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Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages

Doug Rendleman
Washington and Lee University School of Law, rendlemand@wlu.edu

Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages

Doug Rendleman*

And whence they came and whither they shall go
the dew upon their feet shall manifest.

Wallace Stevens, Sunday Morning

Abstract

Courts apply compensatory damages, restitution, and punitive damages to formulate litigants' civil remedies. The frequently contested policy justifications for these three remedies are often hazy and uncertain. The transitions between the three remedies are disputed. Lawyers and courts often misunderstand restitution with deleterious consequences for litigants and the administration of justice.

The American Law Institute's completion of the Restatement (Third) of Restitution & Unjust Enrichment provides the legal profession with opportunities to dispel this haze and to clarify the distinctions. In addition to obviating defendants' unjust enrichment, restitution with its measurement choices provides a midpoint on a continuum of the three remedies. Restitution's policy justifications often overlap with

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* Huntley Professor, Washington and Lee Law School. This Article began to take its shape during three presentations: the South Eastern Association of Law Schools Conference panel, Restitution Revival—Restatement (Third) of Restitution & Unjust Enrichment, August 2010; the Frances Lewis Law Center Faculty Enclave, March 2011; and the Remedies Discussion Forum, University Aix-en-Provence, France, June 2011.

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compensatory damages at one end of the continuum and with punitive damages at the other.

This modest effort identifies wiser choices to aid lawyers' and courts' remedial decisions and seeks to improve the courts' administration of litigants' civil remedies. Focusing on the Restatement's measurement choices for restitution, it explains familiar examples to analyze the choices between compensatory damages, restitution, and punitive damages and to locate the transitions between them.

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I. Introduction

The completion of the Restatement (Third) of Restitution & Unjust Enrichment in 2010 and its publication in 2011 provide me with this opportunity to situate restitution within the broader continuum of remedies. My goal is to use examples, many of them well known, to locate the way a court will measure a plaintiff's restitution within the broader spectrum of compensatory damages and punitive damages.

II. Civil Remedies

A court's remedy is what it does on behalf of a successful claimant. The court's remedies include, first, a personal order telling the defendant to perform or refrain from something, an order that may be restitution, and, second, money that may also include compensatory damages, restitution, and punitive damages.

A court's personal order may be a constructive trust or an equitable lien, equitable restitution that this Article will return to below. The court's other principal personal orders are an injunction and a specific performance order.

A court may award a plaintiff money for several purposes. The major headings of a plaintiff's money recovery that this Article examines are compensatory damages, restitution, and punitive damages. Examples of money recovery that we are not examining are nominal damages and attorney fees-costs.

A court will view compensatory damages as money granted to put the plaintiff, so far as money can, where the plaintiff would have been without the defendant's breach or invasion. The court will base the plaintiff's recovery of compensatory damages on her loss. The compensation principle is strong and deeply entrenched in the professional psyche.[1] For example, the strength of the compensation principle is the underlying basis for a recent attack on Rule 23(b)(3) damages-class cy pres remedies.[2]

A court will respond to a defendant's unjust enrichment by granting the plaintiff restitution. The court will measure a plaintiff's money restitution to prevent or reverse the defendant's unjust enrichment. The court's baseline guide to restitution is the defendant's gain, not the

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1. *See* Jeff Berryman, *The Compensation Principle in Private Law*, 42 LOY. L.A. L. REV. 91, 93–95 (2008) (stating that the compensation principle is a justification for commencing actions and serves as a control on the court's power).

2. *See* Martin Redish, Peter Julian & Samantha Zyontz, *Cy-Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 641–61 (2010) (questioning the constitutionality of class action cy-pres relief). Going farther, calling cy pres "punitive" is Judge Richard Posner in *Misifasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 784 (7th Cir. 2004). *But see* Jeff Berryman, *Nudge, Nudge, Wink, Wink: Behavioural Modification, Cy-Pres Distributions and Class Actions* (Working Paper Series, Apr. 5, 2011), *available at* http://ssrn.com/abstract=1803724 (taking a more nuanced and broadly based view of policies and stating that plaintiffs "sometimes prefer other remedial outcomes than slavish adherence to compensable damages."). Moreover, the focus on compensatory damages "myopically focuses on damages at the expense of other remedies." *Id.*

plaintiff's loss. This Article will not examine restitution in specie—the defendant's return of the plaintiff's actual property.

A court will grant a plaintiff punitive damages to punish the defendant for its aggravated misconduct and to deter that defendant and other potential defendants from similar misconduct.

A skeptical observer may refer to a plaintiff's money recovery of restitution or punitive damages that exceed the plaintiff's loss as a "windfall," an epithet that means the writer thinks the plaintiff is receiving too much. Since restitution and punitive damages rest on discrete noncompensatory policy bases, this Article rejects the observer's disparaging "windfall" label below.

In addition to the functional distinctions above—a personal order versus a money substitute and compensation versus restitution versus punitive damages—the difference between a Legal remedy and an Equitable remedy stems from the historical division of courts. It resides today in two major distinctions that this Article develops below–jury versus nonjury trial and impersonal collection versus personal enforcement. Compensatory damages and punitive damages are Legal remedies while restitution may be either Legal or Equitable. The distinction between Legal and Equitable leads to confusion and more than a little error.

Our court-made common law jurisprudence has not developed fences around the doctrines to define exact boundaries. Indeed, a lawyer may win a prize by a novel characterization that presses against or crosses the boundary. S.F.C. Milsom wrote:

> The life of the common law has been in the abuse of its elementary ideas. If the rules of property give what seems an unjust answer, try obligation; and equity has proved that from the materials of obligation you can counterfeit the phenomena of property. If the rules of contract give what now seems an unjust answer, try tort. Your counterfeit will look odd to one brought up on categories of Roman origin; but it will work. If the rules of one tort, say deceit, give what now seems an unjust answer, try another, try negligence. And so the legal world goes round.[3]

Novel and sometimes even routine disputes challenge courts to apply policies, judgment, and common sense to align justification, rule, and result.

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3. S.F.C. MILSOM, 2 HISTORICAL FOUNDATIONS OF THE COMMON LAW 6 (1981).

III. Restitution Confusion

Professional misunderstanding of restitution exacerbates the difficulties of developing boundaries. Restitution specialists frequently observe that restitution, which has fallen out of the law school curriculum, is subject to professional misunderstanding on every level.[4]

To begin with, a major source of confusion is that the meanings of the words change between the vernacular language and the technical vocabulary of remedies. "Restitution," in the vernacular sense of "justice," may be used to describe any form of recovery or redress. And under criminal statutes, a criminal may be ordered to give "restitution," to his victim, but that "restitution" almost always takes the form of compensation. "Damages" may be used generally to describe any form of money recovery including recovery based on the defendant's unjust enrichment, restitution.[5]

Lawyers use inapplicable arguments that do not help the courts. A common theme in three contemporary business law excessive-compensation decisions I read for another project is that all three of the defendants argued against granting the plaintiffs restitution because restitution exceeds the plaintiff's loss.[6] It should of course go without saying that a plaintiff's restitution, which the court will base on the defendant's unjust enrichment, does not stem from plaintiff's loss, but from the defendant's gains, an amount that will often exceed the plaintiff's loss.

Dealing with badly argued motions and appeals, courts themselves miscue. An extreme example comes to us from the realm of consumer class actions. A plaintiff class sued the defendant under the California false-advertising and unfair competition statutes. The California Supreme Court had held earlier that restitution was plaintiffs' money remedy under the

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4. *See* HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 1 (2004) (describing the common misinterpretations current lawyers have on the subject of restitution); Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1195 (1995); Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1277 (1989) ("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 . . . .").

5. DOUG RENDLEMAN & CAPRICE ROBERTS, 8 REMEDIES—CASES & MATERIALS 489–95 (2011).

6. *See* Scrushy v. Tucker, 955 So. 2d 988, 1009–10 (Ala. 2006) (pertaining to annual multi-million dollar bonuses from 1997 through 2002); *In re* Citigroup, Inc. S'holder Derivative Litig., 964 A.2d 106, 139 (Del. Ch. 2009) (arguing against the multi-million dollar compensation package paid to the departing CEO of Citigroup); Valeant Pharm. Int'l v. Jerney, 921 A.2d 732, 752–53 (Del. Ch. 2007) (seeking recovery of a $3 million bonus).

statutes.[7] Restitution is based on the defendant's unjust enrichment. Seeking certification of a plaintiff class to recover money, however, plaintiffs offered a money-recovery model based on class plaintiffs' losses, not the defendant's gains. The court declined to certify the plaintiff class giving as the reason that individual plaintiffs' variations in recovery meant that the prerequisite community of interest for a plaintiff class was lacking.[8] However, a court measures restitution by the defendant's unjust enrichment not by the plaintiffs' loss. In plaintiffs' one-defendant lawsuit, there were no variations.

Inadequate definitions of restitution hampered the class-action court. Earlier California decisions did not define restitution but gave an example of restitution as restoring the status quo, a remedy that resembles rescission-restitution.[9] The earlier court also gave as an example of restitution the out-of-pocket measure of a plaintiff's compensatory damages for defendant's fraud: "The difference between what the plaintiff paid and the value of what the plaintiff received is a proper measure of restitution."[10]

This stupefaction vindicates Professor Kull's observation that:

> Confusion over the content of restitution carries significant adverse consequences. To put it bluntly, American lawyers today (judges and law professors included) do not know what restitution is. The technical competence of published opinions in straightforward restitution cases

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7. *See* Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937, 946 (Cal. 2003) ("An order for restitution, then, is authorized by the clear language of the statute. In fact, 'restitution is the only monetary remedy expressly authorized by [the California unfair competition statute].'" (citation omitted)).

8. *In re* Vioxx Class Cases, 103 Cal. Rptr. 3d 83,100 (Cal. App. Dep't Super. Ct. 2009) (concluding that "the monetary value plaintiffs wish to assign to their claim—the difference in price between Vioxx and a generic, non-specific NSAID, implicates a patient-specific inquiry and therefore fails the community of interest test").

9. *Id.* at 96; *see* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 54 (2011) ("Rescission is limited to cases in which counter-restitution by the claimant will restore the defendant to the status quo ante . . . ."). The genesis of restitution as restoring the status quo may have been the Supreme Court's statement in *Porter v. Warner* holding that restitution "asks the Court to act in the Public Interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser." Porter v. Warner Holding Co., 328 U.S. 395, 402 (1946).

10. *Vioxx*, 103 Cal. Rptr. 3d at 96 (citing Cortez v. Purolator Air Filtrations Prod. Co., 999 P.2d 706, 713 (Cal. 2000)). Class actions seeking to recover "restitution" seem to be unusually error prone. A notable exception is Judge Brock Hornby who overcomes bad arguments to analyze restitution correctly in *In re* New Motor Vehicles, 350 F. Supp. 2d 160 (D. Me. 2004).

> has noticeably declined; judges and lawyers sometimes fail to grasp the rudiments of the doctrine even when they know where to find it.[11]

IV. Distinctions

We move closer to visible boundaries by examining Professor Cooter's three-part economic and policy-based analysis of substantive standards leading to remedies—a liability right, a disgorgement or restitution right, and punitive damages, called a disgorgement-plus right.

First, if a defendant has breached what Cooter names the plaintiff's "liability right," then that will lead the court to award the plaintiff compensatory damages. Compensating the plaintiff's loss means that the court sets the plaintiff's recovery at a level to allow the defendant's activity to continue but also to deter potentially harmful activity because it forces the defendant to internalize its activity's full cost.

Second, suppose the defendant breached a standard with what Cooter calls a "disgorgement" measure, but we call restitution. Then the court will measure the plaintiff's recovery to make the injurer give up all its gains to the victim. Measuring plaintiff's recovery by the defendant's gains is restitution. The defendant's payment to the plaintiff deters repetition by making the injurer indifferent to whether to continue the activity.

Third, is disgorgement plus or punitive damages. As a remedy for a defendant's aggravated misconduct, a court will impose punitive damages, a plaintiff's recovery that augments either compensation or the restitution-disgorgement measure. This measure will punish and deter a potential defendant's intentional wrongdoing.[12]

A court should strive to match a common law legal rule with its policy justifications.[13] Once we examine the categories above and seek to align the rules with policy justifications, we observe that observers' views of the appropriate function of civil remedies diverge.[14] Moreover, the categories are founded on multiple policies justifications and feature primary,

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11. *See supra* note 4 and accompanying text (describing the lack of knowledge on restitution among lawyers and judges).

12. *See* Robert Cooter, *Punitive Damages, Social Norms, and Economic Analysis*, 60 L. & CONTEMP. PROBS. 73, 76 (1997) (describing the unclear use of punitive damages).

13. *See* MELVIN EISENBERG, THE NATURE OF THE COMMON LAW 26–37 (1988) (examining the relationship between common law legal rules and their policy foundations).

14. *See* Berryman, *supra* note 2, at 1–7 (describing the difficulties in having scholars and lawmakers agree on the proper function of civil remedies).

secondary, and overlapping justifications. Observers question basic premises.[15]

The principal distinction between compensatory damages and restitution is that compensatory damages respond to the plaintiff's loss, restitution to the defendant's gain.[16] Although both deter, if restitution exceeds compensatory damages, restitution will deter more.

In comparing restitution with punitive damages, a court will mete out and measure both restitution and punitive damages to deter the defendant's profitable misconduct by taking the defendant's benefit or profit. The policy bases are not identical. The court awards a plaintiff restitution to deter and to prevent or reverse the defendant's unjust enrichment. Nevertheless, the policies are unclear and may overlap, leading an observer to remark or a defendant to argue that disgorgement has a punitive quality.[17] The court imposes punitive damages on a defendant to punish it and to deter it and others from misconduct. The court has separate reasons to give punitive damages to the plaintiff; these include paying the plaintiff a bounty for bagging a miscreant, financing the plaintiff's expensive litigation, and awarding the plaintiff concealed compensation, perhaps for losses under- or un-compensated by compensatory damages measures.[18]

In short, the lines between compensatory damages, restitution, and punitive damages are difficult to draw in either practice or in concept because each serves a deterrent function.

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15. *See* Gary Schwartz, *Reality in Economic Analysis of Tort Law: Does Tort Law Really Deter*, 42 UCLA L. REV. 377, 377–85 (1994) (suggesting that the economic model that compensatory damages deter has mixed success in actually altering potential defendants' conduct); Elaine Shoben, *Let the Damages Fit the Wrong: An Immodest Proposal for Reforming Personal Injury Damages*, 39 AKRON L. REV. 1069, 1069–80 (2006) (suggesting broadening damages beyond compensation); W. Jonathan Cardi, Randy Penfield, & Albert Yoon, *Does Tort Law Deter?* (Wake Forest Univ. Legal Studies Paper No. 1851383, 2011), *available at* http://ssrn.com/abstract=1851383 (using experimental surveys of law students to yield a negative answer to their title question, Does Tort Law Deter?).

16. 1 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 555 (2d ed. 1993) ("Restitution measures the remedy by the defendant's gain and seeks to force disgorgement of that gain. It differs in its goal or principle form damages, which measures the remedy by the plaintiff's loss and seeks to provide compensation for that loss.").

17. *See* Mark Gergen, *What Renders Enrichment Unjust*, 79 TEX. L. REV. 1927, 1934, 1964 n.181 (2001) (stating that disgorgement and punitive damages have similar supporting arguments).

18. *See* Doug Rendleman, *Punitive Damages—Something for Everyone?*, 7 U. ST. THOMAS L.J. 1, 1–9 (2010) (studying the reasons punitive damages are imposed and the many problems that occur with the imposition of punitive damages).

V. Compensatory Damages and Restitution

The boundary between compensatory damages and restitution is neither well defined nor well maintained and therefore frequently contested.[19] The basic point is the plaintiff's choice. The secondary point is the defendant's state of mind.

The plaintiff we are studying will seek restitution under one of three circumstances: when compensatory damages are unavailable, when the defendant's unjust enrichment exceeds available compensatory damages, and when the defendant's unjust enrichment is easier for her to prove than compensatory damages.[20] The question for the judge is whether the plaintiff satisfies the prerequisites for restitution.

The late Professor Peter Birks's felicitous distinction between "giving back" and "giving up" is one way to focus on measurement of restitution.[21] The bank's freestanding restitution when its computer mistakenly deposits money in a depositor's account will be the amount that it lost; in other words, the defendant will give the bank's money back. Restitution by way of "giving back" will be symmetrical with compensatory damages. As Professor Dan Friedmann observed, plaintiff's loss and defendant's gain "ordinarily represent two sides of the same coin."[22] "Giving back" measurement of restitution comes with the prerequisite that the defendant's unjust enrichment be "at the expense of" the plaintiff. "Giving back" restitution's commodious and confusing overlap with compensatory damages shows the importance of careful analysis, tactical choice, and wise judgment.

In the "giving up" measurement of restitution, on the other hand, the court will tell the defendant to pay the plaintiff its gains that may exceed,

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19. *See* Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1288–89 (1989) (describing the difficulties in awarding more than the plaintiff lost).

20. In addition to the examples in the text, a plaintiff may use restitution either to recover property in specie-in fact or to pursue a more judgment-worthy defendant.

21. PETER BIRKS, UNJUST ENRICHMENT 167–68, 281–82 (2d ed. 2005). This Article uses Professor Birks's terminology without adopting its vocabulary innovations and analytical baggage.

22. Daniel Friedmann, *Restitution for Wrongs: The Measure of Recovery*, 79 TEX. L. REV. 1879, 1880 (2001). The 1937 Restatement used the same adverb for the same principle:

> Ordinarily the benefit to the one and the loss to the other are co-extensive, and the result of the remedies given under the rules stated in the restatement of this subject is to compel the one to surrender the benefit which he has received and thereby to make restitution to the other for the loss which he has suffered.

RESTATEMENT (FIRST) OF RESTITUTION § 1 cmt. d (1937).

not equal, the plaintiff's loss. The court will examine the defendant's state of mind for wrongfulness and his position in relation to the plaintiff. The example below is an intentional copyright-infringer who makes a profit that the plaintiff would not have earned. Because the defendant's unjust enrichment comes from the people that buy the infringing work, the defendant does not "give back" anything that originated with the plaintiff. The prerequisite for restitution that the defendant's unjust enrichment be "at the expense of the plaintiff effectively falls out of the analysis—the defendant "gives up" to the plaintiff a benefit that came from third parties. The plaintiff's restitution measured by "giving up" exceeds her compensatory damages.[23] "Giving up" is below in this Article; its earmark is the defendant's misconduct; and its technical names are "disgorgement" and "accounting."

The distinction between "giving back" and "giving up" is helpful as far as it goes. But because of the refinements of measurement and the distinctions between legal and equitable restitution, it only goes part of the way.

VI. Freestanding Restitution

A court will base a plaintiff's freestanding restitution on the defendant's unjust enrichment but no other breach of legal duty. Examples include a defendant's receipt of the plaintiff's mistaken payment or a transaction that fails as a contract for want of a required writing.[24] When the plaintiff has no choice between compensatory damages and restitution,

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23. Professor Murphy distinguishes the two forms of measurement:

> With respect to the remedy for unjust enrichment, the Restatement comments that "[o]rdinarily the measure of restitution is the amount of enrichment received." In other words, the defendant's gain, rather than the plaintiff's loss, typically is the measure of recovery in an action for unjust enrichment. In many instances, a remedy based on the defendant's enrichment would yield the same award as a remedy based on the plaintiff's loss [giving back]. In certain circumstances—typically those of conscious wrongdoing—the defendant may be required to disgorge any profits that it derived from the benefit, and the amount of recovery for unjust enrichment may therefore exceed the amount of the plaintiff's loss [giving up].

Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1582 (2002); *see also* Douglas Laycock, Book Review, *Restoring Restitution to the Canon*, 110 MICH. L. REV. (forthcoming 2011).

24. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 5–12, 31–39 (2011) (pertaining to restitution from benefits conferred by mistake and from intentional transactions).

freestanding restitution will be the plaintiff's fallback remedy because a compensatory damages cause of action will be unsuccessful. The court should grant and measure the plaintiff's freestanding restitution in ways that do not undermine the policy reasons that prevent the plaintiff from recovering under the damages cause of action.[25]

In many freestanding mistaken payment claims, for example the bank's overcharged computer that incorrectly fires too much money into a depositor's account, the non-tortfeasor, non-breacher defendant is not at fault. Restitution here illustrates a compensatory measure of "giving back." The Restatement is even easier on the defendant, saying plaintiff's loss or defendant's gain, whichever is less.[26] Measurement of restitution is more difficult when the defendant's benefit is not money.

Example: Chief Archivist of State University Library agrees with McCampbell to scan the library's collection of Latin Medieval Church documents into the library's website. No binding contract was formed because Chief Archivist lacked power to contract. Indeed, for a contract of this size, a State statute requires competitive bidding and approval by Head Librarian. Having completed the job without a formal contract, McCampbell may nevertheless, recover restitution from the Library because from outward appearances, he could consider that the Chief Archivist was the official with capacity to form that contract and State University, while not responsible under the contract, could be charged with his knowledge.[27]

But how much? Library has not put the scanned documents on its website, but it retains the files and a graduate student used them for one afternoon. McCampbell's competitor's president will testify that it would have done the job for $100,000. The improper agreement called for the library to pay McCampbell $300,000.

McCampbell's restitution is freestanding because he has no enforceable contract. He will cast his restitution complaint in the common count of quantum meruit, Legal restitution, which is subject to a jury trial.

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25. *See* Doug Rendleman, *When Is Enrichment Unjust?: Restitution Visits an Onyx Bathroom*, 36 LOY. L.A. L. REV. 991, 1007–15 (2003) (using three examples to demonstrate how a court should measure a plaintiff's freestanding restitution).

26. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 51 (2011). Professor Gergen's earlier article anticipated this distinction. Mark Gergen, *What Renders Enrichment Unjust?*, 79 TEX. L. REV. 1927, 1954–55 (2001).

27. *Cf.* GEORGE PALMER, THE LAW OF RESTITUTION §§ 14.15, 15.11 (1978) (arguing that the defendant's knowledge is a reason to approve the higher measure of restitution, a point that is discussed and rejected below).

In a similar early decision against the TVA, the United States Court of Appeals affirmed an Alabama jury's restitution verdict for the contract or agreement price.[28] The dissent argued persuasively that such a result frustrated the competitive bidding statute.[29]

When a court measures a plaintiff's restitution for his services to a defendant, a large difference exists between, on the one hand, a benefit that adds to the defendant's economic wealth, and, on the other, a benefit measured by the value of the plaintiff's performance under an agreement that failed as a contract.[30] The first, addition to the defendant's economic wealth, measures plaintiff's restitution in an "objective" way that resembles compensatory tort damages; the second, performance bargained for, may lead to restitution that resembles contract expectation damages.

A court may justify the latter measure, performance bargained for, on the ground that it is just to charge the defendant the amount of the performance it negotiated and agreed with the plaintiff. That justification will not support measuring McCampbell's restitution under the rate in the failed agreement. For that measure of restitution lends credence to an agreement that fails as a contract because of the competitive bidding statute.[31]

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28. *See* Campbell v. Tenn. Valley Auth., 421 F.2d 293, 298 (5th Cir. 1969) ("The point is that the TVA has not suffered a loss or been damaged as a result of Daniel's unauthorized dealings, but has received a benefit for which, in justice, it must pay restitution.").

29. *See id.* (Rives, C. J., dissenting) ("I would hold that TVA is not liable to Campbell in any amount. If mistaken in that view, I would nonetheless hold that the extent of its liability is measured by the benefit it received from the limited use made of the film . . . ."). *Campbell* appears twice in the RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT, §§ 9 and 33. Another Legal restitution decision where a jury entered a high verdict against an unpopular target or deep-pocket defendant, this one a coal operator, is *Raven Red Ash v. Ball*. *See* Raven Red Ash Coal Co. v. Ball, 39 S.E.2d 231, 239 (Va. 1946) (affirming jury verdict in favor of plaintiff that allowed plaintiff to recover $5,000 for the use and occupation by defendant of an easement across plaintiff's land).

30. *See* GEORGE PALMER, THE LAW OF RESTITUTION §§ 1.8, 4.2 (1978) (describing the difference in restitution principles between a benefit conferred onto the defendant and a loss incurred by a plaintiff).

31. *But see id.* §§ 7.4 at 121, 14.15 at 216–17, 15.11 at 448–49 (stating that the recovery is measured by the fair market value of the goods and services provided rather than their actual benefit to the recipient).

VII. Restitution for Defendant's Substantive Breach

We have crossed the boundary between freestanding restitution—restitution based on defendant's unjust enrichment standing alone without any other breach of substantive law—and restitution based on defendant's violation of positive law independent of unjust enrichment-restitution principles. Restitution for defendant's "wrong" is another way of saying "breach." And we may call this measurement of restitution "giving up" not "giving back."[32]

The Restatement puts it this way: "[T]here are significant instances of liability based on unjust enrichment that do not involve the restoration of anything the claimant previously possessed. The most notable examples are cases involving the disgorgement of profits, or other benefits wrongfully obtained, in excess of the plaintiff's loss."[33]

Where the defendant's tort, breach of contract, or violation of property right leads to his unjust enrichment, the plaintiff may choose between compensatory damages and restitution.[34] Restitution may exceed the plaintiff's loss, or restitution may be easier for the plaintiff to prove than compensatory damages.

In a classic example, the converter sells the converted item above market price and the plaintiff sues to recover the defendant-converter's receipt, not the item's market value.

Example: The defendant converts or steals the plaintiff's MP3 player and sells it to Patsy for $75. The used MP3 player's market value is $35, which equals the owner's compensatory damages from the thief. The plaintiff may recover $75 as restitution from the wrongdoer.[35] History

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32. BIRKS, *supra* note 21.

33. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. c (2011). The first Restatment in 1937 had articulated the same principle as follows:

> In other situations, a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust. In such cases, the defendant may be under a duty to give to the plaintiff the amount by which he has been enriched.

RESTATEMENT (FIRST) OF RESTITUTION § 1 cmt. e (1937).

34. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 13–15, 40–43, 45–46 (stating how restitution applies to torts and other wrongs such as fraud, trespass, and homicide). One common name for this branch of restitution and the title of Chapter 5 is "Restitution for Wrongs." *Id.* at pt. II, ch. 5.

35. *See* DAN B. DOBBS, 2 LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 4.1(1) at 554 (1993) (utilizing a similar fact pattern); Daniel Friedmann, *Restitution for Wrongs: The Measure of Recovery*, 79 TEX. L. REV. 1879, 1881 (2001) (same).

named this technique "waiver of tort and suit in assumpsit" although the plaintiff did not really "waive" the tort of conversion and "restitution" is a more accurate name than "assumpsit."[36]

Sometimes the court must choose between compensatory damages and restitution. In *Horne v. Baker*,[37] the first decision under the first copyright statute, the Statute of Anne in 1710, a remedies issue for the defendant's infringement of the plaintiff's copyright was damages versus restitution. The Chancellor's decision identified damages based on the plaintiff's loss, not restitution based on the defendant's gain. "To make the defendant account for proffits of what he has sold is going too far; for the injury that the plaintiff has susteined ought to be the measure of the damage, & not the proffit, which the defendant has made."[38] A few years later, in 1737, the Chancellor did choose to award a copyright plaintiff restitution of defendant's profits under the Statute of Anne.[39]

Example: Professor writes "Restitution Measurement" for a Remedies Forum and a law review, retaining the copyright. Professor has not made a dime on the article from either royalties or increased Washington and Lee salary. Without obtaining permission, Infringer reprints Professor's "Restitution Measurement" article and nine others in an anthology, "Leading Studies on Restitution," which it sells for $200 to 2,000 buyers. Avid for readers in addition to his mother, Professor would have granted a license to reprint his article to Infringer for nothing or $10.

Each anthology cost Infringer $100 to publish, yielding it a net profit of $100 on each book or about $10 for each of ten articles. Professor's compensatory damages are $10, at best. He did not ride in on a turnip truck, so he sues Infringer for $20,000 restitution, $10 x 2000.[40] The statute allows plaintiff's choice of his losses or defendant's gains, not "for the sum of the two."[41]

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36. PETER BIRKS, UNJUST ENRICHMENT 15 (2005).

37. Horne v. Baker, C5/290/70, m.1 (Ch. 1709) (U.K.) (calculating damages in a copyright infringement case based on the plaintiff's loss rather than the defendant's gain).

38. Tomás Gómez-Arostegui, *The Untold Story of the First Copyright Suit Under the Statute of Anne in 1710*, 25 BERKELEY TECH. L.J. 1247, 1307 (2010).

39. *Id.* at 1309 n.327.

40. Copyright Act, 17 U.S.C. § 504(b) ("The copyright owner is entitled to recover the actual damages suffered by him or her as a result of infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.").

41. Bucklew v. Hawkins, Ash, Baptie & Co., 329 F.3d 923, 931 (7th Cir. 2003). We return below to whether Professor might choose statutory damages under § 504(c).

The restitution policy is to discourage infringement and to encourage voluntary negotiation.[42] In addition, Professors Thel and Siegelman have written that "the obvious justification for requiring breaching promisors to surrender their gains is probably one based on justice and fairness."[43]

Should the court stand aside and let an infringer reap and retain a portion of its improper harvest? Is restitution wiser because it will divest the infringer of its entire gain? Justice Benjamin Kaplan meted out compensatory contempt for the defendant's breach of an injunction forbidding violation of a noncompetition covenant. He wrote:

> [A]n intending tortfeasor should not be prompted to speculate that his profits might exceed the injured party's losses, thus encouraging commission of the tort. Nor should such a defendant be heard to say that the unjust enrichment remedy is unfairly 'punitive' because the plaintiff may recover more than his exact loss, when use of a tort measure might allow the defendant to retain some part of his ill-gotten gains.[44]

That identified the policy justifications for compensatory damages, restitution, and punitive damages and located restitution in between the other two.

Do not expect universal approbation. In a similar appeal, the Utah court specifically declined to follow Justice Kaplan's reasoning.[45] It examined two issues: A former employer's remedy for its ex-employee's violation of a noncompetition covenant and its remedy for the ex-employee's present employer's tortious interference with its contract.[46] The Utah court rejected restitution as a remedy.[47] Instead of the defendant's profits, the plaintiff recovers damages measured by its lost profits.[48] Lost

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42. *See id.* ("Copyright infringement . . . forcing the infringer to disgorge his profit should it exceed the copyright owner's loss the law discourages infringement and encourages the would-be infringer to transact with the copyright owner rather than 'steal' the copyrighted work.").

43. Steve Thel & Peter Siegelman, *You Do Have to Keep Your Promises: A Disgorgement Theory of Contract Remedies*, 52 WM. & MARY L. REV. 1181, 1221 (2011).

44. Nat'l Merch. Corp. v. Leyden, 348 N.E.2d 771, 776 (Mass. 1976).

45. *See* TruGreen Cos. v. Mower Bros., 199 P.3d 929, 932–34 (Utah 2008) (finding that the proper measure of damages for breach of a noncompetition contract and for tortious interference with an employment contract is plaintiff's lost profits).

46. *See id.* at 930 (stating the issues on appeal).

47. *See id.* at 933 ("[W]e are . . . holding that restitution or unjust enrichment is not an appropriate measurement in these actions.").

48. *See id.* at 930 ("We hold that lost profits is the correct measure of damages . . . . We also hold, regarding the second question, that lost profits is the measure of damages for pecuniary injuries due to tortious interference with a competitor's contractual

profit damages would, the court maintained, put the plaintiff where the defendant's performance would have.[49]

The Utah court's palpable misunderstanding of restitution is illustrated by its misstatements: that restitution is a branch of quantum meruit, instead of the other way around; that restitution, quantum meruit variety, is Equitable, instead of Legal; and that restitution is used when the parties have no express contract, which is only sometimes true.[50] The Utah court chose compensatory damages instead of restitution to facilitate efficient breach, to allow a contractual party to violate it, to pay the other party's damages, and to keep the excess. Granting the plaintiff restitution would thwart efficient breach by taking that excess. Moreover, restitution would punish the defendant. The Utah court's reasoning is debatable, with both the Restatement and Professor Roberts on Justice Kaplan's side.[51]

The disputes about commercial restitution also reveal another relationship between restitution and compensatory damages. In our copyright example, Professor's restitution exceeds his compensatory damages because Professor lacks entrepreneurial spirit. Having not attempted to make any sales, Professor cannot prove lost sales. In addition to Professor neglecting to exploit his statutory monopoly, the defendant who is in the book business is probably more efficient at assembling, manufacturing, and merchandising than Professor. Professor's restitution exceeds his compensatory damages.

Suppose, on the other hand, a copyright owner that is assiduously and efficiently undertaking to earn profits from his work. If the defendant's infringing sales may equal the plaintiff's lost sales, then compensatory damages and restitution are congruent. In other words, proving the defendant's profits may be an indirect way of showing the plaintiff's compensatory damages for lost profits.

The Utah court continued. The plaintiff may adduce:

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and economic relations.").

49. *See id.* at 933 ("Additionally, as a policy matter, we do not wish to adopt a remedy for breach of contract that punishes the breaching party. Rather, our focus is on placing the non-breaching party in as good a position as if the contract had been performed.").

50. *Id.*; RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 37–39 (describing the restitutionary measures for breach of contract).

51. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 39 (describing the restitution derived from opportunistic breach); Caprice Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 WASH. & LEE L. REV. 1027 (2011) (arguing for a normative approach to restitutionary disgorgement of opportunistic breach).

> [D]efendant's profit in an attempt to assess its own economic loss. . . . [A] plaintiff must do more than merely state a defendant's profits when claiming damages. There must be some correspondence between the two so that the claim of damages is more than mere speculation. Thus, it is the loss sustained by the plaintiff that provides the core measure of damages for the breach of non-compete clauses. The gains enjoyed by the breaching employee can be relevant to that damage inquiry, but cannot alone support a damage award.[52]

VIII. The Role of Defendant's Intent

Suppose, in the copyright example above, that Professor's pre-trial discovery turns up an e-mail wherein the president of Infringer explains his decision not to seek licenses to a subordinate: "Let's screw those overpaid underworked professors." For his intentional misconduct, should the court refuse to deduct the cost of goods sold from Infringer's profit, doubling Professor's restitution? Would allowing a restitution defendant to deduct overhead and taxes from profit be punitive? This point, which we turn to below, is contested.[53]

The court will hinge the measurement of the plaintiff's restitution on the defendant's mental state or blameworthiness.[54]

If the defendant's wrongdoing was conscious, the court will choose a higher measure of restitution to take all the defendant's benefit, the better to deter misconduct.[55]

The principal policy is deterrence. "A common concern is that if a wrongdoer is unduly rewarded for his or her actions, this will undermine the cardinal principle that those in a position of trust must be financially disinterested in the execution of their duties."[56]

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52. TruGreen Cos. v. Mower Bros., 199 P.3d 929, 932–33 (Utah 2008).

53. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 42 cmt. g ("Statutory remedies for infringement differ in the significance they attribute to the willfulness or deliberateness of the defendant's conduct."); George Roach, *Counter-Restitution for Monetary Remedies in Equity*, 68 WASH. & LEE L. REV. 1271 (2011) (arguing for counter restitution, subtracting expenses).

54. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 39(3), 49(5), 50(5), 51(5)(A), 53(2), 53(3), 58(3)(a), 43 cmt. h, 53 cmt. d (2011).

55. *See* BASF Corp. v. Old World Trading Co., Inc., 41 F.3d 1081, 1095–96 (7th Cir.1994) (upholding a $4.2 million damage amount as it was sufficient enough to render the violations unprofitable); Olwell v. Nye & Nissen Co., 173 P.2d 652, 654 (Wash. 1946) (denying profit derived from the dealing because the company was consciously tortious).

56. Peter Devonshire, *Account of Profits for Breach of Fiduciary Duty*, 32 SYDNEY L. REV. 389, 405 (2010).

In *Kahn v. Kohlberg Kravis*,[57] the plaintiff was pursuing an insider-fiduciary's profit from trading based on nonpublic information.[58] In the course of deciding that plaintiff's shareholder-derivative-action complaint stated a claim, the Delaware court rejected the defendants' argument that a shareholder-derivative-action plaintiff must show that the company suffered actual harm.[59] Actual harm to the corporation is not, the court held, a prerequisite for a plaintiff to state a claim for restitution-disgorgement. The court made the point that this was not a damages case, but restitution to prevent a fiduciary from benefitting from confidential inside information.[60]

For other examples, in Federal Trade Commission disgorgement actions against fraudsters, courts allow the government to recover a defendant's profits. In an enforcement action against the peddler of a bracelet that he said would cure chronic pain, the United States Court of Appeals for the Seventh Circuit allowed the federal agency to recover a reasonable estimate of the defendant's profits.[61] And in a civil contempt proceeding against a contemnor who persisted in broadcasting a misleading weight-loss infomercial, the same court of appeals had ruled that the government could choose the larger of consumers' loss, compensatory damages, or defendant's gain, restitution.[62] Another example, treated elsewhere in this symposium, is that the Restatement cues on a contract breacher's intent in asking whether the judge should order the defendant to disgorge any gains from the breach.[63]

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57. *See* Kahn v. Kohlberg Kravis, 23 A.3d 831, 837–39 (Del. 2011) (finding that stockholders do not have to show actual harm to a corporation when asserting derivative claims for insider trading by fiduciaries).

58. *See id.* at 835 ("Plaintiffs claimed that the KKR defendants breached their fiduciary duty to the company by purchasing the preferred stock at a time when they possessed material, non-public information.").

59. *See id.* at 837 ("Thus, actual harm to the corporation is not required for a plaintiff to state a claim under *Brophy*.").

60. *See id.* at 837–38 ("As the court recognized in *Brophy*, it is inequitable to permit the fiduciary profit from using confidential corporate information. Even if the corporation did not suffer actual harm, equity requires disgorgement of that profit.").

61. *See* F.T.C. v. QT, Inc., 512 F.3d 858, 863–64 (7th Cir. 2008) (allowing the F.T.C. to recover over $16 million in profits from the manufacturer of the fraudulent bracelets).

62. *See* F.T.C. v. Trudeau, 579 F.3d 754, 771–73 (7th Cir. 2009) (finding that courts have the discretion to fashion an appropriate remedy based on compensatory damages, consumer loss, and/or defendant's profits); *see also* F.T.C. v. Direct Mktg. Concepts, 624 F.3d 1, 14–15 (1st Cir. 2010) (granting disgorgement, called "damages," that was based on defendant's net revenues for a bogus dietary supplement that "cured cancer" among other things); United States v. Keystone Corp., 763 F. Supp. 2d 633, 637-42 (S.D.N.Y. 2011) (involving disgorgement's first ever appearance in antitrust, where the court approved a consent decree).

63. Roberts, *supra* note 51, at 1055–58; Caprice L. Roberts, *Disgorgement as a Moral*

IX. Equitable Restitution

The forms of Equitable restitution we will study are the constructive trust,[64] the equitable lien,[65] and accounting-disgorgement.[66] Accounting will be discussed separately following the constructive trust and the equitable lien.

A. Constructive Trust and Equitable Lien

Equitable restitution means no jury trial, a court order to the defendant, personal or contempt enforcement, and a property-based order. The court will hold that the successful constructive-trust plaintiff "owns" all the asset and has an equitable title, a property right. The defendant has only the legal title, which he holds as constructive trustee for the plaintiff. According to the maxim, "Equity acts in personam, the law in rem," the judge's personal order to the defendant, potentially enforced by contempt, will be to convey the property to the plaintiff. In contrast, Legal restitution will lead to a plaintiff's money judgment collected in rem or impersonally from defendant's property.

A plaintiff's equitable lien is a security interest for an amount, not complete title. A judge will impose an equitable lien when a constructive trust would "overkill." For example, if the defendant embezzles $250,000 and buys a house for that amount, the judge will impose a constructive trust, enforced as summarized above. On the other hand, if the defendant embezzles $25,000 and spends it to remodel the kitchen in his $250,000 house, the judge will impose an equitable lien for $25,000, a security interest the plaintiff can foreclose.[67]

In addition to measuring recovery by the defendant's gains when the plaintiff may not be able to prove compensatory damages, a plaintiff may seek equitable restitution through a constructive trust to recover specific property and to outrank defendant's other creditors.

Compass of Breach of Contract, 77 U. CINN. L. REV. 991 (2009).

64. *See* RESTATEMENT (THIRD) RESTITUTION & UNJUST ENRICHMENT § 55 (2011) (discussing restitution and constructive trusts).

65. *See id.* § 56 (discussing restitution and equitable liens).

66. *See id.* § 51 (discussing restitution and the enrichment of wrongdoers).

67. DOBBS, *supra* note 35, § 4.3(3) at 602 (utilizing a similar fact pattern); RESTATEMENT (FIRST) OF RESTITUTION § 160 (1937) (same).

Since the plaintiff owns the constructive trust asset, the plaintiff must "trace" her asset—following her property into its product.[68]

Example of Tracing: Defendant embezzles money from Plaintiff.[69] Defendant buys a racehorse named Just Deserts with Plaintiff's money. Defendant gives Just Deserts to his daughter. Just Deserts wins a purse in a race. The judge finds that Defendant's daughter is a constructive trustee of Just Deserts and the purse for plaintiff. As a donee she is not entitled to a bona fide purchaser defense. The judge traces Plaintiff's money to Defendant, into Just Deserts, from Just Deserts into the purse, and then grants Plaintiff constructive-trust recovery, against the property which is identified with Defendant's wrong and unjust enrichment. "If so, a constructive trust may be deemed imposed upon such funds, which trust would accordingly follow the 'beneficial interest' of ownership in the true asset."[70]

The plaintiff's tracing ends where the plaintiff's proof ends. Suppose the plaintiff traces her embezzled money into the defendant's bank account and that account fluctuates as the defendant deposits and withdraws funds. The judge will presume that the plaintiff's equitable lien or constructive trust money is last out of the defendant's bank account, and it will cap the plaintiff's tracing at the lowest balance in the defendant's account; these techniques will accommodate the plaintiff and the defendant's other creditors.[71]

In working out tracing, the court will consider the defendant, the plaintiff, and, notably, third parties, including the defendant's creditors and his family. Common sense also plays a role, in particular in examining

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68. *See* Savalangam v. Unum Life Ins. Co. of America, No. 09-4702, 2011 WL 1584055, at *11 (E.D. Pa. Apr. 26, 2011) (requiring strict tracing and refusing to relax it); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 58, 59 (2011) (discussing tracing property into and through a commingled fund and following property into its product and against transferees); DOBBS, *supra* note 35, at § 6.1 (detailing how an individual must trace their property through a constructive trust).

69. LiButti v. United States, 107 F.3d 110 (2d Cir. 1997) (involving a similar fact pattern but a horse named "Devil His Due").

70. *Id.* at 125; *see also* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 58 cmt. d (2011) (defining traceable product).

71. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 59 (2011) (describing how a court will calculate the plaintiff's tracing); Mallory Sullivan, Note, *When the Bezzle Bursts: Restitutionary Distribution of Assets After Ponzi Schemes Enter Bankruptcy*, 68 WASH. & LEE L. REV. 1589, 1609 (2011) (discussing a dispute between tracing and pro rata in Restitution (Third) of Restitution & Unjust Enrichment notes). For a refinement on the statement in the text, if the defendant made an earlier withdrawal that she invested profitably, the plaintiff may trace into those profits.

whether the court should follow the logic of the plaintiff's equitable "ownership" of the asset and apply tracing rules beyond the policy justifications that give rise to tracing. When the real dispute is between the plaintiff and third parties, the creditors and family members mentioned above, the court may seek principles of confinement to suspend the policy of preventing or reversing the defendant's unjust enrichment to prevent the plaintiff's excessive recovery.[72]

Example: Elizabeth embezzles $250,000 from Employer. She uses $25,000 of the stolen money to buy a $1,000,000 life insurance policy. We don't know where the other $225,000 is, except that it's gone. Elizabeth dies. The $1,000,000 insurance proceeds are paid to her estate.

We will examine Employer's three possible recoveries: $1,000,000, $250,000, and $25,000.

First, Elizabeth was solvent, she had neither creditors nor dependents. Employer seeks restitution for $1,000,000 by tracing its stolen money into a constructive trust in the swollen asset, the policy proceeds. Because all of the premiums were paid with Employer's money, it claims to be the equitable owner of $1,000,000. The Estate holds the $1,000,000 as constructive trustee for Employer.

Second, Elizabeth left no dependents, but a swarm of creditors. Her estate has only one asset, the insurance proceeds. Wrongdoer-Elizabeth is not around. The contest is between Employer and Elizabeth's other creditors. A full constructive trust, $1,000,000, will give Employer a recovery that exceeds its loss and it will leave Elizabeth's creditors without any recovery. Considering the third-party creditors' interests, Employer has an equitable lien or constructive trust for $250,000.[73]

Third, Elizabeth dies survived by three children under seven but no creditors. A different set of third parties may lead to a different result. To begin with, the social function of life insurance is to take care of the decedent's family. The amount of premiums Elizabeth paid with Employer's funds was $25,000. The children's lawyer may argue for

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72. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 61 (2011) (stating that a claimant may be entitled to a recovery exceeding the amount of the claimant's loss but that claim is subordinated to the claims of creditors).

73. *See id.* § 60 ("[A] right to restitution from identifiable property is superior to the competing rights of a creditor of the recipient who is not a bona fide purchaser or payee of the property in question."). This Article does not discuss pro rata recovery wherein each creditor shares in the fund in proportion to its percentage of the total debts. *See* Sullivan, *supra* note 71, at 1601–10.

giving Employer an equitable lien for $25,000, the amount of insurance premiums Elizabeth paid with its money.

Following a strict-tracing, maximum-deterrence approach, a court might hold that Employer takes all of the $1,000,000. The late Professor Palmer condemned this approach. He observed that

> we are cursed with a lawyer's logic that reaches an undesirable result as the logical deduction from a fixed premise. There are several forms of cure: the use of common sense; the recognition that there are few if any universals in the law; or an examination of the premise. In this case the premise is false.[74]

The Restatement, however, favors Employer's recovery of the amount of its loss, $250,000.[75]

Rejecting the Employer's full-monte constructive trust when restitution is not a contest between the plaintiff and the defendant but between the plaintiff and others, the Restatement defaults to awarding the Employer restitution that equals compensatory damages; this illustrates once again the compensatory principle's magnetic effect. The result favors Employer's full compensation in competition with Elizabeth's innocent children. The Restatement recognizes principles of confinement to curb restitution that exceeds the needs of reversing unjust enrichment. An observer is hard put to maintain that the Restitution Restatement disfavors restitution so thoroughly that it subordinates restitution to compensatory damages. The embezzler's children are remitted to arguing, unsuccessfully, that the Restatement has traced "too far" and has not curbed restitution enough.

B. Equitable Accounting

Accounting, also known as disgorgement, is a vehicle for equitable restitution that is not based on a res or fund. It does not require the plaintiff to trace "her" asset.[76] Instead, it captures the defendant's gains from other sources. The successful accounting plaintiff as judgment creditor is not

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74. PALMER, *supra* note 30, § 2.15.

75. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 61 cmt. b, illus. 3 (2011) (using the same facts and calculating recovery in the amount of $250,000); *see also* Friedmann, *supra* note 35, at 1916–17 (using the same reasoning in a similar hypothetical).

76. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 58 cmt. c (2011) ("[P]rofits subject to disgorgement need not be the traceable product of any property in which the claimant has an interest."); DOBBS, *supra* note 35, § 4.3(1) (discussing disgorgement and how it differs from tracing).

limited to recovering her former property. She may satisfy her money judgment out of any of the defendant-judgment debtor's property. But, unlike a constructive trust, the plaintiff's money judgment for an accounting will not outrank the defendant's other creditors.[77]

There are two qualifications on the "equitable" part of "equitable accounting": First, as discussed above, a successful plaintiff's accounting will lead to money recovery, not to a traditional equitable remedy.[78] The Restatement classifies accounting under the heading of "Restitution via money judgment."[79] Second, the court may recharacterize a plaintiff's demand for an accounting as damages and require a jury trial.[80]

To begin with an easy example, Defendant, a trustee, "borrows" trust money to speculate in grain futures, an investment that would be off limits for the trust. She makes a killing. The trust beneficiary's compensatory damages would be the amount lost from Defendant failing to make qualifying investments. The beneficiary will, however, be entitled to restitution of all of the trustee's gain.

> If . . . the trustee chances . . . her arm and applies trust funds in a speculative venture that yields a higher return, there is no additional basis for allowing the trustee to participate in the gains. Moreover, higher profits are often associated with higher risk. This merely compounds the wrongdoing and further affirms the need for a complete disgorgement of the profits.[81]

Another example: We will follow the Kentucky Supreme Court's decision in *Edwards v. Lee's Administrator*[82] through the Restatement's treatment as accounting to examine more subtle restitution measurement issues. The entrance to The Great Onyx Cave was on Edwards's property, but one-third of the cave's length was 360 feet under neighbor Lee's land.[83]

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77. *See* FTC v. Bronson Partners, LLC, No. 10-0878-CV, 2011 WL 3629718, at *10 (2d Cir. Aug. 19, 2011) ("Nor is an agency that has won a disgorgement order entitled to priority over the other creditors of the defendant.").

78. PALMER, *supra* note 30, § 1.5(c), at 24 (stating that proper equitable accounting results in a monetary judgment).

79. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT, ch. 7, topic 1 (2011).

80. *See* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479–80 (1962) (ordering a jury trial).

81. Devonshire, *supra* note 56, at 408 n.138.

82. *See* Edwards v. Lee's Adm'r, 96 S.W.2d 1028, 1032–33 (Ky. 1936) (finding that the plaintiff's correct restitution recovery was the net profits received by defendants on whose land the entrance to the cave was located, with the cave extending under plaintiff's property).

83. *Id.* at 1029–30.

Edwards developed the whole cave and made buckets of money from tourists.[84] Edwards was a conscious tortfeasor who had trespassed on Lee's property; developing the part of the cave under Lee's land was a tort.[85]

Although Edwards thought that a "reasonable" rent measure of damages was more fitting, the court turned to restitution. How much restitution should Lee recover from Edwards?[86] Lee, who had no surface access to the cave on his property, lacked traditional compensatory tort damages measured by diminution or cost to restore. By his surreptitious taking, Edwards deprived Lee of the opportunity to bargain, to negotiate a lease, license, or easement. The price that bilateral monopolists Lee and Edwards would have set in a hypothetical bargain would probably have considered Lee's lack of access along with Edwards's entrepreneurship in setting consideration. We are assuming that negotiation between Lee and Edwards would have been likely to consider Lee's ownership of one-third of the cave, but to end with a lower-priced lease, easement, or license.

In the accounting, the court's first decision was to divide the cave. The court set the cave as divided—two-thirds Edwards's and one-third Lee's.[87] The court's length-based reference point has an arbitrary quality, because it is unrelated to the legal and economic realities of the entrance on Edwards's land and his business acumen.[88] Thus, it favored plaintiff Lee and advanced the last half of the Restatement's approach to restitution for a wrong, the plaintiff's recovery of "market value or more."[89] The unasked question was, if Edwards had not trespassed would his earnings have been reduced by one-third?

What should the court include as Edwards's improper gain or unjust enrichment in calculating Lee's restitution? Edwards had operated a hotel for tourists who came to visit the cave. In calculating Lee's restitution, should the court consider that the hotel's income comprised part of Edwards's relevant

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84. *Id.* at 1028–29 (describing defendant's efforts in advertising and building on the land to attract tourists to visit the cave).

85. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 40 cmt. c, illus. 4 (2011) (using the facts from *Edwards* to illustrate the concepts of restitution from trespass).

86. *See id.* § 49 (describing how to calculate the measure of unjust enrichment).

87. *See id.* § 51 cmt. g, illus. 15 (dividing the profits on the same ratio as the physical division of the cave).

88. *See* PALMER, *supra* note 30, §§ 1.8–4.2 (describing the factors that go into a resitutionary recovery such as business skill of the parties involved and right of access to the contested area).

89. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 51(2) (2011) ("The value for restitution purposes of benefits obtained by the misconduct of the defendant, culpable or otherwise, is not less than their market value.").

income? The hotel income is "too far" from Edwards's trespass; in the Restatement's words, it is too "remote."[90] Another way to reject income from the hotel is to say that including it in Edwards's receipts would be "confiscatory rather than restitutionary."[91] The court, the Restatement says, should measure a plaintiff's restitution to avoid, "so far as possible," imposing a "penalty" on the defendant.[92] The Restatement seems here to be eschewing punitive damages.

The court's next decision was whether to award Lee all of Edwards's receipts for operating the cave or whether to subtract Edwards's expenses and award Lee Edwards's net profit. "The court will avoid unjust enrichment to the plaintiff and therefore an applicant for relief must not unfairly deny the value provided by the defendant."[93] The court used the somewhat arbitrary length-based two-thirds–one-third division to set Lee's restitution for Edwards's unjust enrichment at Edwards's cave-related receipts minus one-third of his costs or expenses.[94]

A final decision concerned what expenses Edwards may deduct. The Restatement limits him to the "necessary" "cash outlays" of developing and operating the cave. It rejects Edwards's services in discovering, developing, and operating the cave.[95] The conscious tortfeasor cannot recover for his risk taking, acumen, and entrepreneurship.[96] Professor Friedmann grumbles that Edwards's contribution was "completely disregarded," but he speculates

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90. *Id.* § 51 cmt. f, illus. 13.

91. *Id.*

92. *Id.* § 51(4).

93. Devonshire, *supra* note 56, at 404.

94. *See supra* notes 82–87 and accompanying text (describing the remedy for Edwards v. Lee's Administrator whereby the profits were divided on the same ratio as the division of the cave). *But see* Cnty. of Essex v. First Union Nat'l Bank, 891 A.2d 600, 607 (N.J. 2006) (finding that the plaintiff-County could recover from the gross profits from the bribing bank, which equaled the "total fees received [and retained] by the bank").

95. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 51 cmt. f, illus 13 (2011) (allowing division of the net profits realized from exhibiting the cave but not from operating the hotel).

96. Professor Devonshire distinguishes subtracting the defendant's "expenses" from "allowances," stating:

> Technically, the [defendant's] recovery of legitimate expenses is not an allowance. Such sums are deducted from gross receipts to produce the net profit in respect of which allowances are claimed. Allowances properly so-called fall into two basic categories: (i) awards for the fiduciary's industry, enterprise and skill; and (ii) apportionment of profits between fiduciary and principal. The apportionment of profits between defaulting fiduciary and principal is only granted in exceptional cases.

Devonshire, *supra* note 56, at 404.

that excluding his income from the hotel was "a crude way [for the court] to compensate [Edwards] for his entrepreneurial contribution."[97]

Defendant Edwards used plaintiff Lee's property for a profitmaking investment to earn money that Lee would probably not have made. The plaintiff may recover more than his original loss. To prevent the tortfeasor's unjust enrichment, his victim may recover the wrongdoer's profit. The plaintiff's restitution that exceeds compensatory damages is not a "windfall" or an overpayment to the plaintiff because it does the policy-based work of deterrence by reversing the defendant's unjust enrichment.

If deterrence is the reason to take unjust enrichment away from the defendant, why does the court give it to the plaintiff? There are several possible reasons: The defendant used the plaintiff's property. Granting the plaintiff restitution has the public benefit of encouraging the plaintiff's private enforcement of the legal standard. The plaintiff may use the restitution money to pay the expenses of preparing and proving the defendant's improper gain.

The Restatement sometimes compares the plaintiff's restitution to her compensatory damages.[98] It is careful to avoid a punitive "penalty" restitution recovery.[99] Having already discussed compensatory damages and restitution, we turn to restitution and punitive damages.

X. Punitive Damages and Restitution

Punitive damages are a complex and controversial branch of U.S. private law. In the last generation, the U.S. Supreme Court has decided several punitive damages appeals with an eye to curbing punitive damages' excesses.[100] Neither the first Restatement of Restitution nor Professor George Palmer's four-volume Restitution treatise refers to punitive damages. Restitution (Third) Restitution & Unjust Enrichment observes that any so-called restitution liability that exceeds the defendant's profits would cross the border into the territory of punitive.[101] A plaintiff's

97. Friedmann, *supra* note 35, at 1918–19.

98. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 51 cmt. b, illus. 1 (2011) (finding that restitution equals compensatory damages).

99. *Id.* §§ 42 cmt. d, illus. 2, 51(4).

100. At this writing, the Court's last decision is *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 514 (2008) (finding that the maximum amount of punitive damages equals the amount of compensatory damages).

101. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 42, 51 (2011) (stating that a restitutionary recovery should not have a punitive effect).

recovery of both her damages and defendant's profits would be, the Comment observes, "anomalous in restitution terms, constituting a punitive sanction."[102] Yet "disgorgement of wrongful gain is not a punitive remedy."[103] Thus, the Restatement approves punitive damages to augment restitution when the defendant's misconduct satisfies both standards; the Restatement cites and quotes Justice Traynor's decision in *Ward v. Taggart* which is quoted below.[104]

Accommodating principles of punitive damages and restitution and law and equity is complex. Neither punitive damages nor restitution compensates the plaintiff. Both deter. A court measures both restitution and punitive damages to deflect potential defendants from profitable misconduct by taking a defendant's benefit or profit. Punitive damages, in addition, punish the defendant. Confusion is inevitable.[105]

The policy justifications of deterrence and punishment are not hermetically sealed off from one another. The court determines the difference between restitution and punitive damages by considering how much deterrence and whether, in addition, the defendant ought to be punished. Most observers will find some overlapping territory. And different observers will locate the boundary in different places.[106]

Scholars cite punitive damages in different ways to justify restitution. Professor Gail Heriot suggested restitution as an alternative to punitive damages because she argued that punitive damages are unprincipled.[107] In the United Kingdom, the defendant's profitmaking misconduct that "may well exceed the compensation payable to the plaintiff" is one ground for the court to award the plaintiff punitive damages.[108] "[I]f the courts are willing to go to the lengths of punishing the profit-seeking deliberate tortfeasor," Professor Burrows argues, "it arguably follows . . . that they ought to be

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102. *Id.* § 42 cmt. d.

103. *Id.* § 51 cmt. k.

104. *Id.* § 51 reporter's note k.

105. City & Cnty. of San Francisco v. P.G.&E., 433 F.3d 1115, 1125 (9th Cir. 2004) (stating punitive damages policy for restitution; Restitution penalizes past unlawful conduct and deters future unlawful conduct).

106. *See* Gail Heriot, *Civilizing Punitive Damages: Lessons from Restitution*, 36 LOY. L.A. L. REV. 869, 871, 879–80 (2003) (equating deterrence with punishment and stating that punitive damages compensate); *see also* TruGreen Cos. v. Mower Bros., 199 P.3d 929, 932–33 (Utah 2008) (stating that restitution would punish the defendant).

107. *See* Heriot, *supra* note 106, at 882, 886 (arguing punitive damages are not the best deterrence and that restitution is a viable alternative).

108. Rookes v. Barnard, [1964] A.C. 1129, 1226 (U.K.).

prepared to go the lesser length of awarding a restitutionary remedy stripping the deliberate tortfeasor of some or all of his ill-gotten gains."[109]

Most plaintiffs, forced to choose between the two, would prefer punitive damages over restitution.[110] However, a neglected feature of the Supreme Court's frequently discussed decision in *United States v. Snepp*,[111] is that Court's preference for restitution in the form of constructive trust instead of punitive damages.[112]

After former CIA employee Frank Snepp published his book, *Decent Interval*, the government sued him for breach of their contract that called for the CIA's pre-publication review and approval.[113] Snepp's book, the government conceded, contained no nonpublic, classified matter.[114] The lower courts agreed almost without discussion that Snepp should be enjoined from future publishing before submission to and review by the CIA.[115]

The Fourth Circuit majority had favored punitive damages.[116] The majority decided that Snepp breached his contract, but that there was no fiduciary breach.[117] So the government could recover compensatory

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109. ANDREW BURROWS, 3 THE LAW OF RESTITUTION 654 (2011).

110. The plaintiff's tactical choice between the remedies may be more subtle than indicated in the text. Suppose that the trustee-fiduciary who breached her duty and made a tidy profit is sympathetic, hardly a willful, person. The standard for recovery of her profits is clear, but punitive damages are subject to the fact finder's discretion. Restitution may be plaintiff's more promising theory. Thanks to Douglas Laycock for this point.

111. *See* United States v. Snepp, 444 U.S. 507, 510–11, 514–16 (1980) (finding that former CIA agent breached fiduciary obligation by failing to submit material to the CIA prior to publication and that the proceeds from the breach were to be placed in a constructive trust).

112. *See* OWEN FISS & DOUG RENDLEMAN, INJUNCTIONS 483 (2d ed. 1984) (discussing *Snepp*).

113. *See* United States v. Snepp, 456 F. Supp. 176, 177 (E.D. Va. 1978), *aff'd in part, rev'd in part, and remanded*, 595 F.2d 926 (4th Cir. 1979), *rev'd and remanded*, 444 U.S. 507 (1980) ("[T]o redress . . . the defendant's breach of his contractual and fiduciary duties caused by his failure to submit to the CIA for its initial review all manuscripts which contain information gained by him as a result of his CIA employment.").

114. *See Snepp*, 595 F.2d at 929 ("The CIA does not assert, however, that the book disclosed classified information or information that defendant had no right to publish.").

115. *See Snepp*, 456 F. Supp. at 182 ("[T]he defendant will be enjoined from any further violation of his secrecy agreement by requiring him to submit to the [CIA] for pre-publication review any manuscript . . . .").

116. *See Snepp*, 595 F.2d at 935 ("[W]e think that the imposition of a constructive trust was improper and that the government's sole remedy for breach of the contract should be the recovery of compensatory and punitive damages as the proof may support and as a jury may assess.").

117. *See id.* at 936 (finding that Snepp's employment contract with the CIA did not

damages measured by its injury, plus punitive damages measured by punishment and deterrence.[118] The government's compensatory damages, however, were not quantifiable.[119] Moreover, a plaintiff usually cannot recover punitive damages for the defendant's breach of contract unless it proves an independent tort.

District Judge Lewis,[120] Judge Hoffman dissenting in the Court of Appeals,[121] and, finally, the Supreme Court majority[122] agreed that Snepp held all of his receipts from "Decent Interval" as a constructive trustee. The Supreme Court found that Snepp had committed a fiduciary breach.[123] It reinstated the District Court's constructive trust measured by Snepp's gains, the royalties he had received.[124]

The Court's policy justification to impose the constructive trust was to remove any incentive to breach the contract. The majority explained that "nominal damages are a hollow alternative, certain to deter no one. The punitive damages recoverable after a jury trial are speculative and unusual. Even if recovered, they may bear no relation to either the Government's irreparable loss or Snepp's unjust gain."[125]

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create any fiduciary duties regarding the disclosure of unclassified information).

118. *See id.* at 937 ("Such damages are given to the plaintiff over and above the full compensation for his injuries, for the purpose of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example.").

119. *See id.* at 936 ("The district court, of course, found that the government's damages were not quantifiable . . . .").

120. *See* United States v. Snepp, 456 F. Supp. 176, 182 (E.D. Va. 1978), *aff'd in part, rev'd in part, and remanded*, 595 F.2d 926 (4th Cir. 1979), *rev'd and remanded* 444 U.S. 507 (1980) ("Therefore the Court will exercise its equity powers and impose a constructive trust . . . .").

121. *See Snepp*, 595 F.2d at 938 (Hoffman, D.J., dissenting) ("[M]y disagreement lies in the rejection of the constructive trust established by the district court.").

122. *See Snepp*, 444 U.S. at 510 (1980) ("We agree with Judge Hoffman that Snepp breached a fiduciary obligation and that the proceeds of his breach are impressed with a constructive trust.").

123. *See id.*

124. The Supreme Court imposed a constructive trust on all of Snepp's book's income in royalties without crediting Snepp with the time and effort of writing the book. *See* Friedmann, *supra* note 35, at 1900 ("In *Snepp* and *Blake*, all the profits that the agents made were confiscated, although a large part of these profits might well have been attributed to their contribution."). Also, since the royalties came to Snepp, not from the government, but from book buyers by way of his publisher, the constructive trust prerequisite that the plaintiff trace its asset to the defendant was not satisfied. Under the circumstances, an accounting might have been a more appropriate equitable remedy.

125. *Snepp*, 444 U.S. at 514.

Snepp had demanded and argued for a jury trial.[126] Damages for breach of the contract and punitive damages would have been tried to a jury. But a constructive trust is an Equitable remedy that would be tried to the judge alone.[127] Except for dissenting Judge Hoffman of the Fourth Circuit, the other courts assumed, but neglected to discuss, that Snepp would not be entitled to a jury in a constructive trust action.

The Supreme Court's decision leaves us with some unanswered inquiries. Perhaps, the government sought an Equitable constructive trust to avoid a jury.[128] On the other hand, during the Cold War, punitive damages may have threatened Snepp because they are "an invitation to the jury to engage in prejudice and irrationality."[129] Since Snepp's book revealed nothing classified, perhaps, as Justice Stevens's dissent argued, the constructive trust unjustly enriched the government.[130]

The plaintiff may not have to choose. We turn from choosing either restitution or punitive damages to adding punitive damages to restitution, restitution plus punitive damages. We bridge a watershed to cross from restitution to prevent defendant's unjust enrichment with its policy base of deterring misconduct to punitive damages with the policy base of deterrence plus punishment. Since the distance is greater than first appears, the traveler needs principled distinctions, not vague ideas.

To begin with, the Supreme Court's decisions imposing due process-based post-verdict judicial review on jury verdicts for punitive damages have recognized that punitive damages punish and deter, but the Court has eroded those policies by insisting that the jury may punish the defendants only for harm to the discrete plaintiff, not for harm to others.[131] Focusing

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126. *See* United States v. Snepp, 595 F.2d 926 (4th Cir. 1979), *rev'd and remanded*, 444 U.S. 507 (1980) ("Although defendant prayed a jury trial, the district court heard the case without a jury and granted judgment for plaintiff . . . .").

127. *See id.* at 940 n.3 (Hoffman, D. J., dissenting) (finding that a jury would not hear arguments regarding a constructive trust).

128. *See* Joshua B. Bolten, Comment, *Enforcing the CIA's Secrecy Agreement Through Postpublication Civil Action:* United States v. Snepp, 32 STAN. L. REV. 409, 419–20 (1980) (arguing that the government sought an Equitable remedy to avoid a jury and avoid having to disclose classified information during discovery and at trial).

129. *Id.* at 427.

130. *See* United States v. Snepp, 444 U.S. 507, 521 (1980) (Stevens, J., dissenting) ("[The government] would have been obliged to clear the book for publication in precisely the same form as it now stands. . . . [T]he Government, rather than Snepp, will be unjustly enriched if he is required to disgorge profits attributable entirely to his own legitimate activity.").

131. Williams v. Philip Morris, 127 S. Ct. 1057 (2007). I criticized the *Williams* Court's distinctions in Doug Rendleman, *A Plea to Reject the United States Supreme Court's*

on one individual plaintiff and one, usually corporate, defendant subordinates punishment, emphasizes disgorgement, and moves punitive damages closer to restitution.

The distinction is not any clearer when viewed from the restitution-disgorgement end on the inquiry. "For the life of me," Mark Gergen wrote about an earlier draft of this Article, "I cannot figure out when or why disgorgement crosses over from the permissible end of deterrence to the impermissible end of punishment."

Two features of restitution's traditional vocabulary combine with limitations on punitive damages to militate against adding punitive damages to restitution. First, beginning with *Moses v. MacFerlan*,[132] courts have said that "Legal" restitution is governed by "equitable" principles.[133] And traditionally the Court of Chancery refused to grant punitive damages.[134]

Second, Legal restitution historically stemmed from assumpsit, a "quasi-contract." A plaintiff usually cannot recover punitive damages for breach of a contract.[135]

Because of the merger of Law and Equity, courts lowered the barriers that previously restricted punitive damages to the common law court and excluded them from Chancery.[136] The contract label for legal restitution is, at best, a legal fiction, and at worst, a fallacy.[137]

Should a defendant, after being compelled to disgorge unjust enrichment or profits as restitution, also pay the plaintiff punitive damages? We expect the defendant to assert that charging him profit that exceeds the

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Distinctions, *in* THE LAW OF REMEDIES: NEW DIRECTIONS IN THE COMMON LAW 533, 540–41, 543–45 (Jeff Berryman & Rick Bigwood eds., 2010 Irwin Law, Canada). Here I accept the Court's decision as positive law and point out its policy implications.

132. Moses v. Macferlan, (1760) 97 Eng. Rep. 676 (K.B.) 681; 2 Burr 1005, 1012.

133. *See id.* ("[T]he gist of this kind of action [that we name restitution today] is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.").

134. *See* Beals v. Washington Int'l, Inc., 386 A.2d 1156, 1159 (Del. Ch. 1978) (stating that the "court of conscience" avoids "vengeance" and that punitive "damages are absolutely forbidden in the well-established equity practice"); W. Hamilton Bryson, *The Merger of Common Law and Equity Pleading in Virginia*, 41 U. RICH. L. REV. 706 (2006); RENDLEMAN & ROBERTS, *supra* note 5, at 153–54, 359–61.

135. *See* RENDLEMAN & ROBERTS, *supra* note 5, at 152–53.

136. *See id.* at 153–54, 359–61. *Ward v. Taggart*, 336 P.2d 534, 537–38 (Cal. 1959), rejects the "contract" theory.

137. *See id.* at 492–93; Int'l Bankers Life v. Holloway, 368 S.W.2d 567 (Tex. 1963) (rejecting the "equity" theory).

plaintiff's losses already provides enough deterrence and doesn't require punishment in addition, or that disgorgement is already punitive.[138]

As an observer might expect from the confusion and policy conflict, courts' decisions are mixed. If disgorgement were punitive, the Restatement would not need to augment it with punitive damages. Courts have allowed plaintiffs who were fraud victims to recover restitution plus punitive damages from fraudsters.[139]

Breach of fiduciary duty may be a tort that qualifies the plaintiff to recover punitive damages. In *Hensley v. Tri–QSI Denver*,[140] an employer recovered for its employee's breach of contract and his breach of fiduciary duty.[141] The plaintiff qualified for punitive damages because of the defendant's fiduciary tort.[142]

On the other hand, courts apply principles of confinement to bar plaintiff's recovery of punitive damages to augment restitution. When a plaintiff sought rescission-restitution plus punitive damages, the court said that a rescinding plaintiff who cannot recover compensatory damages could not recover punitive damages either.[143] Also, where plaintiff based rescission on breach of contract, the court disallowed punitive damages citing the bar on punitive damages for breach of contract.[144]

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138. *See* Gergen, *supra* note 17, at 1934, 1964 n.181 (comparing disgorgement and punitive damages).

139. *See* Thomas Auto Co. v. Craft, 763 S.W.2d 651, 652–55 (Ark. 1989) (allowing purchasers of a defective car to recover restitution and punitive damages from seller); Ind. & Mich. Elec. Co. v. Harlan, 504 N.E.2d 301 (Ind. Ct. App. 1987) (awarding restitution and punitive damages for sale of land that fraudulently induced).

140. *See* Hensley v. Tri–QSI Denver Corp., 98 P.3d 965, 967–68 (Colo. Ct. App. 2004) (finding that punitive damages assessed against employee for breach of fiduciary duty was not limited to amount of actual damages).

141. *See id.* at 966 (affirming lower court's decision that employee breached fiduciary duty).

142. *See id.* at 967 (finding that punitive damages are only recoverable for tort claims and not ordinary breach of contract claims).

143. *See* Roberts v. Estate of Barbagallo, 531 A.2d 1125, 1132–33 (Pa. Super. Ct. 1987) (refusing to award punitive damages because there were no actual damages regarding the sale of a house that contained dangerous insulation). Both of the court's points are debatable. Under proper circumstances, a rescission plaintiff should recover restitution plus damages. RENDLEMAN & ROBERTS, *supra* note 5, at 607, 922–30. And under proper circumstances, a rescinding plaintiff may be entitled to recover punitive damages. *Id.* at 930; Fillion v. Troy, 956 S.W.2d 912 (Tex. Ct. App. 1983) (rejecting the defendant's argument that where there are no actual damages, there can be no punitive damages).

144. *See* McKinney v. Gannett Co., Inc., 660 F. Supp. 984, 1022 (D. N.M. 1981), *appeal dismissed*, 694 F.2d 1240 (10th Cir. 1982) (refusing to award punitive damages to a former newspaper owner in his suit against the purchasers on a breach of contract claim).

A court that seeks to refuse to add punitive damages to restitution can pick from several reasons: no punitive damages in equity; equity deters, but does not punish; no punitive damages in contract; no punitive damages for fiduciary breach; and punitive damages only for a tort.

Whether the preceding reasons are weighty is a different matter. A plaintiff's recovery of punitive damages should not, I submit, turn on that plaintiff's "form of action" but on whether the defendant's state of mind and misconduct satisfy the threshold tests for punitive damages. The court might examine the parties' relationship, the defendant's reprehensibility, and the context without respect to formal rules.[145]

Suppose that a defendant intentionally breached a clear duty to the plaintiff and obtained a profit. Is restitution that strips the defendant's illicit profits enough? *Ward v. Taggart*[146] grew out of a bent real estate agent's double-escrow scheme. Discovering that the seller's price was below the buyer's, in breach of his duty, he bought from the seller, sold to the buyer, and profited by the difference.[147] The court affirmed restitution plus punitive damages.[148] Punitive damages will, the court said, "discourage oppression, fraud, or malice by punishing the wrongdoer . . . where restitution would have little or no deterrent effect, for wrongdoers would run no risk of liability to their victims beyond that of returning what they wrongfully obtained."[149]

I leave to readers whether the copyright-infringer above who sought to "screw" professors should pay extra for his willful infringement. The copyright surrogate for punitive damages here is an alternative to damages and restitution, recovery of statutory damages of up to $150,000.[150]

XI. Conclusion

This modest effort has touched on and considered several points: Restitution and compensatory damages; how to measure restitution; how to define defendant's enrichment subject to restitution; what to subtract from that enrichment; and restitution and punitive damages.

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145. RENDLEMAN & ROBERTS, *supra* note 5, at 153; BURROWS, *supra* note 109, at 660; Devonshire, *supra* note 56, at 404.

146. *See* Ward v. Taggart, 336 P.2d 534, 535–39 (Cal. 1959) (finding real estate broker liable to purchasers for secret profits made by broker at expense of purchasers).

147. *Id.* at 535.

148. *See id.* at 538.

149. *Id.*

150. 17 U.S.C. § 504(c)(2) (2006).

Courts' decisions on which direction to take at each point depend on the balance between the policies of compensation, deterrence, and punishment. Courts and, in Legal restitution, juries lack clear definitions, boundaries, and landmarks to navigate these transitions. Their decisions are not uniform and may seem to possess an ostensibly random quality. To dissipate some of that randomness is one of the goals of this effort.

A court brings discretion and judgment to bear in deciding whether to grant and how to measure restitution. Professor Leon Green listed several overarching "factors" that influence the court's "determination of duties and through them the limits of protection afforded by law," these are administrative, ethical or moral, economic, prophylactic, and justice.[151] The court must also examine context, culpability, plaintiff's interest, and remedial alternatives. In addition to formal "rules," common sense, intuition, creativity, and morality play important roles.[152]

In following the policies of compensation, deterrence, and punishment through compensatory damages, measurement of restitution and punitive damages, we have observed that the courts' decisions are difficult and contested. Misunderstanding of basic restitution principles and rules hampers lawyers' and courts' analysis and prevents well-reasoned decisions. People emphasize the rules and policies in different ways. Some professional and judicial "reasoning" has not advanced beyond the early eighteenth century Chancellor's conclusion that restitution would take the defendant's liability "too far." That conclusion's converse is that sometimes compensatory damages or restitution would not take the defendant's liability "far enough." A clearer understanding of restitution principles and decisions as well as analysis based on whether particular remedies or measurements would advance or erode the policy justifications of compensating plaintiffs, preventing defendants' unjust enrichment, deterring the defendant and others, and punishing the defendant is greatly to be desired. The Restatement Third's blackletter rules and supporting Illustrations will be a crucial resource for students, instructors, lawyers, and judges who are grappling with restitution and related damages distinctions. Recasting Wallace Stevens's lines at the beginning of this Article, as restitution emerges from obscurity and confusion into lucid and accessible doctrine, it will manifest the Restatement's contributions.

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151. Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1034 (1928); Leon Green, *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255, 255–57 (1929), *reprinted in* LEON GREEN, THE LITIGATION PROCESS IN TORT LAW 153 (1965).

152. Gergen, *supra* note 17, at 1927–40 (describing the numerous factors that go into a restitution determination); DAGAN, *supra* note 4, at 4 (same).