further thing the money was used to buy. It especially matters when the defendant has other creditors and doesn't have enough money left to pay them all. One would prefer not to get in line with those others



in hopes of recovering pennies on the dollar; one would much rather take back the property outright. The law of restitution provides a framework for understanding when that can be done. Those distinctions are another way in which restitution departs from the law of contract and tort, which are mostly concerned with money liabilities and aren't designed to answer hard questions about the meaning of ownership.

Property rights, once recognized, can have rigorous and startling implications. They don't lend themselves to the balancing and inquiries into blame that we often find in tort cases and with which modern legal instincts tend to be more at home. A brief example will make the point more concrete. Suppose that after defrauding Smithers and Jones out of \$500 each, you put their money into separate pockets. You spend Jones's money, and then you are caught. All you have left is the \$500 from Smithers. Both parties bring restitution claims against you. Should Smithers get the entire \$500 back, or should he and Jones get \$250 apiece? The latter solution might seem more fair, since the two plaintiffs were (let us assume) equally victimized by you and equally free from any culpability of their own. But traditional rules of restitution would probably entitle Smithers to all of his money and Jones to nothing, because Smithers can make a property claim. The money is *his*; he can point to it in your pocket, say that you never obtained title to it, and insist that it therefore has to be returned directly without any talk about what is fair to Jones. Some courts might insist on a clearer separation of the funds than just putting them into separate pockets, but the principles would still be the same. Then again, a few modern courts have abandoned this logic in favor of pro rata distribution to victims of fraud when the defrauder has spent the money of some of them but not others. We will return to all this later in the book. For now just consider it an example of a general theme: the recurrent tension in restitution law between rules founded in property and more modern tendencies to apportion liability and loss based on notions of relative fault and desert.

### **Economic Logic**

The scholarship on restitution is vastly more extensive outside the United States than inside. The topic hasn't quite caught on here. Some say this is because the scholarship from elsewhere has a prerealist quality. It often is occupied with philosophical puzzles that are conceptually interesting

but seem to have modest practical stakes, at least to American eyes.<sup>4</sup> This book will likely have other problems but probably not that one. Its first ambition is to effectively explain how the law works. And while this is not a “law and economics” book, I do like functional explanations where they are possible and so try to suggest at many points how doctrines of restitution serve the cause of efficiency. Scholars who don’t like economic accounts may find some of those explanations unrealistic or otherwise unpersuasive, and scholars from other countries may regret my indifference to some definitional conundrums that they consider essential to an understanding of the field. But they have other books to read.

The functional explanations just mentioned will appear as we go along, but a few themes recur often enough to be worth mentioning from the outset. They may serve as complements to the foundational principles of doctrine listed a moment ago; indeed, in some cases the functional principles are the same as the principles of fairness, just interpreted differently. One is that wrongs should be made valueless to those who commit them—a maxim readily defensible as a matter of justice but also as a matter of sound policy. Another is that the law of restitution, like the law of tort, often can be understood as pressuring parties to make contracts when they can, rather than imposing costs and benefits on each other and then calling for judicial valuation of them afterward. When contracts aren’t feasible to make, the law of restitution—again, like the law of tort—sometimes can be viewed as creating the outcome that the parties might have reached by contract if one had been possible to make. This can be viewed as a rule of respect for the autonomy of those who receive benefits they didn’t ask for. It also can be viewed as good economics.

Another recurring problem is the correct performance of a cost-benefit analysis when private costs are high and social costs are low. Begin by observing that the losses at issue in restitution cases differ in interesting ways from the losses at issue in many tort cases. Usually negligence that results in tort liability doesn’t just cause a loss to the victim; it produces a real loss of resources. An accident has occurred, and now some costs exist that weren’t there before—medical expenses, repairs, and so on. Cases of unjust enrichment don’t as often involve social losses of that kind, at least directly. If I pay money to you that I don’t owe, or I pay you money on a contract that turns out to be invalid, I’m poorer but the world isn’t, at least not significantly. Rather, I’m poorer and you are richer, maybe to an identical extent. In this case resources haven’t been wasted. They just have been moved from one person to another. It is easy to understand

why liability should be imposed on someone who fails to prevent a waste of resources, but not as obvious why there is a public interest of any economic kind in a case where one person's wealth merely has been shifted to another.

Perhaps the answer is that the law in this area is best explained by notions of justice rather than utility, but some justifications are available on economic grounds all the same. Some of them resemble the economic account of why we have liability for intentional torts that merely transfer wealth from one person to another (such as conversion—i.e., theft). First, some acts that call for restitution *are* intentional torts. They result in restitution suits just because the gain for the tortfeasor happened to be larger than the loss to the victim (e.g., when the tortfeasor embezzled money and then profitably invested it). Taking away the tortfeasor's gains will make his act valueless to him, and so deters it better than just making him pay for the damage done. In addition, bad transfers—even those that create no loss to the world in themselves—create side costs if they go uncorrected. If you aren't legally obliged to return overpayments I make to you, then we may have to waste time making our own agreements about how to handle that problem if it ever comes up (contracting around the legal rule, so to speak), or taking exaggerated precautions to make sure such an overpayment never happens. So restitution law may not prevent costly accidents, but it sometimes provides a substitute for precautions that the people involved should not be put to the bother of taking in advance. Granted, that gain comes at some administrative cost: we have to entertain lawsuits from time to time. Whether that cost is outweighed by greater benefits of the type just described is hard to say, but it might be.

### **An Unfortunate Word**

A final note is in order on vocabulary. The principles this book explains tend to be old, but use of the word "restitution" to refer to their collective operation is comparatively recent. The word was picked in 1936 by two law professors, Warren Seavey and Austin Scott, to describe the principles they had summarized in their new project for the American Law Institute—one they christened the *Restatement of Restitution*.<sup>5</sup> Their work was marvelous, but their word for it was not. It basically means "restoration." That sometimes describes what happens in a restitution case, as when the plaintiff sues to get his property back from the defendant.

Sometimes it does not describe what is happening very aptly at all, however, as when the plaintiff sues to recover payment for a service that he performed for the defendant—a classic case of unjust enrichment. So the word is an unhappily imprecise fit to the body of law that it labels.

The word is also unfortunate because it can refer to one of two (or three) things. “Restitution” is, as we have been treating it, the name of a certain kind of *claim* a plaintiff can bring, analogous to one brought in tort or contract law: it is a claim that the defendant has been unjustly enriched at the plaintiff’s expense. At the same time, “restitution” also is the name of a certain type of *remedy* a plaintiff can seek in other kinds of cases—mostly cases arising under contract law, but sometimes also involving other areas, such as those governed by statutes that may entitle a plaintiff to “restitution” in a specially defined sense. And then more recently the word has also been appropriated to refer to payments that criminals make to compensate their victims, which often have nothing to do with gain-based recovery. These multiple meanings of the word are mostly just an annoyance that the lawyer has to master early in studying the subject. But it has done practical damage, too, because many generations of attorneys have graduated from law school thinking that “restitution” is just the name of a contract remedy (or an idea from criminal law), and having little or no idea that it may refer to an important and useful legal claim of its own.

Some of this confusion could be avoided by changing our use of the word “restitution” so that it never describes a type of legal claim and only is used to describe a remedy—the remedy of taking away a defendant’s gains, whether in response to a claim sounding in unjust enrichment or a claim sounding in contract or some other body of law. The *claims* that now go by the name “restitution” would be called “claims of unjust enrichment” from now on.<sup>6</sup> On this view “unjust enrichment” might refer not to every situation that gives rise to restitution but just to a subset of claims with its own set of elements. We thus would have tort claims, for which restitution is a possible remedy, and contract claims, for which restitution is a possible remedy, and unjust enrichment claims, for which restitution is a possible (or perhaps inevitable) remedy.

That solution might have made good sense as an original matter, and might now make life a little less confusing in some ways. But moving to it also would create a series of fresh problems. The claim of “unjust enrichment” would have to be defined to capture a lot of cases that are quite dissimilar—cases involving, say, both mistakes and conferrings. Some

claims will fall outside any definition one makes (restitution law currently covers a lot of very miscellaneous fact patterns); they will be left in search of a name, and in a strange legal posture. Meanwhile it doesn't appear that reworking the verbal and intellectual framework in this way would cause any cases to come out differently. So with due regret that the terminology for these cases wasn't chosen better seventy years ago, the case for a fundamental change in it now seems unpersuasive. Lawyers understand that the word "negligence" is ambiguous, as it can refer either to the tort claim one brings in a typical accident case or to one element of that claim—a failure to use due care. They also understand, or can quickly enough grasp, that "restitution" is subject to its own ambiguity, as it can name either a remedy or a freestanding type of legal claim based on unjust enrichment.