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Cohabitation and the Restatement (Third) of Restitution & Unjust Enrichment

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Cohabitation and the Restatement (Third) of Restitution & Unjust Enrichment

Candace Saari Kovacic-Fleischer*

Abstract

The Restatement (Third) of Restitution & Unjust Enrichment clarified and modernized a field that had become muddled since the publication of the Restatement (First) in 1937. One area of modernization relates to the changes in law towards women, particularly changes in law toward female cohabitants. Published in 2011, the Restatement (Third) added a new Section 28, which rejected the view that it would be immoral for one cohabitant to bring suit against the other, and relaxed the restriction on recovery in unjust enrichment for “gratuitous” contributions. This Article reviews societal and legal changes for women since 1937 and notes that, in adding Section 28, the Restatement (Third) followed the methodology of the Restatement (First). The Article reviews the principles of restitution and demonstrates how Section 28 follows them. Section 28 is a welcome addition to the law of restitution, but the author suggests that some of the recoveries described in the illustrations are inadequate. For example, since homemaking services do not have a market value, attempting to put a monetary value on them tends to undervalue them. Limiting recovery to the value of services also ignores the concept of tracing the value of one’s contribution to an asset and recovering the enhanced value of the asset. The name in which the assets are titled should not negate the value of the contributions of the partner without nominal ownership. On the other hand, some illustrations to Section 28 describe adequate remedies, including sharing assets. The author notes the complexity inherent in measuring value in nonmarket, nonmarriage situations, but recommends that the illustrations with the more generous recoveries are appropriate for avoiding the unjust enrichment of one partner.

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I. Introduction

The Restatement (Third) of Restitution & Unjust Enrichment endorses the modern view that a partner in a marriage-like relationship may recover in unjust enrichment from the one who left with jointly created assets. In doing so, the Restatement (Third) is following the example of the Restatement (First) of Restitution, which endorsed the then modern view that a putative wife, one who thought she was married, could recover in unjust enrichment from her "spouse." Both Restatements rejected the reasoning of cases that denied recovery to women (usually women) because they were in illicit, or meretricious, relationships. The Restatement (First)

justified its rejection of this bar because the putative wife was the victim of deception or mistake. The Restatement (Third) rejects the bar on the ground that denying recovery to one partner can enrich the other, equally illicit, partner. The late Professor John Dawson, a leading voice in the articulation of the doctrine of restitution and unjust enrichment, would approve.

The addition of Section 28, Unmarried Cohabitants, to the Restatement (Third) is a good step toward protecting the frustrated expectations of financially vulnerable, trusting people, some of whom raised families with their prior "spouse." It raises many questions about the scope of relief, however. The enriched cohabitant frequently leaves with his (usually his) future security unchanged. His partner often may have little earned income of her own. Section 28 has differing emphases about the value of homemaking and helpmate services. Some Illustrations describe recoveries that involve sharing assets created during the relationship. Illustration 11, however, describes a woman who was an essential part of her partner's business and contributed ideas that helped it grow substantially. She would only be entitled to salary for that period but not any part of the increase in the business from her contributions (the "traceable product" from her services).

In this Article I explain why I think Professor Dawson would approve of the addition of Section 28, which would explicitly make restitution available to cohabitants who live as if they were married. I describe how the addition of Section 28 to the Restatement (Third) is consistent with the original Restatement's methodology and with changes in society, particularly for women. I then describe the law of restitution and how Section 28 fits into it. I conclude by describing various remedies illustrated in Section 28 and the questions raised by them.

II. Section 28 and Professor Dawson

Watching the Reporter, Professor Andrew Kull, put together the Restatement (Third) of Restitution & Unjust Enrichment, I was impressed by the gargantuan amount of work he did for more than ten years researching the field. How skillfully he analyzed and drafted. How kind he was in considering all suggestions. How painstaking he was putting everything together to be correct and fair.

Professor John Dawson, whose contributions to the field of restitution and unjust enrichment were enormous,¹ would be pleased. He said in his book, *Unjust Enrichment*, written less than fifteen years after publication of the Restatement (First) that "any highly developed legal system needs restitution remedies and cannot get on without them."² He was concerned, however, that "the practical limitations of our own working method [makes us] less generous than we could otherwise afford to be."³ In the fifty years since Professor Dawson wrote *Unjust Enrichment*, the law of restitution has developed substantially, enabling Professor Kull and the ALI to compile a new Restatement that describes a modern working method for analyzing claims in restitution.

Professor Kull sifted through more than seventy years of judicial and scholarly analysis since the original Restatement of Restitution appeared. He brought clarity to a field that had become muddled with inconsistency, with an eye favoring the more modern judicial formulations. This accords with the ALI's expressed goal for Restatements, that they provide "clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might be plausibly stated by a court."⁴ Inevitably, stating "the law as it presently stands" required that choices be made. The delicacy of the process of so "restating" the law is well explained by Professor Doug Rendleman in his article *Restating Restitution*.⁵ Those choices for the Restatement (Third) have been made adroitly and fairly by Professor Kull.

III. Overview of Restitution

Just as breach of contract and tort are substantive areas providing sources of liability, so too is restitution.⁶ The remedies in both contract and

1. See Candace S. Kovacic, *Applying Restitution to Remedy a Discriminatory Denial of Partnership*, 34 SYRACUSE L. REV. 743, 770 n.115 (1983) ("In his book, Professor Dawson discussed analytic problems in the area of restitution, but not from the point of view that restitution should be abandoned . . . but rather that it should be better analyzed so that it can be given wider application.").

2. JOHN P. DAWSON, *UNJUST ENRICHMENT* 150 (1951).

3. *Id.* at 127.

4. American Law Institute, *Projects*, <http://www.ali.org/index.cfm?fuseaction=projects.main> (last visited Oct. 5, 2011) (on file with the Washington and Lee Law Review).

5. Doug Rendleman, *Restating Restitution: The Restatement Process and Its Critics*, 65 WASH. & LEE L. REV. 933, 942–43 (2008).

6. See Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1284–85 (1989).

tort cases generally measure a plaintiff's loss: in contract, compensation for loss of plaintiff's bargain; in tort, compensation for losses to a plaintiff's person or property. Unlike recovery in contract and tort actions, however, recovery in restitution is not based on what a plaintiff lost; rather, it measures what a defendant gained unjustly at a plaintiff's expense.⁷ As I wrote in 1983, "the many definitions of restitution articulated throughout the years consistently contain the following three elements: '(1) the defendant has been enriched by the receipt of a benefit; (2) the defendant's enrichment is at the plaintiff's expense; and, (3) it would be unjust to allow the defendant to retain the benefit.'"⁸ Besides quoting from Section 1 of the Restatement (First) of Restitution, I referenced Dean J.B. Ames's and Professor William A. Kenner's writings from the late 1800s, which listed those three basic elements in the context of the legal action referred to as quasi-contract.⁹ Recognizing that the same elements were present in the equitable principles of constructive trust, Warren A. Seavey and Austin W. Scott, the Reporters of the Restatement (First), put quasi-contract and constructive trust together in that one Restatement, published in 1937.¹⁰ As Professor Douglas Laycock said: "This was a major accomplishment; it created the field."¹¹ Professor Dawson recognized the potential scope of the field. He said:

My own conclusion is that restitution remedies in our law have a roving commission. The generalizations now built around them and the techniques they provide have implications that reach in every direction, in unsuspected ways. No area is marked off as exempt. We have not

7. See Kovacic, *supra* note 1, at 764–67; Laycock, *supra* note 6, at 1285–86; see also Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504, 504 (1980) (stating that restitution prevents unjust enrichment: torts repair wrongfully inflicted damage).

8. Kovacic, *supra* note 1, at 757–59 (citations omitted).

9. See WILLIAM A. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS 16 (1893) ("[N]o one shall be allowed to enrich himself unjustly at the expense of another."); J.B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 53, 64 (1888) ("Quasi-contracts are founded . . . upon the fundamental principle of justice that no one ought unjustly to enrich himself at the expense of another."); see also 3 FREDRICK WOODWARD, THE LAW OF QUASI-CONTRACTS 4 (1913) (stating that quasi-contracts are "legal obligations arising . . . from the receipt of a benefit the retention of which is unjust, and requiring the obligor to make restitution"), quoted in Kovacic, *supra* note 1, at 757 n.72.

10. See GRAHAM DOUTHWAITE, ATTORNEY'S GUIDE TO RESTITUTION § 8.1, at 323 (1977) (noting that restitution derives from both common law and equity, both of which are based on the principle that "recovery of a benefit should be allowed where one has received the benefit under circumstances which render it unjust that he should retain it" (citations omitted)), quoted in Kovacic, *supra* note 1, at 757 n. 72.

11. Laycock, *supra* note 6, at 1278.

yet absorbed all the contributions that they made or foreseen those still in the making.¹²

In contrast to Professor Dawson's statement that restitution remedies have a "roving commission" and "implications that reach in every direction," some have criticized the field as too vague or broad. Some have even quoted his comment that when "formulated as a generalization, [unjust enrichment] has the peculiar faculty of inducing quite sober citizens to jump right off the dock."¹³ In context, however, it would appear that the statement does not suggest that restitution is a narrow field, but rather "that it should be better analyzed so that it can be given wider application."¹⁴

Not only do critics ignore Professor Dawson's concern that limitations of the method of analysis of restitution limited its generosity, but they also ignore the analyses of Judge Learned Hand and the Reporters of the Restatement (First) of Restitution.¹⁵ Judge Hand pointed out that if unjust enrichment is vague, so too are the concepts of the "ordinar[y] prudent man" and "enjoyment of land."¹⁶ Reporters Seavey and Scott noted that the concepts of "promises" in contract law and "wrong" and "harm" in tort law are no more narrow than the concept of restitution.¹⁷ They said that what had been required in tort and contract law was "a large number of individual rules to determine when relief will be given," and that the same would be required for restitution: "[A]n extensive set of individual rules to spell out what is meant by 'unjust.'"¹⁸ In the years since Judge Hand and

12. DAWSON, *supra* note 2, at 117.

13. DAWSON, *supra* note 2, at 8; *see also, e.g.*, Daniel Friedmann, *supra* note 7, at 504–05 ("The concept of unjust enrichment is notoriously difficult to define. It has on occasion been regarded as too indefinite and vague to be recognized as a general legal principle . . ." (citations omitted)); Dale A. Oesterle, 79 MICH. L. REV. 336, 337 (1980) (reviewing G. PALMER, *THE LAW OF RESTITUTION* (1978)) ("Restitution is a term that describes a variety of common law rights . . ."); Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 716 (2006) ("[T]he law of restitution is both potent and poorly understood. In these circumstances, it seems appropriate to recall Professor Dawson's warning that when 'formulated as a generalization, [unjust enrichment] has the peculiar faculty of inducing quite sober citizens to jump right off the dock.' (citations omitted)).

14. Kovacic, *supra* note 1, at 770 n.115.

15. *See id.* at 771–72 (noting Judge Learned Hand's defense of quasi-contract law). For further discussion of the historical development, criticism and defense of restitution as a cause of action, *see generally id.* at 761–74 and accompanying footnotes.

16. Learned Hand, *Restitution or Unjust Enrichment*, 11 HARV. L. REV. 249, 250 (1898).

17. Warren A. Seavey & Austin W. Scott, *Restitution*, 54 LAW Q. REV. 29, 36 (1938).

18. *Id.*

Reporters Seavey and Scott wrote, courts have developed a large number of individual rules to determine when relief will be given, albeit with confusions and inconsistencies. Professor Kull was able to draw from these rules to put together the Restatement (Third). This much needed work should minimize if not eliminate much of the confusion about the field.

Despite the publication of the Restatement (First) in 1937, restitution had not been well understood. "As Professor Dawson said in 1951, 'it is doubtful even now whether most lawyers have an adequate conception of the range and resources of the remedy.'¹⁹ It is doubtful whether the field is any better understood sixty years later. Judges and lawyers have found restitution confusing, at least in part, because the term has many synonyms, some of which, such as "quasi-contract," create confusion with contract law,²⁰ and because the term at times has dual meanings as either a cause of action or a remedy.²¹ In addition, some judges and lawyers view restitution as available only if "the remedy at law is inadequate,"²² which raises the question: Which law?

The Restatement (Third) clarifies the meaning of the many synonyms for restitution and adds the phrase "Unjust Enrichment" to the title to emphasize that they are overlapping topics.²³ Despite the fact that they are not always used synonymously, the Restatement (Third) uses the terms that way, unless the context requires a distinction.²⁴ It makes clear that because

19. Kovacic, *supra* note 1, at 761 (quoting DAWSON, *supra* note 2, at 22); *see also* DOUTHWAITE, *supra* note 10, § 1.1, at 2 (noting that a practitioner usually does not recognize "the restitutionary implications or potential of the problem before him"), *quoted in* Kovacic *supra* note 1, at 761 n.90; Laycock, *supra* note 6, at 1277 ("Despite its importance, restitution is a relatively neglected and underdeveloped part of the law.").

20. *See* Kovacic, *supra* note 1, at 761–63.

21. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT ch. 7, intro. note (2011) ("The awkwardness of using the word 'restitution' to identify both a claim based on unjust enrichment and the corresponding remedy means that this simple division of the overall subject matter is not always apparent from its terminology."); *see also* Laycock, *supra* note 6, at 1279–83 (discussing the many meanings of "restitution").

22. *See* CANDACE KOVACIC-FLEISCHER, JEAN LOVE AND GRANT NELSON, *EQUITABLE REMEDIES, RESTITUTION AND DAMAGES: CASES AND MATERIALS*, 547–48 (8th ed. 2010) (identifying cases that require an adequate legal remedy before considering a restitution claim).

23. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. c (2011) ("The title of the present Restatement incorporates both terms—not to imply that they are correlatives, much less synonyms, but to convey as clearly and immediately as possible an accurate idea of the overlapping topics treated herein.").

24. *See id.* ("When used in this Restatement to refer to a theory of liability or a body of legal doctrine, the terms 'restitution' and 'unjust enrichment' will generally be treated as synonymous. Any more particular meaning that the words may carry should be clear from

restitution is a source of liability,²⁵ the idea that it is available only if the remedy at law is inadequate for a different liability does not make sense.

IV. Restatement (First) of Restitution from 1937 and Restatement (Third) of Restitution & Unjust Enrichment from 2010 Compared

A. The Restatement (First) and Cohabitation

In 1937, when the Restatement (First) of Restitution appeared, unmarried cohabitation was socially unacceptable. Both before and after the appearance of the Restatement (First), courts based their decisions to deny recovery to unmarried cohabitants on moral judgments about "meretricious" or "illegitimate" relationships.²⁶ Statements in *Brown v. Tuttle*,²⁷ an early case from Maine, typified those attitudes. There a woman, who lived with a man "as husband and wife" from 1871 to 1884, brought suit to recover money she had loaned him and payment for her services after he left her to marry another woman.²⁸ In denying recovery, the court did not discuss whether the parties had a common law marriage or whether the woman was deceived into thinking that she was married. Nor did the court consider who benefitted and who lost by its decision. Refusing to imply a promise that her "husband" should repay her loan or pay her for her services, the court said:

The parties were living together in violation of the principles of morality and chastity, as well as of the positive law of the state; a relation to which the court can lend no sanction. The services rendered, as well as the money furnished, were in furtherance, and for the continuation of that unlawful relation. The law will imply no promise to pay for either. If there had been an express promise for such a purpose, the court would not enforce it.²⁹

the context.").

25. *See id.* cmt. a ("The identification of unjust enrichment as an independent basis of liability in common-law legal systems . . . was the central achievement of the 1937 Restatement of Restitution. That conception of the subject is carried forward here.").

26. *See e.g.*, *Swires v. Parsons*, 5 Watts & Serg. 357, 358 (Pa. 1843) ("The evidence establishes one of two things, either that the plaintiff and intestate were married, or that she was living in a state of concubinage Either position is fatal to the claim for compensation . . .").

27. *See Brown v. Tuttle*, 13 A. 583 (Me. 1888).

28. *Id.* at 583.

29. *Id.* at 584.

Similarly, shortly after the Restatement (First) appeared, the Appellate Court in Illinois denied recovery to a female cohabitant who sought payment for her services from her cohabitant's estate.³⁰ Testimony in *Usalatz v. Pleshe's Estate*³¹ showed that people in the community and decedent's family thought that she and the decedent were married, that the decedent referred to her as his wife, and that she used his name. The jury found against her, however, because she knew she was not married. The Appellate Court affirmed. The court said that while the decedent's conduct "was a deception upon the public," the evidence "does not make a prima facie case of her being deceived by any fraud of the decedent."³² The court then held:

It is a well-settled rule that a woman who knowingly and voluntarily lives in illicit relations with a man cannot recover on an implied contract for services rendered him during such relationship. Not only does the relationship as of husband and wife negative that of master and servant, but, such cohabitation being in violation of principles of morality and chastity, and so against public policy, the law will not imply a promise to pay for services rendered under such circumstances.³³

Neither court discussed the morality and chastity of the men in the relationships.

Despite societal disapprobation of a woman who lived with a man "in violation of the principles of morality and chastity," the Restatement (First) of Restitution addressed cohabitation in its chapters on mistake and fraud,³⁴ approving the exception articulated but not applied in *Usalatz*. The Restatement recommended recovery in restitution for a putative spouse, one who thought she was married but was not because of the fraud or mistake of the "quasi-husband."³⁵ That was not the

30. *Usalatz v. Pleshe's Estate*, 23 N.E.2d 939, 939-42 (Ill. 1939).

31. *See id.* at 942.

32. *Id.* at 941.

33. *Id.* at 942 (quoting *Stewart v. Waterman*, 123 A. 524, 526 (Vt. 1924)).

34. *See generally* RESTATEMENT (FIRST) OF RESTITUTION ch. 2, topic 2 (1937); *id.* at ch. 7.

35. *See id.* § 40 reporter's note a ("Whether or not the defendant was fraudulent, the older cases refused recovery on an implied contract and indicated that the wife was relegated to a tort action, usually useless because it did not survive the death of the pseudo husband as the contract action did."); *id.* § 134 cmt. a, illus. 2 ("A, a married man, fraudulently purports to marry B, who does not know that A is married. Believing that she is A's wife, B renders services to A. B is entitled to recover the reasonable value of her services, less the value of benefits received by her."); *see also id.* § 40 cmt. b ("The rule . . . is applicable both where the services are obtained by a consciously false statement and where they are the result of an

unanimous view of the courts at the time, as the Reporters noted: "[W]hether or not the defendant was fraudulent, the older cases refused recovery on an implied contract."³⁶ The Reporters chose, however, to follow those more generous later cases that "tend to allow relief in this situation."³⁷

B. Societal Changes Between 1937 and 2010

The "later cases" referred to in the Restatement (First) were modern at the time. Of course, what was modern in 1937 is no longer modern. In their note to Section 40, Reporters Seavey and Scott discussed putative marriages only in the context of putative wives. They may well have concluded that women, more than men, were the ones who were hurt "in this situation,"³⁸ particularly given the lack of employment opportunities for women at the time.

Much has changed for women since then. Putative wives routinely recover in unjust enrichment from their deceitful "husbands."³⁹ While in 1937 women had been voting for less than twenty years, today they have been voting for almost one hundred, and women hold many elected offices.⁴⁰ In 1937 employers could pay women less than men for the same work and could keep them out of the workplace altogether if they so chose.⁴¹ About twenty-five years later, the Equal Pay

innocent but material misstatement. The fact that the one rendering the services does not expect to be compensated therefor or otherwise to receive benefit is immaterial."); *id.* § 40 cmt. b, illus. 3 ("Mistakenly believing that he is properly divorced, A represents to B that he is single and goes through a ceremony of marriage A becomes sick and B assumes charge of family affairs, rendering personal service to A and supporting him by her earnings. B is entitled to restitution.").

36. *Id.* § 40 reporter's note a.

37. *Id.*

38. *Id.*

39. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 cmt. b (2011) (contrasting restitution available under Section 28 for a cohabitant with restitution available under the sections of misrepresentation or mistake for a putative spouse).

40. The Nineteenth Amendment to the Constitution of the United States, which conferred on women the right to vote, was approved in 1920. U.S. CONST. amend. XIX.

41. See Claudia Goldin, *Understanding the Gender Gap: An Economic History of American Women*, in EQUAL EMPLOYMENT OPPORTUNITY: LABOR MARKET DISCRIMINATION AND PUBLIC POLICY 17, 20 (Paul Burstein ed., 1994) (indicating that the difference between men's and women's earnings throughout much of history, and to some extent today, can be attributed to "wage discrimination").

Act⁴² amendment in 1963 to the Fair Labor Standards Act⁴³ and Title VII of the Civil Rights Act of 1964 prohibited those practices.⁴⁴

Prior to 1971, states could pass laws that distinguished between men and women merely by noting that men and women are different from one another. For example, in 1948 the United States Supreme Court upheld, against a Fourteenth Amendment challenge, a Michigan statute that prohibited women from working as bartenders unless they were the wife or daughter of a male bar owner.⁴⁵ Justice Frankfurter, noting that "alewives" according to Shakespeare, were "sprightly and ribald" said:

[b]eguiling as the subject is, it need not detain us long. . . . Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes⁴⁶

The Court held that the exception for wives and daughters was not irrational as the Michigan legislature could have thought women bartenders might "give rise to moral and social problems" that could be lessened by "the oversight . . . by a barmaid's husband or father," and that the legislature, which did not bar women from being waitresses in bars, did not need to address every aspect of the problem.⁴⁷ Justice Rutledge for the dissent would have held that the statute's distinction was "invidious," pointing out that the male bar owner did not need to be present when his wife or daughter tended bar.⁴⁸ In 1971, however, in a case involving a state

42. See Equal Pay Act of 1963, PUB. L. NO. 88-38, 77 Stat. 56 (1962) ("No employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work . . .").

43. See 29 U.S.C. §§ 201–219 (2006) (establishing minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments).

44. See 42 U.S.C. § 2000e-2(a)(1) (2006) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin.").

45. *Goesart v. Cleary*, 335 U.S. 464, 465–67 (1948).

46. *Id.* at 465–66.

47. *Id.* at 466.

48. *Id.* at 468 (Rutledge, J., dissenting).

statute preferring men over women as administrators of estates, the Supreme Court held that laws distinguishing between men and women must have "a fair and substantial relation to the object of the legislation" and not be validated merely for administrative convenience.⁴⁹

Much has also changed since 1937 in how the law regulates morality. In most states cohabitation and adultery are no longer criminal.⁵⁰ Homosexuality is no longer criminal,⁵¹ and societal views about same-sex marriage are not uniform. The incidence of cohabitation has increased substantially and is generally viewed with less disapproval than at the time the Restatement (First) appeared.⁵² In some cases a "stay-at-home-dad" is the complainant.⁵³ Not all courts view the woman, solely, as the "guilty" party. As Judge Shirley Abrahamson of the Supreme Court of Wisconsin said in *In re Steffes*⁵⁴ in 1980: "Why should the estate be enriched when that man was just as much a part of the illicit relationship as she."⁵⁵ The dissent in *Steffes*, however, was still of the view that "this court ought not to

49. See *Reed v. Reed*, 404 U.S. 71, 76 (1971).

50. See Brandon Campbell, Comment, *Cohabitation Agreements in Massachusetts: Wilcox v. Trautz Changes the Rules But Not the Results*, 34 NEW ENG. L. REV. 485, 489 (2000) (indicating that "cohabitation was a criminal offense in Massachusetts until 1987"); Jonathan Turley, *Criminal Adultery: States Ponder the Continuation of Puritanical Laws*, JONATHAN TURLEY RES IPSA LOQUITUR (Apr. 26, 2010), <http://jonathanturley.org/2010/04/26/criminal-adultery-states-ponder-the-continuation-of-puritanical-law> (last visited Oct. 5, 2011) (chronicling the history of criminal adultery statutes and states' decisions whether to repeal those statutes) (on file with the Washington and Lee Law Review); see, e.g., MICH. COMP. LAWS § 750.30 (2004) ("Any person who shall commit adultery shall be guilty of a felony; and when the crime is committed between a married woman and a man who is unmarried, the man shall be guilty of adultery, and liable to the same punishment.").

51. See *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (invalidating the criminality of homosexuality).

52. See *Marvin v. Marvin*, 557 P.2d 106, 109 (Cal. 1976) (stating that in the fifteen years since 1960 the number of cohabiting couples increased substantially); *Goode v. Goode*, 396 S.E.2d 430, 436 (W.Va. 1990) (stating that the number of couples living together increased substantially between 1970 and 1990); see also Terry S. Kogan, *Competing Approaches to Same-Sex Versus Opposite-Sex, Unmarried Couples in Domestic Partnership Laws and Ordinances*, 2001 BYU L. REV. 1023, 1025 n.5 (stating that cohabitation in the United States increased 400 percent between 1980 and 2000, representing 4.1 million of the approximately 93 million U.S. households in 1997).

53. See *Costa v. Oliven*, 849 N.E.2d 122, 125 (Ill. App. Ct. 2006) (holding that a male cohabitant who cared for the home and child was unable to recover from the female cohabitant, in whose name property was titled because of Illinois precedent against one cohabitant recovering from the other).

54. See *In re Steffes*, 290 N.W.2d 697, 705 (Wis. 1980) (holding that there was sufficient evidence to "support the trial court's finding that there was an implied promise to pay for the services plaintiff rendered").

55. *Id.* at 706.

allow [plaintiff] to assert a right to compensation growing out of a relationship which offends the standards of decency of any age."⁵⁶

Some things have not changed, however. Women's wages on average are still less than men's.⁵⁷ Women are still more often than men the primary caregivers at home and are still more often than men financially hurt when a relationship ends.⁵⁸ Because many couples now live in marriage-like relationships, if laws of the past are imported to modern day, many women will continue to be hurt.⁵⁹

C. Restatement (Third) of Restitution & Unjust Enrichment and Cohabitation

As the Restatement (Third) notes, many cases decided in the later part of the twentieth century and the first decade of the twenty-first century have allowed one cohabitant from a terminated relationship to recover from the other.⁶⁰ Just as at the time of publication of the Restatement (First) not all courts recognized unjust enrichment claims of putative wives,⁶¹ at the time of publication of the Restatement (Third) not all courts recognized unjust enrichment claims of knowingly unmarried cohabitants.⁶² For example, in

56. *Id.* at 712 (Coffey, J., dissenting).

57. See Laura Fitzpatrick, *Why Do Women Still Earn Less Than Men?*, TIME (Apr. 20, 2010), <http://www.time.com/time/nation/article/0,8599,1983185,00.html#ixzz1Eepcu53R> (last visited Oct. 5, 2011) (indicating that, as of 2008, the average woman only earned seventy-seven cents for every dollar earned by a man and that the disparity is even greater among black and Hispanic women) (on file with the Washington and Lee Law Review).

58. Diana Pearce, *The Feminization of Ghetto Poverty*, 21 SOCIETY 70, 70 (1983).

59. See Kogan, *supra* note 52, at 1027 (suggesting that extending legal recognition to cohabiting couples embraces "fairness, tolerance, and diversity").

60. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 reporter's note a (2011) (noting twentieth and twenty-first century decisions).

61. See *supra* notes 26–33 and accompanying text (identifying cases where putative wives were unable to recover).

62. Section 28 applies to both homosexual and heterosexual partnerships. See RESTATEMENT (THIRD) § 28 cmt. b ("For the purposes of this section, a 'relationship resembling marriage' includes a relationship between persons of the same sex."). The fact that women are more likely to be financially hurt when relationships end than men is not limited to heterosexual partnerships. In a homosexual relationship it is possible for one of the partners to assume the gendered role of "wife." Any cohabitant, man or woman, who is the helper to his or her partner's financial success at the expense of his or her own is financially harmed when a relationship terminates. This Article will speak of abandoned women, using this as a proxy for anyone who takes on a traditionally female gendered role in the same situation.

denying a cohabitant's claim, a 2004 case in Illinois⁶³ followed the reasoning of its Supreme Court in *Hewitt v. Hewitt*⁶⁴ from 1979. The court in *Hewitt* expressed the attitude that morality should be the basis for deciding whether or not to allow a claimant to recover. There, the plaintiff and defendant had lived together for fifteen years, had three children, and had represented themselves as married. The plaintiff claimed that the defendant had promised to share everything with her and that she had worked and borrowed money from her parents to help him with his dental education and establishment of his periodontal practice. After their separation, the woman brought suit. The Illinois trial court dismissed the suit, but the Appellate Court of Illinois reversed, holding that when the relationship is a "stable family relationship" like a marriage, the plaintiff should be allowed to recover.⁶⁵ In reinstating the trial court's verdict, however, the Supreme Court of Illinois wrote: "We do not intend to suggest that plaintiff's claims are totally devoid of merit,"⁶⁶ but the court questioned whether allowing recovery to a woman who chose "to enter into what have heretofore been commonly referred to as 'illicit' or 'meretricious' relationships," would "encourage formation of such relationships and weaken marriage as the foundation of our family-based society?"⁶⁷ The court did not question whether relieving Mr. Hewitt of any responsibility when he also chose to enter into the same "illicit" or "meretricious" relationship would encourage men to form illicit relationships and weaken marriage.

The court in *Hewitt* left the parties as they were because the issue involved matters of public policy, which the court said were the province of the legislature. In so holding, the court said:

We are aware, of course, of the increasing judicial attention given the individual claims of unmarried cohabitants to jointly accumulated property, and the fact that the majority of courts considering the question have recognized an equitable or contractual basis for implementing the reasonable expectations of the parties unless sexual services were the explicit consideration. . . . Of substantially greater

63. See *Costa v. Oliven*, 849 N.E.2d 122, 123 (Ill. App. Ct. 2004) (following *Hewitt*). For background knowledge on this case see *supra* note 53.

64. See *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1211 (Ill. 1979) (holding "that plaintiff's claims are unenforceable for the reason that they contravene public policy, implicit in the statutory scheme of the Illinois Marriage and Dissolution of Marriage Act, disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants").

65. *Hewitt v. Hewitt*, 380 N.E.2d 454, 460 (Ill. App. Ct. 1978).

66. *Hewitt*, 394 N.E.2d at 1211.

67. *Id.* at 1207.

importance than the rights of the immediate parties is the impact of such recognition upon our society and the institution of marriage.⁶⁸

The court expressed concern that if it allowed Mrs. Hewitt to recover, its decision could affect the laws of inheritance, wrongful death, workers' compensation, and children's rights, none of which were involved in Mrs. Hewitt's suit.⁶⁹

Professor Peter Linzer has written about the consequences of rules that deny recovery to cohabitants. Speaking of presumptions about gratuitously provided services and meretricious relationships, he said, "One thing that should be apparent, but isn't to many people[,] is that both these rules are heavily loaded against women: Women usually provide services within a household, and the 'meretricious relationship' ban will almost always leave a man with happy memories and a woman with nothing."⁷⁰ To paraphrase John Dawson then, to be fair, restitution should be given wider application to prevent men from being unjustly enriched at the expense of women.⁷¹

V. *Applicability of Section 28*

The Restatement (Third) did not follow those cases that denied recovery to knowingly unmarried cohabitants. Rather, it added Section 28, which provides:

(1) If two persons have formerly lived together in a relationship resembling marriage, and if one of them owns a specific asset to which the other has made substantial, uncompensated contributions in the form of property or services, the person making such contributions has a claim in restitution against the owner as necessary to prevent unjust enrichment upon the dissolution of the relationship.

(2) The rule of subsection (1) may be displaced, modified, or supplemented by local domestic relations law.⁷²

By permitting one cohabitant to bring a claim in restitution against the other at the termination of the relationship, Section 28 rejects the moralistic approach that would have courts leave the parties as they were when they parted ways. Section 28 comments that most jurisdictions also reject this

68. *Id.*

69. *Id.*

70. Peter Linzer, *Rough Justice*, 2001 WIS. L. REV. 695, 705.

71. Kovacic, *supra* note 1, at 770 n.115.

72. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 (2011).

moralistic approach.⁷³ It recognizes that when a court refuses to award any of the jointly acquired but not jointly titled property to a cohabitant who has been left without, then the cohabitant with the property has been enriched, and unjustly so. Even when courts view people who live together without marriage as in "meretricious" or "illicit" relationships, most modern courts also recognize that both parties are equally complicit.⁷⁴

Besides removing a total bar to recovery, Section 28 relaxes traditional rules regarding gifts and assumptions of risk, recognizing that couples who live in marriage-like relationships do not always deal with each other as they would anyone else.⁷⁵ Emily Sherwin has questioned the approach of Section 28, arguing, *inter alia*, that the "intrinsic value of freedom and self-determination" weighs in favor of providing "options for couples who wish to remain financially independent,"⁷⁶ and that the parties could negotiate to determine their rights upon a dissolution of their relationship, even if some situations are complex: "[I]n a typical restitution case, negotiating for payment is not necessarily a daunting prospect [F]requently all that is needed is an off-the-rack legal arrangement such as a joint ownership or a loan."⁷⁷ Sherwin also argues that an exemplary case granting relief rewarded a plaintiff whose position "read[s] like [a] Darwin Award for the economically naïve,"⁷⁸ and that a competent adult who chooses to make a gift to another should not expect relief.⁷⁹

I consider the Restatement preferable. When one partner is enriched at the expense of the other, often only one of the two has "remained financially independent." Also, the financially dependent partner, because of the unique, intimate living arrangement, is not expecting to be treated as

73. See *id.* § 28 reporter's note a (detailing jurisdictions rejecting the moralistic approach).

74. See *supra* notes 55–56 and accompanying text (noting the rationale of modern courts).

75. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 cmt. c (2011) ("Decisions allowing restitution under § 28 involve an implicit determination that the contributions at issue were made on [the expectation that the donor will share in the resulting benefits basis]—thereby distinguishing them from ordinary gifts—and that the claimant's expectation was justifiable."). "They rest, moreover, on an implicit determination that the claimant should not be held to have assumed the risk that things would turn out as they did . . . in short, that the transaction is not one that the parties should have regulated by contract." *Id.*

76. Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 722 (2006).

77. *Id.* at 727.

78. *Id.* at 719 n.32.

79. *Id.* at 724.

a self-sufficient roommate, but instead is financially dependent because she was expecting to be taken care of.⁸⁰ Recognizing the uniqueness of this plight, Section 28 created rules applicable only to it, and inapplicable to other home sharing relationships, such as nonmarriage-like intimate relationships or those involving relatives or roommates.⁸¹

As Comment b notes: "A standard objection to restitution in related contexts—the argument that the asserted obligation should properly have been the subject of a contract between the parties—is ordinarily disregarded when restitution is allowed between former cohabitants."⁸² Even those not disregarding such a future contingency may believe that planning for the end of a relationship through contract would indicate lack of trust. In divorce cases, just division of assets is not limited to those who have signed prenuptial agreements.⁸³ Also, not all cohabitants who have lived together for years, and perhaps had children together, have only simple transactions and know where or how to find or create an appropriate legal document. Not all asset-holding partners are willing to agree to contract, regardless of fairness or moral duties. Thus, Section 28 recognizes that cohabitation creates atypical restitution cases and that the law should provide appropriate relief.

Perhaps people are not wise to assume that their marriage-like relationships will continue, but love and intimacy do not always correlate with wisdom. By the time wisdom is acquired in hindsight, one partner may be unjustly enriched at the expense of the other. As the Restatement (Third) comments, because "unjust enrichment in these cases can be demonstrated only in retrospect" cohabitants do not assume the risk "that things would turn out as they did."⁸⁴ Rules of law that favor the wise at the expense of the foolish may create injustice. Just as Section 90 in the Restatements of Contracts creates an exception from some of the usual

80. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 cmt. c (2011) ("Even when a transfer between cohabitants is essentially gratuitous, it may be made in the expectation that the donor will share, directly or indirectly, in the resulting benefits.").

81. Whether rules should be relaxed in the context of other nonbusiness-like relationships is not addressed in this Article.

82. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 cmt. b (2011).

83. Cf. *Eyster v. Pechenik*, 887 N.E.2d 272, 279 (Mass. App. Ct. 2008) (holding that prenuptial agreements require judicial scrutiny because "expectations that persons planning to marry usually have about one another can disarm their capacity for self-protective judgment, or their inclination to exercise it, as compared to parties negotiating commercial agreements") (quoting PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 7.02 cmt. c (2002)).

84. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 cmt. c (2011).

rules of contract, such as the need for consideration to make a promise intended to induce reliance enforceable for people who reasonably, but perhaps not wisely, did rely,⁸⁵ Section 28 creates an exception from some of the usual rules of restitution for unwise cohabitants.

Illustration 3 of Section 28 describes a scenario in which restitution is appropriate for an enamored, presumably lonely, 56-year-old farmer who loses everything to a woman who ends up leaving him with nothing.⁸⁶ The Restatement (Third) is concerned not with punishing naivety, but with what should happen to one partner whose frustrated expectations of trust and sharing enrich the other. As Section 28 recognizes, this describes a scenario appropriate for restitution. An action that is mean-spirited and opportunistic is unjust,⁸⁷ while the just result is reimbursement of the claimant. As Professor William A. Keener said in his 1893 treatise: "[T]he question to be determined is not the defendant's intention, but what in equity and good conscience the defendant ought to do," or what a fair-minded person would have done.⁸⁸

Some believe that allowing a cohabitant to recover in unjust enrichment weakens the institution of marriage.⁸⁹ Unfortunately, when remedies are denied to a financially vulnerable cohabitant because of lack of marriage, a court is punishing only one of two cohabitants by allowing one, not two, to be enriched. Such an unequal outcome itself might weaken rather than strengthen the institution of marriage because it creates an incentive for the more financially savvy partner to opt out of marriage. As the Supreme Court of Nevada said in reversing the dismissal of a woman's claim: "We recognize that the state has a strong public policy interest in encouraging legal marriage. We do not, however, believe that policy is well served by allowing one participant in a meretricious relationship to abscond with the bulk of the couple's acquisitions."⁹⁰

85. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

86. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 cmt. d, illus. 3 (2011). This illustration is based on *Sharp v. Kosmalski*, 351 N.E.2d 721 (1976). RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 reporter's note d (2011).

87. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 39 (2011) (addressing profits derived from opportunistic breach).

88. WILLIAM A. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS 20 (1893).

89. *See, e.g.,* Sherwin, *supra* note 76, at 722 (stating that "[a]rguments in favor of a contractual approach include . . . the possibility that legal equivalence between marriage and cohabitation will devalue and discourage marriage").

90. *Hay v. Hay*, 678 P.2d 672, 674 (Nev. 1984); *see also* *Pickens v. Pickens*, 490 So. 2d 872, 876 n.1 (Miss. 1986) ("That we may recognize other rights arising out of the marital

*VI. Uncertain Remedies Obtainable in Cohabitation Cases**A. Overview*

The proposition that restitution is available to resolve cohabitation cases has slowly gained credence over the years and is now reflected in the Restatement (Third). The proposition that one partner should not be allowed to "abscond with the bulk of the couple's assets" has also gained credence.⁹¹ The Restatement (Third) demonstrates, however, that fertile ground for disputes still remains concerning the type of relief that should be available upon the dissolution of a marriage-like relationship.

As discussed above, the term restitution is used to connote both a source of liability and a remedy.⁹² There is a similar overlap in the term unjust enrichment. A person who is liable in restitution is "[a] person who is unjustly enriched at the expense of another."⁹³ The remedy is for the defendant to "either restore the benefit in question or its traceable product, or else pay money in the amount necessary to eliminate unjust enrichment."⁹⁴ Thus, the unjust enrichment that creates the liability also measures the remedy.

The substantive area of unjust enrichment is concerned with determining what type of enrichment is unjust. Once that is determined, measuring the enrichment involves two considerations: what caused the enrichment and what it is worth. When the enrichment is readily measurable, the two considerations are the same. The amount the defendant received is the amount that the defendant owes.⁹⁵ When the enrichment is not monetary, however, such as the receipt of services, it must be translated into money.

Measuring the value of services in cohabitation cases is particularly difficult. Most unjust enrichment cases valuing services involve market transactions with market prices. For example, some subcontractors, when

relationship provides no reason on principle why we should deny an equitable property division upon dissolution of a non-marital cohabitation.").

91. *Goode v. Goode*, 396 S.E.2d 430, 437 (W. Va. 1990) (quoting *Hay*, 678 P.2d at 674). *Goode* is cited in the reporter's notes. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 reporter's note c (2011).

92. *See supra* note 21 and accompanying text.

93. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 (2011).

94. *Id.* § 1 cmt a; *see also id.* § 49(1).

95. The amount may be different than received if, for example, it can be traced into something more profitable or the defendant can claim a change of position. Both of those possibilities raise predominantly substantive issues.

not paid by the general contractor with whom they contracted, seek to recover the market value of their work from the owner for whom their work was performed. Some workers who breached a construction contract want to recover the excess value of their work over their customer's losses from the breach. Some plaintiffs seek compensation for design work or commissions based on contracts without sufficient terms or that are unenforceable due to the statute of frauds.⁹⁶ The plaintiffs may not recover at all or may not receive all they seek, but the values generally start with a market or contract price.

Not all services provided by one partner to another in a marriage-like relationship are market transactions, however, and therefore they are not easily valued. Although it is possible to measure something that does not have a market value, such as loss of love and companionship of a parent, lost earning capacity, and pain and anguish,⁹⁷ the nature of an intimate relationship makes determining the value of services within it particularly difficult.⁹⁸ One partner may provide services such as raising children, keeping a home, or working alongside the other to acquire assets or build a business. If so, the other partner probably receives money from earnings, investments, or other sources. He may pay for living expenses and the like. When the partners separate, how, if at all, should the assets they acquired be divided? If instead of apportioning the assets a court orders the defendant to pay the plaintiff the value of her services, how should they be valued, if at all?

The difficulty in measuring unjust enrichment in marriage-like relationships is exacerbated by the fact that the services involved are typically the same as those performed within a marriage. Every state has divorce laws that govern the terminations of marriage. The laws vary. Many if not all have been criticized as being unfair to women.⁹⁹ Courts

96. See Candace Saari Kovacic-Fleischer, *A Proposal to Simplify Quantum Meruit Litigation*, 35 AM. UNIV. L. REV. 547, 587–92, 607–09, 628–34 (1986) (reviewing commercial cases in which plaintiffs are seeking to recover for their services, and in which the courts inconsistently measure them either by the market value of the services or the market value to the defendant).

97. See generally KOVACIC-FLEISCHER, LOVE & NELSON, *supra* note 22, at 459–97.

98. See Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989, 994 (1995) (describing the many different theories for valuing services in the home).

99. See Alicia Brokars Kelly, *Explaining Intuitions: Relating Mergers, Contribution, and Loss in the ALI Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 185, 186–87 (2001) (identifying literature critiquing divorce laws and noting harm to women and children from those laws).

faced with having to adjudicate a property dispute between two people whose lifestyle is like a marriage often question the role that divorce laws should play.¹⁰⁰ Should they apply? If not, do they require that the award be less complete than a divorce settlement so that someone who is not married does not get the protections of marriage? If so, how much less? If less, does that mean the award is unfair? If so, then the principle underlying liability in unjust enrichment, the very cause of action at issue, would be compromised.

Another way divorce laws might influence cohabitation awards would be if a judge awarded the financially vulnerable plaintiff half of everything that the two acquired during the relationship on the ground that the person with the property should not be able to shield assets by staying single while acting as if married. Another way would be to try to figure out what the financial condition of the party with assets would have been had he been truly single and subtract the difference between that and the assets acquired. Another is to measure the amount of involvement the financially vulnerable partner had in the other partner's business and to award her that percentage of the profits. Another is to measure the value of homemaking services or the opportunity costs of homemaking services.

Section 28 is clear that cohabitants should no longer be barred from bringing suit on moral grounds. However, its illustrations and comments contain some conflicts and inconsistencies about the remedies. Some suggest that a plaintiff cannot recover the value of the traceable product of her work; others suggest she can.¹⁰¹ Some suggest that helpmate services are valued; others suggest they are not.¹⁰² The difficulty in finding a "one size fits all" remedy for cohabitation liability is due, no doubt, to the many competing policies surrounding compensation of non- or under-paid work in the home or in the partner's business.¹⁰³

100. See e.g., *Flood v. Kalinyaprak*, 84 P.3d 27, 32 (Mont. 2004) (declining to apply divorce principles to a partition action by an unmarried couple).

101. See *infra* Part VI.C (discussing title and traceable product).

102. See *infra* Part VI.D (discussing helpmate services).

103. See, e.g., Laura Weinrib, Note, *Reconstructing Family: Constructive Trust at Relational Dissolution*, 37 HARV. C.R.-C.L. L. REV. 207, 214-232 (2002) (discussing the competing policies implicated by questions of compensation for uncompensated domestic labor).

B. Remedial Provisions in the Restatement (Third)

Sections 49 through 53 of the Restatement (Third) identify a number of options available for measuring unjust enrichment. Section 49 describes remedies that can result from monetary as well as nonmonetary transactions. The latter may be "difficult to measure."¹⁰⁴ Section 49(3) suggests five ways to quantify this hard-to-measure unjust enrichment: value of benefit, cost to claimant, market value of benefit, price fixed by agreement, or, in appropriate cases, recipient's net profit. Although not present in the black letter, some comments in Section 28 appear to suggest that not all of the remedies from Section 49 would be available to cohabitants, but Section 49 is not so restricted.

C. Title and Traceable Product

One of the areas in which the illustrations in Section 28 appear to suggest contradictory results involves whether one cohabitant can recover a share of assets titled in the other's name. Some of the illustrations would deny that type of recovery, while others would allow it. Title is problematic. As early as 1957, Justice Finley of the Supreme Court of Washington, concurring in a cohabitation case, expressed concern about the rule that title determines ownership rights, saying that the rule "often operates to the great advantage of the cunning and the shrewd, who wind up with possession of the property, or title to it in their names, at the end of a so-called meretricious relationship."¹⁰⁵

A comment to Illustration 11, which is based on *Maglica v. Maglica*,¹⁰⁶ would appear to foreclose recovering assets. In *Maglica*, a woman whose ideas and efforts helped create an immensely profitable business was allowed to recover a salary but denied any part of the business profits because the stock was solely in her partner's name. Comment e to Section 28 reads: "When a claimant under § 28 seeks restitution in respect of services, the measure of recovery is the value of the services rendered, not their traceable product."¹⁰⁷

104. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 49 cmt. d (2011).

105. *West v. Knowles*, 311 P.2d 689, 692–93 (Wash. 1957) (Finley, J., concurring). *West* was cited by, among other cases, *Marvin v. Marvin*, 557 P.2d 106, 121 n.21 (Cal. 1976).

106. See *Maglica v. Maglica*, 78 Cal. Rptr. 2d 101 (Cal. Dis. Ct. App. 1998).

107. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 cmt. e (2011).

On the other hand, other illustrations support recovery based on shared assets. For example, under Illustration 1, a woman is entitled to an equitable distribution of property titled only in the man's name because, despite earning less, her services to the family equalized their contributions.¹⁰⁸ Illustration 5 notes that title to a house in one partner's name does not prohibit division of its sale proceeds.¹⁰⁹

These inconsistencies raise the question whether there should be a significant difference between businesses and houses.

1. No Recovery Based on Enhanced Value of Acquired Assets

Illustration 11 is based on both *Carney v. Hansell*¹¹⁰ and *Maglica*. In *Carney*, Joann Carney and Christopher Hansell lived together for sixteen and a half years after Carney learned that she was pregnant. She took care of the house and child and was "deeply involved" in Hansell's towing business. The Superior Court of New Jersey, Chancery Division, noted that "[t]he business was built from the ground up and both parties contributed substantially to its success."¹¹¹ For the first eight years she received no compensation for her work in the business. For the remainder of their time together, at her insistence, she received a minimal salary. In addition, she, along with her family, helped gut and renovate an old house that defendant's parents bought and titled in his name.

The court would not award Carney "a percentage of the value of the business" because the legal requirements for a partnership, such as shared profits and ownership of assets, were lacking.¹¹² Hansell also had told Carney that "he would burn the business down before she would ever get anything."¹¹³

The court did hold that Carney was entitled to recover, at minimum wage rates, for the time she had worked in the business, even though "as a key employee to the business, there is no doubt her services were worth more than minimum wage, but applying another standard would be speculation not supported by the record."¹¹⁴ The court denied her any

108. Illustration 1 is based on *Pickens v. Pickens*, 490 So. 2d 872 (Miss. 1986).

109. Illustration 5 is based on *Pederson v. Anibas*, 247 Wis. 2d 990 (Ct. App. 2001).

110. See *Carney v. Hansell*, 831 A.2d 128, 135 (N.J. Super. Ct. Ch. Div. 2003).

111. *Id.* at 131.

112. *Id.* at 134.

113. *Id.* at 132.

114. *Id.* at 136

further recovery. First the court denied Carney any division of the real estate properties because "she did not contribute capital to the purchase of the parcels [and] has no contractual claim to the properties [and] she and defendant are not married."¹¹⁵ Second, the court said:

There is a separation between plaintiff's role as home maker, mother and housemate, and her role as a key employee of the business. As to the former role as homemaker, claims for compensation for services rendered must fail, as she received the benefit of the bargain of her relationship with defendant. He provided for her support and those expenses which he approved, for as long as she resided with him.¹¹⁶

When Carney eventually did leave Hansell, she moved in with her mother with only her personal belongings and a small disability income. Hansell retained the business. One would think that the court could have awarded Carney the same salary or other compensation as Hansell. The court said: "There is no question that she was instrumental in assisting defendant in building his business and in helping it grow."¹¹⁷ Or the court could have attempted some approximation of the market value of Carney's contribution to the business.

In *Maglica*, Anthony and Clare lived together for twenty years as husband and wife.¹¹⁸ Mr. Maglica had owned a machine shop business since the 1950s. When Anthony and Clare began living together "they worked side by side to build the business," which began manufacturing flashlights.¹¹⁹ They had equal salaries.¹²⁰ "Thanks in part to some great ideas and hard work on Claire's part (e.g., coming out with a purse-sized flashlight in colors), the business boomed."¹²¹ By the time of their

115. *Id.* at 136–37.

116. *Id.* at 135.

117. *Id.* at 134.

118. *Maglica v. Maglica*, 78 Cal. Rptr. 2d 101, 103 (Cal. Dis. Ct. App. 1998).

119. *Id.*

120. *Id.* The hypothetical in Illustration 11 has both partners having been paid below market salaries. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 cmt. e., illus. 11 (2011) ("Salaries paid to both parties by the corporation were artificially low . . ."). *Maglica* does not discuss whether the salaries in that case were below market or not. *Maglica v. Maglica*, 78 Cal. Rptr. 2d 101, 103 (Cal. Dis. Ct. App. 1998). Illustration 11 would provide the partner without title to stock the difference between the market rate of her work and the salary she received, unless she could prove a contract to share the business or that her partner had defrauded her.

121. *Maglica*, 78 Cal. Rptr. 2d at 103.

separation, the business, Mag Instrument, Inc., was worth "hundreds of millions of dollars."¹²²

When the business was incorporated "all shares went into Anthony's name."¹²³ Clare and Anthony parted after Clare learned that he was transferring the stock to his children, but not to her. She brought suit. The jury awarded her \$84 million in unjust enrichment.¹²⁴ The California Appellate Court reversed, however, holding that because she was not an equity partner, she was not entitled to the product of her work, but only the reasonable value of her services. The Appellate Court said: "It is one thing to require that the defendant be benefited by services, it is quite another to *measure* the reasonable value of those *services* by the value by which the defendant was 'benefited' as a *result* of them. . . .," [and a] "resulting benefit is an open-ended standard, which . . . can result in the plaintiff obtaining recovery amounting to *de facto* ownership in a business all out of reasonable relation to the value of services rendered."¹²⁵ Given that the court had credited Mrs. Maglica's "great ideas and hard work"¹²⁶ to the business' success, it is hard to see why \$84 million out of "hundreds of millions of dollars"¹²⁷ was "all out of reasonable relation to the value of services rendered."¹²⁸

The outcomes of *Carey* and *Maglica* may be appropriate for business colleagues. Those working together would most likely not enter into an arrangement whereby one owned the business and the other, despite working as a partner, was content with a salary. More likely, they would negotiate an express contract for a partnership or other sharing arrangement. Even if they did not, the scope of the relationship between the two would probably not be unspoken.

Section 28 is premised on the fact that cohabitants are not in a business relationship and that business rules are therefore inapplicable.¹²⁹ If

122. *Id.*

123. *Id.* The court's use of the passive voice makes it impossible for the reader to know who initiated the titling of the stock, but one can surmise.

124. *Id.*

125. *Id.* (emphasis in original).

126. *Id.* at 103.

127. *Id.*

128. *Id.* at 105.

129. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 cmt. b (2011) ("A standard objection to restitution in related contexts—the argument that the asserted obligation should properly have been the subject of a contract between the parties—is ordinarily disregarded when restitution is allowed between former cohabitants.").

cohabitants were dealing with someone other than their partner, they could be viewed as having assumed the risk that their labor would benefit someone else. In the context of a terminated marriage-like relationship, however, what might appear donative can become "an interrupted exchange or a conditional gift" and what might appear appropriate for a contract is not always viewed as contractual.¹³⁰ Lack of a contract does not mean, therefore, as implied by *Carey* and *Maglica*, that the non-owner cohabitant would have expected to be cut out of the business at any time, with only a salary for services, but not any of the traceable results of her work.

The rationale of Illustration 11 is that restitution for services performed by a cohabitant should be the services' value and "not their traceable product" because "restitution regards the defendant in such circumstances as the innocent recipient of a noncontractual transfer, not as a wrongdoer. Liability is accordingly for the value of benefits received, not for their potentially more valuable product (a form of consequential gain)."¹³¹

The premise that Christopher Hansell and Anthony Maglica were "innocent recipients of noncontractual transfers" is not persuasive. Hansell and Maglica knew they were accepting their partners' services and were refusing to provide their partners with a share in the businesses. There is no compelling reason why the "value" of services is only the hourly wage or salary that would attend an employee's doing them, particularly if the partner's activities are of an inventive or capital-producing nature. Hansell took advantage of Carney's needy predicament to make her choose between leaving with nothing or staying with food and shelter for herself and their son.¹³² Anthony Maglica never informed Clare that she had no ownership stake in the business to which she contributed "some great ideas and hard work."¹³³

Some cases cited in the Reporter's Notes to Section 28 take a different road to relief: They suggest that Christopher Hansell, Anthony Maglica, and others like them should be estopped from claiming ownership of all of the proceeds of joint efforts. One court awarded an equitable distribution of property, saying:

Where, as here, the man accepted the benefit of such services, he will not be heard to argue that he did not need them and that their economic value

130. *Id.*

131. *Id.* § 28 cmt. e.

132. *Carney v. Hansell*, 831 A.2d 128, 132–34 (N.J. 2003)

133. *Maglica v. Maglica*, 78 Cal. Rptr. 2d 101, 103 (Cal. Dis. Ct. App. 1998).

should not be considered as the woman's economic contributions to the joint accumulation of property between them.¹³⁴

Similarly another case cited in the Reporter's Notes stated that one cannot be enriched by an unrequested benefit when one could have declined its receipt,¹³⁵ and that:

It would be unjust for [one party] to assert in one breath that [the other party] can in no way be presumed to be his [spouse] for purposes of either the dissolution of marriage statutes or the concept of putative spouse and to assert in another the presumption that she rendered her services voluntarily and gratuitously.¹³⁶

Section 52 of the Restatement (Third) recognizes that a recipient can be responsible for his enrichment even though he is not a conscious wrongdoer.¹³⁷ In such case he "may be subject to a greater liability in restitution than an innocent recipient."¹³⁸

Limiting a plaintiff's recovery only to the value of her services would appear to be inconsistent with one of the options under Section 49(3), which says that enrichment can be measured by "the value of the benefit in advancing the purposes of the defendant."¹³⁹ If one's services increase the value of assets that are titled in the other's name, then it would appear that the services "advanced the purposes" of that partner. The limitation against recovering the "traceable product" of the services found in Illustration 11 also appears to be inconsistent with other illustrations to Section 28.¹⁴⁰

2. Recovery Based on Value from Acquired Assets

Other illustrations in Section 28 describe remedies that appear inconsistent with the limitation of Illustration 11. For example, Illustration 1 is

134. *Pickens v. Pickens*, 490 So. 2d 872, 876 (Miss. 1986); *see also infra* Part VI.C.2 (discussing *Pickens*).

135. *See Turner v. Freed*, 792 N.E.2d 947, 950 (Ind. Ct. App. 2003).

136. *Id.* at 950 n.3 (brackets in original) (quoting *Glasgo v. Glasgo*, 410 N.E.2d 1325, 1332 (Ind. Ct. App. 1980)).

137. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 52 (2011) ("A defendant who is not a conscious wrongdoer may nevertheless be responsible for receiving, retaining, or dealing with the benefits that are the subject of a restitution claim." (internal cross reference omitted)).

138. *Id.*

139. *Id.* § 49(3)(a).

140. *See id.* § 28 cmt. e., illus. 11. *See generally id.* § 28.

based on *Pickens v. Pickens*.¹⁴¹ There, a couple divorced after having been married for fourteen years and having had five children. A year after their divorce, they began living together but did not remarry. They stayed together for another twenty years and had two more children. After their final separation the trial court ordered an "equitable distribution" of the property based on unjust enrichment, not the laws of divorce.¹⁴² The trial court found that Mr. and Mrs. Pickens contributed equally to the family and accumulation of property even though Mr. Pickens earned more than Mrs. Pickens. The court said that despite the disparity of earnings, "she did the housework, and in my judgment the two [Pickens] were equal in their contributions to the ongoing of the family and the accumulation of the portion of the property now owned."¹⁴³

Similarly, the court in *Pederson v. Anibas*,¹⁴⁴ on which Illustration 5 is based,¹⁴⁵ held that although a log cabin was titled only in the man's name, the woman was entitled to half of the proceeds of its sale.¹⁴⁶ It said that her payments for some household expenses "freed up his earnings" so he could buy the land, and that her work doing "the majority of cooking, laundry and household chores . . . free[d] up time" for him to work on building the cabin.¹⁴⁷ Additionally the court found that she fed the workers and helped grind logs.¹⁴⁸

D. Helpmate Services

1. Valuable or Not

If unjust enrichment is measured by the value of services instead of the value of the product, then a court will need to decide which services to compensate and how to value them. Both the "which" and "how" are difficult to determine when the services are provided to help and take care of one's partner and children, if any.

141. See *Pickens v. Pickens*, 490 So. 2d 872 (Miss. 1986).

142. *Id.* at 875.

143. *Id.* at 874.

144. See *Penderson v. Anibas*, No. 00-2940, 2001 WL 969176 (Wis. Ct. App. Aug. 28, 2001).

145. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 cmt. d, illus. 5 (2011)

146. See *Penderson*, 2001 WL 969176, at *1.

147. *Id.* at *2.

148. *Id.*

As in *Pickens* and *Pederson*, the plaintiffs in many cohabitation cases are women who perform domestic and other helpmate services, to their economic disadvantage. In both of those cases, the courts divided the property between the partners. Despite those cases, Section 28 discusses the relevance of "domestic services" in two different comments with differing emphases. One appears to allow division of cohabitants' assets based on the "domestic services" of one of the partners while the other does not. Comment c to Section 28 notes that assets may be divided "when the equities favoring the claimant are sufficiently compelling . . . even where the claimant's contribution consists primarily of domestic services . . ." ¹⁴⁹ Comment d, however, states that the type of contributions that aid in the creation of an asset do not need to be "of any particular kind," but that claims "based purely on domestic services are less likely to succeed, because services of this character tend to be classified among the reciprocal contributions normally exchanged between cohabitants whether married or not." ¹⁵⁰

Comment d's analogy to marriage is unfortunate. Reciprocal services exchanged between spouses do not lack value, nor are spouses unprotected in the case of separation. Divorce laws do not allow one spouse to keep all of the assets when the parties separate, even when the other has performed "purely" domestic services. ¹⁵¹ Separating spouses have other protections. While people who have not worked for a salary are not covered by Social Security and therefore not eligible for disability or retirement benefits, a spouse is eligible for those benefits derivatively on the basis of her husband's salary whether or not she had earned income. ¹⁵² Someone divorced after having been married ten years or more has the same protections. ¹⁵³ No matter how long someone lives in a marriage-like

149. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28 cmt. c (2011).

150. *Id.* § 28 cmt. d.

151. Many criticize divorce laws as inadequately protecting the more financially vulnerable spouse. *See generally, e.g., Kelly, supra* note 99. That, however, is not a reason to avoid adequate remedies to cohabitants. It may well be a reason to change the divorce laws.

152. *See* 42 U.S.C. § 402 (2006) (providing that a spouse can recover old age, disability, or surviving child benefits that derive from his or her spouse's eligibility for social security benefits from his or her employment).

153. *See id.* (providing that divorced spouses are similarly entitled to those benefits if they were married ten years or more and had not remarried).

relationship, however, that person will not have any access to Social Security benefits except on the basis of her own earnings, if any.¹⁵⁴

Disallowing recovery for purely domestic services ignores the concept of comparative advantage where people, like countries, divide services or production of goods between them based on their respective abilities and then exchange their services or goods to maximize efficiency. In cases of intimate relationships, a couple may allocate duties so that one is the primary earner while the other is the primary homemaker. This allocation may be based on comparative abilities, or, often, based on cultural norms.¹⁵⁵ In awarding an equitable division of property between the Pickens, the Supreme Court of Mississippi said:

As any freshman economics student knows, services and in kind contributions have an economic value as real as cash contributions. In such situations, where one party to the relationship acts without compensation to perform work or render services to a business enterprise or performs work or services generally regarded as domestic in nature, these are nevertheless economic contributions.¹⁵⁶

While Mrs. Pickens contributed some earnings to the household, nothing in the Mississippi Supreme Court's opinion indicated that Mrs. Pickens would not have recovered if she had performed only homemaking services.

2. Offsets

As the Supreme Court of Mississippi noted in *Pickens*, services in kind and services for money are both economic contributions. Thus, both contribute to the household's acquisition of wealth. *Carney*, discussed above, held to the contrary using an offset method.¹⁵⁷

154. See generally Laura C. Bornstein, *Homemakers and Social Security: Giving Credits Where Credits are Due*, 24 WIS. J.L. GENDER & SOC'Y 255 (2009). Bornstein advocates for Social Security reform for "homemakers." See generally *id.*

155. Judge Posner has said that women are paid less than men because they spend more time with their children, and that if wages for traditionally male jobs are depressed and those for traditionally female jobs are inflated, then "[l]abor will be allocated less efficiently." *Am. Nurses' Ass'n v. Illinois*, 783 F.2d 716, 719–20 (7th Cir. 1986). His premise seems to be that it is more efficient for women rather than men to care for children.

156. *Pickens v. Pickens*, 490 So. 2d 872, 876 (Miss. 1986); see also *supra* Part VI.C.2 (discussing *Pickens*).

157. *Supra* notes 110–20 and accompanying text.

A case similar to *Carney* is cited in the Reporter's Notes to support Illustration 2.¹⁵⁸ Illustration 2, based on *Mitchell v. Moore*,¹⁵⁹ describes a case in which the offset method is appropriately used based on the facts given. There, male partners are both fully employed, but one also performs unsalaried work in the other's home and business while supported by the other. Illustration 2 says, "benefits conferred . . . in the course of the parties' relationship were adequately compensated by benefits received."¹⁶⁰ Given that both work full time, it would appear that neither is dependent on the other. Nothing in the facts indicates that the one performing unsalaried work during his spare time was worse off than if he had not been in the relationship. Nor does it appear that the other was better off.

Many cohabitants are not financially dependent upon the other. So long as neither sacrifices that independence to care for the other, whatever contributions made between them most likely do set each other off. But what of Joann Carney? Is she in the same position as the fully employed man who performed unsalaried work for his partner in exchange for support? She was totally dependent upon Christopher Hansell. Assuming she had not worked in the business, but just took care of Hansell, the home, and the child, is justice served when Hansell is able to leave her with nothing on the theory that she had been supported by him while she was with him? She must move in with her mother with nothing but a small disability income and a few possessions: He keeps the house and all income and assets acquired during the time of their cohabitation. Has he been unjustly enriched?

Drawing the line between *Mitchell v. Moore* and *Carney v. Hansell* is not easy, but that does not mean it should not be drawn. The following case, *Tarry v. Stewart*,¹⁶¹ cited in support of Illustration 2, would seem to be on the other side of the line from *Mitchell*, and much more like *Carney*. *Tarry* held that the defendant, Don Stewart, had not been unjustly enriched when he kept the proceeds from the sale of a house that he had bought. Despite noting that both he and the plaintiff, Linda Tarry, had made "substantial improvements"¹⁶² and that "as a result of the repairs . . . Stewart

158. *Tarry v. Stewart*, 649 N.E.2d 1 (Ohio Ct. App. 1994).

159. *See Mitchell v. Moore*, 729 A.2d 1200, 1206 (Pa. Super. Ct. 1999) (finding that former life partner of farm owner brought action against owner, with whom partner lived for thirteen years was not entitled to damages for unjust enrichment).

160. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 cmt. c, illus. 2 (2011).

161. *See Tarry v. Stewart*, 649 N.E.2d 1 (Ohio Ct. App. 1994).

162. *Id.* at 2.

realized a financial benefit when the property was sold."¹⁶³ Stewart was not unjustly enriched, the court held, because both parties "enjoyed the improvements made to the house" in the five years they lived there.¹⁶⁴

In addition the court held Stewart was not justly enriched in any manner. Stewart and Tarry had lived together for fourteen years and had a child three years into their relationship. Neither had any assets when they began living together. Tarry stopped working until the child was in school. Then she "finished her education and began work as a medical laboratory technician."¹⁶⁵ According to the court the defendant supported Tarry and their child until he left in 1989, when the child was eleven.¹⁶⁶

Stewart and Tarry had pooled their resources for expenses by keeping their money in a drawer to use as needed. The court did not award Tarry any of the assets acquired during their cohabitation, however, because there was no evidence

specifically indicating that she paid for assets that Stewart now has. To the contrary, she has only asserted that her contribution to household expenses "freed funds to be used in purchasing various assets," and that she contributed to the increased value of both the Ninth Street and Eastern Heights residences by "investing sweat equity."¹⁶⁷

When Stewart left, Tarry had \$710.30 in addition to her salary.¹⁶⁸ She started working as a medical technician a few years before their relationship ended.¹⁶⁹ She also had a car and a little furniture, all of which she had had before she and Stewart began living together.¹⁷⁰ Had they not met, presumably she would have continued working, accruing a salary and social security benefits. Because they met, they both had a child, but she was the one who stopped working, not he.

According to the court's analysis, both Tarry and Stewart enjoyed the improvements to the house when they were together. If she and he had the same enjoyment, why is he and not she entitled to the value of the

163. *Id.* at 5.

164. *Id.*

165. *Id.* at 2.

166. *Id.* There was evidence that Tarry supported Stewart during their last year together, but the court did not address that.

167. *Id.* at 4. The holding that merely freeing up funds for one partner to buy assets does not entitle the other to any property interest in the assets is contrary to the holding in *Pickens v. Pickens*.

168. *Id.* at 4.

169. *Id.* at 2.

170. *Id.* at 3.

improvements? Unlike *Mitchell v. Moore*, it would appear that Tarry is financially worse off than if she had not begun living with Stewart.

Cases involving a lot of money, particularly if they also involve celebrities, tend to be resolved on the basis that the life style during the relationship offset any costs to the less wealthy partner. *Marvin v. Marvin*¹⁷¹ was such a case. Many courts cite this case, which was brought against actor Lee Marvin, as a leading case for the proposition that one cohabitant can bring suit against another. What many people do not know is that when that case reached its conclusion, Michelle Marvin recovered nothing, leaving her in the same position as if the California Supreme Court had affirmed the lower court's dismissal of her case as meretricious.¹⁷²

Michelle Marvin had claimed that when she moved in with Lee Marvin, at his request and with his promise to always support her, she gave up her career to make a home for him. When the relationship terminated, she brought suit under theories of contract and unjust enrichment. After the California Supreme Court reinstated the case, the trial court on remand found that Michelle was unlikely to be able to return to her prior singing career. The court held that "plaintiff was in need of rehabilitation" and awarded her \$104,000 "to accomplish such rehabilitation in two years."¹⁷³ The court of appeal, with one judge dissenting, reversed. It held that there was no authority for an award of "rehabilitation pay."¹⁷⁴ The court noted that the Marvins had no agreement to combine assets or share wealth. It held that Lee was not unjustly enriched by Michelle's services because "plaintiff actually benefited economically and socially from the cohabitation of the parties."¹⁷⁵

Although the trial court found Michelle "in need," there was no discussion of the facts surrounding the need. The California Supreme Court noted that the trial court had found that Lee had given Michelle substantial gifts,¹⁷⁶ but there were no findings as to what remained of the gifts after the relationship ended. The court did not discuss whether Michelle's economic

171. See *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976). *Marvin* is known as the "palimony" case, but courts do not award the equivalent of alimony to an unmarried partner, nor did plaintiff in *Marvin* receive support.

172. See generally *Marvin v. Marvin*, 176 Cal. Rptr. 555 (Cal. App. 1981).

173. *Marvin*, 176 Cal. Rptr. at 557. The trial court also found that Lee tried to "launch" Michelle in a recording career and to help her "continue" her nightclub singing career. *Id.* at 557 n.3. Regardless of his attempts, the trial court found that she was "in need." *Id.* at 557.

174. *Id.* at 577.

175. *Id.*

176. *Id.* at 558.

benefit during the cohabitation would provide any security after the end of the relationship. Were both Lee and Michelle living the good life, with only Lee having money for the future?

There is a danger that the outcome of a case resolved under this theory of "you had a good life" not only leaves the plaintiff with the same outcome as if her case had been dismissed because of her meretricious life, but it also appears to describe a meretricious relationship. It effectively says that the man is not unjustly enriched because he had "paid for her services." Further consideration of where the less wealthy cohabitant would have been if she had not been living with her former partner and further consideration of the less wealthy cohabitant's current economic status might shed some light on whether losses can be offset by the life style.

3. *Measuring Value*

If enrichment is not measured with reference to acquired assets, then it will be measured by the value of the services. As the sections above indicate, finding the value of services is difficult. Section 49(3) identifies "market value of the benefit" as one of five options for measuring enrichment.¹⁷⁷ Section 28 suggests that services should be measured by "the value of the services rendered,"¹⁷⁸ with no reference to any market. If there is no market to use to value the services, then perhaps another one of the Section 49(3) options could be used. Section 49(3) identifies "cost to claimant" as one way to measure the value of services.¹⁷⁹

Costs can include measuring the value of goods and services, but costs can also include foregone opportunities—opportunity costs as economists label them. In most commercial transactions, the reasonable market value of services can also be viewed as a measurement of opportunity costs. If it were more productive to provide the services in a more opportune manner, an efficient business person would seek out that opportunity.

Services performed during cohabitation are not based on economic efficiencies, however. When a relationship turns out not as expected, and one partner leaves with a disproportionate share of the assets, that person has been benefited by the value of the services of the less affluent partner. Loss of opportunity costs might reflect the actual value of the services, but

177. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 49(3) (2011).

178. *Id.* § 28 cmt. e.

179. *Id.* § 49(3)(b).

that might be no easier to value than services generally.¹⁸⁰ Where would the plaintiff be if she had not stopped working to care for a home? Where would a plaintiff be if she spent \$100,000 on her education instead of her partner's? How would she have protected her future if she had not expected to be supported, often based on assurances by her partner? How important to the calculation is the length of the relationship?

While some might argue that measuring opportunity costs is speculative, so too is putting any monetary value on domestic services. A remedy is not speculative just because the amount of damage is not easily measurable. Many cases involve recovery where the amount is difficult to measure. In particular, through wrongful death suits the survivors may recover lost earnings of someone killed early in life.¹⁸¹ A remedy is only speculative if the fact of damage is uncertain. If one partner accepts the domestic services of the other, that partner is unjustly enriched by those services, so the fact of damage is clear.¹⁸²

VII. Conclusion

While financially vulnerable cohabitants may have a contract with their partner to share assets if the relationship should terminate, many do not, as Section 28 recognizes.¹⁸³ Without a contract or state laws favoring recovery for cohabitants, the only protection that the partner without assets has is the law of restitution. Without it, the one with title to the assets that were acquired during the relationship could leave the other who provided domestic services or services directly increasing the value of the assets with nothing or next to nothing and with no security for the future. The inclusion of Section 28 in the Restatement (Third) is an appropriate recognition that barriers to one cohabitant bringing suit against another have been or should be eroded. Section 28 also reveals the complexity in measuring the remedies. Difficulty in measuring those remedies, however,

180. See Estin, *supra* note 98, at 1006–14 (discussing opportunity costs as part of measuring human capital).

181. See, e.g., Baird v. Chicago, Burlington & Quincy R.R. Co., 349 N.E.2d 413, 418 (Ill. 1976) (upholding damages awarded for wrongful death of teens based on economic testimony).

182. KOVACIC-FLEISCHER, LOVE & NELSON, *supra* note 22, at 327–36.

183. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28 cmt. b (2011) ("A standard objection to restitution in related contexts—the argument that the asserted obligation should properly have been the subject of a contract between the parties—is ordinarily disregarded when restitution is allowed between former cohabitants.").

should not justify backsliding to the result of the "meretricious" relationship cases or rendering hollow Section 28's recognition of a restitution claim in cohabitation disputes.