The Scope and Significance of Restitution

Douglas Laycock*

The law of restitution offers substantive and remedial principles of broad scope and practical significance. In an outline of the sources of civil liability, the principal headings would be tort, contract, and restitution.[1] In every major remedies book, three of the largest subdivisions are some variation of damages, equity, and restitution.[2]

Despite its importance, restitution is a relatively neglected and underdeveloped part of the law. In the mental map of most lawyers, restitution consists largely of blank spaces with undefined borders and only scattered patches of familiar ground. Few law schools teach a separate course in restitution, no restitution casebook is in print, and scholarship in the field is largely devoted to specific applications.

This Essay offers a conceptual and practical overview of the field. First, I attempt to define the concept of restitution, its principal subdivisions, and its boundaries with other bodies of law. Second, I attempt to identify and classify the principal situations in which restitution is of practical and not just theoretical interest.

Such an essay would do little good in most areas of law, but it fills a need in restitution. Neither the *Restatement of Restitution*,[3] nor George Palmer's treatise,[4] offers such an overview. Both Palmer and the *Restatement* are strong on grand abstractions, and strong on detailed rules, but weak on intermediate levels of generality. Neither offers much help in determining when restitution matters to the result and when it is

* Alice McKean Young Regents Chair in Law, The University of Texas at Austin. This Essay derives from my longer unpublished work, Preliminary Report on a Restatement (Second) of Restitution, commissioned by the American Law Institute. No body of the Institute has acted on the report, and the views expressed are solely my own. I am grateful to Debbie Backus for research assistance.

1. *See* 1 G. PALMER, THE LAW OF RESTITUTION § 1.1, at 1-2 (1978).

2. *See* R. CHILDRES & W. JOHNSON, EQUITY, RESTITUTION AND DAMAGES: THE STUDY OF LITIGATION THEORY (1974); D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION at xix (1973); D. LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS vii (1985); R. LEAVELL, J. LOVE & G. NELSON, CASES AND MATERIALS ON EQUITABLE REMEDIES, RESTITUTION AND DAMAGES at xv, xxiii, (4th ed. 1986); K. PARKER, MODERN JUDICIAL REMEDIES: CASES AND MATERIALS at ix, xiii (1975); E. RE, CASES AND MATERIALS ON REMEDIES at xxiii, xxxiii (2d ed. 1987); R. THOMPSON & J. SEBERT, REMEDIES: DAMAGES, EQUITY AND RESTITUTION at xii, xiii, xvi (1983); K. YORK, J. BAUMAN & D. RENDLEMAN, CASES AND MATERIALS ON REMEDIES at xvii (4th ed. 1985).

3. RESTATEMENT OF RESTITUTION (1937).

4. G. PALMER, *supra* note 1.

merely a conceptual alternative to other theories of recovery. Palmer and the *Restatement* do define the concept and scope of restitution, but their definitions were challenged by John P. Dawson, the other great American restitution scholar of the last generation.[5] This Essay addresses that definitional dispute in a practical context. I aim for the level of generality that Palmer and the *Restatement* skip: a clear conceptual outline, uncluttered by detail.

I. The Defining Concepts of Restitution

A. A Historical Definition

The rules of restitution developed much like the rules of equity. Restitution arose to avoid unjust results in specific cases—as a series of innovations to fill gaps in the rest of the law. Consequently, any definition of restitution risks the self-conscious circularity of Maitland's definition of equity:[6] restitution consists of those rules that originated in writs and equitable remedies that lawyers think of as restitutionary.

The *Restatement* attempted to induce a unifying principle and thus to provide a more satisfactory definition. The *Restatement* legitimated three insights: that a seemingly great variety of specific rules serve a common purpose, that these rules can be thought of as a single body of law under the name "restitution," and that these rules support a general principle that unjust enrichment must be disgorged. This was a major accomplishment; it created the field.

But the effort succeeded only in part. Drafting decisions that were probably inevitable in 1937 have become increasingly problematic over the years, in part because of the other great legal publication of 1937, the Federal Rules of Civil Procedure. The subtitle of the *Restatement*, and of its two great subdivisions, is "Quasi Contracts and Constructive Trusts." These categories depend in part on the separation of law and equity, and even more on a categorization of claims rooted in the forms of action and dependent on fictional pleadings. Yet the Federal Rules merged law and equity,[7] put the last nail in the coffin of the forms of action,[8] and embodied both the realist emphasis on substantial justice and a modern distaste for legal fiction.

5. *See generally* Dawson, *Restitution Without Enrichment*, 61 B.U.L. REV. 563, 576-620 (1981).

6. "Equity is that body of rules which is administered only by those courts which are known as Courts of Equity." F. MAITLAND, EQUITY 1 (2d ed. 1936).

7. *See* FED. R. CIV. P. 2 ("There shall be one form of action to be known as 'civil action'.").

8. *See id.*; *see also id.* advisory committee's note (explaining that the rule provides "for a single action and mode of procedure, with abolition of forms of action and procedural distinctions").

The reporters of the *Restatement* were sympathetic to these trends, but they could not yet escape the past. Their work is laden with references to the pre-1937 roots of restitution,[9] and they did not fully avoid the view that restitution is the body of law historically available under the label of quasi-contract or constructive trust. But a definition in terms of common-law writs is little help to modern lawyers. It is also misleading: restitution is both broader and narrower than the historic scope of quasi-contract and constructive trust. The search for definition must be conceptual rather than historical.

B. A Conceptual Definition

Lawyers use the word "restitution" in at least two senses. "Restitution" means recovery based on and measured by unjust enrichment.[10] It also means restoration in kind of a specific thing.[11] Both usages are part of any complete definition of restitution. Palmer and the *Restatement* use the word both ways, but neither defines it to include both meanings.

Palmer and the *Restatement* define restitution in terms of unjust enrichment, and that usage dominates both works. In their view, restitution is the body of law that grants recovery on the basis of unjust enrichment.[12] It follows from the focus on enrichment that restitution measures recovery by defendant's gain rather than plaintiff's loss. The *Restatement* generally adopts this measure of recovery,[13] but it introduces a surprising number of qualifications.[14] Palmer more consistently insists on defendant's gain as the proper measure of recovery.[15]

"Restitution" also retains its original literal meaning, which is simply restoration of something lost or taken away.[16] Thus, restitution con-

9. *See, e.g.*, RESTATEMENT OF RESTITUTION pt. I, at 5-10 introductory note (1937) (tracing the roots of restitution in equity and common law); *id.* § 5 comment a (noting continued effects of fiction that recipient of a benefit has promised to pay). There are 47 index entries for "assumpsit," and 34 for "quasi-contract." *Id.* at 883, 995.

10. *See, e.g.*, Shaffer v. Reed, 456 So. 2d 1082, 1086 (Ala. 1984); Fleer Corp. v. Topps Chewing Gum, 539 A.2d 1060, 1062-63 (Del. 1988); Markwica v. Davis, 64 N.Y.2d 38, 42, 473 N.E.2d 750, 753, 484 N.Y.S.2d 522, 525 (1984); Lincoln Nat'l Life Ins. Co. v. Brown Schools, 757 S.W.2d 411, 414 (Tex. App.—Houston [14th Dist.] 1988, n.w.h.); D. DOBBS, *supra* note 2, § 4.1, at 223-24; D. LAYCOCK, *supra* note 2, at 462; K. YORK, J. BAUMAN, & D. RENDLEMAN, *supra* note 2, at 175-76.

11. *See, e.g.*, Frigillana v. Frigillana, 266 Ark. 296, 306, 584 S.W.2d 30, 35 (1979) (citing 77 C.J.S. *Restitution* 323 (1952)); D. DOBBS, *supra* note 2, § 4.1, at 222; D. LAYCOCK, *supra* note 2, at 462.

12. *See* RESTATEMENT OF RESTITUTION general scope note at 1 (1937); *id.* § 1; 1 G. PALMER, *supra* note 1, § 1.1, at 2-5.

13. *See* RESTATEMENT OF RESTITUTION § 1 comments a, d (1937).

14. *See id.* comment e; *id.* ch. 8, topic 2 introductory note at 595-96.

15. *See* 1 G. PALMER, *supra* note 1, § 2.10, at 140.

16. *See* OXFORD ENGLISH DICTIONARY 2516 (compact ed. 1971) ("The action of restoring or giving back something to its proper owner . . . ."); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1617 (2d ed. unabr. 1987) (in comparing synonyms under entry for "redress,"

tinues to include remedies that restore to plaintiff the specific thing he lost or that undo disrupted transactions and restore both parties to their original positions in kind. The *Restatement* refers to in-kind restoration of specific property as "specific restitution."[17] Both Palmer and the *Restatement* recognize this usage, but neither harmonizes it with the concept of unjust enrichment. Palmer even suggests that the term "restitution" is "not wholly apt since it suggests restoration" of something taken from plaintiff.[18]

Palmer is right to note that the word "restitution" means something more than recovery of unjust enrichment, but he is wrong to disclaim that meaning. In my judgment, specific restitution is part of the core concept of restitution. It is conceptually equal to the avoidance of unjust enrichment. Neither usage of the term subsumes the other.

It is true that specific restitution can often be explained as a means of disgorging unjust enrichment. Specific restitution of misappropriated property both restores the property to the rightful owner and deprives the misappropriator of his unjust gain. But such explanations are often indirect and sometimes ill-fitting in more complex situations. The misappropriator is unjustly enriched whether or not the rightful owner can trace the specific property taken. Yet a plaintiff who can trace the specific property gets a far more powerful remedy than one who cannot.[19] The conceptual basis for this remedy is plaintiff's claim to restoration of property that is still identifiable as his. Elaborate tracing rules separate the property still identifiable as plaintiff's from property that has passed into the misappropriator's general assets.[20] The reason these rules are needed is that a claim to specific restitution adds something to a claim of unjust enrichment.

Similarly, the principle of disgorging unjust enrichment adds much to the principle of specific restitution. Defendant may simply pay the value of his unjust enrichment without restoring specific property to plaintiff.[21] Even some cases of tracing are hard to explain as specific

noting that "[r]estitution means literally the restoration of what has been taken from the lawful owner"). The word was derived by adding the prefix "re" to a Latin verb meaning "to set up"; thus, to set up again, or to restore a thing to its original position. OXFORD ENGLISH DICTIONARY, *supra*, at 2516.

17. *See* RESTATEMENT OF RESTITUTION § 4 comments c, d (1937); *id.* § 128. The same usage appears in RESTATEMENT (SECOND) OF CONTRACTS § 372 (1981).

18. 1 G. PALMER, *supra* note 1, § 1.1, at 4.

19. *See, e.g., In re* Erie Trust Co., 326 Pa. 198, 201, 191 A. 613, 614 (1937) (holding that trust beneficiaries have preference over general creditors when improperly converted assets of a trust estate are traced into a particular fund).

20. *See infra* notes 79-80 and accompanying text.

21. *See, e.g.*, Truck Equip. Serv. Co. v. Fruehauf Corp., 536 F.2d 1210, 1222-23 (8th Cir.) (profits earned from unlawful use of competitor's distinctive design), *cert. denied*, 429 U.S. 861

restitution. Consider a defendant who misappropriates property and uses it to make large profits that plaintiff would not have made.[22] Avoidance of unjust enrichment explains why we award these profits to plaintiff. But we are not restoring anything that plaintiff once had or ever would have had. We often explain such awards as restoration of the proceeds of plaintiff's property.[23] But there are reasons to focus more on unjust enrichment than on tracing in these cases. Whether to give plaintiff more than he lost is a matter of judgment,[24] and our judgment should not be overwhelmed by mechanical tracing rules.

Despite their emphasis on unjust enrichment, Palmer and the *Restatement* use "restitution" in both senses: as disgorgement of unjust enrichment and as restoration in kind of specific property. Thus, Palmer notes that replevin is a form of restitution,[25] and the *Restatement* notes that replevin, ejectment, trover, and trespass to chattels are restitutionary, because they restore to plaintiff that which was taken from him.[26]

Even so, the reporters excluded these remedies from the *Restatement*. They offered two related reasons.[27] First, they said that these remedies are granted in tort on facts where quasi-contract would also lie.[28] The reporters thus implied that quasi-contract was an essential part of their working conception of the field. Second, they said that quasi-contract actions focus on unjust enrichment, but tort actions focus on wrongdoing.[29] This is a doubtful claim. Conversion is a strict liability tort;[30] it allocates commercial risk as often as it remedies wrongdoing. A better argument would have been that the harsh results in some conversion cases show that the focus is more on plaintiff's loss than on defendant's gain. But the reporters did not explore such questions. The nature

(1976); Maier Brewing Co. v. Fleischmann Distilling Corp., 390 F.2d 117, 124 (9th Cir.) (profits from trademark infringement), *cert. denied*, 391 U.S. 966 (1968); Monsanto Chem. Co. v. Perfect Fit Prods. Mfg. Co., 349 F.2d 389, 396 (2d Cir. 1965) (same), *cert. denied*, 383 U.S. 942 (1966).

22. *See, e.g.*, Snepp v. United States, 444 U.S. 507, 515 (1980) (per curiam) (profits from unauthorized book by former intelligence agent, a book that plaintiff would never have published); *Maier Brewing Co.*, 390 F.2d at 124 (profits from sale of beer under label that infringed plaintiff's trademark for scotch whiskey); Olwell v. Nye & Nissen Co., 26 Wash. 2d 282, 285-86, 173 P.2d 652, 654 (1946) (profits from defendant's wrongful use of machine that plaintiff had not used in years).

23. *See, e.g.*, *Snepp*, 444 U.S. at 515 (treating defendant's book royalties as proceeds of plaintiff's right to review manuscript before publication).

24. *See infra* sections II(B)(3)-(4).

25. *See* 1 G. PALMER, *supra* note 1, § 1.1, at 4.

26. *See* RESTATEMENT OF RESTITUTION general scope note at 2 (1937); *id.* ch. 7 introductory note at 522-23.

27. *See id.* ch. 7 introductory note at 523.

28. *See id.*

29. *See id.*

30. *See* F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 2.10, at 165-67 (2d ed. 1986); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 15, at 92-93, 96-97 (5th ed. 1984).

of the underlying wrong appears to have been only their post hoc rationalization for a decision based on the scope of quasi-contract. The reporters appear to have based their decision to omit replevin and ejectment more on the forms of action than on any clear conception of restitution.

Whatever the reporters' reasons for including and excluding certain remedies, their work plainly reflects both usages of the word "restitution." Neither meaning has gained primacy in the intervening half century. Professor Dawson argued that the essence of restitution in cases of partly performed contract is to reverse the transaction, and that this remedy often has nothing to do with unjust enrichment.[31] Some of his examples are better explained as reliance damages than as restitution.[32] Consciously or unconsciously, Dawson also gave too much weight to the historical scope of quasi-contract. But he was right about the larger issue, the continuing duality in the core concepts of restitution. When courts grant rescission of a partly or wholly performed transaction, they undertake to restore to each party all that each has given—in kind if possible, and otherwise in a cash equivalent.[33] The logic of specific restitution drives the result, and talk of unjust enrichment is distinctly secondary.

"Restitution" is sometimes used in a third sense—to restore the value of what plaintiff lost. The *Restatement* employs the term this way at least occasionally,[34] and the usage is common in the statutes requiring criminals to make restitution to their victims.[35] But restitution of the value of what plaintiff lost is simply compensatory damages. Used in this

31. *See* Dawson, *supra* note 5, at 621; *see also* Perillo, *Restitution in a Contractual Context*, 73 COLUM. L. REV. 1208, 1222 (1973) (noting that not all restitution cases can be explained by unjust enrichment and that some are better explained as restoration of status quo ante). For a similar debate in England, see Hedley, *Unjust Enrichment as the Basis of Restitution: An Overworked Concept*, 5 LEGAL STUD. 56 (1985); Birks, *Unjust Enrichment: A Reply to Mr. Hedley*, 5 LEGAL STUD. 67 (1985).

32. *See* Dawson, *supra* note 5, at 585-600. On the distinction between reliance and restitution, see RESTATEMENT (SECOND) OF CONTRACTS §§ 349, 370 (1981); Fuller & Perdue, *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 54 (1936). For other scholars who think that cases like the ones Dawson cites are better understood as reliance cases, see Fuller & Perdue, *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373, 394 (1936); Perillo, *supra* note 31, at 1222. Dawson fully understood the point, but apparently preferred to treat reliance as part of restitution. This appears most clearly in Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175, 190-92 (1959).

33. *See, e.g.*, Cherry v. Crispin, 346 Mass. 89, 93, 190 N.E.2d 93, 95-96 (1963) (holding that rescission of completed sale of home requires that the home be reconveyed and the purchase price refunded, and that amounts due each side be adjusted for rental value of temporary occupancy, for taxes paid, and for any improvements made); Seneca Wire & Mfg. Co. v. A.B. Leach & Co., 247 N.Y. 1, 7-8, 159 N.E. 700, 702 (1928) (noting that remedy in a recission action at law was the return of money previously paid).

34. *See* RESTATEMENT OF RESTITUTION ch. 7 introductory note at 522 (1937).

35. *See, e.g.*, 18 U.S.C. § 3663(b) (Supp. V 1987); *see also* Kelly v. Robinson, 479 U.S. 36, 38-39 (1986); Bearden v. Georgia, 461 U.S. 660, 662 (1983).

sense, "restitution" loses all utility as a means of distinguishing one body of law from another. Restitution must be distinguished from compensation, either by its focus on restoration of the loss in kind or by its focus on defendant's gain as the measure of recovery.[36]

Restitution is also commonly distinguished from injunctions and specific performance,[37] even though these remedies also grant specific relief and are premised on the inadequacy of substitutionary remedies such as damages. An injunction can order defendant to return specific property to plaintiff,[38] and in this simple case, the injunction is a means of achieving specific restitution.

But most injunctive remedies are not restitutionary in this sense. Injunctions prevent future wrongdoing or ameliorate the future consequences of a past wrong by some means more complex than restoring possession of misappropriated property or reversing a transaction.[39] Specific performance decrees award plaintiff something he has never had, because it was promised to him and cannot be obtained elsewhere. Thus, injunctions and specific performance are more often preventive than restorative. They are historically subject to different rules, and they raise different policy considerations. The occasional restitutionary use of injunctions is part of restitution and should be recognized as such, but most of the law of injunctions and specific performance is outside the field.

II. The Practical Significance of Restitution

Many cases of unjust enrichment are also covered by other principles, including the basic rules of tort and contract. If defendant steals a hundred-dollar bill, he is unjustly enriched in the amount of one hundred dollars. But he has also committed a tort; indeed, it is the tort that makes his enrichment unjust. The tort damages are also one hundred dollars. If defendant is solvent, it will rarely matter whether plaintiff recovers one hundred dollars in damages for the tort or one hundred dollars in restitution of the unjust enrichment.

Because of such overlaps, one gets little sense of the practical signifi-

36. *See* 1 G. PALMER, *supra* note 1, § 2.10, at 140.

37. This distinction is implicit in the common use of equity and restitution as principal subdivisions of remedies books. *See supra* note 2.

38. *See* Van Hecke, *Equitable Replevin*, 33 N.C.L. REV. 57, 57 (1954).

39. On whether reparative injunctions are better conceived as compensation in kind for the past wrong or as preventing the future consequences of the past wrong, compare O. FISS, THE CIVIL RIGHTS INJUNCTION 8-12, 55-56 (1978) (compensation in kind) with Laycock, *Injunctions and the Irreparable Injury Rule* (Book Review), 57 TEXAS L. REV. 1065, 1073-75 (1979) (preventing future harm). This dispute does not affect the point in the text; according to either theory, the reparative injunction often does far more than return specific property to plaintiff.

cance of restitution by systematically developing all applications of the unjust enrichment and specific restitution principles. It is more enlightening to ask what restitution adds to the other sources of civil liability. The restitutionary claim matters in three sets of cases: (1) when unjust enrichment is the only source of liability; (2) when plaintiff prefers to measure recovery by defendant's gain, either because it exceeds plaintiff's loss or because it is easier to measure; and (3) when plaintiff prefers specific restitution, either because defendant is insolvent, because the thing plaintiff lost has changed in value, or because plaintiff values the thing he lost for nonmarket reasons.

A. Restitution as the Source of Liability

Defendant may be unjustly enriched without having committed any other civil wrong. Defendant may be enriched by mistake,[40] as in cases of mistaken payments or mistaken improvements. He may be enriched through another's discharge of a joint obligation.[41] This and closely related problems are the source of the law of indemnity, contribution, subrogation, and marshalling of assets. Defendant may be enriched by emergency services performed for his benefit,[42] or by compliance with a judicial order later modified.[43] He may be enriched by part performance of a supposed contract that turns out to be unenforceable.[44] Finally, defendant may enrich himself by means that we condemn as unjust but for which we would not impose tort liability in the absence of enrichment. Duress is the leading example,[45] although some jurisdictions now consider duress a tort.[46]

Defendant may also be enriched in ways that the law does not condemn as unjust. The *Restatement*'s general principle in favor of disgorging unjust enrichment[47] is followed by a general negative rule: a person is not entitled to restitution for benefits voluntarily conferred in the absence of mistake, coercion, request, or emergency.[48] This rule against restitution to "volunteers" denies relief to those who deliver unwanted goods or services and then demand payment. The function of the

40. *See generally* RESTATEMENT OF RESTITUTION §§ 6-69 (1937).
41. *See generally id.* §§ 76-102.
42. *See id.* §§ 113-117.
43. *See id.* §§ 72-75.
44. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 197-199, 375-377 (1981); RESTATEMENT OF RESTITUTION §§ 15-16 (1937).
45. *See* RESTATEMENT OF RESTITUTION § 70 (1937).
46. *See, e.g.*, State Nat'l Bank v. Farah Mfg. Co., 678 S.W.2d 661, 698 (Tex. App.—El Paso 1984, no writ).
47. *See* RESTATEMENT OF RESTITUTION § 1 (1937).
48. *See id.* §§ 2, 112.

rule is less apparent when the benefit is conferred in cash.[49] And the content of the rule—the line between those who can and cannot recover restitution for benefits conferred—is confused and wavering.[50] Drawing this line is the fundamental issue of substantive restitution.

Whenever liability depends on a finding of unjust enrichment, the law of restitution is substantive as distinguished from remedial. The focus of inquiry is on the meaning of "unjust." What is it that makes enrichment unjust in the absence of some wrong for which the law would impose damage liability? In cases of near tort and of unenforceable contract, restitution should not undermine policies of tort or contract law that are served by denying recovery.

B. Restitution as the Measure of Recovery

1. The Choice Between Compensation and Restitution.—Defendant may commit a civil wrong that benefits him more than it hurts plaintiff, or that benefits defendant in an easily measurable way and hurts plaintiff in a speculative or hard-to-measure way. In such a case, plaintiff will prefer restitution of defendant's unjust enrichment to compensation for his own damages.

The underlying claim may or may not be based on the substantive law of restitution. If it is, we may logically expect that the restitutionary measure of recovery will apply, and that plaintiff will have no election to seek damages. But this result is not inevitable. In some cases, unjust enrichment best explains substantive liability, but plaintiff's loss is the most appropriate measure of recovery. Rescue cases are the most obvious example; we might expect rescued persons to pay the cost of the rescue, but no one expects them to pay the value of their lives.[51] We can clear logical and doctrinal hurdles by saying that their enrichment is unjust only to the extent of plaintiff's cost, or, more directly, by saying that

49. The volunteer rule can produce litigation and injustice for no apparent purpose in such cases. A recurring case arises when two merchants cooperate to serve a customer, the goods or services are defective, and fault is unclear. Merchant One pays the customer and then seeks contribution or indemnity from Merchant Two. Merchant Two is no worse off than if the customer had sued him directly. But he often argues, sometimes with success, that Merchant One cannot recover because he paid voluntarily. *Compare* Armco v. Southern Rock, 696 F.2d 410, 412-13 (5th Cir. 1983) (barring recovery) *with* American Nat'l Bank & Trust Co. v. Weyerhaeuser Co., 692 F.2d 455, 463-66 (7th Cir. 1982) (allowing recovery).

50. *See* Levmore, *Explaining Restitution*, 71 VA. L. REV. 65, 65-67 (1985).

51. *Cf.* Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 459, 124 N.W. 221, 222 (1910) (holding that defendant who saved ship by tying fast to plaintiff's dock must pay for damage to dock; plaintiff made no claim for value of ship and lives of crew). For an economic analysis, see Wittman, *Should Compensation Be Based on Costs or Benefits*, 5 INT'L REV. L. & ECON. 173 (1985).

compensatory damages may sometimes be the appropriate remedy for a substantive liability based in unjust enrichment.

For substantive claims not dependent on the law of restitution—such as those based in ordinary torts and breaches of contract—plaintiff generally has an election. Plaintiff can always claim his own damages; alternatively, he can usually claim defendant's gain.

This election was traditionally thought to require plaintiff to sue for unjust enrichment rather than for tort or breach of contract, and thus to plead in quasi-contract or in equity.[52] But this substantive dichotomy is misleading, because it is only the tort or breach of contract that makes the enrichment unjust. In these cases, restitution is remedial. Defendant's enrichment is now generally recognized as simply an alternate measure of recovery for the underlying wrong.[53]

When the restitutionary claim leads to the same recovery as the tort or contract claim, there is little reason to distinguish between them. But technical distinctions may arise in states that take the pleading fictions seriously. If a state says that plaintiff may waive the tort and sue in quasi-contract, and if it treats quasi-contract as real contract for some purposes, or if quasi-contract has its own set of collateral rules, plaintiff may be able to choose between different statutes of limitation, survivorship rules, sovereign immunity rules, and rights to jury trial.[54] These distinctions have little to recommend them. When the underlying wrong is the same and the remedy is the same, important collateral issues should not be left to the option of the clever pleader.

52. *See, e.g.*, Olwell v. Nye & Nissen Co., 26 Wash. 2d 282, 284, 173 P.2d 652, 654 (1946) (holding that because plaintiff elected "to waive his right of action *in tort* and to sue *in assumpsit* on the implied contract," he is entitled to the restitutionary measure of recovery); 1 G. PALMER, *supra* note 1, § 2.1, at 50-51 ("[I]t has been traditional to say that if the plaintiff is entitled to recover in quasi contract he waives the tort.").

53. *See* D. DOBBS, *supra* note 2, § 4.2, at 238-39; *id.* § 4.3, at 246; 1 G. PALMER, *supra* note 1, § 2.1, at 50-51; *id.* § 4.1, at 364-66. The *Restatement* sometimes recognizes the remedial nature of restitution in these cases, but it often treats the distinction between tort and restitution as substantive. *Compare* RESTATEMENT OF RESTITUTION ch. 7 introductory note at 525 (1937) (remedial) *and id.* § 160 comment a (remedial) *with id.* § 4 comment a (substantive) *and id.* § 5 (substantive). The parallel distinction between contract and restitution was largely left to the *Restatement of Contracts*. *See id.* general scope note at 2. Without squarely addressing the issue, the *Restatement (Second) of Contracts* appears to treat restitution as a remedy on the contract in cases in which the contract is enforceable. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 344, 345, 371, 373 (1981). See especially *id.* § 344 comment d (noting that "occasionally a party chooses the restitution interest even though the contract is enforceable because it will give a larger recovery than will enforcement based on either the expectation or reliance interest").

54. The first three examples are from RESTATEMENT OF RESTITUTION ch. 7 introductory note at 524 (1937). *See also id.* § 5 comment b (statutes of limitations, survivorship, setoffs and counterclaims, assignments, and attachments). The last example is illustrated by Fur & Wool Trading Co. v. George I. Fox, Inc., 219 A.D. 398, 219 N.Y.S. 625, *rev'd*, 245 N.Y. 215, 156 N.E. 670 (1927), in which the issue was whether plaintiff could sue in equity or only at law. One reason that choice matters is that there is no right to jury trial in equity.

2. When the Choice Matters.—Plaintiff's loss may be greater than, less than, or equal to defendant's gain. The relationship between the two measures turns on facts and not legal categories, but some generalizations are possible. Many wrongful acts are destructive; they harm plaintiff without benefiting defendant. This category includes most negligence and many intentional torts. In these cases, restitution is not an option. Defendant receives no enrichment, just or unjust.

Most nondestructive wrongs involve a transfer of property from plaintiff to defendant, or a withholding of property due from plaintiff to defendant. Most frauds, conversions, infringements of intellectual property, and breaches of contract fit this pattern. If the property has the same value in the hands of both victim and wrongdoer, direct benefit to one equals direct harm to the other. If the victim has consequential damages, his losses will exceed the wrongdoer's direct gains. When damages equal or exceed gains, the victim has little need for restitution.

But in some of these cases, plaintiff's damages are hard to measure and defendant's profits are clear. This is often true in the intellectual property cases. In these cases, defendant's sales are a known quantity, but no one knows how many sales plaintiff would have made but for the infringement. In such cases, restitution of defendant's profits has sometimes been thought of as a proxy for plaintiff's losses.[55] But restitution of the profits is available even when they bear no relation to plaintiff's losses.[56]

The most controversial cases arise when the property produces gains to defendant that clearly exceed plaintiff's losses. The property might change in value so that it is more valuable in defendant's hands, or simply more valuable at the time of trial, than it was in plaintiff's hands before the wrongful transfer. Or defendant may put the fruits of his wrong to some profitable use, earning consequential gains that exceed plaintiff's consequential losses.

There is a tendency to view these cases as rare, and assume that

55. *See, e.g.*, Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co., 152 U.S. 200, 203-07 (1894) (treating counterdefendant's sales as sales that counterplaintiff would have made, but only at counterdefendant's lower price); National Merchandising Corp. v. Leyden, 370 Mass. 425, 430-31, 348 N.E.2d 771, 774-75 (1976) (treating defendant's sales as measure of sales plaintiff would have made but for tortious interference with contract); Note, *An Accounting of Profits for Trade-Symbol Infringement Based Upon a Theory of Restitution*, 1963 WASH. U.L.Q. 243 (attacking cases requiring that plaintiff and defendant be in direct competition, a requirement deduced from the premise that defendant's sales are merely evidence of plaintiff's lost sales).

56. *See, e.g.*, Maier Brewing Co. v. Fleischmann Distilling Corp., 390 F.2d 117, 124 (9th Cir.) (noting that awarding profits "under the unjust enrichment rationale has no relation to the damages . . . sustained by the plaintiff"), *cert. denied*, 391 U.S. 966 (1968).

plaintiff's loss generally equals defendant's gain.[57] To the extent this is true, restitution as a measure of recovery becomes unimportant. Distinctions between restitutionary and compensatory measures of recovery are irrelevant when the recoveries turn out to be equal. Restitution as a measure of recovery matters precisely when defendant's gain exceeds plaintiff's provable loss, either because plaintiff's loss is small or because it is hard to prove.

3. Awarding More Than Plaintiff Lost.—When to give plaintiff gains that exceed his losses is a matter of judgment, and the rules are neither settled nor uniform. For example, defendant may profit from the resale of property to which plaintiff has a claim. If defendant acquired the property by fraud or conversion, plaintiff may recover the profits from resale.[58] On the other hand, if defendant promised to sell the property to plaintiff but retained it through breach of contract, plaintiff generally may not recover the profits of resale,[59] but there have been exceptions.[60] To take another example, defendant may use plaintiff's property in a profitable business. Courts sometimes award plaintiff all the profits produced by defendant's use of the property,[61] but sometimes

57. *See* RESTATEMENT OF RESTITUTION § 1 comment d (1937); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 344 comment d (1981) (stating that there are "rare instances" where restitution interest exceeds expectancy and reliance interests); *id.* § 371 comment b (stating that plaintiff's loss usually exceeds the value gained by defendant, because plaintiff's expenditures are excluded to the extent that they confer no benefit on defendant); W. YOUNG, REVISION OF THE RESTATEMENT OF RESTITUTION 5 (1979) (stating that gains or profits "not matched by claimant's loss nor attributable to his outlays" may be recovered "on some occasions").

58. *See, e.g., Fur & Wool Trading Co.*, 245 N.Y. at 217-18, 156 N.E. at 670-71 (stating that proceeds of the defendant's sale may be recovered in action for money had and received or in accounting for constructive trust).

59. *See* RESTATEMENT (SECOND) OF CONTRACTS § 370 comment a (1981); *see also* Marcus, Stowell & Beye Gov't Sec. v. Jefferson Inv. Corp., 797 F.2d 227, 231-32 (5th Cir. 1986) (refusing to award defendant's profits from tortious interference with contract, on ground that party who breached contract would be liable only for plaintiff's damages); Dawson, *supra* note 32, at 187 (noting that "prevention of profit through mere breach of contract is not yet an approved aim of our legal order" but that a desire to minimize gains from breach influences measure of damages).

60. *See* D. LAYCOCK, *supra* note 2, at 490-94; Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1370-78 (1985); Jones, *The Recovery of Benefits Gained from a Breach of Contract*, 99 LAW Q. REV. 443, 443-52 (1983); Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 376-82 (1978).

61. *See, e.g.*, Snepp v. United States, 444 U.S. 507, 508, 515-16 (1980) (per curiam); Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 205-07 (1942); Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 406-09 (1940); Blackman v. Hustler Magazine, 800 F.2d 1160, 1163 (D.C. Cir. 1986); Taylor v. Meirick, 712 F.2d 1112, 1119-20 (7th Cir. 1983); Truck Equip. Serv. Co. v. Fruehauf Corp., 536 F.2d 1210, 1222-23 (8th Cir.), *cert. denied*, 429 U.S. 861 (1976); Maier Brewing Co. v. Fleischmann Distilling Corp., 390 F.2d 117, 123-24 (9th Cir.), *cert. denied*, 391 U.S. 966 (1968); Monsanto Chem. Co. v. Perfect Fit Prods. Mfg. Co., 349 F.2d 389, 395-97 (2d Cir. 1965), *cert. denied*, 383 U.S. 942 (1966); Janigan v. Taylor, 344 F.2d 781, 786-87 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965); Edwards v. Lee's Adm'r, 265 Ky. 418, 423-27, 96 S.W.2d 1028, 1030-32 (1936); Automatic Laundry Serv. v. Demas, 216 Md. 544, 551, 141 A.2d 497, 501

they award only the market value.[62] The *Restatement* and Professor Palmer explain such distinctions partly in terms of culpability and partly in terms of directness.[63] The more culpable defendant's behavior, and the more direct the connection between the profits and the wrongdoing, the more likely that plaintiff can recover all defendant's profits.

Professor Dawson argued that culpability has nothing to do with the measure of recovery.[64] But distinctions based on culpability have considerable support in the cases.[65] If courts sometimes award all profits earned with the property taken and sometimes award only the original market value of the property taken, the judicial reaction to the underlying wrong surely affects the choice of remedy. Courts award all profits to deter the underlying wrong by removing the possibility of profit. Courts award less than all profits when they are willing to tolerate the wrong if defendant pays for it, or when they are willing to let defendant keep profits from his own subsequent efforts or transactions with the fruits of the wrong. Courts are more likely to let a wrongdoer profit in these ways when the original wrong was relatively innocent or inadvertant.

4. The Tension With Economic Analysis of Law.—The core rationale for allowing plaintiff to recover the greater of his own loss or defendant's gain is that no person should profit by his own wrong.[66] The neoclassical school of law and economics frontally challenges that rationale. Members of this movement assert that actors should be free to harm others if their acts are profitable after subtracting the costs of full compensation to the victims.[67] Manifestations of this idea include the concept of efficient breach of contract[68] and the definition of negligence as the failure to take cost-effective safety measures.[69] Thus, over some

(1958); *Fur & Wool Trading Co.*, 245 N.Y. at 219, 156 N.E. at 671; Olwell v. Nye & Nissen Co., 26 Wash. 2d 282, 285-87, 173 P.2d 652, 653-54 (1946).

62. *See, e.g.*, SEC v. MacDonald, 699 F.2d 47, 52-55 (1st Cir. 1983); University Computing Co. v. Lykes-Youngstown Corp., 504 F.2d 518, 535-40 (5th Cir. 1974); Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 460, 124 N.W. 221, 222 (1910).

63. *See* RESTATEMENT OF RESTITUTION ch. 8, topic 2 introductory note at 596 (1937); *id.* §§ 151-155, 157, 202-205; 1 G. PALMER, *supra* note 1, § 2.12, at 157, 164-66.

64. *See* Dawson, *supra* note 5, at 614.

65. Most of the cases cited at *supra* note 61 involved conscious wrongdoing. For opinions explicitly discussing the relationship between culpability and remedy, see Champion Spark Plug Co. v. Sanders, 331 U.S. 125, 130-32 (1947); Roberts v. Sears, Roebuck & Co., 573 F.2d 976, 980 (7th Cir. 1976); *Truck Equip. Serv. Co.*, 536 F.2d at 1222-23; *Maier Brewing Co.*, 390 F.2d at 123; *Monsanto Chem. Co.*, 349 F.2d at 396-97.

66. *See, e.g.*, Gelfand v. Horizon Corp., 675 F.2d 1108, 1111 (10th Cir. 1982); Edwards v. Lee's Adm'r, 265 Ky. 418, 427, 96 S.W.2d 1028, 1032 (1936).

67. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW § 1.2, at 13-14 (3d ed. 1986).

68. *See id.* § 4.8, at 106-08.

69. *See id.* § 6.1.

range of cases, the central idea of neoclassical economic analysis of law is precisely that people should be able to profit from conduct that is wrongful in the sense that the law will make them pay damages for having done it.

We can reconcile the tension between neoclassical law and economics and the law of restitution to a surprising extent. Economic analysts agree that actors should be required to bargain with their victims when transaction costs are not prohibitive.[70] This bargaining rationale will cover a wide range of fraud, misappropriation, conversion, and infringement cases. For example, Judge Posner explains restitution of the profits from a copyright infringement on the grounds that it will deter infringers and encourage them to bargain with copyright holders.[71]

On the other hand, judges have always been cautious about restitution in some of the core cases for the economic analysts. When defendant breaches a contract and commits to an alternative transaction the resources he would have used to perform, the victim of the breach rarely recovers profits from the alternative transaction.[72] Similarly, when defendant saves money by failing to take some safety precaution, courts have not allowed plaintiff to recover the savings as profits from the wrong.[73] What Palmer and the *Restatement* explain in terms of culpability or directness, the economic analysts might explain in terms of whether the wrongdoer bypassed the market.[74] The explanations and the rhetoric vary more than the results, and the competing perspectives of unjust enrichment and efficient violation might each sharpen the other.

C. *Specific Restitution*

Plaintiff may want the specific thing he lost rather than monetary compensation for his loss or monetary restitution of the value of defendant's gain. Several restitutionary remedies grant specific restitution of the thing itself, including constructive trust, rescission, replevin, and ejectment. The equitable lien is a hybrid, granting a money judgment and securing its collection with a lien on the specific thing. Plaintiff might prefer specific restitution for at least three distinct reasons.

70. *See* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1124-27 (1972).

71. *See* Taylor v. Meirick, 712 F.2d 1112, 1120 (7th Cir. 1983) (Posner, J.).

72. *See supra* notes 59-60 and accompanying text.

73. *See* D. LAYCOCK, *supra* note 2, at 494-96.

74. *See Taylor*, 712 F.2d at 1120 (Posner, J.); *cf.* R. POSNER, *supra* note 67, § 4.8, at 105-06 (recommending restitution of profits against a seller who keeps the buyer's money but does not deliver the goods, on the grounds that the seller's behavior has no economic justification).

1. Preference Over Other Creditors.—Plaintiff may seek specific restitution to acquire a preference over other creditors of a financially distressed defendant. The restitutionary remedy gives plaintiff a property right in the thing wrongfully taken or withheld from him and in its identifiable proceeds. This property right prevails over the claims of other creditors.[75] It prevails even in bankruptcy.[76] Like other property rights, the restitution claim does not prevail over bona fide purchasers.[77] But a trustee in bankruptcy cannot invoke the hypothetical rights of a bona fide purchaser to invalidate an otherwise valid claim to specific restitution.[78]

The tracing fictions stretch the concept of identifiability to its outer limits,[79] but they produce a rough compromise between the interests of restitution plaintiffs and other creditors. The tracing rules are arcane and the results are sometimes arbitrary, but the resulting compromise is important. The compromise depends on two underlying judgments.[80] The first is that some plaintiffs—roughly victims of fraud, misappropriation, or other violations of property rights—are entitled to a preference over ordinary creditors. The second is that this preference should be limited to property having some connection to the wrong and should not reach the wrongdoer's general assets. The rationale for these judgments is not always clear, but the basic compromise is well settled.

2. Changes in Value.—Plaintiff may want the specific property because it has changed in value since the time that controls the measure of damages. If defendant converts property that then increases in value, recovery of the property in kind is more lucrative than damages for its value at the time of conversion. Replevin, trover, and conversion traditionally permit plaintiff to choose between the specific property or its

75. *See In re* Erie Trust Co., 326 Pa. 198, 201-02, 191 A. 613, 614-15 (1937).

76. Cunningham v. Brown, 265 U.S. 1, 11 (1924) (stating that victims of fraud could recover their own money if they could trace it); *In re* Teltronics, 649 F.2d 1236, 1239-42 (7th Cir. 1981) (holding that assets acquired by fraud are not property of the bankruptcy estate); Nicklaus v. Bank of Russellville, 336 F.2d 144, 146 (8th Cir. 1964) (same).

77. RESTATEMENT OF RESTITUTION § 172 (1937).

78. The power to avoid transfers of real estate that would be voidable by a bona fide purchaser is conferred by 11 U.S.C. § 544(a)(3) (Supp. V 1987). That power applies only to transfers that could have been perfected against a bona fide purchaser. *Id.* Thus, the trustee can avoid unrecorded deeds and mortgages, but cannot avoid valid claims to specific restitution. A victim cannot record or otherwise perfect his claim to specific restitution from one who has wrongfully acquired his property.

79. The tracing fictions are summarized in D. LAYCOCK, *supra* note 2, at 542-48. They are reviewed in greater detail in 1 G. PALMER, *supra* note 1, §§ 2.14-.16. Somewhat different tracing rules are stated in RESTATEMENT OF RESTITUTION §§ 202-215 (1937).

80. Both points are illustrated in the cases cited at *supra* notes 75-76. For a thorough analysis, see Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. ILL. L. REV.—(forthcoming).

value.[81] The choice between damages and rescission for serious breach of contract sometimes offers the same choice. Rescission benefits rescinding sellers when the property has gone up in value; it benefits rescinding buyers when the property has declined in value. This choice arguably confers a windfall, but it is well embedded in our law.[82]

The practical differences among the various means of granting specific restitution are most important when the property changes in value. Constructive trust, rescission, replevin, ejectment, and injunction give the plaintiff ownership of the thing, including any appreciation or depreciation. Equitable lien gives plaintiff a lien on the thing to secure a money judgment. Plaintiff would generally prefer ownership if the value has gone up and an equitable lien if the value has gone down. The *Restatement* occasionally provides this option.[83]

These remedies also differ in scope for purely historical reasons. Replevin is limited to goods;[84] ejectment is limited to land.[85] Constructive trust will reach goods, land, and intangibles,[86] and it will support tracing through exchanges.[87] But the *Restatement* takes the position that constructive trust is not available if defendant has possession but not title.[88]

These distinctions serve no purpose. A better formulation would simply distinguish specific restitution that confers ownership from specific restitution that confers a lien. But these relics of the writ system are well entrenched—even enacted into statute—in many states.[89]

3. Nonmarket Values.—Plaintiff may value the specific thing for reasons not reflected in its market value. He may value it for personal or idiosyncratic reasons, or he may be more optimistic than the market about its future monetary value.

This rationale focuses on plaintiff's loss rather than defendant's gain, and thus seems remote from the unjust enrichment sense of restitu-

81. *See* D. DOBBS, *supra* note 2, § 5.13.

82. For an extreme example, see Seneca Wire & Mfg. Co. v. A. B. Leach & Co., 247 N.Y. 1, 5, 7-8, 159 N.E. 700, 701-02 (1928).

83. *See* RESTATEMENT OF RESTITUTION §§ 202, 211 (1937).

84. *See* D. DOBBS, *supra* note 2, § 5.13, at 399.

85. *See id.* § 5.8, at 365.

86. *See* Snepp v. United States, 444 U.S. 507, 510 (1980) (per curiam) (imposing constructive trust on proceeds of breach of duty to submit manuscript for prepublication review); Newton v. Porter, 69 N.Y. 133, 135-36 (1877) (imposing constructive trust on bearer bonds).

87. *See* 1 G. PALMER, *supra* note 1, § 1.3, at 14.

88. *See* RESTATEMENT OF RESTITUTION § 160 comment j (1937).

89. *See* ALA. CODE § 6-6-100 (1977) (replevin for goods and chattels); VA. CODE ANN. § 8.01-114 (Supp. 1988) (detinue for personal property); W. VA. CODE § 55-6-1 (Supp. 1988) (detinue for goods, chattels, and intangible personal property); *see also* D. DOBBS, *supra* note 2, § 5.13, at 399 (noting that "[r]eplevin statutes adhere generally to the scheme provided in the old common law writ").

tion. But specific restitution is one way of satisfying this preference. Specific restitution of property is part of restitution, whatever plaintiff's motives.

III. Conclusion

This Essay suggests that restitution derives from two definitional concepts and that it has practical significance in three sets of cases. These two categories correspond, even though the number of items in each does not. Cases in which plaintiff desires specific restitution obviously correspond to the specific restitution strand of the definition. Cases in which unjust enrichment is the only source of substantive liability, and cases in which monetary recovery is measured by defendant's gain, both grow out of the unjust enrichment strand of the definition.

By subdividing the definitional concepts to correspond with the significant cases, we may clarify these interrelationships. Restitution should therefore be defined as that body of law in which (1) substantive liability is based on unjust enrichment, (2) the measure of recovery is based on defendant's gain instead of plaintiff's loss, *or* (3) the court restores to plaintiff, in kind, his lost property or its proceeds. Restoration in kind includes remedies that reverse transactions, such as rescission.

Lawyers too often overlook restitutionary rights and remedies. This body of law has practical significance when unjust enrichment is the only basis of substantive liability, when defendant's gain exceeds plaintiff's provable loss, or when plaintiff desires the property in kind or its proceeds.

I have offered a definition and a set of practical applications in direct and contemporary language, without reliance on unfamiliar categories from common-law pleading. I have tried to show how restitution fits into the framework of modern American law. Much more work would be required to state all the rules of restitution in similar terms, but I am confident that it can be done. If we think about restitution in such modern terms, then we can effectively bring it to bear on the many cases in which it matters to the result.