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The Strategic Value of Restitutionary Remedies

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I. INTRODUCTION

In connection with “restitutionary” remedies and the practicing bar, it is probably safe to say that there is both good news and bad news. The good news is that most practicing lawyers have heard of restitutionary remedies. Furthermore, most practicing lawyers generally know that restitutionary remedies have something to do with “unjust enrichment.” Indeed, many lawyers may even have requested such remedies from time to time in civil actions, or have defended against requests for such remedies. The bad news, however, is this: The vast majority of practicing lawyers do not really understand restitutionary remedies, and do not really understand why such remedies can be extraordinarily useful in certain circumstances. In short, although most practicing lawyers know a little bit about restitutionary remedies, they do not know enough.

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* Associate Professor of Law, John Marshall Law School. The author would like to thank Catherine O'Daniel for the assistance she provided in researching this essay.
The following analysis—which focuses on the strategic value of the use of restitutionary remedies—attempts to address this problem. First, this Article briefly describes a “functional” system for classifying remedies, a system that focuses on the “what” and the “why” of remedies. Then, the analysis emphasizes the difference between the why of compensation and the why of restitution. Finally, the analysis describes three different categories of “strategic” reasons for differentiating between restitutionary and compensatory remedies. The first category involves the amount of possible remedy. In this category this Article discusses, among other things, “losing money” contracts, timing issues, economic profiteering, and, of all things, “intangible gains.” (In this last context, incidentally, the analysis addresses a very important modern topic in the law, sexual exploitation in non-employment situations.) This Article then turns to procedural issues involved with obtaining restitutionary and compensatory remedies. Lastly, the analysis describes differences between restitution and compensation in connection with the enforcement of remedies, i.e., in connection with the methods that lawyers use to turn abstract judgments into concrete things.

II. A FUNCTIONAL SYSTEM OF CIVIL REMEDIES

The most common method for classifying civil remedies starts with the distinction between “legal” remedies and “equitable” remedies. Unfortunately, a major problem with this system exists. As everybody knows, the whole law/equity distinction really makes no sense in the modern world. This is so because the two historically separate court systems that originally granted these different kinds of remedies have now, for the most part, been combined. Hence, a classification of civil remedies into law/equity categories simply makes no sense in modern times.

I would suggest that a much better classification system for civil remedies turns on the present day functions of the various civil remedies and on the rationales behind the grant of such traditional remedies rather than on their historic origins. In other words, a much better classification system for modern civil remedies starts with the “what” of remedies—what remedies ultimately produce—and the “why” of remedies—why they produce it. One such “what-why” classification system might look like this.2

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1. See generally, DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION 11-12 (1993)(explaining the classification between legal and equitable remedies). See also, DOUGLAS LAYCOCK, CASES AND MATERIALS ON REMEDIES.

2. For a somewhat different version of the following analysis see Paul T. Wangerin, Restitution for Intangible Gains, 54 LA. L. Rev. 339 (1993).
First, remedies can be classified by what they ultimately produce, the nature, in short, of the judgment entered in connection with them. Four distinct “what’s” come to mind.

Figure 1:

| Money Remedies | Specific Remedies | Injunctions | Declarations |

Some civil remedies—a group that herein will be called “money remedies”—provide successful litigants with judgments for money. A second group of civil remedies—that herein will be called “specific remedies”—provides successful litigants with judgments ordering other people or entities to do certain things. A third category called injunctions provides successful litigants with judgments ordering other people or entities to do something, or, more commonly, not to do something. (To the extent that injunctions require people to do things, these kinds of remedies are similar to specific remedies.) Finally, some civil remedies called declaratory remedies, do not provide disputants with judgments for money, or judgments requiring acts or non-acts. Rather, these kinds of remedies simply provide litigants with judicial declarations of legal rights or responsibilities.

The second part of a functional classification system for remedies involves the “why” of remedies. In connection with the system described herein, no less than six different “why’s” or rationales for remedies exist.

Sometimes courts grant remedies in order to compensate individuals or entities for loss caused by past wrongful acts. At other times, courts grant remedies requiring restitution of gain by defendant caused by past wrongful acts. Third, courts sometimes grant remedies that punish individuals or entities for wrongful past conduct. Fourth, courts sometimes provide remedies aimed at preventing future wrongful conduct, or conduct that might otherwise lead in the future to actions for compensation, restitution, or punishment. Fifth, courts

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3. The most common kind of specific remedy, but by no means the only kind, is specific performance.
4. Note here a critically important point about declaratory remedies. Suits for declaratory remedies produce only a declaration of rights or responsibilities. That is all they provide. Conversely, the other kinds of remedies—money, specific, and injunctive—provide disputants with both a declaration of rights and responsibilities and something else, namely judgments for money and acts or prevention of acts. Thus, for the most part it makes no sense for traditional plaintiffs to seek declaratory remedies rather than other kinds of remedies.
sometimes grant remedies that have the effect of "preempting" other individuals or entities from themselves obtaining remedies.\textsuperscript{5} Finally, courts today sometimes grant remedies using a rationale that is roughly comparable to the "new writs" rationale of the very earliest equity courts. (The early equity courts, it should be recalled, frequently created "new writs" in situations where standardized law remedies were not available. These new writs became the predecessors of the now standardized equitable remedies.)

Note two important introductory points about the two-part "What-Why" remedies classification system just described. First, skilled lawyers can, and indeed should, mix and match the various what's and why's of remedies. For example, lawyers who want to obtain money remedies might sometimes use the rationale of compensation and at other times use the rationale of restitution—or punishment. Similarly, lawyers who wish to use the rationale of restitution might sometimes seek money remedies, but other times might seek specific remedies. Skilled lawyers can, and indeed in many instances should, seek several different kinds of remedies in the same action, and should use several different rationales in the same action. Thus, in many situations lawyers can seek alternatively or cumulatively, both a money remedy and a specific remedy. Likewise, lawyers can alternatively or cumulatively employ the rationales of both compensation and restitution.

III. RESTITUTIONARY AND COMPENSATORY REMEDIES

Restitutionary remedies\textsuperscript{6} are perhaps best described by contrasting them to compensatory remedies. Compensatory remedies, it
should be recalled, whether those remedies be money remedies, specific remedies, injunctions, or declarations, deal with losses to injured parties caused by past injuries. Restitutionary remedies, on the other hand, focus on gains to wrongfully acting parties rather than losses to injured parties. For instance, in connection with compensatory money remedies, courts turn past losses into money. Similarly, in connection with compensatory specific remedies, courts turn past losses into acts. Conversely, in connection with restitutionary money remedies, courts turn past gains into money. Additionally, in connection with restitutionary specific remedies, courts turn past gains into acts.

There are three critically important points about the foregoing distinctions between restitutionary and compensatory remedies. First, as noted earlier, lawyers can and should play mix and match with the "what's" and the "why's" of remedies. Hence, the rationales, of both compensation and restitution can be used with both money remedies and specific remedies.7


7. As noted, the most common kind of specific remedy is specific performance, a kind of remedy granted in breach of contract situations. Other kinds of specific remedies also exist, however, notably specific remedies involving the rationales of restitution and tortious conduct.

For example, "specific restitution" and "replevin" both produce judgments ordering a wrongdoer to restore, "in species," a wrongful gain, i.e. the gain itself. For example, assume that someone wrongfully appropriated a prize winning bull. Normally, of course, someone seeking restitution in this situation would convert the defendant's gain into money, and seek a money remedy. However, assume that the owner in this situation wanted the defendant to return the bull itself. In this situation, the owner would seek the remedy of specific restitution or replevin.
Second, many judges and lawyers use the term "restitution" quite loosely. For example, judges and lawyers often talk and write about requiring criminals to make "restitution" to the victims of their crimes. These judges and lawyers then describe a process that requires the criminals to compensate their victims for losses experienced. This, however, is not restitution, it is compensation. Moreover, judges and lawyers often talk and write about requiring tortfeasors or contract breachers to make "restitution." However, these judges and lawyers then describe a process that requires wrong-acting individuals to compensate injured parties for losses. Again, this is not restitution, it is compensation.

Further, people involved in the current debate about the ownership and return of "cultural treasures" often use the term restitution. The Greek people, goes the argument, and not the British Museum, own the Elgin Marbles. Thus, those sculptures must be returned to Greece. Again, however, since the protagonists in these debates often spend most of their time discussing losses rather than gains, the debate really turns on compensation rather than restitution. As a final example, people involved in civil rights litigation sometimes talk about the need to make "restitution" to the victims of racial or gender

Another specific remedy also exists, although one rarely used. Usually, of course, people or entities who have experienced a loss due to a tortious act convert the loss into a monetary amount and seek a money remedy. Sometimes, however, these injured parties might seek action rather than money. Assume, for example, that a brain surgeon wrongfully smashes someone's head with a sledge hammer. Normally the injured party in this situation would convert their loss into money, and seek a money remedy against the surgeon. However, nothing prevents this injured party from asking a court to require the defendant to do something to fix the injury, such as do reparative brain surgery. Assume further that the injured party in this dispute wants that surgeon himself or herself to repair the injury, i.e. to do brain surgery. Usually, remedies like this are called "reparative injunctions." A much better name for this kind of remedy, however, a name clearly describing exactly what they do, is "specific reparation."

8. This point is also made by Douglas Laycock. See Laycock, supra note 6, at 1282-83.

9. Many discussions of this topic exist. For an early and influential one see Alan T. Harland, Monetary Remedies for the Victims of Crimes: Assessing the Role of the Criminal Courts, 30 UCLA L. Rev. 52 (1982).

10. It is not at all clear how this kind of loose thinking got started in connection with the law of torts and contracts. One thought, however, is this: The notion of promissory estoppel only took solid root in American law during the middle part of the 20th century. Prior to that time mere reliance on a promise could not generate a remedy in contract. Thus, many relying promisees experienced severe losses for which no compensation seemed available. Since many courts wished to grant compensation in these situations, however, they simply stated that "restitution" should be available. Of course, these cases had nothing whatsoever to do with restitution. But, nobody in those early days seemed to be thinking very carefully about this topic.

Discussion of civil rights protection generally addresses losses to the victims of prejudice rather than gains to the victimizers. Therefore, what actually is being discussed is compensation rather than restitution.

Third, in many litigation situations, little or no difference exists between the amount of the losses experienced by injured parties—i.e., the amount at issue in compensation actions—and the amount of the gains experienced by the injuring parties—i.e., the amounts at issue in restitution actions. The losses that the injured parties experience are equal to the gains reaped by the injuring parties. In many breach of contract situations, for example, the monetary losses of the non-breaching parties are roughly the same as the monetary gains of the breaching party. Hence, it often makes no difference—at least in connection with the amount of money produced by a remedy—whether the action proceeds on a compensation or restitution theory.

The existence of the foregoing fact—that in many litigation situations no functional difference exists between the amount of the remedy produced by a restitution theory and the amount of the remedy produced by a compensation theory—should not be allowed to distract attention from two important matters. First, in at least some kinds of situations, a major difference exists between the amount of loss and the amount of gain. Therefore, in those situations it is extremely important to think through notions of restitution and compensation. Second, major procedural differences exist between the way restitutionary and compensatory remedies are obtained. Furthermore, major differences exist between the way restitutionary and compensatory remedies are enforced. It is to these ideas that this analysis now turns.


13. Admittedly, real restitutionary remedies could be employed in all three of the kinds of situations just described. In the criminal context, for example, criminals sometimes sell their stories to the movies. When they do this, they reap unjust gains. If these gains are the subject of suit, a real claim in restitution will be raised. Likewise, contract breachers and tortfeasors often experience gains from their wrongful acts. When courts focus on these gains they are actually talking about restitution. Furthermore, if the discussion of cultural treasures turned on the fact that the new owners gained something unjustly, rather than on the fact that the original owners lost something unjustly, then, clearly, the debate would be one about restitution. Finally, in the civil rights context attempts might be made to calculate the gains that Anglo-Saxon people have experienced over the years as a result of discrimination against African Americans. These gains—if any way could be devised to calculate them—might then be the subject of restitutionary claims. See America, supra note 12, at 163.

14. See Laycock, supra note 6, at 1283-84.
IV. THE STRATEGIC VALUE OF RESTITUTIONARY REMEDIES

Perhaps the best way to think generally about the strategic value of restitutionary remedies—and, hence, the contrast with compensatory remedies—is to divide the topic into three distinct subtopics. First, restitutionary theories can significantly increase the amount of the remedy that litigants can obtain. Second, in some situations litigants who use restitutionary theories can use litigation procedures that would not be available to litigants using compensatory theories. Finally, and most importantly, litigants who use restitutionary theories in many cases have very powerful enforcement tools; tools that allow them to turn abstract judgments into real actions. These enforcement tools are not generally available when litigants use compensatory theories.

A. The Amount of Remedies

Two things must immediately be noted about the amount of remedies awardable in connection with restitutionary theories. First, as noted above, in many breach of contract situations the losses that plaintiffs experience in connection with particular events are roughly equal to the gains experienced by the defendants in those actions. For example, the gains that accrue to a seller who breaches a contract and then sells to somebody else usually are roughly comparable to the losses incurred by the original buyer. Therefore, in many breach of contract situations it makes no difference in terms of the amount of the remedy whether the theory is one of restitution or one of compensation. Second, in many tort situations, including most negligent tort situations, plaintiffs experience a loss, but defendants experience no gain. In connection with a car accident, for example, a pedestrian might experience $100,000 in loss. However, the driver of the car that caused the injury incurs no gain. Hence, in many tort law situations it makes no sense to seek a restitutionary remedy rather than a compensatory remedy, at least if the amount of the remedy is the only thing that matters.

Notwithstanding the foregoing, in some kinds of situations, both in tort and in contract, gains are greater than losses. In these kinds of situations plaintiffs almost certainly should use restitutionary rather than compensatory theories.

Sometimes, a gain exists, but no loss occurs. The Olwell case is representative. In Olwell, the defendant reaped a significant gain through the use of an egg-washing machine that actually belonged to

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15. Id. at 1284-88.
16. See Laycock, supra note 6, at 1287; Dobbs, supra note 1, at 637-38.
The machine washed eggs much faster and at much less cost than manual workers. The actual owner of the machine did not even know that the defendant was using it. Therefore, the owner arguably experienced no quantifiable loss.

Admittedly, situations like that in Olwell are unusual, but they do occur. When such situations occur, restitutionary remedies are more appropriate than compensatory ones. Two examples suffice, one involving “losing money” contracts, and the other involving what might be called “economic profiteering”.

In “losing money” contract cases, some person or entity enters into a contract that ultimately proves to be extremely burdensome to them. For example, a construction company might agree to pave a road for $1 million. Later, after one-half of the work is done, the company realizes that its own costs on the job will be $2 million. These facts which are not uncommon, are not what produces a “losing money” contract case. Rather, what happens in “losing money” cases—and it is quite rare—is that the non-losing party breaches. For example, in the foregoing situation assume that the city or county—the non-losing party—breaches. (Why a non-losing party would breach in such a situation is a mystery.)

The problem presented by losing money contract cases ultimately is this: If the non-breaching party—in the example, the construction company—uses a compensatory theory, it recovers nothing. This is so because the non-breaching parties incurred no loss as a result of the breach. However, if the non-breaching construction company uses a restitutionary theory, it might recover a large amount of money, namely the gain to the defendant. In the foregoing situation, the breaching party, the city or county, arguably reaped a $1 million gain if the job was half completed at the time of the breach. A restitutionary remedy might require the city to disgorge that $1 million.

It is important to note a fundamental point about losing money contract situations. Some courts have concluded that a “ceiling” exists in connection with these restitutionary actions, a ceiling erected by the contract price itself. What that ceiling actually is in individual cases, however, is unclear. Further, and more significantly, this whole issue of the ceiling in losing money cases is itself unsettled. Nevertheless, even when a ceiling rule exists, losing money plaintiffs who use restitutionary theories may well collect larger judgments than losing money plaintiffs who use compensatory theories.

Another type of situation, a type potentially far more important than losing money contract situations, may also produce recoverable

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18. Id. at 652-53.
19. Id. at 653.
20. Id.
gains that are greater than recoverable losses. These cases involve what might be called "economic profiteering."²¹ In economic profiteering cases, someone consciously makes a decision not to do something that clearly will maximize safety for others. This decision is made because that person concludes that the cost of doing the thing is greater than the liability costs that are likely to accrue if it is not done. The famous "Pinto" cases²² provide a perfect example. Assume that a manufacturer decides that it will cost $10 to add a particular kind of safety mechanism to a car—say a flexible tube for filling the gas tank rather than a rigid tube. (The precise facts in the actual Pinto cases, incidentally, are changed a bit in this example.) Further, assume that the manufacturer concludes that omitting this safety feature will allow it to reap $100 million in extra profits and that omitting it will ultimately cost the manufacturer $10 million in liability payments—10 fatalities at $1 million per fatality. Now assume that the manufacturer does not add the safety feature, and thereafter, X buys one of these cars and is turned to toast when the car explodes. What happens? If X brings a claim based on a theory of compensation, she might recover roughly $1 million. That is, after all, her loss. Conversely, if X brings a claim based on restitution she might recover $100 million. That is the amount of the manufacturer's wrongful gain.

There are two critically important points to be considered about profiteering cases. First, many will argue that people and companies constantly make cost/benefit decisions much like the one just described and that nothing is wrong with doing precisely that. For example, people who truly want to prevent automobile injuries to themselves and their passengers can buy automobiles that will almost completely eliminate the likelihood of car-related injuries. (Humvees, for example, noted for their high degree of stability, are available for purchase. Cars such as Volvos are also said to have exceptionally good safety records.) The fact is, however, that in this situation, and in other comparable ones, most people decide that the high cost of an item is simply not worth the benefit achieved. Therefore, it can be argued that there is nothing inherently wrong with the type of decision-making that is the subject of economic profiteering cases.

Second, many people will note in connection with the foregoing example that a punitive theory might also produce a large judgment for X, perhaps even $100 million. Indeed, that is exactly what happened in the Pinto case.²³ However, several major problems presently exist with attempts to get punitive remedies. Currently, statutes in many

²¹ Laycock indirectly discusses the following ideas in connection with his comments about the potentially "punitive" aspects of restitutionary theories. Laycock, supra note 6, at 1288-90.


²³ Id.
states severely limit the amount of punitive remedies. Moreover, the law is not at all clear at the present time—at least in the United States Supreme Court—as to the standard of proof necessary in connection with punitive remedies. Neither of these restrictions seems to exist, however, in connection with restitutionary remedies.

Another issue that must be considered in connection with the juxtaposition of compensatory and restitutionary remedies relates to the timing of the remedy. The difference is this: In connection with compensation, courts generally calculate the amount of the loss at the time the wrongful event occurred. Conversely, courts may calculate the amount of a wrongful gain either at the time the wrongful event occurred, or at the time of judgment in an action involving the event. Consider the consequences of these different rules. Assume that X, a dealer in sports memorabilia, tricked Y into selling him an O.J. Simpson "rookie" card for $10. X pulled this trick on Y before O.J.'s current troubles. At the time of the trick the card was worth $100. The card is now worth, for the sake of this example, $1,000. Assume that Y successfully brings an action against X. If Y uses a compensatory theory, she recovers only $90, namely, her loss at the time of the event. However, if Y uses a restitutionary theory, she potentially recovers $990; that is, X's gain at the time of the judgment involving the event.

One last issue must be mentioned in connection with the comparison of compensatory and restitutionary remedies, an issue that is, to say the least, cutting edge. Several years ago, this author suggested in *Restitution for Intangible Gains*24 that the notion of "non-economic" or "non-pecuniary" losses has, or should have, a counterpart in restitution. Non-economic losses are losses such as pain and suffering, emotional distress, loss of reputation, consortium, and the like. I suggested that the comparable non-economic gains should be recognized. For example, if losses from wrongfully caused pain and suffering can be remedied, so also should gains from wrongfully caused pleasure and enjoyment be remedied. Similarly, I suggested that if loss of reputation by plaintiffs could be addressed by remedies, a gain in reputation by defendants should also be recognized and addressed.

My point, admittedly, is an abstract one, and one that seems unlikely to rapidly sweep through the legal community. Nevertheless, in a number of extremely important contexts that idea—restitution for intangible gains—might generate remedies where no remedies currently exist. Consider, for example, the problem of "street harassment," a problem for which no standard compensatory remedy seems to exist. My notion potentially provides a remedy. Street harassers, after all, engage in such harassment because they personally gain some sort of sick pleasure or enjoyment from doing so. In short, these

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harassers reap an intangible gain from their conduct. Such harassment can be remedied.

Consider also the problem of non-employment sexual exploitation. In some sexual exploitation cases a person who is not an employer, but who is in a position of trust, enters into a sexual relationship with someone dependent on him. Usually, but not always, the perpetrator in these cases is male and the victim is female. For example, male lawyers sometimes enter into exploitative sexual relationships with clients. Similarly, male doctors sometimes enter into these relationships with patients, clergy with parishioners, bankers with customers, et cetera. Generally, the victims of this kind of exploitation cannot recover remedies in these situations because no employment relationship exists between them and the victimizer and because both victim and victimizer are considered "consenting" adults. However, my analysis suggests a way to provide remedies. Sexual exploiters reap enormous amounts of intangible gains from their activities. Those gains might be compensable in restitution.

B. Obtaining Restitutionary and Compensatory Remedies

As important as the ideas just described may be in connection with differentiating between compensatory and restitutionary remedies, equally important differences between compensation and restitution exist in connection with the procedures used to obtain remedies. Two such differences are worthy of extended discussion involving causes of action and the historic distinctions between law and equity. Further, a brief comment must also be made in this context regarding limitation of actions.

Everybody in the legal profession knows that cause of action problems constantly create problems in connection with claims that are intuitively meritorious. Countless intuitively meritorious claims involving contract breaches, for example, are not litigated at all, or are not successfully litigated, because a necessary writing is missing. Moreover, countless intuitively meritorious claims in tort or property law are not litigated at all, or are not litigated successfully, because an individual element of a tort or property cause of action is missing.

Restitutionary theories can sometimes solve these problems. This is so because of an important notion in the law of restitution, a notion that is, sadly, unknown to many lawyers. As noted earlier, almost all lawyers know that the cause of action for restitution involves "unjust enrichment." What most lawyers do not know, however, is that the "unjust" part of this two-part notion can be established in two distinct ways. Obviously, claimants seeking restitution can establish the unjust part of unjust enrichment by proving a traditional cause of

25. Laycock, supra note 6, at 1282-86.
action in tort, contract, etc. Indeed, this is the most common method. However, the law of restitution itself clearly indicates that restitution claimants do not have to prove up such a cause of action to establish injustice. Rather, such claimants can satisfy the unjust part of the unjust enrichment standard simply by proving that pertinent activities were intuitively wrong, unfair, or unjust. In other words, restitution claimants need not establish all of the elements of traditional causes of action in order to obtain a remedy.

A classic case, from the heyday of traditional contract law, illustrates this point. In *Mills v. Wyman*, the plaintiff provided death bed care to a young man. Neither the recipient of the care, nor anybody else agreed in advance to pay for this care. After the care was provided, a parent promised to pay for the already rendered aid. Later, however, the parent refused to follow through on that promise and the care-giver sued. Not surprisingly—since this occurred during the heyday of traditional contract law—the plaintiff's claim for compensation failed because of a cause of action problem. What was missing, of course, was consideration for the promise to pay. Past consideration, i.e. the past provision of help, was not good enough—at least under traditional rules—to make the promise legally enforceable. Interestingly, however, the plaintiff's claim for restitution in this case succeeded despite the seemingly fatal cause of action problem. The court concluded the promisor was clearly enriched through the provision of care. Further, the failure to pay for that enrichment, especially in light of the subsequent promise to pay for it, produced an injustice.

Cause of action issues are not the only reasons to differentiate between restitutionary and compensatory theories in connection with procedures for obtaining remedies. Law/equity issues also pose some interesting twists.

As noted at the outset, everybody generally knows that no substantive reasons currently exist for differentiating between legal remedies and equitable remedies. Having said that, however, it still must be noted that lawyers nevertheless must continue to differentiate between such remedies. The dead hand of the past still controls.

The dead hand of the law/equity past still controls in four distinct contexts. First, claimants who seek remedies that have their roots in law generally are entitled to jury trials, whereas claimants who seek remedies that have their roots in equity generally are not entitled to juries. Second, at least in theory, claimants who seek remedies that have their roots in equity must satisfy the "irreparable injury" rule (also referred to as the "inadequate remedy at law" rule) whereas claimants who seek remedies with roots in law need not, even in the-

26. 20 Mass. (3 Pick) 207 (1825)
ory, satisfy that rule. Third, in theory, courts ruling on remedies issues with roots in equity can exercise greater discretion than they can in cases involving remedies which have their roots in law. Finally, claimants who seek remedies with roots in equity may encounter problems with a group of moral or religious limitations on remedies—e.g. laches or unclean hands. Claimants who have themselves done something which the law disapproves of may not recover in equity—whereas claimants who seek remedies that have roots in law need not, for the most part, worry about such limitations.

These distinctions bring us back to restitution and compensation. Claimants who seek a money remedy involving compensation are generally bound by the rules applicable to remedies with roots in law. This is so because, for all practical purposes, the only money remedy involving compensation is damages, and damages has its roots in law. Conversely, and here rests the key point, claimants who seek a money remedy involving restitution can frequently pick among several different remedies, some of which have their roots in law and some of which have their roots in equity. For example, claimants who wish to obtain restitution in money, and who wish to do so on the law side of the law/equity dividing line, can ask for the remedy of “quasi-contract.” When seeking quasi-contract, claimants allege that defendants impliedly promised to pay for a gain received and that the failure to keep that implied promise produces injustice. Conversely, claimants who wish to obtain restitution in money, and who wish to do so on the equity side of the law/equity divide, can ask for the remedy of constructive trust. When seeking recovery via constructive trusts, claimants allege that defendants impliedly agreed to hold a gain received in trust and that failure to hold that gain in trust produces injustice.

This raises an important point. In many situations, claimants can seek either the remedy of quasi-contract or the remedy of constructive trust and get exactly the same result. In short, the two different remedies are often identical. However, one of these remedies has its roots in law and the other in equity. In short, claimants who use restitution theories in connection with money remedies may well be able to choose either a law remedy or an equity remedy. Nothing comparable to that exists for claimants who use compensation theories in connection with money remedies.

One last procedural matter must yet be mentioned in connection with this analysis of the mechanisms for obtaining restitutionary remedies. This involves limitations of actions.27

Limitations of actions establish a time-frame during which individuals who wish to obtain a judicial remedy must commence their actions. The theory behind these limitations is two-fold. First, the law

27. Dobbs, supra note 1, at 656.
has concluded—and who can doubt the sense of this—that even wrong-acting people have the right at some point in time to put behind them their wrong actions. In short, at some point in time bygones are bygones. Second, the law has concluded that evidentiary problems that exist in proving wrongfulness, and in defending against claims of wrongfulness, are likely to be tremendously magnified if long periods of time have elapsed between the time of the alleged wrongful acts and the time an action is brought regarding those acts.

What then, does this have to do with restitutionary remedies? Two things come to mind. First, as noted repeatedly herein, litigants who seek restitutionary remedies can often either seek remedies that have their roots in law or remedies that have their roots in equity. Comparable remedies exist in restitution on either side of the law/equity line. This means litigants who wish to obtain restitutionary remedies might well have the choice between an action governed by the standard statute of limitations in law or an action governed by the more amorphous concept of laches in equity. For example, a litigant who seeks the remedy called “quasi-contract” might encounter a statute of limitation (because quasi-contract has its roots in equity) whereas a litigant who seeks the essentially identical remedy of “constructive trust” might encounter only the limitation of laches.

Frequently, the law now extrapolates statutory time limits to laches matters. Consequently, the laches time limits and the statutory time limits are generally the same. However, there are exceptions. Even in jurisdictions that apply limitations, courts ruling on requests for remedies with their roots in equity sometimes extend the laches time period beyond the comparable statutory period.

The second point regarding limitations is considerably more subtle. Recall that it was noted earlier that the “wrongfulness” element of the restitutionary standard—i.e. the “unjust” part of “unjust enrichment”—can be established either by proving up a standard cause of action in torts, contracts, or the like or by generally proving wrongfulness. Restitution claimants need not be able to prove up standard causes of action. Although what this fact means in connection with limitations of actions is not exactly clear, the implications are fascinating. If a restitutionary claim is not based on a standard cause of action in torts or contracts, what is the pertinent limitations period? Because neither a tort theory nor a contract theory is being used, the respective limitations periods do not seem applicable. Thus, a great deal of ambiguity regarding limitations periods exists in this context, ambiguity that almost certainly can be put to use by knowledgeable plaintiffs.

A brief summary of these procedural matters is now apropos. First, claimants who seek restitutionary remedies—as opposed to compensatory remedies—need not prove up standard causes of action
in tort, contract, or the like. This is so because the "unjust" part of the "unjust enrichment" standard can be established either through proof of a standard cause of action or through general notions of fairness and justice. Hence, claimants who face serious cause of action problems in connection with standard compensatory remedies, might well be able to overcome those problems by seeking restitutionary remedies. Second, claimants who seek restitutionary remedies can, in many instances, seek essentially identical remedies on either side of the law/equity dividing line. The remedy of quasi-contract, for example, is on the law side, whereas the essentially identical remedy of constructive trust is on the equity side. The strategic implications of this ability to choose either law or equity remedies are immense. Third, claims for restitution produce intriguing limitation of action issues. This is so because such claims can be on either side of the law/equity line and because such claims can, in some instances, be based on theories other than standard tort or contract causes of action.

C. Miscellaneous Strategic Matters

Three additional points about the strategic value of restitutionary remedies must yet be noted. One deals with "preliminary" remedies. Another deals with attorney fees. And the last involves payments of pre-judgment interest. In all of these situations, lawyers who understand restitutionary remedies may have a distinct advantage over lawyers who do not understand such remedies.

Preliminary remedies are principally used to preserve the status quo during lawsuits. Thus, for example, lawyers generally use temporary restraining orders and preliminary injunctions to preserve the status quo regarding defendants' ability to respond to injunctive remedies during the pendency of suits seeking permanent injunctions. Likewise, lawyers generally use remedies like pre-judgment attachment and pre-judgment garnishment to preserve the status quo regarding defendants' ability to respond to money judgments during the pendency of lawsuits seeking money. Interestingly, a little restitutionary twist exists in this context—at least in connection with preliminary money remedies.

Most lawyers know about, and sometimes use, preliminary money remedies such as pre-judgment attachment and garnishment.28 Few lawyers, however, seem to know about, and even fewer seem to use, a preliminary money remedy based on restitutionary theories. This remedy is called "preliminary replevin."29

Replevin, it should be recalled, is a specific restitutionary remedy. In short, plaintiffs who seek replevin do not follow the standard pro-

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28. Dobbs, supra note 2 at § 1.3.
29. Id. at §§ 1.3, 17(3).
cess of converting a wrongful gain into money and then seeking a money remedy. Rather, plaintiffs who seek replevin ask for the gain itself to be restored. Assume, for example, that a dispute exists regarding the ownership of a prize-winning bull—"Rose of Aberlone, Jr." The plaintiff, who is out of possession of the bull, claims that the defendant who possesses the bull has wrongfully gained by that possession. Normally the plaintiff would seek to convert the value of the gain into money and then seek a money remedy. Sometimes, however, the plaintiff wants the bull itself. In this case, the plaintiff would file a claim for either replevin (rooted in law) or specific restitution (rooted in equity).

Preliminary replevin is simply a preliminary version of the process of replevin just described. When this preliminary remedy is available, plaintiffs who seek this remedy can potentially obtain restoration of the gain itself prior to trial. In effect, preliminary replevin then becomes similar to what would occur if a preliminary injunction were entered, or if a temporary restraining order (TRO) were used. But, because preliminary replevin is not a preliminary injunction, and because it is not a TRO, different rules apply when it is used.30

The second miscellaneous restitutionary matter involves attorney fees.31 All lawyers in the United States know that the general rules regarding fees—the so-called "American Rule," is that parties to disputes pay their own attorney fees. All lawyers also know, however, that the American Rule is subject to countless exceptions. Many statutes, for example, provide for the payment of attorney fees. Similarly, the "common fund" exception and the "private attorney general" exception frequently produce payments of attorney fees despite the provisions of the American Rule. Few lawyers, however, seem to know that both the common fund exception and the private attorney general exception have their basis in restitutionary theories.32 The rationale is straightforward. In connection with both the common fund exception and the private attorney general exception, the named plaintiffs' actions are said to benefit a group of individuals other than the named plaintiffs. In other words, a group of people other than the named plaintiffs gain because of plaintiffs' victory against the defendant. That gain, of course, becomes the subject of a restitutionary theory. Unless the non-named plaintiffs are required to help pay the attorney's fees associated with the production of this gain, the receipt by these non-named plaintiffs of the gain would be "unjust".

It might be argued, with some justification, that the foregoing discussion does not really involve strategic matters. Admittedly, it is

30. Id. at 5.17(3).
31. Id. at § 3.10.
32. Id. at § 4.9(6).
probably a good thing for lawyers who invoke the common fund and private attorney general exceptions to the American Rule about attorney fees to realize that those exceptions flow out of restitutionary principles. On the other hand, countless lawyers have raised these exceptions without understanding the underlying rationale, and have nevertheless recovered. There is, however, at least one important strategic consideration that can arise in this context. Interestingly, it is a strategic matter that is likely to be raised by a defendant resisting an award of fees under these exceptions, rather than a plaintiff seeking them.

Those familiar with the substantive law of restitution know about three closely related defenses to claims for restitution. The defenses—all of which address the issue of the wrongfulness of the enrichment—involve “volunteers,” “gifts” and “choice.” Defendants who are the recipients of gifts, for example, clearly are enriched. However, that enrichment is clearly not unjust. If the students in a class, for example, jointly decide to buy their teacher a new BMW because he is such a good classroom teacher, clearly that teacher is enriched. But, just as clearly he is not “unjustly” enriched. The same thing is true regarding “volunteers.” If a person voluntarily provides something to another, the other may well be enriched. But, because of the voluntariness, the enrichment is not unjust.

The choice principle is slightly different. In situations in which this defense comes into play, the providers of the enrichment do not themselves intend to provide that enrichment either as a gift or as volunteers. Rather, when this enrichment is provided, the providers themselves expect payment for it. If this occurs, the recipient cannot assert either the gift or the volunteer principles. The students in a teacher’s class, for example, might give the teacher a BMW expecting that the teacher will give all of them A’s for the course. Hence, in this situation, the teacher will be enriched, but the teacher cannot assert either the gift or the volunteer principles. The teacher can, however, assert the “choice” principle. “Had I been given a choice in advance,” the teacher can argue, “I would not have accepted the BMW.” The choice defense, in short, again focuses on the unjust part of the unjust enrichment idea. Though the recipient in these cases has been enriched, the enrichment is not unjust because had the recipient been given an opportunity in advance to make a choice regarding the benefit, the benefit would have been refused.

What then does this have to do with strategic choices potentially to be made by defendants who are resisting claims for attorney fees under either the common fund or the private attorney general exceptions to the American Rule? The answer involves the non-named parties in common fund and private attorney general situations, the non-named parties who are said to be additional beneficiaries of the named
plaintiffs' actions. What if the benefits received by these non-named beneficiaries turn out to be gifts or the results of voluntary actions? Or what if these benefits are ones that the non-named parties would not have chosen to receive had they been given the choice in advance? If any of these things can be established, the non-named beneficiaries will not have been "unjustly" enriched. And, if they have not been "unjustly" enriched, the benefits accruing to them need not be restored in the form of payments for attorney fees to the named plaintiffs.

Let me now emphasize an important practical point. Serious problems might stand in the way of defendants who attempt to assert that non-named beneficiaries in common fund or private attorney general cases are the recipients of gifts or voluntary actions, or that those beneficiaries would not have chosen to receive the benefits. For example, it might be argued that defendants lack the standing to assert these ideas on behalf of the non-named beneficiaries. Further, no decisions have been found that support such an approach by defendants in common fund and private attorney general situations, nor even any cases articulating this approach. Nevertheless, from a policy perspective, this idea makes sense. Since the common fund and private attorney general exceptions rest on restitutionary principles, restitutionary principles should actually be applied when those exceptions are invoked.

The final miscellaneous point about the strategic value of restitutionary remedies involves an arcane point—pre-judgment interest. While this point may indeed appear arcane, it is important to note that in at least some situations, large amounts of money are at stake.

Again, we start with a general rule, a rule known to all lawyers. Generally speaking, pre-judgment interest is paid on claims if, but only if, the claims themselves involve "liquidated" or "ascertainable" amounts. A claim for $100,000 in personal injury losses, for example, almost certainly would be considered unliquidated, or non-ascertainable, especially if that claim included a call for money for pain and suffering. On the other hand, a claim for failure to pay $100,000 on a promissory note with a certain due date probably would be considered liquidated or ascertainable. In effect, if the parties to a dispute disagree about the right to a remedy but not about the amount of that remedy, the claim is liquidated. Conversely, if the parties disagree about the amount of the remedy, the claim is not liquidated.

The limitation of pre-judgment interest to liquidated amounts is a sensible idea. If the money value of the claim is not liquidated, the amount of interest that can be earned on that amount cannot reasonably be calculated. Because the amount is not ascertainable prior to judgment, defendants cannot know how much money to set aside pre-

33. Id. at § 3.6.
judgment in order to pay pre-judgment interest that is calculated on a post-judgment basis.

Generally, people or entities who possess property or money also possess the right to earn interest on that property or money. Hence, for example, if this author possesses $100,000 in cash, I also generally possess the right to earn interest on that money. Imagine now, that someone wrongfully obtains money or property. Obviously the wrong-acting person possesses the money or property itself. The wrong-acting person now also possesses the right to earn interest on this money or property. Here, in turn, is where restitutionary theories come into play. If a defendant has been wrongfully enriched, full restitution seems to require disgorgement of both the money or property itself wrongfully possessed and any interest that the defendant might have earned on the property or money while it was wrongfully held.

The interest just noted clearly includes pre-judgment earned interest. Hence, restitutionary claims seem to carry with them, almost automatically, the right to pre-judgment interest. Furthermore, and perhaps more importantly, the restitutionary right to pre-judgment interest probably even applies to unliquidated claims. And why not? Measurement problems, problems that justify the general rule prohibiting payment of pre-judgment interest in connection with unliquidated claims are not the issue here. Rather, the issue in these restitution cases is simply unjust enrichment.

D. Enforcement of Restitutionary and Compensatory Remedies

All of this brings this analysis to the most important strategic consequence that flows from a decision to seek a restitutionary rather than a compensatory remedy. This consequence involves methods for "enforcing" money remedies, i.e. methods for turning simple pieces of paper—judgments for remedies—into actual money.

We start with something known to all experienced lawyers, but often overlooked by novice lawyers and academic lawyers. Defendants against whom judgments for money are entered do not automatically comply with the judgments. In other words, such defendants do not simply write out checks or hand over cash. Rather, these defendants often stall and stall and stall, or, in some cases, just flatly refuse to pay. Sometimes the defendant engages in this tactic because he or she cannot comply with the judgment. A defendant who has no assets, for example, simply cannot comply with an adverse judgment for $100,000. Further, defendants sometimes do not comply with judgments—at least not fully—because they have many creditors in addition to the judgment creditor. A defendant who owes 10 creditors...

34. See generally, Laycock, supra note 6, at 1290-91.
$10,000 each, but who has only $50,000, will not be able to give each creditor his or her due. Finally, defendants sometimes do not comply with judgments simply because they choose not to do so. Some defendants, plainly stated, have the money to pay the judgment, but nevertheless refuse to pay.

It is in this context that perhaps the most important strategic differences exist between restitutionary money remedies and compensatory money remedies. As a general rule, a judgment for a compensatory money claim turns the loss of an injured party into a "debt" of the injuring party. Injured parties, therefore, usually can collect these debts only pursuant to standard debt collection procedures, and can collect these debts only alongside all of the other debts of that injuring party. Thus, if the assets of an injuring party are limited, or if other debts of that party take precedence over the judgment, or if bankruptcy is a viable option, the holder of a judgment for a compensatory money remedy may end up with little or no actual money.

Different rules, however, seem to apply to judgments for restitutionary money remedies. Three such different rules are critical. First, unlike judgments for compensatory money remedies, which are essentially unsecured debts, judgments for restitutionary money are, in effect, "secured" debts. More significantly, the security in these situations is the precise money or thing that is the subject of the unjust gain. If, for example, a piece of property changes possession because of mistake or fraud, a judgment for restitution regarding that piece of property is, in effect, a secured debt with the property itself the security. Likewise, if a particular and identifiable pot of money is the source of unjust enrichment, a judgment for restitution regarding that pot of money is, in effect, a secured debt with the pot of money itself as the security. The consequences of this are profound. If the secured item that is the object of a judgment for restitution is in the possession of the defendant, collection of that judgment takes precedence over all of the other debts of the defendant, at least to the extent of the security. Thus, for example, if the subject of a judgment for restitution is a particular item, or a particular pot of money, the holder of that judgment can claim the entire value of that pot, or the entire value of that thing even though the debtor has several other creditors and limited assets.

Second, because judgments for restitution are directly tied to specific things, changes in value of those things that have occurred prior to the wrongful act may accrue to the benefit of the original owner. If, for example, a defendant converts property that subsequently in-

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35. For an extensive discussion of the points made here, see Emily L. Sherwin, Constructive Trusts in Bankruptcy, 1989 U. Ill. L. Rev. 297.
36. Laycock, supra note 6, at 1291.
37. Id. at 1291-92.
creases in value, the plaintiff in a suit for restitution might be able to recover the increase. This might not be so if the suit were brought for compensation.

The third advantage that holders of judgments for restitution have over judgments for compensation is perhaps even more important than the security or mortgage idea. This second advantage turns on the arcane notion of “tracing.” In many situations, the notion of tracing allows the holder of a judgment for restitution to trace or follow an unjustly reaped gain from one form to another. For example, if the original object of unjust enrichment is some type of property and if the property is somehow sold or otherwise converted into money, the holder of the judgment for restitution can trace or follow the money with his claim. That money itself then becomes the object of the secured judgment. Thereafter, the holder of the judgment can take all of the money so identified, even if the debtor has numerous other creditors and limited assets.

Consider now the extraordinary implications of the facts just noted about the differences between judgments for compensation and judgments for restitution: Assume that Jones through fraud, gets both Smith and Adams to sell to her their Ming vases for $100 a piece. (Each vase is worth about $50,000.) Jones then sells the vases and buys a $100,000 Rolls Royce for her boyfriend. Smith later sues Jones in tort for a compensatory money remedy and Adams sues her for a restitutionary money remedy with a constructive trust action. Both Smith and Adams obtain judgments for $49,900. Smith’s judgment, of course, is for his loss. Adams’ judgment, however, is for Jones’ gain. Then the problems begin. Jones’ financial situation is bleak. She has no cash. She owes various creditors approximately $100,000. Her house is completely encumbered with a mortgage. Finally, the boyfriend has taken up with a new woman, and won’t give back the car.

What then happens with Smith and Adams? Smith, it should be recalled, has a judgment for a compensatory money remedy. Thus, she has only a debt against Jones. However, since Jones has no assets available to pay his debts, Smith gets nothing. Further, even if, somehow, Smith can draw the now missing Rolls back into Jones’ pool of assets, he would have to divide the proceeds from the sale of that car among all of the creditors. Thus, even if this occurred, Smith would only collect a fraction of his judgment.

Adams, however, is in much better shape. He has a judgment for a restitutionary money remedy. Thus, he has, in effect, a “mortgage” against the specific property (or money) that constitutes Jones’ gain. Further, Adams gets to “trace” that gain into other forms, including, of course, the car now owned by the former boyfriend. Ultimately, there-

38. Id. at 1291.
fore, Adams may well get the entire $49,900 of her judgment, despite the fact that none of Jones' other creditors, including Smith, get anything at all.

Many judges, lawyers, and students might argue that nothing like the foregoing should be allowed to occur in the law of civil remedies. In the foregoing situation, of course, the injuries incurred by Adams and Smith were identical, as were the gains reaped by Jones. Further, since in this situation losses equalled gains, the only real difference between the suits brought by Adams and Smith was the name assigned to the remedy sought. Thus, only a hyper-technical system of civil remedies, a system that has no place in the modern world, would generate the different results described. The widely accepted view is that similar factual circumstances ought to generate similar remedial results.

Yet, these rules can potentially create wildly different results in connection with remedies for essentially identical events. The merits of these rules are debatable. However, regardless of the inconsistencies described, the rules of restitution and compensation are as noted. Lawyers who wish to give their clients the best possible service, therefore, should know and understand these rules.

V. CONCLUSION

As noted at the outset, it is probably safe to say that there is both good news and bad news in connection with the knowledge possessed by the practicing bar about "restitutionary" remedies. The good news is that it is probably safe to say that most practicing lawyers have heard of restitutionary remedies and probably even generally know that restitutionary remedies have something to do with "unjust enrichment." The bad news, however, is this: It is also probably safe to say that the vast majority of practicing lawyers do not truly understand restitutionary remedies, and do not understand why such remedies can be extraordinarily useful in certain circumstances. In short, although most practicing lawyers know a little bit about restitutionary remedies, they do not know nearly enough.

Restitutionary remedies are powerful tools in the hands of lawyers who truly understand them. There are procedural, strategic, and enforcement advantages to using restitutionary remedies. A lawyer who does not avail himself of the advantages of restitution is not fully serving his clients.