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Teaching Restitution

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TEACHING RESTITUTION

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When I began teaching in 1981, I was assigned two separate Remedies courses to teach during the fall: (1) Equitable Remedies and (2) Legal and Extraordinary Remedies. For the Equitable course, I chose the text Leavell, Love & Nelson, *Equitable Remedies, Restitution and Damages* (3d ed. 1980) and for the Legal and Extraordinary course, York and Bauman, *Remedies* (3d ed. 1979). I was not sure what “extraordinary remedies” were if they were not equitable remedies, so I assumed they must be this topic called restitution. Of course, most people refer to equitable remedies as the extraordinary ones, and my two Remedies courses were shortly thereafter combined into one, called, unsurprisingly, Remedies. Ever since then, however, the topic of restitution has intrigued me.

I did not remember studying restitution in law school. When I looked back at my law school notes, I discovered that I had, and had even read *Moses v. Macpherlan*.¹ Apparently, however, neither the subject matter nor its oldest case had made an impression on me. In fact, it was not until I tried to reduce *Moses* to a note for the 6th edition of *Equitable Remedies, Restitution and Damages*,² that I think I began to understand it. (I had always left it out of my syllabus before.) My note on *Moses*, which I had planned to make very brief, now contains a very long excerpt from the case.

When I began teaching Remedies, I had not had time to prepare more than the first six weeks of classes in advance. That preparation did not include restitution. When I reached the first restitution case, the first student question made me realize that I did not know what this topic was about. My first group of students and I struggled to make sense of it. From the cases in the

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¹ 2 Burr. 1005 (K.B. 1760).

² Bob Leavell, Jean Love and Grant Nelson invited me to be a co-author on their book for the 5th and later editions.

York and Bauman text, my students and I derived a theory. Restitution was different from contracts and torts because it measured recovery by defendant's gain and could be a cause of action on its own with three elements: (1) defendant's gain, (2) at plaintiff's expense, and (3) circumstances which would make it unjust for defendant to retain the gain.

I continue to teach and write about restitution as a cause of action. This is what Doug Rendleman in his thoughtful article, *Common Law Restitution in the Mississippi Tobacco Settlement: Did Smoke Get in Their Eyes*, refers to as "free standing restitution," the breadth of which troubles him and others.³ The summer after I finished teaching restitution for the first time, I wrote about restitution because I wanted to learn more about it and apply it in an unusual way. I noted the critique of overbreadth, but also noted that years ago Learned Hand and the Reporters of the *Restatement of Restitution* (1937), Seavey and Scott, had countered the critique by arguing that restitution was no more broad than, for example, the concept of the "reasonable person" (then to as the "ordinary prudent man"), which had been refined by courts over time.⁴

In this paper, I will discuss how and why I teach restitution to reach the conclusion that restitution is "freestanding." I think this conclusion makes sense theoretically, and practically I like the idea that it can "arise in a bedazzling variety of situations."⁵ In fact, I begin the unit on restitution with a (somewhat, I hope) dramatic reading of the longer version of this quote from Professor Douthwaite. I will attempt to do in this paper what I do in class, build a chart ("The Chart") in the form of a matrix that first, describes how restitution fits within the context of a Remedies course and second, arrives at the conclusion that restitution is not a remedy, but a cause of action. I will also question, as I do in class as The Chart is being built, whether restitution really can be so easily categorized. I will also explain, however, why feminist concerns propel me to conclude that "freestanding restitution" is a valid legal theory.

I have a three-credit Remedies course, which is taught in two eighty-minute segments per week for fourteen weeks. The class often has approximately 100 students. I devote four classes to introducing restitution.

³ 33 GA. L. REV. 847, 886 (1999).

⁴ See CANDACE S. KOVACIC, *Applying Restitution to Remedy a Discrimination Denial of Partnership*, 34 SYRACUSE L. REV. 743, 769-73 (1983).

⁵ GRAHAM DOUTHWAITE, ATTORNEY'S GUIDE TO RESTITUTION § 1.1 at 3 (1977).

Those four follow nine classes on equity and contempt and another five on damages. The latter five include comparisons between remedial theory in contract and tort. I then, following the organization of the textbook, introduce in a variety of contexts the concept of an attorney helping a plaintiff choose among options—between equity and law, and among theories of contract, tort or restitution. I emphasize that every cause of action, including those created by statute, potentially has a law-versus-equity option, but that either the facts of the case or the restrictions in a statute may limit that choice. In addition, I emphasize that the other remedial theories that are introduced throughout the course may (or should) be found at the remedial stage of all litigation. Throughout the course the students and I discuss how Remedies is a course about a society's values—how a society is willing to encourage or discourage conduct by determining what remedy will be allowed—how values and thus remedies might change over time—and how all societies may not have the same values and thus might reach different remedial conclusions.

I introduce restitution by asking the students to identify its confusing abundance of terminology. I ask the students to call out words of restitution's terminology. I get a list that includes most, if not all of the following:

- assumpsit
- implied contract
- contract implied in fact
- contract implied in law
- quasi contract
- quantum meruit
- unjust enrichment

These words will eventually appear on "The Chart."

I then ask the students to compare the terminology used in two cases: *Kossian v. American National Insurance Co.*⁶ and *Bastian v. Gafford*.⁷ In *Kossian* an owner of an inn contracted to pay Kossian \$18,900 to clean up debris from the inn's having burned. That owner, Reichart, became bankrupt and lost the inn to the defendant, who later collected money from the company

⁶ 62 Cal. Rptr. 225 (Cal. Ct. App. 1967).

⁷ 563 P.2d 48 (Idaho 1977).

that had insured the inn against fire. Some portion of the sum collected included reimbursement for cleanup costs. Kossian sued the later owner of the inn for payment for his work. (The defendant was an insurance company, but in *Kossian* its role was not as an insurer, but as a company that had acquired real estate. The insurance company that had insured the inn against fire was not a party to the suit.) The trial court dismissed Kossian's suit on the ground that there was no privity of contract between Kossian and the later owner of the inn.

In *Bastian*, Bastian had orally agreed with Gafford to construct an office building on Gafford's land. After Bastian prepared the plans, a dispute arose as to how the project was to be financed and how Bastian was to be paid. The building was later planned and built by someone else. Bastian sued Gafford for payment for his plans, but the trial court dismissed the suit on the ground that the defendant, Gafford, had not been enriched because he did not use Bastian's plans. Both cases were reversed.

I ask the students what the causes of action were in *Kossian* and *Bastian*. The students will answer unjust enrichment or restitution in *Kossian* and breach of a contract implied in fact in *Bastian*. I ask why *Kossian* is not a breach of contract case. (No privity.) If *Kossian* is not a breach of contract action, then what is the significance of unjust enrichment? The answer is that it must be a cause of action. There is no other theory that would have enabled Kossian to sue the owner of the property—tort does not apply. This, then, introduces “freestanding restitution.”

To pursue the theoretical underpinnings of both cases, I ask whether the students have seen any inconsistencies between the two appellate cases. I also say that, for many practitioners, the law they will practice after they graduate will be self-taught. One method of self-teaching is learning the terminology. One way of doing that is to see how the courts define the terms (and learn when the courts, and not the reader, are confused). The students compare the following paragraphs from *Kossian* and *Bastian*:

The court in *Kossian* said:

Plaintiff . . . relies upon the basic premise that defendant should not be allowed to have the fruits of plaintiff's labor and also the money value of that labor. This, of course, is a simplified pronouncement of the doctrine of unjust enrichment, a theory which can, in some instances, have validity without privity of relationship. The most prevalent implied-in-fact contract recognized under the doctrine of unjust enrichment is predicated upon a

relationship between the parties from which the court infers an intent. However, the doctrine also recognizes an obligation *imposed* by law regardless of the intent of the parties. In these instances there need be no relationship that gives substance to an implied intent basic to the "contract" concept, rather the obligation is imposed because good conscience dictates that under the circumstances the person benefitted should make reimbursement....

Plaintiff's claim does not rest upon a quasi contract implied in fact but upon an equitable obligation imposed by law....⁸

The court in *Bastian* said:

In basing its decision on unjust enrichment, the trial court failed to distinguish between a quasi-contract and a contract implied in fact. Although unjust enrichment is necessary for recovery based upon quasi-contract, it is irrelevant to a contract implied in fact. For appellant to recover under the latter theory, it is not necessary that respondent either use the plans or derive any benefit from them. It is enough that he requested and received them under circumstances which imply an agreement that he pay for appellant's services....⁹

I approximate an outline of those paragraphs on the board as follows:

<i>Kossian</i>	<i>Bastian</i>
<p>I. The doctrine of unjust enrichment</p> <p>A. Quasi contract implied in fact</p> <p>-relationship from which to infer intent</p> <p>B. Obligation imposed by law</p> <p>-no intent</p> <p>-good conscience</p> <p>-person benefitted should make reimbursement</p> <p>"Plaintiff's claim does not rest upon a quasi contract implied in fact"</p>	<p>The need to <i>distinguish between</i> I. quasi contract and II. contract implied in fact</p> <p>I. Contract implied in fact</p> <p>-unjust enrichment irrelevant</p> <p>1. services requested</p> <p>2. services received</p> <p>3. circumstances implying agreement to pay plaintiff</p>

⁸ *Kossian*, 62 Cal. Rptr. at 227.

⁹ *Bastian*, 563 P.2d at 49.

It becomes clear that *Kossian's* discussion of contract implied in fact, is inconsistent with *Bastian*. I ask the students how they might know, without further research, which court is correct. That leads to a discussion of the difference between *dictum* and holding. The trial court in *Kossian* had dismissed plaintiff's case because there was no contract between *Kossian* and the defendant. The first theory in *Kossian*, therefore, is "mere *dictum*, your honor." The appellate court in *Kossian* determined from the facts of the case (holding) that the defendant had been unjustly enriched by receiving both *Kossian's* cleanup work and some insurance money to reimburse cleanup costs. The fire insurance company had settled with the defendant for an amount less than the total value of the loss. The court remanded for a determination of the percentage of the insurance proceeds that would cover the cost of cleanup to measure defendant's gain. *Kossian* did not recover his contract price from the contract he made with the now bankrupt, former owner of the property; rather, he recovered the "unjust" portion of the defendant's enrichment. It was unjust because the defendant has a double recovery.

Since the trial court in *Bastian* had dismissed the plaintiff's case because the defendant had not been unjustly enriched, it becomes apparent that the trial courts should have exchanged theories. The appellate court in *Bastian* remanded for *Bastian* to prove the existence of a contract implied in fact, a real contract. The students see that three elements in the *Bastian* column above could be rewritten as offer, acceptance and consideration. At this point I explain, with the help of a long excerpt from *Moses*, the historic development of the terminology. That history explains the use of contract terminology in non-contractual situations. I lament that this terminology causes unnecessary confusion for lawyers and judges.

The class then reviews (with another case) the difference between an express contract and a contract implied in fact. The difference is *not* the difference between an oral and a written contract; rather, it is the difference between a contract where the terms are expressed, either orally or in writing, and one where the terms are inferred from conduct. I ask the students, if two parties had *intended to form a contract* but had not discussed the price term, how a court can measure the amount of nonpayment for services rendered. I lead students to the word "intent" and to the court's "inferring" from the conduct of the parties that they must have "intended" the unspoken price term to be the reasonable value of the plaintiff's services. Thus, at this point, reasonable market value of plaintiff's services is seen as a contract remedy and defendant's gain is seen from *Kossian* as a restitutionary remedy. This

then becomes the beginning of The Chart:

Cause of Action	Restitution	Contract (express or implied in fact)	Tort
Elements	Defendant's gain Plaintiff's loss Unjustness	Offer Acceptance Consideration Capacity	Duty Breach of Duty
Remedy	Defendant's gain	Expectation (court infers parties intend price term to be reasonable market value if the term is not expressed) OR Reliance	Make plaintiff whole

Then the class studies four cases to consider how to measure defendant's gain in restitution cases. The cases do not produce a uniform theory as to recovery, leading to the questions "what really is restitution?" and "is my chart accurate?" In the famous egg washing case, *Olwell v. Nye & Nissen Co.*, the students see that a plaintiff was able to "waive the tort and sue in assumpsit" and recover the amount of a defendant's gain that was greater than plaintiff's loss.¹⁰ By contrast, in *Maglica v. Maglica*, the court said:

[T]he threshold requirement that there be a benefit from the services can lead to confusion, as it did in the case before us. 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 "benefitted" as a *result* of them.¹¹

But that is exactly what I have said restitution does measure, the amount of defendant's gain. *Maglica* involved a suit by a female cohabitant against a male cohabitant. The jury had awarded the woman \$84 million, half of the value of the defendant's business, for which she had worked and contributed

¹⁰ *Olwell v. Nye & Nissen Co.*, 173 P.2d 652 (Wash. 1946).

¹¹ *Maglica v. Maglica*, 78 Cal. Rptr. 2d 101, at 105 (Cal. Ct. App. 1998).

profitable ideas, but in which she did not have a formal ownership interest. One of her ideas—that the company make purse-sized flashlights in different colors—was very successful. The trial court had instructed the jury that it could measure recovery by the reasonable value of her services or by the amount by which the defendant had benefited from them. The intermediate appellate court, quoted above, appeared amazed at the amount of the verdict. Although the intermediate appellate court noted that the case was one under the theory of unjust enrichment for which a contract was not required, the appellate court limited the remedy to the reasonable value of her services, which, as has already been established, is a contract implied in fact remedy.

The students discuss whether *Maglica* and *Olwell* are inconsistent, and if so, which one is wrong. Should the measurement be defendant's gain, and is *Maglica* wrong? Or are the cases distinguishable, and is the distinguishing feature tortiousness, present in *Olwell* but missing in *Maglica*? Should the determination whether defendant's gain can exceed damages in tort or contract be limited to historically defined torts, or can it encompass "unjustness" more broadly defined? Who was more wrongful, the person who took an idle machine, albeit someone else's, out of a closet to deal with labor shortages during wartime, or the male cohabitant who left the relationship a wealthy man, in substantial part because of the ideas of his female cohabitant. (A feminist perspective creeps in here—one can note that the measurement of defendant's gain was allowed in *Olwell*, but not when it would be awarded to a woman in her traditional role of a person behind the scenes, and without the protection of formal title, "owning" the business, or the "protection" of marriage.) How does restitution for material breach of contract fit with notions of wrongfulness for the purpose of restitution?

The class discusses two more cases about the measurement of recovery in restitution. *W.H. Fuller Co. v. Seater* is similar to *Kossian* in that the person for whom the plaintiff contracted to work is no longer in possession of the property and the worker is suing the owner of the property who did not contract for the work.¹² *Seater*, however, did not involve a double payment to the defendant. The defendant did not contest the trial court's findings of a contract implied in law; rather, he argued, successfully on appeal, that the plaintiff's recovery must be limited by the defendant's gain and not be measured by the reasonable value of plaintiff's services as it had been in the trial court. In *Seater* the court remanded for a determination of "which, if any,

¹² *W.H. Fuller Co. v. Seater*, 595 N.W.2d 96 (Wis. Ct. App. 1999).

of Fuller Company's services benefited Seater."¹³ Thus, using the measurement of defendant's gain can be useful to a defendant when there is little or no gain. (If there is no gain, however, there should not be an action in restitution.) *Seater* contrasts with *Maglica*, which held that in order to use unjust enrichment there must be a gain, but that gain is not the measurement of recovery.

One possible interpretation of *Olwell*, *Maglica* and *Seater* when they are read together is that the recovery can never measure defendant's gain if that gain is higher than another measure of recovery unless the conduct is tortious, or unless the defendant's gain is less than the reasonable value of plaintiff's services. In *May v. Watt*, however, the Ninth Circuit said, "If a new trial is held on rescission, and the quantum meruit damages are greater than those already awarded for breach of contract, May will be entitled to the additional amount."¹⁴ *May* involved a designer who had contracted to design a condominium complex but who wanted his name taken off of the project because the developer, contrary to the contract, was not adhering to May's designs. May wanted more than his contract price, which he claimed had been discounted because of the publicity he would receive. The Ninth Circuit, however, did not give guidance as to how to measure defendant's gain, which might be higher than the contract price, other than to say that May could not use a fixed percentage of the cost of building.

After comparing these cases, the students debate whether restitution can at times provide a plaintiff with a greater recovery than the plaintiff could recover in contract or tort, regardless of the tortiousness of the conduct or whether restitution should be more limited. As with the scholarship on the subject, the student's debate does not always conclude with consensus. For purposes of my theoretical view of restitution, I like to think that not only is restitution a cause of action, but also that it measures recovery by the value of the defendant's gain. Such a theory makes a nice, clean distinction among restitution, contract, and tort. But is it correct? After reading these cases involving the defendant's gain, one might have to put a question mark under the recovery section for restitution.

We then study equitable restitution. We read some constructive trust, equitable lien, and subrogation cases. Since equitable relief is a court order to the defendant to do or not do something, the students are directed to the

¹³ *Id.* at 100.

¹⁴ *May v. Watt*, 822 F.2d 896, 902 (9th Cir. 1987).

language in the cases in which the defendant is ordered to “convey” something to the plaintiff. The tracing cases are thus understood in the context of the defendant having to convey to the plaintiff what is the plaintiff’s, distinguishing the plaintiff from other general creditors. After discussing these cases, the students return to *Kossian* to determine whether *Kossian* is a legal or an equitable action. The students can see from the last substantive sentence in *Kossian* that despite all of the “equitable” terminology used by that court, the award is “then plaintiff should recover,” not “defendant is ordered to pay *Kossian*.”¹⁵ Thus, in the context of restitution, the class reviews the differences between law and equity in general. This helps them see that those differences remain constant regardless of the cause of action in which they are applied.

At this point I add to The Chart, under each of the three causes of action, a legal and an equitable option. Under both of those options, I add the terminology that is limited to one or the other. For legal restitution the terminology includes contract implied in law, quasi contract, *assumpsit*, quantum meruit, and other common counts. Quasi contract and contract implied in law are synonymous, but quantum meruit and the other common counts are limited to certain specific factual circumstances, e.g., quantum meruit refers to services provided. The terminology for equitable restitution includes constructive trust, equitable lien, and subrogation. On the chart, I also fill in the terminology for legal and equitable contract and tort, although there are fewer synonymous terms of art because I do not teach any historical writs other than *assumpsit* and *quantum meruit*. I add those two terms to the legal contract column, pointing out that the words can have one of two meanings because they appear in both the legal restitution and contract columns. In the classes on damages the class had already learned that “foreseeability” has different meanings depending upon whether used in tort (proximate cause) or contract (contemplation of the parties at the time of contracting). Equitable terminology under contract is specific performance, and under tort, injunction, but all equitable relief is an order by the judge to the defendant to do or not do something, despite its label. By adding these words to The Chart, I should have accounted for all of the terminology that was listed on the board during the first class (and explained its historical roots). The Chart is now:

¹⁵ *Kossian*, 62 Cal. Rptr. at 228.

Cause of Action	Restitution		Contract (express or implied in fact)		Tort	
Type of Action	Legal: quasi-contract contract in law assumpsit quantum meruit (other common counts)	Equitable: construc-tive trust equitable lien subrogation	Legal: assumpsit quantum meruit	Equitable: specific perform-ance	Legal	Equitable injunc-tion
Elements	Defendant's gain Plaintiff's loss Unjustness		Offer Acceptance Consideration Capacity		Duty Breach of duty	

Remedy	Amount of defendant's gain	Convey defendant's gain	Expecta- tion (contract implied in fact — infer parties intend price to be reasonable market value of plaintiff's services) OR Reliance	Order defendant to perform	Make plaintiff whole
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Finally we study the defenses to restitution, reading cases involving volunteers, lack of expectation of payment and other defenses. While the courts in some of these cases apply an expansive view of restitution in rejecting a defense, there are others that apply a restrictive view of restitution by applying a defense expansively. Those latter cases appear to have a disparate impact on women. Many involve the need to compensate a nonwage earner for his or her contributions to the total wealth of a marital relationship. There are a number of cases that deny relief, or grant it stingily, to women. I would call *Maglica*, discussed above, a “stingy recovery” case. Thus, from the feminist perspective, I would like to see those cases decided under the more expansive view of restitution.

In *Verity v. Verity*, the court denied a wife a constructive trust on one-half of her husband's property, which she had been managing during his mental incapacity, on the ground that she had a duty to perform services for her husband.¹⁶ The court did, however, award her an equitable lien to cover her out of pocket expenses, presumably because her duty did not extend to spending money. In *Dusenka v. Dusenka*, the court denied compensation, on the ground of lack of expectation of payment, to a widow who had been

¹⁶ *Verity v. Verity*, 191 N.Y.S.2d 204 (N.Y. App. Div. 1959).

working in what she thought was her husband's business, but which her husband had transferred to her stepson prior to his death.¹⁷ *Verity* and *Dusenka* are older cases, but even in a more recent case, *Kuder v. Schroeder*, a court denied any recovery to a former wife.¹⁸ In *Kuder*, the wife and husband had agreed that if she had only one child and supported the family while he was in school (undergraduate through law school) he would then support the family and she could be a full time wife and mother. They divorced shortly after he started working. The court denied recovery because of the spouse's duty to support the other, "which may not be abrogated or modified by agreement of the parties to a marriage."¹⁹ Unfortunately the dissolution of marriage laws did not help the wife because the couple had accumulated few assets during the marriage and she had no right to alimony because she was not "dependent." The dissenter said:

Arguably, as previously discussed, plaintiff's contribution to defendant's educational accomplishments is outside the scope of her marital duty of support, and therefore is not presumed gratuitous. However, even assuming that her contribution falls within such duty, the allegations in plaintiff's complaint are sufficient to rebut the presumption that her efforts were rendered gratuitously. Based on the allegations in her complaint, I conclude that plaintiff has stated a claim for unjust enrichment, and would hold that the trial court erred in dismissing it.²⁰

In *Pyeatte v. Pyeatte*, cited by the dissent in *Kuder*, a wife was able to recover in restitution.²¹ She and her husband had agreed that after she put him through law school, he would put her through a master's degree. In what I would view as another "stingy recovery" case, the court restricted the wife's recovery to the cost of her education if it were less than the defendant husband's gain (the cost of law school) because "the award to [her] should be limited to the amount of the anticipated benefit to [her]."²² The court, however, had held that she could not recover under a contract claim because the terms were too indefinite. This is similar to *Maglica*, in which the court held that the measurement under unjust enrichment cannot be the value of defendant's gain, but must be limited to the reasonable value of her services,

¹⁷ *Dusenka v. Dusenka*, 21 N.W.2d 528 (Minn. 1946).

¹⁸ *Kuder v. Schroeder*, 430 S.E.2d 271 (N.C. Ct. App. 1993).

¹⁹ *Id.* at 273.

²⁰ *Id.* at 276 (Greene, J., dissenting).

²¹ *Pyeatte v. Pyeatte*, 661 P.2d 196 (Ariz. Ct. App. 1982).

²² *Id.* at 207.

apparently not recognizing that some of the gain that the business received was from her idea to market purse-sized colorful flashlights.

Watts v. Watts, stands out as a cohabitant case that awarded defendant's gain.²³ *Watts* upheld an award to "Mrs." Watts of 10% of the \$1,113,900 increase in wealth during the relationship on the ground that:

the jury could have inferred that [his having planned to leave her 10% of his wealth in a prior will] was the value [he] placed on [her] services in 1972. . . . There was sufficient evidence to support the jury's finding that Watts was unjustly enriched by [her] efforts by \$113,090.08, which is a little less than \$12,000 a year.²⁴

Perhaps finding this a "stingy recovery," the court remanded for a determination whether "Mr." Watts had breached a contract implied in fact to share equally the increase in the wealth. Following *Watts*, the jury in *Maglica* might not have been wrong in finding that the female cohabitant's contributions to the defendant's business that they started together, including her profitable ideas, justified that she share in the gain of the business.

These restrictive cases are contrasted with *Olwell*, in which defendant's gain was permitted to be more than the plaintiff's loss and with *Ventura v. Titan Sports, Inc.*, in which now governor Jesse Ventura was able to recover over \$800,000, which the court said represented either the defendant's gain or plaintiff's loss, for unauthorized and fraudulent use of Ventura's image in videotape sales.²⁵

The defenses become limitations to the recovery in restitution, which I compare to the limitations in contract, contemplation of the parties at the time of contracting (referred to as foreseeability) and in tort, proximate cause (also, unfortunately, referred to as foreseeability). I add to the bottom of The Chart the following:

²³ *Watts v. Watts*, 448 N.W.2d 292 (Wis. Ct. App. 1989).

²⁴ *Id.* at 297.

²⁵ *Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 728 (8th Cir. 1995).

Defenses or Limitations	Volunteer	Contemplation of parties at time of contracting	Proximate Cause
	No expectation of payment	Duty to Mitigate	Comparative (or contributory) negligence
	Change of position	Offset the benefits	Avoidable Consequences or Duty to Mitigate
	Innocent Third Party		Economic Loss Rule
	Fruits of defendant's labor		

With the addition of the defenses and limitations, The Chart is complete. (The completed chart is Appendix A to this paper.) On the completed chart I draw a circle around defendant's gain as a remedy under restitution and from that circle draw two arrows, one of which points to the remedy section under contract, the other to tort. I explain that restitution is often referred to as an alternative measurement of recovery for contract or tort, and thus restitution (measured by defendant's gain) could also be listed at these two points. Since it does not matter whether restitution is a cause of action or a remedy in these two situations because the outcome is the same, it is not inaccurate to refer to restitution as an alternative remedy. In fact, Lon Fuller and William Perdue, in their famous article, *The Reliance Interest in Contract Damages I*, distinguished among restitution, reliance and expectation as "three principal purposes which may be pursued in awarding contract damages."²⁶ They also say, discussing Aristotle, that "[t]he 'restitution interest,' involving a combination of unjust impoverishment with unjust gain presents the strongest case for relief."²⁷

I ask, however, why restitution cannot be referred to only as a remedy. As The Chart and cases such as *Kossian* demonstrate, restitution can be a cause of action when no other would apply. I explain, because restitution can stand alone, one can think of it in all cases in which it is applied as a cause of action. Just as plaintiffs in some instances can choose between causes of action in contract or tort to achieve different remedial goals, such as obtaining punitive damages (tort) or taking advantage of a longer statute of limitations

²⁶ Lon Fuller & William Perdue, *The Reliance Interest in Contract Damages I*, 46 YALE L.J. 52, 53-57 (1936).

²⁷ *Id.* at 53.

or easier proof of breach (contract) rather than negligence (tort), so too plaintiffs can waive the tort (or material breach of contract) and sue in *assumpsit* (restitution) to achieve a greater recovery (defendant's unjust enrichment). When restitution is an alternative to a material breach of contract action or a tort, that is because the "unjust" element in restitution either is the material breach of contract, which enables the plaintiff to view the contract as nonexistent, or is the tortious conduct. Thus, The Chart demonstrates three independent causes of action and in doing so, emphasizes "freestanding" restitution. That emphasis focuses attention upon the different measurements of recovery under all three theories. With each remedy independently measured, it is irrelevant whether defendant's gain is greater or less than the other measures of recovery. It is merely different. When justice requires, defendant should disgorge gain. Of course, defining "when justice requires" is not necessarily easy. I have, however, suggested one approach.

As the title of the first article I wrote, referred to above,²⁸ indicates, I theorized applying restitution to remedy a discriminatory denial of partnership to a female associate. I wrote the article after the 11th Circuit, in *Hishon v. King & Spaulding*, had ruled that discrimination in partnership decisions against associates was not covered by Title VII of the Civil Rights Act of 1964.²⁹ The United States Supreme Court later reversed that decision,³⁰ but I wanted the plaintiff to be able to have her day in court and to have a chance to prove discrimination (of course, it is not easy to prove). I applied restitution as follows: The defendant law firm had a gain, the plaintiff's billed hours minus salary and overhead; she had a loss, her labor and, perhaps, a foregone lifestyle based upon not being eligible for "the brass ring;" the unjustness was either the material breach of contract by not honoring the promise of eligibility for partnership to have her name in the hat from which names are drawn, or the fact of discrimination itself. The remedy would be defendant's gain, the billed hours minus salary and overhead. A breach of contract action would be more difficult because to recover damages a plaintiff presumably would have to prove that she would have made partner and measure what she lost after mitigation. In restitution, however, the remedy is (or in my view should be) what the defendant gained, not what the plaintiff lost.

This theory works under The Chart I construct. The question, of course,

²⁸ See *supra* note 4.

²⁹ *Hishon v. King & Spaulding*, 678 F.2d 1022, 1024 (11th Cir. 1982).

³⁰ See *Hishon v. King & Spaulding*, 459 U.S. 1169 (1983).

is whether I am right, or at least whether I can be right some of the time, particularly in circumstances in which women have been treated unjustly.

Appendix A—Professor Candace Kovacic-Fleischer's Chart of Teaching Restitution (pages 674-675)

Cause of Action	Restitution		Contract (express or implied in fact)		Tort	
Type of Action	Legal: quasi-contract contract in law assumpsit quantum meruit (other common counts)	Equitable: constructive trust equitable lien subrogation	Legal: assumpsit quantum meruit	Equitable: specific performance	Legal	Equitable: injunction
Elements	Defendant's gain Plaintiff's loss Unjustness		Offer Acceptance Consideration Capacity		Duty Breach of Duty	

Cause of Action	Restitution		Contract (express or implied in fact)		Tort
Remedy	Amount of defendant's gain	Convey defendant's gain	Expectation (contract in fact — infer parties intend reasonable market value of plaintiff's services) OR Reliance	Order defendant to perform	Make plaintiff whole
Defenses or Limitations	Volunteer No expectation of payment Change of position Innocent Third Party Fruits of defendant's labor		Contemplation of parties at time of contracting Duty to Mitigate Offset the benefits		Proximate Cause Comparative (or contributory negligence) Avoidable Consequences or Duty to Mitigate Economic Loss Rule

