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Restitution and Reform

Dale A. Oesterle
Cornell University

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RECENT BOOKS

RESTITUTION AND REFORM

Dale A. Oesterle*


In 1968 a distinguished legal scholar could write that "[i]t is a source of real regret" that there is no general treatise on the law of restitution in this country. Professor George E. Palmer of the University of Michigan Law School now has filled the void splendidly with a four-volume treatment of the subject. The absence of such a treatise for so many years is remarkable, because knowledgeable observers of American law have recognized for over fifty years that restitution is a discrete body of legal and equitable rights and remedies based on the principle of rectifying situations of unjust enrichment. We are fortunate to have two early treatises, W. Keener, Quasi-Contract (1893) and P. Woodward, The Law of Quasi-Contracts (1913), that introduce us to the threads of unjust enrichment in the common law. But no subsequent treatises developed the themes

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The author thanks his colleagues Alan Gunn, Robert B. Kent, Russel K. Osgood, and Robert S. Summers for their assistance in reviewing earlier drafts.


2. The Restatement of Restitution, published in 1937, combined in one text most of the legal and equitable remedies affording restitutionary relief. Only a few select sections on relief in connection with contracts were omitted, because the material had been previously prepared and published in the Restatement of Contracts (1932). See Restatement of Restitution § 108 (1937) (referring to §§ 180-83, 347-57, 468, and 598-609 in the Restatement of Contracts). The Restatement of Restitution did not integrate fully the legal and equitable remedies around their common themes, however. Warren A. Seavey was the reporter for Part I of the Restatement and Austin W. Scott was the reporter for Part II. The division between the Parts was based primarily on the law-equity dichotomy with the inevitable result that the two parts at times overlap and even conflict. Moreover, many of those portions of the Restatement that proposed advancements in existing doctrine have met with limited success. See, e.g., 1 G. Palmer, The Law of Restitution § 2.17 [hereinafter cited as G. Palmer without cross-reference] (discussing the tracing rules of the Restatement, §§ 211 and 212).

A second Restatement of Restitution is under way. Professor William F. Young of Columbia University has been appointed the reporter. As of the date of writing of this review, no drafts of the second Restatement have been circulated.

3. See J. Dawson, Unjust Enrichment 22-23 (1951); Restatement of Restitution § 1, Comments b and c (1937).
of these early works. 4 Rather, apart from the Restatement of Restitution (1937) and its accompanying reporter's notes, we have had to consult treatises in a variety of fields — contracts, trusts, equity, fraud, remedies and damages 5 — to obtain an enriching comparison of the application of the unjust enrichment concept in various circumstances. 6 Professor Palmer's treatise gathers, refines, and expands these scattered treatments.

Restitution is a term that describes a variety of common-law rights that share the following features: (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. 7 If the three criteria are satisfied, the law requires that the defendant transfer the benefit, in specie or in value, to the plaintiff. For example, A tells his bookkeeper to mail a check to B. The bookkeeper misunderstands the directions and mails a check to C. A is entitled to restitution from C equal to the amount of the check. 8 The definition hides intriguing problems: the meaning of "benefit" (where labor and materials have gone into the defendant's building pursuant to a construction contract and the contract is discharged by impossibility because a fire destroys the building before the work is completed, has the defendant benefited? 9 ); the meaning of "at the plaintiff's expense" (where the defendant benefits through inducing a third party to break a contract with the plaintiff and the contract was a losing proposition for the

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4. I am not overlooking Professor John P. Dawson's important 1950 Julius Rosenthal lectures at Northwestern University, published under the title UNJUST ENRICHMENT (1951). The lectures are a significant contribution to the literature on restitution, but their broad focus did not provide the systematic, methodical treatment of the subject that characterizes legal treatises.

5. E.g., M. Bigelow, Fraud, ch. 11, §§ 4, 5 (1877); G. Bogert, Trusts §§ 472, 495, 497 (1973); S-G A. Corbin, Contracts §§ 1107, 1112, 1372 (1963); D. Dobbs, Remedies §§ 4.1-4.3 (1973); H. McClintock, Equity §§ 118-23 (2d ed. 1948); C. McCormick, Damages 448, 458, 586, 626-27, 683 (1935); J. Pomeroy, Equity Jurisprudence § 1044 (5th ed. 1941); A. Scott, Trusts §§ 462-64 (2d ed. 1956); S. Williston, Contracts § 1454 (2d ed. 1970).


7. See Restatement of Restitution § 1, Comments b and c (1937); R. Goff & G. Jones, supra note 6, at 11-25.

8. Restatement of Restitution § 22, Comment a, Illustration 3 (1937). A is not entitled to interest on the fund during the time that C has possession, however, even though C may have benefited by collecting the interest. See id. at § 156, Comment a. The rule on interest needs reevaluation. If C profits from the use of A's money, C should restore to A the market value (market rate of interest) of the money if less than C's profit. If the interest is more than C's actual profit, C should restore only the profit, since C is an innocent converter. See note 83 infra.

plaintiff, can the plaintiff recover the defendant's benefit?\(^\text{10}\)); and the meaning of unjust enrichment (where the plaintiff knowingly paid a debt a second time because he was unable to find documentation of the first payment, can he recover the second payment?\(^\text{11}\)).

The selection of the term "restitution" to denote the category of rights defined by these criteria is perhaps unfortunate.\(^\text{12}\) The term suggests a very limited list of remedies aimed at the restoration of circumstances to a previous state (restoration to the claimant of an item previously held by him, for example). The law of restitution deals with much more than this. Restitution, properly defined, affords relief in cases in which the successful party claims something he did not have before. For example, \(A\) owes \(B\) $500 for purchased goods. \(A\) mistakenly believes that he purchased the goods from \(C\) and mails a check to \(C\) for $500. \(C\) cashes the check in the mistaken belief that it is payment on a debt that \(A\) formerly owed but in fact paid. \(B\) has a right to restitution from \(C\), which is superior to any right to restitution that \(A\) has from \(C\).\(^\text{13}\) It uncomfortably stretches the concept of restoration to argue that \(C\) restores \(A\)’s property when recovery is enforced.

Far more substantial problems than proper nomenclature, however, pervade the law of restitution. The cardinal outlines of this branch of law are in dispute. One seeking to gather various common-law rights in the restitution category must decide between a selection based on historical derivation and a selection based purely on theory. A selection based on historical development includes the modern product of the common counts in general assumpsit and of the equitable doctrines of constructive trust, equitable lien, subrogation, equitable accounting, and contribution and indemnity. Excluded are the common-law actions of trover, trespass to chattels, trespass for mesne profits, detinue, replevin and ejectment,\(^\text{14}\) and the


\(^{11}\) See, e.g., Shockley v. Wickliffe, 150 S.C. 476, 148 S.E. 476 (1929). The English refuse to recognize a law of restitution primarily because they believe that the principle of unjust enrichment is too vague to be of any practical value. See R. Goff & G. Jones, supra note 6, at 11-13.

\(^{12}\) Professor Palmer attributes the general usage of the term to the publication of the Restatement of Restitution in 1937. 1 G. Palmer at 4.

\(^{13}\) Restatement of Restitution § 126, Comment b, Illustration 1 (1937).

\(^{14}\) For a discussion of the historical origin of these actions, see J. Baker, An Introduction to English Legal History 49-61 (2d ed. 1979).
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The concept of *negotiorum gestor* in admiralty, all of which may provide a form of restitutionary relief. The *Restatement of Restitution* favors this classification scheme, and Professor Palmer, in his selection of topics for discussion in his treatise and in his occasional comments on these other common-law actions, appears to continue in the Restatement tradition. On the other hand, a selection based purely on theory focuses on the three criteria noted above and includes all rights that allow for relief under circumstances satisfying the criteria. No one supports this latter position fully, although the writings of Robert Goff and Gareth Jones approach it. Those who limit restitution to select, historically-derived actions, however, espouse the liberal operation of the theory of restitution, free of ancient distinctions, within their chosen forms of action.

Moreover, the essential theory of restitution, whatever its scope of application, itself exhibits severe definitional anomalies. For example, one of the cornerstones of the theory is that the value of the relief awarded is measured by the value of the defendant's benefit, not by the value of the plaintiff's loss. In a "damage" action the plaintiff seeks to recover for the harm done to him; in a restitution action the plaintiff seeks to recover the gain acquired by the defendant through the wrongful act. The difference serves to justify the existence of the restitutinary remedy and to distinguish it from the tort and the contract remedies where the restitutinary remedy and either a tort or a contract remedy are alternatively appropriate. Yet, the methods of measuring the defendant's gain in restitution actions often are a transparent pretense for awarding the plaintiff his loss and a measure of punitive damages. The latter part of this review will explain this problem in more detail. Other core definitional irregularities also exist. Another problem, which is not discussed

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16. See *Restatement of Restitution*, ch. 7, Introductory Note (1937). The *Restatement* favored the distinction between tort actions and restitution actions with respect to survivorship, bankruptcy, statute of limitations and attachment. Restitution was analogized to those contracts, enabling the claimant to take advantage of contract rules in these areas where different from rules applicable to torts. Lawmakers now recognize that these distinctions are unprincipled vestiges of the old forms of action, and they are moving slowly to eliminate them. For an early criticism of the distinctions see Corbin, *Waiver of Tort and Suit in Assumpsit*, 19 Yale L.J. 221 (1910).
17. For example, Professor Palmer's discussion of recovery in trespass for mesne profits indicates that he believes such an action to fall outside the scope of the law of restitution. 1 G. Palmer at 77. *But see id.* at 4 ("replevin of goods is sometimes a form of restitution").
18. R. Goff & G. Jones, *supra* note 6, at 4-5.
20. See text at notes 71-92 infra.
here, is the elasticity of the concept of benefit. In this definitional morass, Professor Palmer operates with remarkable clarity. He begins his treatise modestly:

Restitution has no well-defined boundaries because it is concerned with unjust enrichment, and that can appear in many places over almost the entire body of private law as well as in some parts of public law. I do not know whether a truly comprehensive treatment of restitution can be written. The book is not comprehensive, partly because I do not have sufficient knowledge of many branches of the law. The book will have served its principal purpose if it contributes to an understanding of one of the important bases of legal liability: liability based in unjust enrichment.

What follows, however, is a herculean attempt at providing integrity to this neglected branch of law. The subsequent 2,316 pages of text discuss (with a notable exception) numerous and diverse problems in restitution that historically have troubled American courts. Professor Palmer, by focusing on the venerable and classic questions in restitution, avoids grappling directly with the definition of restitution's outer limits. The approach requires, however, an extraordinary range of text. While one can find select areas that deserve better treatment (I urge Professor Palmer to supplement his securities discussion), on the whole the treatise reflects a mastery of an
astounding amount of material.

Traditional divisions of civil law influence Professor Palmer’s organization of the material. His major divisions are as follows: tort (and wrongs from breach of trust or other fiduciary obligation); fraud and misrepresentation; breached, unenforceable, frustrated, and illegal contracts (often subdivided by the subject matter of the contract — real property, personal property, and services, for example); duress; volunteers; mistake in business transactions, gifts or bequests; and three-party problems (restitution of a benefit transferred to the defendant by a third person and restitution from a defendant because of a payment to the third person). The material overlaps in the various sections, and a reader should take care to read all pertinent portions (which are easy to find because of Professor Palmer’s excellent index in volume four). The repetition is due to Professor Palmer’s attempt to discuss discretely and completely various themes in restitution, such as legal history and three-party problems, that are not subject-matter specific.

Unfortunately, Professor Palmer’s valuable treatise may turn out to be under used, perhaps for reasons similar to those that explain the declining popularity of classes in restitution at American law schools. Law school curricula and statements by commentators have led lawyers to regard the law of tort and contract (and, perhaps, restitution) as the source of substantive rights.

later footnote that “the effect of federal regulation of the securities market on a damage action is outside the scope of this book. Some departures from common-law rules have occurred.” Id. at 265 n.2. Professor Palmer cites Affiliated Ute in support, noting that common-law rules concerning causation have been altered. This understates the impact of the common-law theories on damage calculation in 10b-5 cases.

An intriguing question is whether the common-law theories are helpful if a buyer or seller is suing someone other than an opposite party in a security sales transaction (for example, a defendant affects the market price of securities held by plaintiff by issuing misleading statements, or a defendant procures a merger by a misleading proxy statement). Is a restitutionary award appropriate? See Elkind v. Liggett & Myers, Inc., 49 U.S.L.W. 2425, 2426 (2d Cir. Dec. 4, 1980); Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1341 (9th Cir. 1976) (Sneed, J., concurring in part).

26. The term civil law is used to describe the body of law that regulates the conduct of persons in ordinary relations with each other. Civil law in this usage contrasts with criminal and administrative law.

27. The organization of the treatise is similar to the organization of Professor Palmer’s casebook. J. Dawson & G. Palmer, Cases on Restitution (2d ed. 1969). Indeed, the treatise is an excellent aid for those teaching from the casebook. The treatise also draws on Professor Palmer’s penetrating and comprehensive 1961 lectures on the doctrines of mistake. G. Palmer, Mistake and Unjust Enrichment (1962).

28. The index is not free from fault, however. First, it cites the reader to sections only, some of which are rather long. If the reference is to a narrow point, thumbing through an entire section can be aggravating. Second, it contains errors. For example, Professor Palmer’s discussion of mesne profits is in §§ 2.5 and 2.12, yet the index cite is to § 1.5.

29. Most law schools teach civil law in the first year through courses in tort, contracts, and property law. In these courses, restitution is rarely identified as a source of substantive rights.
fiduciary responsibility) as the principal source of civil liability at common law. Restitution is viewed solely as an alternative remedy for tortious conduct or breaches of contract. Why have a separate course (or treatise) for restitution when it can be tacked on to a course (or treatise) on torts or contracts?

There are two ready answers. First, restitution must be separated from torts, contracts, and fiduciary responsibility because restitution can provide a right to relief when none of the other theories are helpful. A lawyer who lacks this knowledge can do an extreme disservice to clients who can recover (or who are liable) only under restitutionary principles. For example, restitution alone gives relief to a mortgagee who voluntarily paid taxes to forestall foreclosure of a tax lien on the mortgaged property; to a person who has paid mistakenly a debt to the wrong person or a debt that he does not owe; and to a physician who provides emergency medical attention to a person unable to assent to the performance of the service. Even in contract cases where the contract is discharged without breach due to unenforceability, impossibility, or illegality, recovery of the value of any performance undertaken pursuant to the contract is based solely on restitutionary principles. Second, even if restitution is viewed primarily as an alternative remedy for a tort or a breach of contract, the correct application of the restitutionary remedy depends on a clear understanding of the general principle of unjust enrichment. Usually, restitution is noted briefly, if at all, to be an alternative remedy for torts and breaches of contract.

30. E.g., 1 G. PALMER at 1 (Our legal system has "split the whole field of civil obligations into contract objections and tort delegations.") (quoting Gilmore, Products Liability: A Commentary, 38 U. CHI. L. REV. 103, 111 (1970)).


34. See, e.g., Cotnam v. Wisdom, 83 Ark. 601, 104 S.W. 164 (1907); 2 G. PALMER § 10.4.

35. See, e.g., McCarthy v. Santangelo, 137 Conn. 410, 78 A.2d 240 (1951) (illegal contract); Anderson v. Shattuck, 76 N.H. 240, 81 A. 781 (1911) (impossibility); Ford v. Stroud, 150 N.C. 362, 64 S.E. 1 (1909) (unenforceable contract); 2 G. PALMER at chs. 6-8. The Uniform Commercial Code incorporates and modifies restitutionary rights when it deals with a contract for the sale of goods that is unenforceable because of the lack of a sufficient writing. See U.C.C. § 2-201(3).

36. Professor Palmer cautions against an overly literal adherence to this view: It is common to describe restitution as a remedy generally available for substantial breach of contract. This is useful as a point of departure, but at the same time it can be a dangerously misleading generalization. In some instances restitution will not be granted, no matter how important that breach. In other instances restitution is regularly granted without requiring that the breach be substantial. 1 G. PALMER at 367-68 (footnote omitted).
judges and lawyers do not appreciate the full benefits of the restitu­
 tionary alternative because they fail to distinguish properly the prin­
ciples behind the alternative from those of tort and contract
doctrines. Now that Professor Palmer's treatise is available, attor­
neys will have little excuse for such a failure.

Every teacher of restitutio­nary remedies has a favorite case for
illustrating blunders made by lawyers who fail to understand restitu­
tion theory.37 Roberts v. Sears, Roebuck & Co.38 serves currently as
my example. The plaintiff was a Sears sales clerk who at age eight­
teen designed and constructed a "quick-release" ratchet wrench dur­
ding his off-duty hours. Two years later he assigned all his rights in
the invention to Sears for a royalty of two cents per unit up to a
maximum of ten thousand dollars. The wrench was an immediate
success. Within days after the signing, Sears was manufacturing
forty-four thousand quick release wrenches a week. In the next nine
months Sears sold over a half-million of the wrenches and paid the
plaintiff the maximum amount in the assignment agreement. Ten
years after the assignment Sears had sold over nineteen million
wrenches, and Sears continues to market the wrenches profitably to­
day.

The plaintiff was understandably vexed by how small a share of
the profits he had received. He filed suit against Sears in a federal
district court four years after the assignment, arguing fraud, breach
of confidential relationship, and negligent misrepresentation during
negotiation of the assignment. At the core of the plaintiff's claims
was the allegation that Sears grossly understated the value of the
wrench during negotiations.39 A jury found for the plaintiff on each
of the three theories of liability and awarded one million dollars as
recompense.

A bizarre series of motions and appeals followed. Dissatisfied
with the size of the jury verdict (plaintiff had introduced evidence
that Sears had made over forty-four million dollars in profits from

37. Professor Palmer has used Millen v. Gulesian, 229 Mass. 27, 118 N.E. 267 (1918). J.
Dawson & G. Palmer, supra note 27, at 462.
372 (N.D. Ill. 1979), remanded 617 F.2d 460 (7th Cir.), cert. denied, 101 S. Ct. 386 (1980).
39. Sears's lawyer overstated probable costs of production, understated probable gross
sales, and cast doubt on the patentability of the invention. Sears made the representations in
the face of private studies to the contrary, and in the face of plans to incorporate the invention
in approximately seventy-five percent of all its wrenches sold. Moreover, Sears had induced
plaintiff's patent counsel to inform Sears directly on the status of patent applications on the
invention. As a consequence, Sears knew before the assignment was executed, but the plaintiff
did not, that patents had been granted on the invention. 573 F.2d at 979 n.1.
the invention), the plaintiff filed a post-trial motion asking for re-scission of the assignment and restitution of Sears's profits. He argued that the district court, sitting as a court of equity, should accept the jury's determination of liability, but should disregard the damage verdict on the equitable counts of fraud and breach of confidential relationship. The district court denied the motion, holding that the plaintiff had elected his legal remedies on all the counts by taking the case to the jury. On appeal the Seventh Circuit remanded, ordering the district court to consider whether the patents should be returned to the plaintiff as of the date of judgment. The circuit court's careless use of the terms rescission and restitution, however, led the district court to reopen the entire case for an equitable accounting of all of defendant's profits after the wrongful acquisition of the rights to the invention. Sears appealed, and the Seventh Circuit clarified its earlier opinion, holding that the plaintiff had elected a damage remedy for past injury by submitting his claims to a jury, but that the election did not prohibit him from asking for relief from future injury. The court found that the best relief from future injury consisted of ordering the return of the patents to the plaintiff retroactive to the time of the trial court judgment. Since that judgment was three years old at the time of the second circuit court opinion, the plaintiff was left with a right to sue Sears for damages caused by Sears's three years of infringement of the patents, and the right to exploit the patents for their remaining years of life. Sears promptly announced that it would defend any patent infringement suit on the

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40. The plaintiff had presented evidence that Sears earned "an incremental net profit of $44,032,082 from its use of his invention." Roberts v. Sears, Roebuck & Co., 471 F. Supp. 372, 382 (N.D. Ill. 1979). Sears disputed the figure. 573 F.2d at 984 n.7.


42. Based on the jury instruction, plaintiff will receive one million dollars as the measure of past profits earned by Sears up to the time of trial. That award, however, is not inconsistent with return of the patent so that plaintiff can receive the future benefits of the patent that Sears fraudulently acquired.

573 F.2d at 985.

43. Judge Swygert dissented, arguing that the plaintiff was entitled to an accounting for Sears's profits from the time of the jury verdict to the present. 617 F.2d at 466.

44. In 1952, Congress amended the federal statute controlling patent infringement actions, eliminating recovery of profits from the patent infringer. The patentee is now limited to a damage remedy. See ARO Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476, 505 (1964) (plurality of four Justices); Foster v. American Mach. & Foundry Co., 492 F.2d 1317, 1320-21 (2d Cir. 1974); Zegers v. Zegers, Inc., 458 F.2d 726 (7th Cir. 1972); Georgia Pac. Corp. v. United States Plywood Corp., 243 F. Supp. 500, 514-46 (S.D.N.Y. 1965). So, in essence, the plaintiff was not given "future profits," but rather a damage remedy through a cause of action commencing at the time of the initial trial court judgment. At the time of the writing of this Review, the plaintiff had not yet filed the second suit.
grounds that the patents were invalid. The plaintiff, the trial judge, and the Seventh Circuit all could have benefited from a careful reading of Palmer's treatise. The plaintiff made two serious errors. First, he failed to realize that he was facing one case in which it was important to decide early in the proceedings whether he was affirming or disaffirming the transfer of rights to the invention. Palmer's treatise would have warned him:

If the plaintiff has transferred title to property to the defrauding party in performance of the contract, and the latter still has the property, there is an inescapable difference between a claim for the return of the property, and a claim for damages which does not call for such return but instead rests on a choice made by the plaintiff to allow the transfer of title to stand.

An election of the damages remedy, affirming the transfer of the invention, entitled the plaintiff to compensation for the injury actually sustained, in this case the market value of the patent at the time of the wrongful transfer minus the proceeds he received on the transfer. On the other hand, an election of the restitutary remedy, disaffirming the transfer of the invention, entitled the plaintiff, upon tendering the proceeds he received on the transfer, to either an action to secure the patents in specie or in value (measured as of the time of the wrongful appropriation) unlimited by the contract price. Moreover, if the restitutary remedy was elected, the plaintiff would be entitled to an accounting of the defendant's profits during the period of wrongful use. In the Sears case, the restitutary remedy clearly was preferable.

The plaintiff, however, allowed the case to go to the jury on a confused instruction without a clear and reasoned objection. A

45. Judge Swygert, dissenting, viewed this announcement with considerable distaste: At oral argument, counsel for Sears categorically asserted that the patents were invalid — despite the evidentiary fact that the quick release wrenches which Sears has sold and is selling all bear the patent number. Such a cavalier attitude reflects cynicism on the part of Sears in its business relations with the public. Slip Op. at 13. n.* (the reported opinion does not carry the footnote).

46. The treatise was not published when the plaintiff made his fatal election or when the Seventh Circuit decided the first appeal.

47. 1 G. PALMER at 273. "Damages" refers to a common-law money judgment rendered to compensate the plaintiff for loss or harm caused by the defendant. A person who has a right to restitution can obtain a money judgment equal to the benefit unjustly obtained by the defendant at the expense of the plaintiff. Some refer to such a money judgment in restitution as "damages," but this usage is historically inaccurate and confuses the separate remedies.


49. The district judge refused to instruct the jury that the plaintiff was entitled to an accounting for the profits Sears had acquired by its fraud. The judge dictated an alternate instruction that was typed and submitted by the plaintiff. Sears argued on appeal that the
proper damage instruction would have granted the plaintiff recovery based on his total loss from the wrongful appropriation of the patents (the market value of the patents at the time of the assignment); the profits Sears made and would make on the invention were evidence on the amount of the loss. A proper restitutionary instruction would have charged the jury to award the plaintiff all past profits made by the defendant on the invention and the value of the patents at the time of the assignment (if the plaintiff had not elected to request the patents be returned in specie). The actual instruction used the term “damages” but did not give the market value standard of valuation; rather the instruction noted only that the jury “may” award past profits. It was neither a true damage instruction nor a true restitutionary instruction; rather it was a hybrid.

The Seventh Circuit Court held that “[h]aving let the case go to the jury without getting the issue clarified, plaintiff should not be heard to complain about the outcome of that procedure.” Roberts v. Sears, Roebuck & Co., 617 F.2d 460, 462 (7th Cir. 1980). Moreover, the plaintiff did not object to the instruction as constituting an improper damage instruction. See note 47 infra. The plaintiff did not object to the alternate instruction. The plaintiff argued that he had objected. The record is ambiguous. In handing the judge the alternative instruction plaintiff’s counsel noted: “I will just say for the record, your Honor, this is being submitted because of the Court’s ruling that the jury should not be instructed that they had to bring in profits.” Roberts v. Sears, Roebuck & Co., No. 80-337, Petitioner’s Reply to Response to Petition for a Writ of Certiorari, at 4 (U.S. Sup. Ct., Oct. 1980). Moreover, the plaintiff did not object to the instruction as constituting an improper damage instruction. See note 47 infra. The circuit court held that “[h]aving let the case go to the jury without getting the issue clarified, plaintiff should not be heard to complain about the outcome of that procedure.” 617 F.2d at 463.

50. The profits may afford evidence of the value of the patents. Cf. Atlas-Pacific Engr. Co. v. Geo. W. Ashlock Co., 339 F.2d 288, 289-90 (9th Cir. 1964) (infringer’s net profits are evidence of patent holder’s loss of profits), cert. denied, 382 U.S. 842 (1965). The weight of such evidence is often highly conjectural. The market value of the patents will reflect the profit projections held by market participants at the time of the wrongful appropriation. Expected profits, however, are not the same as actual profits, which would probably not be known with certainty in the market at the time of wrongful appropriation. Actual profits, therefore, are evidence of expected profits only when the prejudicial effect of hindsight knowledge can be discounted. Cf. Brian Jackson Assocs. v. San Manuel Copper Co., 305 F. Supp. 66 (D. Ariz. 1969) (calculation of reasonable royalties based on an analysis not of profits but of the royalty rate parties would have agreed upon had they bargained freely).

51. The trial judge instructed the jury as follows: If you find in favor of the plaintiff upon either the first or second claim, then, one of the elements of the money damages to be considered by you may be the net value to the defendant of the profits and benefits derived from the use of plaintiff’s invention. The award of money damages you make may equal the net profits which you find the defendant gained as a result of its merchandising of wrenches incorporating plaintiff’s Quick Release invention and idea, minus any expenditures which you find the defendant has proved it incurred had it not merchandised such wrenches incorporating plaintiff’s Quick Release invention and idea from the time of the contract in question to the present.

Roberts v. Sears, Roebuck & Co., 617 F.2d 460, 462 (7th Cir. 1980).

Roberts argued on appeal that this was a damage instruction; Sears argued that it was a restitution instruction. Interestingly, damage instructions were held to a much higher standard of accuracy in older cases. For example, cases from the turn of the century have held “value” or “reasonable value” inadequate substitutes for “market value” in instructions to juries. See, e.g., Cincinnati N.O. & T.P. Ry. Co. v. Sweeney, 166 Ky. 360, 179 S.W. 214 (1915); Texas & N.O.R. Co. v. Turner, 199 S.W. 868 (Tex. Civ. App. 1917).

52. The trial judge appeared to have derived the instruction from a sample instruction for patent infringement cases found in W. Mathes & E. Devitt, Federal Jury Practice and Instructions § 86.37, at 575-76 (1965). The sample instruction was a damage instruction. See note 51 supra. Ironically the instruction actually given the jury by the trial judge has been cited by the subsequent edition of the book as an illustration of instructions given in non-
Circuit, in essence, construed the instruction as a limited damage instruction for the value of the loss of use of the invention from the date of the assignment to the date of trial. Of course, the standard of damages that should have been given the jury under the circuit court's theory was a reasonable royalty standard. Since the jury was not instructed on the essential method of calculating such a damage remedy, it is hard to say with confidence that the jury did in fact what the circuit court held that it did. 53

The plaintiff's second error came after he recognized that the jury was to receive a damage instruction. He assumed incorrectly that a damages verdict would not preclude a post-verdict request to the judge for equitable restitutionary relief — rescission of the assignment and an accounting of profits. The trial judge, in accordance with Illinois law, 54 held that the plaintiff had elected irrevocably his legal remedies and could not ask for any form of equitable relief. The Seventh Circuit came partially to the plaintiff's aid by holding that a claim for a return of the patent as of the date of the entry of the judgment was not a mutually inconsistent remedy. The Seventh Circuit ruled that a damages verdict forecloses only claims for restitution for the time period explicitly covered by the verdict. 55 The court was willing to look beyond a simple law/equity dichotomy in applying the election of remedies doctrine. It interpreted the jury instruction in issue to contain a time limitation (the jury was instructed to award only damages for pre-trial or "past" injury) 56 and saddled the plaintiff with his damage election only for the period so included.

infringement actions for fraud and deceit in which restitutionary relief is recoverable. 3 E. DEVIIT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 83.01 (3d ed. Supp. 1979). Since federal district judges rely heavily on this book for guidance, it appears that the trial judge's errors in Roberts will be often repeated. In any event, the record demonstrates that the trial judge believed he was instructing under a damages theory. See Petitioner's Reply, supra note 49, at pp. 3-4.

53. The jury was given a reasonable royalty instruction on count three dealing with negligent misrepresentation. Since the jury found for the plaintiff in the sum of one million dollars for each count, perhaps it did award something equivalent to a reasonable royalty for counts one and two. See note 84 infra.


55. Illinois law is to the contrary. Illinois not only precludes recovery of profits for loss of use, but also bars a return of the patents as of the date of entry of the trial court judgment. 617 F.2d at 465 (citing Faber, Coe & Gregg, Inc. v. First Natl. Bank of Chicago, 107 Ill. App. 2d 204, 211, 246 N.E.2d 96, 99-100 (1969)). The Illinois position is arguable: If the plaintiff elects his damage remedy, damages instructions should include relief for all relevant time periods. If a time period is omitted, the plaintiff is bound unless he properly objects to the omission.

56. In fact, the damage instruction suggested, but did not mandate, a time limitation.
The Seventh Circuit misunderstood the law of restitution as well. It incorrectly held that the plaintiff had elected his damages remedy for "past" injury merely by asking for a jury trial.57 A reading of Palmer's treatise would make it clear that, because the plaintiff had a right to restitutionary relief on the fraud count through the legal remedy of quasi-contract, he was entitled to a jury trial on a quasi-contract theory.58 A quasi-contract count based on the fraudulent procurement of the patents supports a request for both an award of the value of the patents when wrongfully taken and an accounting of all profits obtained by the defendant attributable to the wrongful use of patents.59 Accounting is available in actions at law.60 Any election for a damage judgment must be based on the plaintiff's failure to insist that a proper quasi-contract instruction be submitted to the jury, and not merely on the plaintiff's desire for a jury trial.

Finally, both the trial court and the Seventh Circuit (albeit for different reasons),61 applied the doctrine of election of remedies with unnecessary harshness. Although the plaintiff could not have been awarded both damages and restitutionary relief on his claims because he would receive double compensation for his injury, Palmer's treatise explains that it is unreasonable to hold the plaintiff to a final

57. The trial judge apparently made a similar ruling. The plaintiff claimed that the trial judge refused to give a restitution instruction because the court ruled that the plaintiff had elected to recover damages by asking for a jury trial. Petition, supra note 48, at 11.

58. 1 G. PALMER §§ 1.2, 1.5(c), 3.3, 3.7. The trial court apparently initiated the mistake, Roberts v. Sears, Roebuck & Co., 471 F. Supp. 372, 382 (N.D. Ill. 1979) ("the doctrine of unjust enrichment is an equitable one, damages is a legal remedy"). See also Roberts v. Sears, Roebuck & Co., 617 F.2d 460, 465 (7th Cir. 1980).

59. See 1 G. PALMER at 237.

60. Accounting is cognizable in actions at law unless the case is so complicated that an account can be unraveled satisfactorily only by a court of equity. See, e.g., Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478, 480-81 (1962) (Black, J., with three Justices concurring); Kennedy v. Lakso Co., 414 F.2d 1249, 1253 (3d Cir. 1969). Justice Black in Dairy Queen stated that in view of the power of district courts to appoint masters under Federal Rule of Civil Procedure 53(b) to assist a jury, "it will be a rare case" in which an accounting is too complicated for a jury. 369 U.S. at 478. But cf. W. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS 166 (1893) and P. WOODWARD, THE LAW OF QUASI-CONTRACTS § 274 (1913) (recovery of profits possible only through equitable accounting, not quasi-contract), criticized in 1 G. PALMER at 158-59.


61. The trial judge felt bound by the Illinois law on election of remedies. The Seventh Circuit recast the law on election of remedies, asserting that the state rule had to give way to a federal procedural solution. Roberts v. Sears, Roebuck & Co., 617 F.2d 460, 462-63 (7th Cir. 1980).
choice of the damage remedy when a change to the restitutionary remedy or trial on both in the alternative would not have unduly surprised the defendant. Since the Roberts plaintiff had asked for both remedies from the beginning of the lawsuit, the only real danger was double recovery. The trial court erred both in refusing to allow the jury to consider, in the alternative, the inconsistent restitutionary and damage claims on two of the three counts (the trial court did allow the jury to determine the three damage counts in the alternative), and in holding that the plaintiff's jury trial request constituted an irrevocable election of the damage remedy on those two counts. The Seventh Circuit erred in affirming the election.

The Seventh Circuit and the trial court were waylaid by the perceived problems associated with a discriminatory application of the plaintiff's right to (and the defendant's right to be free from) a jury trial. To preserve the restitutionary claims in counts one and two, the Seventh Circuit apparently would require the plaintiff either to drop the jury demand on all counts (including count three, which supported no alternative restitutionary theory of recovery) or to drop the jury demand on counts one and two, proceed to the jury on count three alone, and ask for a bench trial on counts one and two. The first alternative seems to violate the thrust of the following language of Ross v. Bernhard:

Under those cases [Beacon and Dairy Queen] where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims.

The second alternative would give the plaintiff a choice on how to order the trial. Either the jury trial or the bench trial could go first, with the second trial subject to the collateral estoppel effects of the first. Given the choice, the plaintiff probably would have chosen to...

62. See 1 G. Palmer § 2.4.
63. See note 84 infra.
64. Unfortunately, Professor Palmer's treatment of the jury trial right is one of the few areas that deserves a more comprehensive analysis. See 1 G. Palmer at 28-29.
66. The judge could minimize the burdens of a two-stage hearing by charging the jury on both the legal and equitable counts. The verdict on the damage count would be binding and the verdict on the equitable counts would be advisory. See Fraser v. Geist, 1 F.R.D. 267 (E.D. Pa. 1940) ("a more desirable solution — one in which the court could try the case with a jury and, in the event that legal relief is appropriate, could treat the jury's verdict as binding. . . ."). See generally 5 Moore's Federal Practice ¶¶ 38.18, at 165 n.5; 38.17. Cf. Morris, Jury Trial Under the Federal Fusion of Law and Equity, 20 Texas L. Rev. 427, 435-36 (1942) (delay calling jury until legal relief is sought).
have a jury determine liability on the third count first and then have the judge try the other two counts (perhaps with an advisory jury), giving consideration to the collateral estoppel effects of the jury verdict. Since the third count on negligent misrepresentation had substantial overlap with the first two counts based on fraud and confidential relation, a favorable jury verdict on the third count would substantially doom the defense on the first two counts. Moreover, the jury verdict on the third count would be alternative to (and not added with) the judge’s award on either of the first two counts. In light of the need for a two-part proceeding in Roberts even if the doctrine of election of remedies is applied, and in light of the irrationality of allowing the plaintiff some alternative remedies but not others based solely on anachronism, a sensible approach would be to allow Roberts the procedure he in essence sought — a jury trial on damages on all counts and a subsequent bench trial (subject to the collateral estoppel effects of the jury verdict) on the equitable theories on counts one and two, with the recovery on any one award not cumulated with any other.

The Roberts case illustrates the need for a clear, comprehensive study of the American law of restitution that Palmer’s treatise provides. Palmer’s treatise speaks to the issue that confounded the litigants and the courts in Roberts. The treatise is, however, more than a mere catalogue of restitutionary doctrines that can be consulted to minimize Roberts-type mistakes. Its real value, perhaps, lies in Professor Palmer’s struggle with the central problem of restitutionary theory, the need to divorce the principles of unjust enrichment from the outmoded legacies of early English cases and to reform the doctrine in its new setting.

The law of restitution has two major stems: the common law of quasi-contract (including the indebitatus assumpsit common counts for money had and received, for money paid, for goods sold and delivered — quantum valebant, and for work and labor done — quantum meruit) and the equitable doctrines of constructive trust, equitable lien, subrogation, equitable accounting, and contribution and indemnity. The law of quasi-contract grew out of the action of assumpsit, which also spawned modern contract law. A promise to
pay or restore was fictitiously "implied" in certain circumstances to give appropriate relief. The equitable doctrines grew out of the law of fiduciary relations and the law of suretyship. As a consequence, it took many years for restitution to shed restricting analogies to contract, trust, and suretyship doctrines in favor of a general principle redressing instances of unjust enrichment.  

The early history of the law of restitution in America reflects this struggle to liberate the principles of restitution from their infant cradles. Professor Palmer chronicles this evolution and criticizes the jurisdictions that are out of step with the movement.

Our current problem, however, is to redefine the law of restitution in its new context. Early restitutuionary doctrines provided broad and powerful remedies for select cases; current restitutuionary doctrine threatens to provide these expansive remedies in a wide range of cases, not all of which can accommodate equitably the full breadth of relief afforded by traditional restitutuionary theory. For example, the doctrine of constructive trust originated in actions against fiduciaries, and included the principles of tracing (that is, of tracking down the product of improperly held money or property and delivering that product to the beneficiary). Now we have extracted the constructive trust remedy from the fiduciary context and applied it generally; we have continued, however, to include the principles of tracing within the remedy, thereby applying tracing to situations where it is inappropriate. Professor Palmer, in dealing with the individual applications of restitutuionary principles, often suggests that restitutuionary remedies should be limited according to the equities present in specific circumstances. I applaud his efforts, but I believe that the limits of restitutuionary relief can be generalized, and contours of the restitutuion doctrine itself reformed. Two places where reform should begin are the restitutuionary rules on profit apportionment and tracing.

For an example of the deficiencies of profit apportionment in res-

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68. English law has not progressed very far beyond the early precedents. For example, constructive trusts can be used only in connection with actual fiduciary relationships. See, e.g., In re Diplock, [1948] 1 Ch. 465, 530 (Ch. App.).

69. See generally J. Dawson, supra note 3.

70. The position taken in Jones v. Hoar, 22 Mass. (5 Pick.) 285 (1827), is an example of confusion produced by the growth of quasi-contract out of a contract form of action. The case held that there is no recovery in quasi-contract for conversion unless the goods in issue had been sold. The court believed that quasi-contract allowed it to imply a contract of agency between the tortfeasor and the victim only if the tortfeasor sold the converted item (the sale was made "on behalf" of the victim). Since assumpsit was a contract form of action, somewhere in the facts there had to be an express contract. "The case illustrates the early failure (of which we are not yet wholly free) to separate quasi contract from actual contract." 1 G. Palmer at 54. The case is still followed in a few states. Id. at 55.
titution, consider again the facts of Roberts. If the plaintiff had properly argued and proved his restitutionary remedy, should he have received all Sears’s profits on his invention, a figure in excess of sixty million dollars? Surely the manufacturing, marketing and promotional efforts of Sears were significant factors in the accumulation of such profits. As noted by Professor Palmer, a very difficult problem in the law of restitution is the determination of whether the defendant’s profits are solely the product of the plaintiff’s interest or rather are the product of contributions made by the defendant.71

While generalizations in this area are inherently suspect, courts appear willing to apportion profits if the defendant contributed money or some other tangible interest to the plaintiff’s interest and thereby produced a gain,72 but they refuse to consider contributions of expertise or other services by the defendant.73

For example, consider the relief available from a bailee who misappropriates ten dollars he is holding for the bailor and adds ten of his own to create an investment fund of twenty dollars, and who then pays out of the fund a ten-dollar commission to a third person for investment services on the remaining ten dollars. If the investment produces a net profit of six dollars (that is, if the investment appreciates to a value of twenty-six dollars), the bailee must pay the plaintiff-bailor the misappropriated ten dollars plus one-half of the net profits (three dollars) — a total of thirteen dollars. Yet, a second bailee who misappropriates ten dollars and adds ten dollars worth of personal time (he has investment expertise) to produce a net profit of six dollars must pay the plaintiff the original ten dollars and all the gross profits (sixteen dollars) — a total of twenty-six dollars. The second bailee, although he has put the value of his time at risk, neither is reimbursed for his time nor shares74 in the profits attributable to his services.

The old saw is that to permit the second bailee to recover for his services and their income would be to allow the “wrongdoer to profit from his wrong.” This assumes, however, that the wrongdoer in-

71. 1 G. PALMER § 2.12.
72. See, e.g., Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390 (1939). Cf. Scott, Following the Res and Sharing the Product, 66 HARV. L. REV. 872, 873 (1953); Scott, The Right to Follow Money Wrongfully Mingled with Other Money, 27 HARV. L. REV. 125 (1913). The statement assumes that there is no evidentiary problem in apportioning the contributions. This is often not the case, and the issue of which party has the burden of proof is often decisive.
73. See Callaghan v. Myers, 128 U.S. 617, 663-64 (1888). But see Brooks v. Conston, 364 Pa. 256, 72 A.2d 75 (1950) (credit given for value of services of wrongdoer; the profit, however, was not apportioned between the services and the misappropriated assets).
74. Assuming that the defendant’s time and the stolen fund contributed proportionally by value to the formation of the profit, the bailee should get half of the net profits or three dollars.
curred no significant opportunity costs in performing the services in issue; that is, that the wrongdoer could not have otherwise made profitable use of his ability to provide the services. Awarding unapportioned profits against the second bailee, if the bailee could have otherwise used the time that he expended on the stolen fund, is in essence a penalty equal to the value of his time, not a disgorgement of a benefit unjustly held at the plaintiff’s expense. Although a penalty in these circumstances often may be justified, it should not masquerade under the guise of a doctrine aimed at denying the defendant benefits unjustly received at the expense of the plaintiff. Moreover, awarding punitive damages through a formula tied to the defendant’s overall gain is irrationally inflexible; the gain may not approximate the amount necessary to punish the defendant effectively.

The application of these simplistic apportionment rules to the Roberts case leads to troublesome results. In Roberts the plaintiff offered evidence of the increment of Sears’s net profits on the wrench attributable to the misappropriated invention, those profits that were gained on wrenches incorporating the quick release device minus profits that Sears would have made on a line of wrenches without the device. Thus the plaintiff attempted to apportion the profits between those attributable to the use of the patented idea and those attributable to the remainder of the wrench. Although it appears that the expenses of manufacturing, marketing, and promotion were deducted in ascertaining profits (arguably some of these expenses could have been disallowed), the profits directly attributable to these efforts were not deducted. Sears’s argument, if any, that its marketing and distribution expertise was largely responsible for the profits, would probably have been ignored. The current law of restitution appears to support the plaintiff’s calculations. Sears would have become an at-cost (or below cost) manufacturing, marketing, and distributing agent for the plaintiff even though Sears had put a substantial amount of its capital at risk.

15. See Friedmann, Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong, 80 COLUM. L. REV. 504, 552 (1980).


77. See Friedmann, supra note 75, at 552.

78. The value of Sears’s in-house marketing and promotional efforts should not have been deducted. See note 73 supra and accompanying text.
The apportionment problem has appeared in other cases. In *Otwell Nye & Nissen Co.*, 79 for example, the defendant converted and put to use a machine that the plaintiff had stored and neglected. The court awarded the plaintiff recovery based on the defendant’s saving of expenditure as a result of the use of the machine. The award was markedly higher than the market value of the machine itself. The recovery for three years’ use amounted to $11,560, though the plaintiff had offered to sell the machine to the defendant for only $600 in the early stages of the controversy. The court failed to take into account the defendant’s contribution of his expertise in employing the machine to its fullest advantage in a going enterprise. The restitutionary award therefore provided the plaintiff with the benefit of the defendant’s expertise at no cost.

Professor Palmer and I approach this apportionment problem somewhat differently. Professor Palmer, not content with *Otwell*, finds:

> no easy formulas by which such problems [of apportioning the profits between those attributable to plaintiff’s interests and defendant’s contributions] can be decided; instead, the court must resort to general considerations of fairness, taking into account the nature of the defendant’s wrong, the relative extent of his contribution, and the feasibility of separating this from the contribution traceable to the plaintiff’s interest.

To avoid excessive awards like those in *Otwell* and (potentially) in *Roberts*, I favor limiting a plaintiff’s restitutionary award to the market value of the wrongfully appropriated interest. Such a rule would include consideration of the factors that concern Professor Palmer, but would add coherence and structure to the inquiry. 82 If the plaintiff regains the subject matter of the controversy in *specie*, he is entitled to the market value of its use plus interest at market

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80. 1 G. PALMER at 161.
81. *Id.*
82. Moreover, I suspect that Professor Palmer and I disagree on how profits should be awarded in at least one type of case. *See* 1 G. PALMER § 2.12. A steals a widget from B. A rents the widget to third parties to acquire profits. After the theft, an unanticipated market change (widget makers cannot get Iranian clay, a key ingredient) causes the market value of widgets to rise, and A is able to raise substantially his widget rental price. Before the lawsuit begins, the widget is destroyed. The market value formula, applied at the time of conversion, will not reflect the unanticipated market change. Yet, it is hard to say that A’s expertise contributed to the gain, unless one argues that A was wise to acquire a widget at the time he did (an argument that can translate into A was wise to steal a widget at the time he did). A better response focuses on timing: A’s benefit at the expense of B should be measured at (or a reasonable time after) the time that A deprived B of the widget, not later. A’s benefit is his ability to forego purchasing a widget to start his rental business. Any other rule allows B to delay a lawsuit in order to use A for risk free speculation.
rates; if he does not regain the subject matter, he is entitled to the market value of the subject matter at the time of the wrongful acquisition or detention plus interest at market rates. For example, in Roberts the defendant would be ordered to restore the patents and pay for the use of the patents at the market value, measured by a reasonable royalty rate for any unrestricted and exclusive license. The market value would take into account the normal profits obtainable from the patent; any profits Sears earned over the royalty rate would be attributable to the efforts of Sears itself, and not to the patent. Indeed, this is the measure of recovery established by Congress in 1946 for patent infringement actions. Ironically, this may be the actual result in the Roberts case. Similarly, in Olwell the plain-
tiff should have recovered the market value of the wrongful use of the machine.

In most cases, of course, the restitutionary recovery under my approach would be equivalent to the damages recovery; each award would be calculated by an assessment of the market value of the misappropriated interest at the time it was taken. The standards would diverge, however, in the rare cases where (i) the defendant's market position is inferior to that of the average participant; (ii) the plaintiff is entitled to special damages; or (iii) the plaintiff suffered no actual damage. The latter two exceptions are straightforward; the first exception deserves explanation. Assume that the bailee in my earlier hypothetical has a very poor credit rating. A restitutionary award would grant the plaintiff the ten dollars wrongfully taken as well as the value of the use of ten dollars (which is a function of the interest rate) computed as if the defendant borrowed the fund. Defendant's poor credit rating will be reflected in higher interest rates. Restitutionary theory should cause the defendant to return the plaintiff's ten dollars and the interest on the ten dollars that the defendant would have had to pay to acquire use of the fund. Since plaintiff's damage remedy will be equal to ten dollars and interest calculated at the prevailing market interest rates (no account being taken of the defendant's credit rating), restitution would award the plaintiff a larger sum.

85. Recovery on the two theories may differ if the plaintiff is able to allege and prove "special" damages. For example, the plaintiff in a direct action for damages is generally permitted to recover, in addition to his lost investment, lost profits due to the fraud. See, e.g., Lowrey v. Dingmann, 251 Minn. 124, 86 N.W.2d 499 (1957). Professor Palmer argues that special damages should be recovered in connection with a restitution award, but he is not supported by a majority of the cases. 1 G. PALMER § 3.9. Moreover, those cases that do not follow the majority involve a select type of special damages such as actual expenditures; lost profits are not recoverable.

86. See, e.g., Harper v. Adametz, 142 Conn. 218, 221, 113 A.2d 136, 138 (1955). An intriguing example is contained in Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977). A television news team taped the entire performance of a "human cannonball" act without consent and showed it on the news with favorable commentary. In an action for unlawful appropriation of plaintiff's "professional property," the Supreme Court held that the plaintiff could sue under Ohio law, and that the broadcast was not privileged under the first and fourteenth amendments to the United States Constitution. In a footnote, the Court added that "[i]t is possible, of course, that respondent's news broadcast increased the value of petitioner's performance by stimulating the public's interest in seeing the act live. In these circumstances, petitioner would not be able to prove damages and thus would not recover." 433 U.S. at 575 n.12. The Supreme Court overlooked the plaintiff's right to restitution for unauthorized exploitation of his act.

87. A difficult case arises when the credit rating of the defendant is so bad that he is effectively excluded (no one will loan money at any rate to the errant bailee). How is the benefit valued? My tentative conclusion is that we must return to a modified version of the old rule: the plaintiff recovers all the profits minus the market value (if any) of the defendant's contributions. Cf. Brooks v. Conston, 364 Pa. 256, 72 A.2d 75 (1950) (credit given for value of services
Support for the market value standard appears, surprisingly, in the Restatement of Restitution's discussion of the conversion of chattels:

In actions for restitution brought because of the conversion of chattels, the measure of restitution is the value of the chattels, together with, ordinarily, interest from the time of the conversion. . . . Nor is there restitution even for the direct products of the subject matter after the time fixed for the valuation of the subject matter, since the damages given are for the value of the subject matter at that time, including as an element of value the prospect of receiving such direct product. . . . Thus there is no right to an accounting for profits made from the subject matter after the time fixed for the computation of the value. 88

This language is not followed in the case law, 89 nor is it reflected in the Restatement's discussions of other types of subject matter (land, for example); 90 indeed, it appears to be contrary to other language in the Restatement itself. 91 The thrust of the position, however, is in accord with my suggested revision of the law of profit apportionment. 92

The law of tracing provides an even starker illustration of a restitutionary remedy operating outside the bounds of reason. Tracing originated in suits against trustees or other fiduciaries. A beneficiary of wrongdoer; the profit, however, was not apportioned between those services and the misappropriated assets).

88. Restatement of Restitution § 157, Comment e (1937). The comment provides an illustration:

A steals B's machinery and keeps it for a period of six months, at the end of which time, the price of machinery having risen, he sells it for a greater price than that which could have been obtained for it at the time of the theft. B now discovers the loss of his machinery. A is under a duty of restitution to B for the value of the machinery at the time of the subsequent sale or for the sale price at B's election, with interest only from such time, or the value at the time when it was taken with interest from that time. A is under no duty to account to B for the profits made by its use.

Id. (emphasis added).


90. See, e.g., Restatement of Restitution § 157, Comment d (1937).

91. See, e.g., Restatement of Restitution § 151, Comment f (1937): “A person who tortiously has acquired, retained or disposed of another's property with knowledge that such conduct is wrongful is entitled to no profits therefrom.”

92. Also supporting such a standard are those cases that refuse to award recovery of profits made by the defendant as a result of a breach of contract. A typical case of this kind arises when the defendant contracts to provide certain goods or services but offers the same goods or services at a higher price to a third party. Friedmann, supra note 75, at 513. An award of damages reflects the value of the goods or services at the time of breach, and to the extent that the defendant can demonstrate that the goods or services were sold at a price higher than its market value he should keep the difference. Presumably, the difference will be attributable to the seller's negotiating or marketing skill, to his improvement of the goods, or to services prior to the new sale. But see note 82 supra. The defendant has benefited from the breach, but only at the expense of the plaintiff to the extent of the market value of goods or services which were denied the plaintiff. Professor Palmer, however, appears to favor recovery of profits in these circumstances unless the contract is one for personal services. 1 G. Palmer at 441-46. See also Dawson, Restitution or Damages?, 20 OHIO ST. L.J. 175, 186-87 (1959).
entitled to the restitution of money or other property misappropriated by a fiduciary is permitted to assert a claim against any asset that is traceable to, or the product of, such money or property. The end result of tracing can be a decree for specific restitution of the traced asset, a decree imposing an equitable lien on the asset to secure a money claim, a decree for subrogation to a debt or charges on property otherwise discharged with the traceable funds, or a simple money judgment for the value of the traced asset. After restitution was drawn out from its historic origins in equity, tracing came to be used in other cases of wrongful acquisition, such as conversion or fraud.\footnote{93} Now we find cases in which tracing is used as a remedy for mistake or breach of contract.\footnote{94}

Currently, tracing is advantageous to a plaintiff (that is, it expands recovery options) in four situations: (1) tracing gives the claimant priority over general creditors when a wrongdoer is insolvent;\footnote{95} (2) tracing allows a recovery from an innocent third person (but not a \textit{bona fide} purchaser) who receives a traced asset;\footnote{96} (3) tracing enables a claimant to reach assets exempt from creditors, such as homestead property;\footnote{97} and (4) tracing permits a claimant to recover more than he has lost when the traced asset is more valuable than the misappropriated funds or property.\footnote{98} The fourth situation may occur in combination with any of the first three. For example, a claimant can argue for specific restitution of a traced asset found in the insolvent estate of the wrongdoer even when the asset is worth

\footnote{93. See, e.g., Nebraska Natl. Bank v. Johnson, 51 Neb. 546, 71 N.W. 294 (1897) (conversion); American Sugar-Ref. Co. v. Fancher, 145 N.Y. 552, 40 N.E. 206 (1895) (fraud).}

\footnote{94. In re Berry, 147 F. 208 (2d Cir. 1906) (mistake); Clark v. McCleery, 115 Iowa 3, 87 N.W. 696 (1901) (contract); Matthews v. Crowder, 111 Tenn. 737, 69 S.W. 779 (1902) (contract).}


\footnote{96. For example, if the wrongdoer has used plaintiff's funds to pay the premiums on a life insurance policy, and the wrongdoer dies, the plaintiff can claim any policy proceeds paid to a named beneficiary. See, e.g., Massachusetts Bonding & Ins. Co. v. Josselyn, 224 Mich. 159, 194 N.W. 548 (1923); Shaler v. Trowbridge, 28 N.J. Eq. 595 (1877). \textit{See generally} Note, \textit{Following Misappropriated Funds into Life Insurance Policies}, 4 ST. JOHN'S L. REV. 239 (1930).

\footnote{97. E.g., American Ry. Express Co. v. Houle, 169 Minn. 209, 210 N.W. 889 (1926); Warsco v. Oshkosh Sav. & Trust Co., 190 Wis. 87, 208 N.W. 886 (1926); Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (1925). Similarly, statutes protecting insurance proceeds from the claims of the insured's creditors do not prevent claims against the insurance proceeds based on tracing. See, e.g., Massachusetts Bonding & Ins. Co. v. Josselyn, 224 Mich. 159, 194 N.W. 548 (1923).

\footnote{98. See, e.g., Flannery v. Flannery Bolt Co., 108 F.2d 531 (3d Cir. 1939); Brooks v. Const. 364 Pa. 256, 72 A.2d 75 (1950).}
more than his actual loss. Professor Palmer, arguing that an interest created by equity "should be adapted so as to achieve equity", would not generally allow relief beyond the plaintiff's actual loss in the first three situations. 99 But support for his position in the case law is sparse. Nevertheless, his uneasiness with the unthinking extension of the equitable remedy is sound. Indeed, tracing should be restricted further than his position would allow. Other than in cases involving actual fiduciaries as defendants, tracing cannot be justified under any of the situations noted above. Although the restitutionary remedies of constructive trust and equitable lien are reasonably employed outside of their origins in fiduciary situations, the concept of tracing is not.

There are several reasons why tracing should be abandoned outside of the law of fiduciary relations. First, tracing provides an advantage to an injured party based on the fortuity of whether the misappropriated asset can be followed into a second asset. Courts discriminate between injured parties suffering equivalent injury and loss based on the fact that one of them has the good fortune to discover and prove that the defendant possesses a traceable asset. For example, assume that the defendant has stolen two cars owned respectively by A and B. A's car is exchanged for a third car; B's car is exchanged for money which is dissipated on necessities. The defendant has no other assets and no other creditors or claimants. A (if prompt) is awarded the third car and B gets a general judgment that cannot be satisfied. This is true even if B can argue and prove that if the defendant had stolen only one car, the car would have been exchanged for money and dissipated, and that, therefore, B's car was essential to the exchange of A's car for the third car. Moreover, B gets nothing if he can prove that the defendant flipped a coin in deciding which stolen car would be resold. Aside from the obvious inequity of the discrimination, this counter-intuitive result induces courts to reach out on tenuous factual inferences or outright fictions to provide injured persons with the benefits associated with tracing. 100 The better result, in which A and B have equal rights to exe-

99. I G. PALMER at 185-87, 189-91. See also Monaghan, supra note 83, at 17 ("[W]here the beneficiary of the [life insurance] policy is the wife or the minor child, recovery should be limited to a charge against the proceeds for the amount of the money wrongfully used in premium payments.").

100. See Taft, A Defense of a Limited Use of the Swollen Assets Theory Where Money Has Wrongfully Been Mingled with Other Money, 39 COLUM. L. REV. 172, 177 n.13, 181-82 nn.26-28 (1939). Consider, for example, the legal fictions associated with tracing into and out of a commingled fund. Compare Knatchbull v. Hallett (In re Hallett's Estate), 13 Ch. D. 696 (1879) with Hertslet v. Oatway (In re Oatway), [1903] 2 Ch. 356. The Knatchbull case is the origin of the rule of Jessel's bag: if a wrongdoer commingles his own fund with the misappro-
cute on the third car, would follow if tracing were eliminated.

Second, tracing is misused when it advantages a select group of claimants for no principled reason other than historical continuity. Bankruptcy laws should allocate explicitly the priorities of all interested parties. If the statutes are silent, courts should look to the policies of the bankruptcy provisions, not ancient restitutionary doctrine, to allow priorities. Similarly, laws exempting property from creditors (homesteads, for example), should, consistent with their policy foundations, deal explicitly or be used implicitly to deal with all appropriate claims. Currently, rights created by the laws of bankruptcy and exempt property are subject to equitable tracing claims that, in effect, alter the intrinsic statutory schemes. Courts hold that these equitable claims have a unique status in bankruptcy actions and against exempt property when the statutes are silent on the issue. Courts often fail to give the policy foundations of the statutes adequate play, when they leap to apply old remedies. Moreover, legislatures that amend such statutes after courts have construed them as subject to equitable tracing tend to accept blindly the existence and need for the tracing remedy. Instead, a homestead exemption law, based on a state policy of protecting its citizens from having their families thrust out of their home by creditors, should also defeat the claims of those tracing into the homestead assets. Similarly, the outcome of a tracing claim against an insolvent estate, is best determined by reference to the legislature’s policies embodied in the bankruptcy statute, not by the common law of restitution.

Priated funds and thereafter withdraws money from the fund, courts presume that the wrongdoer withdrew his own funds first. However, if the withdrawal can be traced into an asset held by the wrongdoer, the Oatway case reverses the presumption. The wrongdoer is presumed to have withdrawn the victim’s funds for the investment. See Townsend, Constructive Trusts and Bank Collections, 39 Yale L.J. 980, 982-84 (1930). The Restatement of Restitution attempted to eliminate the tracing fictions, but with limited success. See Restatement of Restitution §§ 211-12 (1937).

101. See note 95 supra.
102. See note 97 supra.
104. I would make an exception to this rule if the statute provides that all judgments based on fraud or tort can be levied on the homestead property.
105. At present the law is unclear on whether a claimant can recover more than his loss through tracing at the expense of the general creditors. Compare Smith v. Township of Au Gres, 150 F. 257 (6th Cir. 1906) with Kemp v. Elmer Co., 56 F.2d 657 (S.D. Cal. 1932). Professor Palmer favors limiting the recovery to actual loss. 1 G. Palmer at 183-84. His view is contrary to the Restatement of Restitution § 202, Comment c (1937). For an attack on the use of equitable devices to undermine the policy of modern bankruptcy legislation, see McLaughlin, Amendment of the Bankruptcy Act, 40 Harv. L. Rev. 341, 389-90 (1927).

In one area, Congress has explicitly ordered the priorities of restitutionary claims relative to other claims to the bankrupt estate. A claim for rescission of a purchase or sale of a security of the debtor is subordinated “to all claims and interests that are senior or equal to the claims
Third, tracing penalizes the defendant for his contributions to the gain to the extent that the recovery is more than the market value of the misappropriated interest. In the example of the second sticky-fingered bailee discussed above, an alternative route for the plaintiff in claiming the twenty-six dollars of gross profit is through a request for tracing from the misappropriated fund to the subsequent investment product of thirty-six dollars. Such a reward cannot be justified on the ground of recovering the benefit gained by the defendant as a result of the wrongful taking. It is rather a penalty equivalent to the value of the defendant's personal contribution to the gain.\textsuperscript{106} Whether or not such a penalty is appropriate is a separate issue, but appropriate or not, punitive damages should not be disguised as restitution.

Fourth, tracing assets to third parties who are not \textit{bona fide} purchasers provides an overly simplistic and often harsh answer to a complex problem that is best handled through other doctrines.\textsuperscript{107} This practice can be justified (outside of fiduciary misconduct) when the claimant seeks the return of a specific, identifiable asset from the third party in \textit{specie}. The legal policies protecting the inviolability of title and other ownership interests support the result.\textsuperscript{108} Of course, one does not need the doctrine of tracing to get recovery in such cases; the doctrines (and their statutory offshoots) of ejectment, replevin and detinue, and specific restitution in equity suffice. The claimant seeking a money judgment should look solely to the trans-
The transferor who wrongfully acquired the property at the expense of the claimant. The judgment against the transferor may be for the full value of the appropriated interest or for the value of the last use if the specific asset is sought and recovered from the transferee. If the transferor is solvent there is no need to involve the innocent transferee. Moreover, if a judgment is levied against the transferee, the culpable transferor may escape liability completely because he may be immune from a suit for indemnification.

The hard case, of course, appears when the transferor is bankrupt. A plaintiff unsatisfied with specific restitution can obtain a full money recovery only if allowed to proceed against the transferee. The plaintiff’s urging should be resisted. If the transferor is bankrupt, the claimant should be satisfied through the operation of the bankruptcy laws, including those that augment the estate by voiding select pre-bankruptcy proceeding transfers by the bankrupt party. The claimant should not be given a specified preference on assets from third parties that the bankrupt estate could otherwise claim, nor should the claimant be able to get assets from third parties that the bankrupt estate could not claim. In other words, the extent of recovery in such a situation should be decided explicitly by a legislature (or by courts extrapolating from the policies of the bankruptcy statutes) within the context of the bankruptcy laws. On the other hand, if the transferor cannot be found (i.e., process cannot be served in any domestic jurisdiction) or the bankruptcy laws otherwise do not apply though the defendant is insolvent (e.g., there are not enough creditors), perhaps the claimant should be entitled to a judgment against the transferee. In these select cases, between the transferee and the claimant the claimant appears, by virtue of superior equities, to have a better right to the traced asset. Tracing provides, in essence, a voidable transfer rule when the bankruptcy laws are not applicable. In this context, however, the claimant should be limited to the amount of his loss.

For all these reasons, I favor eliminating the use of the tracing fiction other than in select cases involving actual fiduciaries (and in

109. For example, suppose A converts a ring owned by B. A has twin daughters (C and D) and on their birthday he gives each a ring; the one he legally acquired he gives to C, and the one he has stolen he gives to D. Both daughters sell the rings for fair value. B can sue D for either the value of the ring at the time of conversion by A or for the sale proceeds held by D. D cannot sue A for indemnification.


111. Cf. Wilson v. Todd, 217 Ind. 183, 26 N.E.2d 1003 (1940) (plaintiff’s funds used to discharge a lien on land held by wrongdoer and spouse of tenants in common; subrogation ordered against spouse’s interest even though she had no knowledge of the wrongdoing).

112. See 1 G. PALMER at 224-25.
cases involving third parties when either the transferor cannot be found or bankruptcy is unavailable), rather than limiting the tracing recovery according to the specific circumstances of the case, as Professor Palmer prefers. Limited tracing is permissible in select fiduciary cases where the fiduciary has a duty to manage and maintain trust assets. No similar duty exists for tortfeasors, contract breakers, and the like. This duty to manage supports the inference that exchanged assets would have been owned by the beneficiary absent the wrongful appropriation, if the beneficiary had properly carried out his responsibilities. In a sense, the fiduciary’s management skills have also been wrongly withheld from the beneficiary.113 In fiduciary cases it therefore appears just to award restitution of the product of these management skills wrongfully withheld as well as the misappropriated property.114 But a rule limiting tracing to the fiduciary context appropriately adjusts restitution theory to its current role, and has the added benefit of narrowing considerably the number of cases in which courts must discern the content of Jessel’s bag or Oatway’s trust fund.115

My brief discussion of problems with the current scope of restitutionary relief is not exhaustive. Other authors have suggested that other restitutionary doctrines in other contexts have outgrown useful limits.116 The scope and purpose of restitution need re-examina-

113. Tracing may not apply to fiduciary misconduct if the fiduciary relationship is strictly limited by express agreement. For example, if a fiduciary is entrusted only with the possession of a chattel and has no power to use or sell the chattel to gain profits (like the bailee in my earlier hypothetical), then a fiduciary who does so use the chattel should be treated like a simple converter. The legal situation can become complicated if the fiduciary has specified management responsibilities and he misappropriates the beneficiary’s property, generating profits from investments that are outside the scope of the fiduciary contract.

114. In my hypothetical dealing with the sticky-fingered bailees, the second bailee, if recast as a fiduciary with fund management responsibilities, wrongfully withheld not only the ten dollar fund, but also his personal services. The bailor should therefore get the entire profit as well as the misappropriated fund. Allowing the beneficiary to trace into the product of the misappropriated fund with apportionment of the product only to reflect property contributions made by the fiduciary achieves the same result.

Tracing in fiduciary cases, however, should be limited to situations in which the remedy enables a claimant to recover more than he has lost because the traced asset is more valuable than the misappropriated property. The remedy, for the reasons noted in the text, should not give a claimant priority over general creditors when the wrongdoer is insolvent, permit recovery from an innocent third party, or enable a claimant to reach assets otherwise exempt from creditors.

115. See note 100 supra.

116. E.g., Posner & Rosenfeld, Impossibility and Related Doctrines in Contract Law: An Economic Analysis, 6 J. LEGAL STUD. 83, 115 (1977). Posner and Rosenfeld favor a rule imposing the loss from contracts discharged through impossibility, impracticability, or frustration of purpose on the party that is the superior risk bearer (the party who can, by purchasing insurance or otherwise, take the least costly steps to avoid the loss). Criticizing the rule that awards a contractor the value of materials “worked into” a house prior to a total fire, they argue that “[t]he proper measure of benefit is the value to the homeowner during the interval
tion. While most recognize and applaud the separation of the principles of unjust enrichment from the early foundations, the irony of the evolution is that only the restrictive vestiges of these foundations have been systematically disregarded; those vestiges that support broad relief — overbroad in new contexts — remain and are uncritically accepted.¹¹⁷

before the fire deprived him of the value of the work. Any greater award would, by conferring a windfall on the contractor, undermine the determination that he was the superior risk bearer." *Id. But see* 2 G. PALMER at 119-23 (arguing for a rule more beneficial to the contractor — the bargained-for-performance rule).

¹¹⁷. Professor Dawson explained the phenomenon this way: "[A] general principle prohibiting enrichment through another's loss appears first as a convenient explanation of specific results. . . . Yet once the idea has been formulated as a generalization, it has the peculiar faculty of inducing quite sober citizens to jump right off the dock." J. DAWSON, *supra* note 3, at 8.