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MISCLASSIFYING MONETARY RESTITUTION

Colleen P. Murphy*

INTRODUCTION ............................................. 1577
I. CLASSIFYING A MONETARY REMEDY AS RESTITUTION ........................................... 1581
   A. The Scholarly Debate over the Taxonomy of Restitution ............................. 1582
   B. The Debate Applied to Classifying Monetary Remedies .............................. 1589
   C. Statutes Using the Term “Restitution” ........................................ 1595
II. THE LEGAL AND EQUITABLE FACETS OF RESTITUTION .................................... 1598
III. COURT TREATMENTS OF MONETARY REMEDIES AS RESTITUTION ......................... 1607
   A. Statutory Authorization of Relief .................................................... 1607
   B. The Right to Jury Trial .............................................................. 1623
   C. Backpay as an Example of Misclassification ....................................... 1628
IV. CLEARING UP THE CONFUSION OVER MONETARY RESTITUTION ......................... 1635
   A. The Misuse of Restitution to Address the Law/Equity Divide and the Equitable Powers of Federal Courts ........................................ 1635
   B. Suggestions for the New Restatement ............................................. 1638
CONCLUSION ................................................ 1640

INTRODUCTION

RESTITUTION is, among other things, a label that courts and legislatures have given to a variety of monetary remedies. Courts have classified as “restitution” monetary remedies that give relief for unjust enrichment, that award the plaintiff the defendant’s gain rather than the plaintiff’s loss, that accompany the unwinding of a transaction, or that restore something to the plaintiff.¹ In statutes, “restitution” can

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¹ See infra Part III. This article addresses the use of “restitution” to connote monetary remedies available under domestic law. Under international law, restitution has been
mean compensation for crime victims, repayment of money, the disgorge-
ment of a statutory violator's gain, or compensation for harms suffered.²

The variety of ways in which courts and legislatures have used restitu-
tion to describe monetary remedies is perhaps unsurprising given that the
contours of the general law of restitution in some respects have been in-
exact and subject to scholarly debate. The Restatement of the Law of Re-
sitution: Quasi Contracts and Constructive Trusts, promulgated in 1936,
has been credited with creating a coherent law of restitution from an as-
sortment of precedents, forms of action, and remedial devices that had
developed around the principle that unjust enrichment should be dis-
gorged.³ Although the core idea of the original Restatement is that resti-
tution is the substantive law of unjust enrichment, the Restatement also
uses restitution to refer to the restoration of something, apart from liabil-
ity based on unjust enrichment.⁴ Modern scholars have debated whether
restitution should be defined solely as the law of unjust enrichment or
whether it also includes “restoration” remedies.⁵ Some have argued that
restitution should be defined as any remedy based on the defendant's
gain at the plaintiff’s expense.⁶ Drafts of the American Law Institute’s
current endeavor to produce a Restatement (Third) of Restitution and Un-
just Enrichment⁷ indicate that the law of unjust enrichment will be at the
core of the project, but restoration remedies also are mentioned.⁸

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². See infra Part I.C.
³. See, e.g., Restatement (Third) of Restitution and Unjust Enrichment, re-
porter's introductory memorandum at xv (Discussion Draft, Mar. 31, 2000) (describing the
original Restatement of Restitution as creating the field of restitution and unjust enrich-
ment); Douglas Laycock, The Scope and Significance of Restitution, 67 Tex. L. Rev. 1277,
1278 (1989) [hereinafter Laycock, The Scope and Significance of Restitution] (describing the
Restatement of Restitution as creating the field of restitution).
⁴. See, e.g., Restatement of Restitution: Quasi Contracts and Constructive
Trusts, general scope note at 2 (1937) (labeling ejectment, replevin, and trover as restitu-
tionary); id. ch. 7 introductory note at 523 (characterizing replevin and ejectment as restitu-
tionary because they “restore to the possession of the owner property of which he was
deprived”). See also Andrew Kull, Rationalizing Restitution, 83 Cal. L. Rev. 1191, 1194
(1995) [hereinafter Kull, Rationalizing Restitution] (commenting that the original Restate-
ment appears “to accept the idea that the act of restoration forms at least a subsidiary part
of the law of restitution, despite the fact that the restoration remedies . . . operate without
regard to the defendant's unjust enrichment”); Laycock, The Scope and Significance of
Restitution, supra note 3, at 1279-81 (discussing how the original Restatement uses restitu-
tion to mean restoration of a specific thing).
⁵. See infra Part I.A.
⁶. See infra notes 34-41, 44 and accompanying text.
⁷. The first restatement of the law of restitution produced by the American Law In-
stitute, the Restatement of Restitution: Quasi-Contracts & Constructive
Trusts, was promulgated in 1936 and published in 1937. The ALI attempted to produce a
second Restatement in the early 1980’s, but the effort was discontinued. See Restatement
(Third) of Restitution and Unjust Enrichment, foreword at ix (Discussion Draft,
Mar. 31, 2000).
⁸. See infra notes 53-62 and accompanying text.
Whether a court classifies a monetary remedy as restitution or something else—such as damages—can have significant consequences. For example, if the plaintiff sues for monetary relief under a statute that authorizes restitution but not damages or compensation, the court will need to decide whether the remedy sought can be labeled restitution.\(^9\) Less directly, courts have used restitution to differentiate between legal and equitable monetary relief, with consequences for whether a cause of action under a statute exists and for whether litigants have a right to jury trial. To illustrate, if the plaintiff sues under a federal statute that authorizes only "equitable relief," then the court's characterization of the plaintiff's requested relief as damages or compensation—legal relief—will mean that the plaintiff likely does not have a cause of action.\(^10\) If the court characterizes the remedy as restitution, then the plaintiff may have a cause of action, depending on whether the court treats the restitutionary remedy as legal or equitable.\(^11\) Under the Seventh Amendment,\(^12\) which has been interpreted by the Supreme Court to guarantee a right to jury trial when a legal remedy is sought, a claim for damages will trigger a jury right, but a claim for restitution may or may not, depending again on the legal or equitable classification of the restitutionary remedy.\(^13\)

In trying to distinguish between legal and equitable remedies, courts frequently have made two errors of classification with respect to monetary restitution. First, some courts have classified particular monetary remedies as restitution when the remedies should have been classified as damages.\(^14\) Second, due to a misreading of history and precedents, some courts have suggested that restitution is exclusively an equitable remedy.\(^15\)

The Supreme Court has been inconsistent in classifying restitution. It has used varying definitions to distinguish restitution of money from other monetary remedies such as compensation. It has at times suggested that restitution is exclusively an equitable remedy, while at other times, it has acknowledged that restitution can be legal or equitable, depending on

\(^{9}\) Cf. Perrone v. Andry, 232 F.3d 433, 439-40 (2000) (interpreting Truth in Lending Act and asserting that "if Congress had meant for restitution to be the measure of actual damages, it could have easily said so in the statute").

\(^{10}\) See infra notes 179-94 and accompanying text.

\(^{11}\) See infra notes 178-251 and accompanying text.

\(^{12}\) U.S. Const. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .").

\(^{13}\) See infra Part III.B.

\(^{14}\) See infra Part III.

\(^{15}\) See infra Part III. The first case to articulate the principle of unjust enrichment in mid-eighteenth century England explained that even in the absence of an express or implied contract, a defendant could be under an obligation to the plaintiff such that the "equity" of the case dictated that the plaintiff have a remedy. Moses v. MacFerlan, 97 Eng. Rep. 676 (K.B. 1760). Restitution became available in both the law courts and the equity courts, with "equitable" considerations—meaning concerns about fairness—driving the determination whether the defendant was liable. Modern courts have seized on the notion that restitution is "equitable" in the dictionary sense of "fairness," but have overlooked historical differences between restitution at law and restitution in equity. See infra Part III.
the circumstances of the case. The Supreme Court's latest foray into classifying restitution is its 2002 decision in Great-West Life & Annuity Insurance Co. v. Knudson. There, a divided Court assumed that the remedy sought by the plaintiff was restitution, but it debated whether the remedy was legal or equitable.

This article attempts to clarify the classification of monetary relief as restitution, focusing on the area of greatest challenge—where the plaintiff's loss or the defendant's gain was originally monetary in form. Through examining the scholarly literature, legislation, history, and case law, three general claims emerge: (1) monetary restitution should be distinguished from compensation or damages, with the concept of restitution as "restoring" a specific thing to the plaintiff generally inapplicable to a loss of money; (2) courts should cease labeling restitution as exclusively equitable and recognize that historically, law courts heard most restitutionary claims for money to remedy a monetary loss or gain; and (3) courts should not use restitution to differentiate legal from equitable monetary remedies because such usage typically is unhelpful and susceptible to error.

In attempting to clarify the classification of monetary relief as restitution, this article does not make a choice as to which of the general definitions of restitution is the "right" one. Rather, I examine how the various definitions would apply to monetary remedies for a plaintiff's loss or a defendant's gain of money, and I suggest the instances in which the definitions might or might not be helpful to the classification task. Nor does this article endeavor to solve the broad and complex question about how to distinguish legal from equitable remedies. Instead, I detail the ways in which restitution has been misused in the attempt to differentiate law from equity and suggest that restitution is not the answer to solving the law/equity divide.

Part I of the article discusses the competing scholarly definitions of restitution and examines how they might apply to the classification of a monetary remedy for a loss or gain originally monetary in form. Part I also canvasses the various ways in which Congress has used the term "restitution," and it makes suggestions for how to interpret "restitution" when the meaning that Congress has ascribed to the term is unclear. Part II discusses the development of restitution in the courts of law and courts of equity. It then focuses on the circumstances that govern whether a restitutionary claim for money should be considered to have historical roots in law or equity. Part III traces the Supreme Court's classifications of monetary remedies as restitution. These classifications have occurred in two main categories of cases: (1) where the Court has had to determine whether the plaintiff's requested remedy was authorized by statute; and

16. See infra Part III.
18. Monetary restitution also can be awarded when the defendant has benefited from goods or services obtained from the plaintiff.
(2) where the issue was whether the plaintiff sought legal relief triggering a right to jury trial under the Seventh Amendment. This Part shows how the Supreme Court and lower federal courts misread imprecise language about restitution in earlier cases, resulting in the misclassification of monetary remedies. Part III also looks at one remedy that has proven particularly vexing—backpay—to illustrate how courts have invoked the terminology of restitution and reached varying conclusions as to whether a monetary remedy is damages or restitution; legal or equitable. In Part IV, I discuss possible explanations for the confusion in the courts about monetary restitution, including the fact that courts have misused restitution to resolve larger questions about the law/equity divide and the general equitable powers of the federal courts. I argue that restitution should not be used in this way, for it causes needless complexity and does not help to answer the ultimate questions involved. I also make suggestions in Part IV for how the new Restatement could help to clarify the classification of monetary restitution.

I. CLASSIFYING A MONETARY REMEDY AS RESTITUTION

The general law of restitution is for many an obscure subject, perhaps explaining why so much confusion exists as to when monetary remedies are properly characterized as restitutionary. Professor Andrew Kull, in his capacity as reporter of the American Law Institute’s current project to produce a new Restatement, has lamented that “a substantial portion of the American bench and bar today could not comfortably explain what ‘the law of restitution’ is or how it works.” This lack of understanding may be a function of the complexity of the subject and the fact that scholarly authorities on restitution differ over its definition and content. My purposes in this Part are to discuss briefly the principal scholarly definitions of restitution, to evaluate how those definitions affect the specific topic of how to characterize monetary relief, and to examine the various ways in which Congress has used the term “restitution” to describe monetary remedies.

19. Restatement (Third) of Restitution and Unjust Enrichment, reporter’s introductory memorandum at xvi (Discussion Draft, Mar. 31, 2000). Kull attributes the lack of knowledge about restitution among the American bench and bar in part to the disappearance of a course on restitution from the U.S. law school curriculum in the mid 1960s. Id. Professor Douglas Laycock has remarked that “[i]n the mental map of most lawyers, restitution consists largely of blank spaces with undefined borders and only scattered patches of familiar ground.” Laycock, The Scope and Significance of Restitution, supra note 3, at 1277.

20. See Doug Rendleman, Remedies 316 (6th ed. 1998) (“Restitution is a complex and unruly topic with many subdivisions and without a uniform vocabulary or a universal theoretical base. . . . No overarching principle exists from which all restitution rules may be drawn.”)

21. See Douglas Laycock, Modern American Remedies: Cases and Materials 569 (3d ed. 2002) [hereinafter Laycock, Modern American Remedies] (“‘Restitution’ and ‘unjust enrichment’ turn out to have multiple meanings, and we have not yet settled on an unambiguous modern vocabulary to distinguish all those meanings.”).
A. The Scholarly Debate over the Taxonomy of Restitution

A starting point in defining restitution is the original *Restatement of the Law of Restitution*. In its first section, the *Restatement* expresses what it considers to be the essentials of restitution: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." The *Restatement* explains that a person is "unjustly enriched" if he receives a benefit from another and "the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it."

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

Restitution as a basis of liability parallel to contract and tort has been called "freestanding" restitution, with the substantive component being unjust enrichment and the remedial component being restitution of the defendant's gain. In addition to defining restitution as a freestanding basis of liability, the *Restatement* sometimes employs restitution in another sense—that of restoring something to the plaintiff or restoring someone to a previous condition.

In recent years, scholars have debated how to define the field of restitution. The debate has centered on whether restitution should be de-

22. *Restatement of Restitution* § 1 (1937); see also id. general scope note at 1-3.
23. The original *Restatement* defined "benefit" very broadly in the following comment: A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. *Id.* at cmt. b.
24. *Id.* § 1 at cmt. c.
25. *Id.* at cmt. a. See also *id.* at cmts. d-e.
26. *Id.* at cmt. d ("Ordinarily the benefit to the one and the loss to the other are coextensive, and the result of the remedies given under the rules stated in the Restatement of this Subject is to compel the one to surrender the benefit which he has received and thereby to make restitution to the other for the loss which he has suffered.").
27. See, e.g., *Restatement of Restitution* § 149, topic 2, introductory note at 596 (1937). ("If [the defendant] was consciously tortious in acquiring the benefit, he is . . . deprived of any profit derived from his subsequent dealing with it.").
29. See supra note 4 and accompanying text.
fined primarily as a substantive basis of liability or primarily as a remedy that is distinct from the law of unjust enrichment. Professor Kull has advanced the argument that restitution should be defined solely as a substantive basis of liability, with its own characteristic remedies. He has stated that “[t]he simplest possible account of the law of restitution, consistent with the case law, will describe it as the branch of civil liability that is based on and measured by the unjust enrichment of the defendant at the expense of the plaintiff.” Kull has commented that unjust enrichment “becomes visible as the basis of liability” in two circumstances: (1) when the defendant has not breached an independent duty to the plaintiff based in contract or tort, or (2) when the benefit to the defendant from the defendant’s wrong exceeds the plaintiff’s losses.

Professor Peter Birks is among those who consider restitution to be most appropriately defined as a remedy. Birks differentiates between the “event” of unjust enrichment and the “legal response” of restitution.


31. There is much support for the notion that the avoidance of unjust enrichment is the predominant aim of the law of restitution. See Restatement (Second) of Restitution and Unjust Enrichment § 1 (Tentative Draft No. 1, 1983); George Palmer, The Law of Restitution § 1.1 (1978); Dobbs, Law of Remedies § 4.1 (2d ed. 1993). Kull has further refined the substantive definition of restitution, describing restitution as the “law of noncontractual transfers.” Andrew Kull, Restitution and the Noncontractual Transfer, 11 Journal of Contract Law 93 (1997) [hereinafter Kull, Restitution and the Noncontractual Transfer]. That is, restitution governs those transactions in which a “nongratuitous benefit moves between private parties otherwise than pursuant to a valid contract.” Id. at 93.

32. Kull, Rationalizing Restitution, supra note 4, at 1226 (emphasis added). Because restitution is “measured by” the defendant’s unjust enrichment, the remedy is based on the defendant’s gain, rather than the plaintiff’s loss. The remedy for unjust enrichment can take the form of restitution “in specie” (giving the plaintiff the very thing that the defendant has gained) or of monetary relief measured by the value of the defendant’s gain. Id. at 1194. See also Laycock, The Scope and Significance of Restitution, supra note 3, at 1290 (acknowledging “monetary restitution of the value of defendant’s gain” as one form of restitutio

33. Kull, Rationalizing Restitution, supra note 4, at 1218 n.85. Kull adds that “where the injury to the plaintiff from the defendant’s wrongdoing equals or exceeds the benefit to the defendant—both established usage and analytical convenience dictate that the liability must be primarily explained in terms of the harm, not the benefit.” Id.

34. Birks, Unjust Enrichment, supra note 30, at 1769-72. See also James J. Edelman, Unjust Enrichment, Restitution, and Wrongs, 79 Tex. L. Rev. 1869 (2001) (asserting that “restitution” should be a term that refers only to a particular remedy, and ‘unjust enrichment’ should be a phrase that describes a particular group of actionable causes, none of which is a wrong”).
For Birks, restitution can be the legal response to any “one of a number of distinct causative events,” including unjust enrichment. He asserts that rights to restitution “arise from consent, from wrongs, from unjust enrichments, or from various other events.” Thus, for Birks, unjust enrichment is but one of several sources of liability triggering the remedy of restitution.

As for how to define the “legal response of restitution,” Birks describes it as the “yielding up” of defendant’s gain, which can take the form either of a “giving back” or a “giving up that is not a giving back.” A “giving back” occurs when the defendant returns something or the value of that thing to the plaintiff; a “giving up that is not a giving back” occurs when the defendant gives to the plaintiff something the plaintiff never had, such as when the defendant must give up any profit that the defendant made on money or property obtained from the plaintiff.

Courts have acknowledged these two types of restitutory remedies, often using the term “disgorgement of profits” to describe the situation when the defendant is required to give the plaintiff profits that the plaintiff never had.

Professor Douglas Laycock has suggested three different facets of restitution. Like Kull, he defines restitution as a source of liability based on

35. Birks, Unjust Enrichment, supra note 30, at 1770.
36. Id. at 1772.
37. There perhaps is more agreement between Birks and Kull than appears from Birks's delineation among unjust enrichment, wrongs, consent, and other events. Birks notes that Kull characterizes “unjust enrichment” in such a way as to include many of the “wrongs” that Birks says give rise to the remedy of restitution. Id. at 1777 (arguing that Kull incorrectly “turns restitution for wrongs . . . into a subset of unjust enrichment, which it is not”).
38. Birks, Misnomer, supra note 30, at 11. See also Birks, Introduction to the Law of Restitution, supra note 30, at 13 (stating that the “legal response of restitution” consists in causing one person to give up to another an enrichment received at his expense or its value in money).
40. Id.
41. The Discussion Draft of portions of the Restatement (Third) distinguishes between return of a benefit that the defendant has obtained at the plaintiff’s expense and disgorgement of profits that the defendant has made based on the benefit obtained, with disgorgement available only in instances of conscious wrongdoing or in cases involving trustees or other fiduciaries. See, e.g., Restatement (Third) of Restitution and Unjust Enrichment § 1, cmt. c (Discussion Draft, Mar. 31, 2000) (“[T]here are significant instances of liability based on unjust enrichment that do not involve the restoration of anything the claimant previously possessed. Salient examples include cases involving the disgorgement of profits, or other benefits wrongfully obtained, in excess of the plaintiff’s loss.”); id. § 2 cmt. d (“Restitution in a proper case may strip a defendant of all profits gained in a transaction with the plaintiff. Such a result is permissible only against a defendant whom the law treats as a conscious wrongdoer.”); id. § 3 cmt. c (“Liability to disgorge profits is ordinarily limited to instances of conscious wrongdoing . . . . As an exception to this general rule, trustees and other fiduciaries may be made liable for profits realized even as the result of an unintentional breach of fiduciary duty.”)
42. Laycock, The Scope and Significance of Restitution, supra note 3. Birks credits Laycock with “being the first to denounce the notion that restitution was triggered by a single causative event which could usefully be called unjust enrichment.” Birks, Unjust Enrichment, supra note 30, at 1771.
defendant’s unjust enrichment. Like Birks, he suggests that restitution is a measure of recovery based on the defendant’s gain, regardless of the source of liability. Laycock adds to the definition of restitution the concept of “specific restitution,” a term used by the original Restatement. Laycock defines the term to include remedies that “restore to the plaintiff the specific thing he lost” or that “undo disrupted transactions and restore both parties to their original positions in kind.” As examples of restitutionary remedies that “grant specific restitution of the thing itself,” Laycock cites rescission of a contract, constructive trust, replevin, and ejectment. Kull has disputed Laycock’s linkage of the “restoration” remedies with restitution, in part because restoration remedies are not unique to liability based on unjust enrichment; they are available as well for liability based on contract and tort.

With their common emphasis on defendant’s gain as the measure of restitutionary recovery, all three scholars would agree that “restitution” must be distinguished from “compensation,” a remedy measured by the plaintiff’s loss. Moreover, Laycock and other American scholars have

43. Laycock, The Scope and Significance of Restitution, supra note 3, at 1284-85 (stating that “[d]efendant may be unjustly enriched without having committed any other civil wrong” and that “[w]henever liability depends on a finding of unjust enrichment, the law of restitution is substantive as distinguished from remedial”).

44. See id. at 1285-88 (discussing restitution as a remedy based on defendant’s gain and stating that in cases for tort or breach of contract, “[d]efendant’s enrichment is now generally recognized as simply an alternate measure of recovery” to plaintiff’s loss); Laycock, Modern American Remedies, supra note 21, at 578 (“It therefore seems to me much simpler and more straightforward to say . . . that in cases like Olwell and Bank One, quasi-contract is simply a remedy for tort. Instead of suing for her own losses from the conversion or fraud, plaintiff sues for defendant’s gains from the conversion or fraud.”)

45. For Laycock, specific restitution is “part of the core concept of restitution . . . conceptually equal to the avoidance of unjust enrichment.” Laycock, Scope and Significance of Restitution, supra note 3, at 1280.

46. Laycock notes that the Restatement uses restitution in the literal sense of restoring something to the plaintiff, even though its emphasis is on restitution as the law of unjust enrichment. Id. (citing Restatement of Restitution § 4 cmts. c, d (1937); id. § 128).

47. As examples of specific restitution of the “thing itself,” Laycock cites constructive trust, rescission, replevin, and ejectment. Id. at 1290. Laycock further states that the “equitable lien is a hybrid, granting a money judgment and securing its collection with a lien on the specific thing.” Id.


49. Kull, Rationalizing Restitution, supra note 4, at 1212-22. Kull argues that the “logical connection” between unjust enrichment and restoration is “no greater than that between restoration and liability for breach of contract, or between restoration and liability for tort.” Id. at 1214-15.

50. See, e.g., Laycock, The Scope and Significance of Restitution, supra note 3, at 1283 (“Restitution must be distinguished from compensation, either by its focus on restoration of the loss in kind or by its focus on defendant’s gain as the measure of recovery.”) (footnote omitted); Birks, Misnomer, supra note 30, at 11-12 (“It is essential not to use ‘restitution’ to denote any kind of ‘compensation’. ‘Restitution’ must be kept for the yielding up of gains, ‘compensation’ for the making good of loss, however the loss is measured.”); cf. Kull, Rationalizing Restitution, supra note 4, at 1193 (“Whenever the law gives a remedy measured by the defendant’s gain rather than plaintiff’s loss, a duty to disgorge unjust enrichment will explain the defendant’s liability more readily . . . than will a duty merely to refrain from injuring others.”). Laycock’s conception of restitution as restoration of a loss “in kind” leads to difficulties in distinguishing damages from restitution when the loss was originally monetary. See infra notes 77-80 and accompanying text.
urged that “restitution” and “damages” should be treated as alternate measures of recovery. For these scholars, the term “damages” has a narrower meaning than monetary relief in general and should be limited to recovery based on plaintiff’s loss or recovery of punitive damages. By contrast, Birks and other British scholars write of “restitutionary damages” and “disgorgement damages,” with the term “damages” seeming to have the meaning of monetary relief generally. For purposes of discussing U.S. cases and statutes, this article assumes a strict division between restitution and damages, with “damages” read narrowly to mean measures of the plaintiff’s loss or, when applicable, punitive damages.

Against the backdrop of the debate among Kull, Laycock, and Birks over the taxonomy of restitution, the American Law Institute is moving forward with its project to restate anew the law of restitution. With Kull as the reporter, and Laycock as an adviser, some draft portions of the Restatement (Third) of Restitution and Unjust Enrichment have been circulated: a “Discussion Draft” dated March 31, 2000 that, among other things, introduces the project and contains a chapter on “General Principles”; and two “Tentative Drafts” that contain sections on liability in restitution. These drafts provide a sense of the current direction of the project, although they are subject to revision until the Restatement (Third) is completed and fully approved by the ALI.

Of immediate note is how the title of the proposed Restatement (Third) describes the project: “Restitution and Unjust Enrichment.” Explaining the choice of title, the Director of the ALI has written:

In Restatement Third we are restoring the full title, Restitution and Unjust Enrichment, that appeared on the Tentative Drafts of the original Restatement but that was dropped when the official text was published. In so doing we are emphasizing that the subject matter encompasses an independent and coherent body of law, the law of unjust enrichment, and not simply the remedy of restitution.

51. See, e.g., Laycock, Modern American Remedies, supra note 21, at 617 (“It would surely be better to confine the word damages to measures of plaintiff’s loss, and to settled usage concerning punitive damages, and to use restitution to describe recovery of defendant’s profits. Restitution is not an alternate measure of damages; rather, restitution and damages are alternate measures of monetary recovery.”); Rendleman, supra note 28, at 893 (“In the technical language of remedies, ‘damages’ means money a claimant recovers to compensate loss, while ‘restitution’ means claimant’s recovery, taken from the defendant to prevent its unjust enrichment. Damages sufficient to provide restitution is technically an oxymoron because courts measure ‘damages’ to compensate plaintiffs and ‘restitution’ to strip defendants of unjust enrichment.”).

52. Birks, Misnomer, supra note 30, at 13 (discussing the usage of “restitutionary damages” and “restitution for wrongs”); Edelman, supra note 34, at 1870 (referring to “restitutionary damages” and “disgorgement damages”).

53. Specifically, the Discussion Draft of 2000 has chapters on general principles and transfers subject to avoidance; Tentative Draft No. 1, dated April 6, 2001, revises some of the chapter on transfers subject to avoidance; and Tentative Draft No. 2, dated April 1, 2002, contains further revisions to the chapter on transfers subject to avoidance and a chapter on intentional transactions.

54. Restatement (Third) of Restitution and Unjust Enrichment, foreword at ix (written by Lance Liebman, Director, The American Law Institute) (Discussion Draft,
Birks has characterized the title as an “equivocation” that “will not resolve the tensions created in the [original Restatement] by a failure to analyze the relation between unjust enrichment, an event, and restitution, a legal response.”

The clear emphasis of the Discussion Draft of the Restatement (Third) is that the law of restitution is the law of unjust enrichment. Section 1 of the “General Principles” part of the draft, titled “Restitution and Unjust Enrichment,” closely follows section 1 of the original Restatement. It states: “A person who is unjustly enriched at the expense of another is liable in restitution to the other.”

Section 4 of the General Principles, titled “Remedies,” states in part that “[t]he function of remedies in restitution is to prevent or redress the unjust enrichment of one or more persons at the expense of the plaintiff.” These principles, as well as commentary to the principles, tie the remedy of restitution to liability based on unjust enrichment.

Nonetheless, the Discussion Draft has some ambiguous language on whether the law of restitution also includes the restoration of something, regardless of the basis of liability. For example, the draft asserts that “most of what is covered by the law of restitution might more helpfully be called the law of unjust or unjustified enrichment,” while acknowledging that:

[T]here are numerous situations in which a claimant's undoubted right to the restitution (or restoration) of something does not depend

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Mar. 31, 2000). The Discussion Draft elsewhere contains further explanation of the title. See id. § 1 cmt. a.

55. Birks, Unjust Enrichment, supra note 30, at 1769.

56. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 at 1 (Discussion Draft, Mar. 31, 2000).

57. Id. § 4.

58. For example, in a comment to § 1, the Discussion Draft states:

[An] important misconception is that restitution is essentially a remedy, available in certain circumstances to enforce obligations derived from torts, contracts, and other topics of substantive law. On the contrary, restitution (meaning the law of unjust or unjustified enrichment) is itself a source of obligations, analogous in this respect to tort or contract. A liability in restitution is enforced by restitution's own characteristic remedies, just as a liability in contract is enforced by what we think of as contract remedies.

Id. § 1 cmt. h.

59. Id. § 1 cmt. c at 7 (emphasis added). The Discussion Draft explains its use of the term “unjustified enrichment:

The concern of restitution is not, in fact, with unjust enrichment [in the broad sense of inequitable results], but with the narrower set of circumstances giving rise to what is more appropriately called unjustified enrichment. . . . Unjustified enrichment is enrichment that lacks an adequate legal basis: it results from a transfer that the law treats as ineffective to work a conclusive alteration in ownership rights. Because the legal basis that makes a transfer effective is ordinarily a consensual exchange, a valid gift, or a legal duty (such as a liability in tort or an obligation to pay taxes), the concern of restitution is predictably with those anomalous transfers that cannot be justified by the terms of a valid and enforceable exchange transaction; by the intention of the transferor to make a gift; or by the existence of a legal duty to the transferee.

Id. § 1 cmt. b at 3.
on the unjust enrichment of the defendant. . . . There are, moreover, many other legal relations in which an owner's entitlement to the restoration of property might theoretically be explained in terms of the defendant's unjust enrichment but which, by convention, are not so classified.\textsuperscript{60}

It remains to be seen whether and how the new \textit{Restatement (Third)} will treat restitution as a remedy apart from liability based on unjust enrichment. The "Projected Overall Table of Contents" in the Discussion Draft contains sections on "Rescission" and "Specific Restitution."\textsuperscript{61} It will be interesting to note how the \textit{Restatement (Third)} will handle these sections—i.e., whether these remedies will be discussed only as related to liability based on unjust enrichment or whether the remedies will be discussed more broadly.\textsuperscript{62}

With respect to the distinction between restitution of a defendant's gain and damages for a plaintiff's loss, some language in the draft portions of the \textit{Restatement (Third)} is confusing. Although the drafts at times do differentiate between compensation for plaintiff's loss and restitution of defendant's gain,\textsuperscript{63} other portions of the drafts use the term "compensation" to describe the remedy for unjust enrichment.\textsuperscript{64} Rather

\textsuperscript{60} Id. § 1 cmt. c at 6-7.

\textsuperscript{61} Id. § xxii.

\textsuperscript{62} With respect to rescission, Kull has indicated an intent to tie the remedy to liability based on unjust enrichment. In a footnote to the heading of "rescission" in the Proposed Overall Table of Contents, the Discussion Draft states that the focus of the section will "be on the aspects of 'law of rescission' that reflect restitutionary principles as opposed to contract: e.g., treating the requirement of restoration by plaintiff, and the two-way accounting for interim use or profits; but not the consequences of affirmance or ratification." \textit{Id.} at xxii n.4.

\textsuperscript{63} See, \textit{e.g.}, id. § 4, cmt. ("Remedies in restitution are directed at gain, not loss: their object is to eliminate the defendant's unjust enrichment, rather than to compensate the plaintiff's injury."); \textit{id.} § 1 cmt. h (discussing why criminal restitution is not part of the law of restitution as defined by the \textit{Restatement} and stating: "It is a natural use of the language to speak of "requiring a criminal to make restitution"; the problem is that the liability imposed in such cases is not based primarily on unjust enrichment, but on compensation for harm."); \textit{id.} § 3, reporter's note (stating that "in the circumstances of a profitable tort—where the benefit realized by the defendant exceeds the injury to the plaintiff—the plaintiff may elect to pursue a claim in restitution to recover the amount of the defendant's unjustified enrichment, rather than a claim in tort to recover compensation for harm.").

\textsuperscript{64} See, \textit{e.g.}, id. § 1 cmt. d at 8-9 (stating that some intentional transfers of benefits "give rise to a claim for compensation, while others do not: restitution is the body of law that draws the distinction," but using the terminology of restitution, not compensation in the illustrations to this statement); \textit{id.} § 2 cmt. a (characterizing as one of "the limiting principles that circumscribe the restitutionary liability for benefits received . . . that there exists a wide range of benefits, including many that have been created or obtained at another person's expense, that we remain free to enjoy without compensation"); \textit{Restatement (Third) of Restitution and Unjust Enrichment}, topic 2 introductory note (Tentative Draft No. 2, April 1, 2002) (writing of "the general topic of compensation for unrequested intervention" in the law of restitution and unjust enrichment). Other portions of the drafts use the terminology of compensation of plaintiff's loss to indicate how the amount of restitution will be measured. \textit{See, e.g.}, \textit{id.} § 25 cmt. f (mentioning that "the restitutionary liability of an innocent defendant will not exceed the amount required to compensate the claimant"); \textit{cf. id.} § 20 cmt. c (explaining that the "measure of benefit to the recipient" of emergency services to protect life or health "is the reasonable and customary charge for such services"). This usage of compensation as a cap on the amount of
than use "compensation," the Restatement (Third) should substitute "restitution" or generic terms such as "relief," "remedy," or "payment" whenever it refers to a remedy for unjust enrichment. This would avoid reader misunderstanding about the distinction between compensation and restitution.

From this survey of the taxonomy of restitution apparent in the original Restatement, the modern scholarly debate, and the ongoing project to produce a new Restatement (Third), we see a consensus for the following proposition: if liability is based on unjust enrichment, and the remedy is measured by the defendant's gain rather than the plaintiff's loss, then the remedy is appropriately called restitution. The more difficult question is whether and when a remedy should be called restitution apart from liability based on unjust enrichment.

B. THE DEBATE APPLIED TO CLASSIFYING MONETARY REMEDIES

Having surveyed the various scholarly definitions of restitution, I now address how these definitions would apply when the plaintiff seeks a monetary remedy for a loss or gain originally of money. Beginning with a definition of restitution as liability based on and measured by unjust enrichment, the characterization of a monetary remedy would depend on the grounds for liability. If the substantive law of unjust enrichment constitutes the sole basis of liability, then the monetary remedy would be for restitution, not damages. This would be the case regardless whether the defendant's gain is equal to, greater than, or less than, the plaintiff's loss. If the plaintiff has more than one legitimate theory of recovery, such as unjust enrichment and contract or unjust enrichment and tort, then the remedy would be for restitution rather than damages if the plaintiff is entitled to a defendant gain that is greater than the plaintiff's loss. Only liability based on unjust enrichment would support such recovery.

If the plaintiff has overlapping causes of action and the plaintiff's loss and the defendant's gain are equal, then the characterization of the monetary remedy becomes more complex. One approach might be to choose

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65. Birks, who does not believe that unjust enrichment is a prerequisite for the legal response of restitution, seemingly would agree that a claim of unjust enrichment with the remedy measured by the defendant's gain rather than the plaintiff's loss would mean that the remedy should be called "restitution" because this meets his definition of restitution as the yielding up of the defendant's gain.

66. A plaintiff might claim restitution for a defendant's gain that is less than the plaintiff's loss when unjust enrichment and another legal theory such as tort might apply, but statutes of limitations or procedural rules foreclose assertion of the other legal theory, leaving only a restitution claim. See, e.g., Felder v. Reeth, 34 F.2d 744, 747-48 (9th Cir. 1929) (involving a defendant's decision to counterclaim for restitution because applicable procedural rules did not permit the defendant to assert a counterclaim based on tort; recovery in restitution was possibly less than recovery in tort).

67. Whether the defendant appears to have made a gain greater than the plaintiff's loss may be indicated at the time of pleading or as the result of discovery.
which is the predominant basis of liability and classify the remedy accordingly. For example, defendant steals money and plaintiff sues to recover the amount stolen. The plaintiff's theory of liability could either be the tort of conversion or unjust enrichment. The amount the plaintiff would recover if successful is the same, although under the tort theory, the recovery would be called damages, and under the unjust enrichment theory, the recovery would be called restitution. The predominant theory of liability arguably is tort in that tort is the more familiar and usual way to describe the situation of theft; the unjust enrichment theory seems secondary. If tort is deemed the predominant theory, the remedy would be classified as damages.

Another approach to classifying a remedy when the plaintiff has more than one theory of recovery and the plaintiff's gain and the defendant's gain are equal is to assume that the theories of liability have equal explanatory value. The choice of classification then must be guided by the purposes for which the classification is necessary. For example, assume that a statute of limitations has a longer period in which to commence suit for contract actions than tort actions. Assume also that the jurisdiction treats restitution claims as contract for purposes of the statute of limitations. Returning to the theft situation, the plaintiff who has missed the deadline for a tort claim will want the court to treat its claim as restitution. If the court treats the two theories of liability as having equal weight, then the court's choice of how to classify the action will depend on whether the court believes that the plaintiff should be able to make a strategic election between two possible characterizations of the same cause of action in order to take advantage of the longer limitations period.

Thus, a definition of restitution as liability based on and measured by unjust enrichment would give some answers to how to classify a monetary remedy for a loss or gain originally of money. A monetary remedy would be uniquely restitution in the following situations: (1) when the only possible basis of liability is unjust enrichment, or (2) when multiple theories of liability may apply, but the plaintiff seeks a defendant gain that is greater than the plaintiff's loss. The definition does not itself, however, make evident how to classify a monetary remedy when plaintiff's loss and

68. See Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. g (Discussion Draft Mar. 31, 2000) (stating that "[t]here are instances in which a liability that might theoretically be ascribed to restitution merely duplicates a liability that is conventionally explained in other terms" and giving theft as an example).
69. See Restatement of Restitution § 149 at 593 (1937) ("Ordinarily, the statutory period for a quasi-contractual cause of action is the same as for a cause of action based upon an oral contract."); 1 Palmer, supra note 31, § 2.3 at 63 ("The limitation period for a tort action is commonly shorter than for an action based on a contract. Most courts have held that, through the use of quasi contract to recover benefits obtained by a tortfeasor, the injured party can obtain the advantage of the longer limitation period; that is, the action will be treated as contractual for purposes of the statute of limitations.") (footnote omitted).
defendant’s gain are equal and unjust enrichment is but one possible basis of liability.

A definition of restitution as the yielding up of the defendant’s gain at the plaintiff’s expense, regardless of the basis of liability, is helpful in classifying a monetary remedy as uniquely restitution in only one situation: when the plaintiff seeks a defendant’s gain that exceeds the plaintiff’s loss. In situations of a plaintiff’s loss of money equal to the defendant’s gain of money, the remedy can be characterized as either damages or restitution. Any necessary choice as to how to classify the remedy would depend on why the classification must be made and related considerations.

Let us turn now to how the concept of “specific restitution” would apply to a plaintiff’s loss or defendant’s gain of money. Recall that Laycock has used “specific restitution” to include two types of remedies that restore “in kind”: those that “undo disrupted transactions and restore both parties to their original positions in kind” and those that restore to the plaintiff the “specific thing he lost.”

Laycock offers as the prime example of the first type of remedy the “rescission of a partly or wholly performed transaction,” in which each party is restored “all that he has given.” In the new edition of his remedies casebook, Laycock appears to have backed away from his earlier description of rescission as specific restitution, acknowledging that if reversing the transaction “in kind” is not feasible, the parties will be required to “pay the market value of the benefit received.” That is, rescission does not necessarily result in the parties being returned “to their original positions in kind” and thus does not perfectly correlate to the notion of specific restitution. The Discussion Draft of the Restatement (Third) devotes separate sections to “Rescission” and “Specific Restitution” in the Projected Overall Table of Contents. From this separation, one might infer that the intent is to give “specific restitution” a meaning of restoring specific property to the plaintiff and to give “rescission” the meaning of unwinding a transaction. For purposes of examining the classification of monetary remedies, I will separately consider rescission and the restoration of a specific thing to the plaintiff.

With rescission, each party must give up the gains it obtained under a

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70. Laycock, The Scope and Significance of Restitution, supra note 3, at 1290. See supra notes 45-49 and accompanying text.
71. Laycock, The Scope and Significance of Restitution, supra note 3, at 1282.
72. Laycock, Modern American Remedies, supra note 21, at 628.
73. Restatement (Third) of Restitution and Unjust Enrichment at xxii (Discussion Draft, Mar. 31, 2000). The Discussion Draft elsewhere speaks of “rescission and specific restitution.” Id. § 4 cmt. at 27 (stating that under the heading of “proprietary rights” in restitution is “an order restoring plaintiff to possession of his own property (as in cases of rescission and specific restitution”).
74. The Discussion Draft of the Restatement (Third), in a footnote to the “Rescission” section in the Projected Overall Table of Contents, mentions that the section will treat “the two-way accounting for interim use or profits,” which may result in a remedy that gives the parties more than the “specific thing” they gave under the transaction. Id. at xxii n.4 (Discussion Draft, Mar. 31, 2000).
transaction, a giving up that has commonly been called "restitution." This use of "restitution" to describe the parties' mutual return of that which was obtained under a cancelled transaction is well established. Using restitution in this way, to include even the return of money, should not cause confusion with damages. A restitution remedy flows from the cancellation or rescission of the transaction; a damages remedy flows from enforcement of the transaction. What should be avoided, however, is calling rescission "specific restitution."

The other component of specific restitution identified by Laycock—restoring something to the plaintiff in kind—has the potential to confuse restitution with damages when applied to a loss of money. An emphasis on restoring something to the plaintiff leads to confusion about the difference between restitution and damages, because the main purpose of compensatory damages is also the "restoration" of the plaintiff to its rightful position. We could avoid a lot of semantic confusion if we differentiated between monetary remedies for plaintiff's loss and monetary remedies for defendant's gain, with only the latter being considered "restitution." This is not to deny the possibility of a monetary award be-

75. See Kull, Rationalizing Restitution, supra note 4, at 1219-20 (discussing the terminology of "rescission and restitution," with "restitution . . . merely a description of the end result" of returning benefits conferred under the transaction); Laycock, Modern American Remedies, supra note 21, at 623 ("Recession cancels the transaction and reverses all benefits that have been exchanged pursuant to the transaction. . . . The remedy is sometimes called rescission and restitution, to emphasize the fact that neither side can rescind without restoring what it received from the other side."); Birks treats rescission as restitution because it constitutes the "yielding up of benefits" that were transferred under a contract or other consent-based act, such as a conveyance. Birks, Misnomer, supra note 30, at 20.

76. Laycock cites as an example of the return of money the cancellation of a sale of defective goods, by which the buyer gets "a full refund of the price—restitution of the sum of money—in exchange for his returning the goods." Laycock, Modern American Remedies, supra note 21, at 6. The buyer's other options are to seek "damages, measured by the difference between the value of the goods as promised and the value of the goods as delivered" or specific performance that, "if it is available, will give the buyer goods that fully conform to the contract." Id.

77. In advancing a definition of restitution as including the restoration in kind of the plaintiff's loss, Laycock has sought to distinguish compensation. He has differentiated restoration in kind of the plaintiff's loss from restoration of the value of the plaintiff's loss, stating:

[R]estitution of the value of what plaintiff lost is simply compensatory damages. Used in this sense, "restitution" loses all utility as a means of distinguishing one body of law from another. Restitution must be distinguished from compensation, either by its focus on restoration of the loss in kind or by its focus on defendant's gain as the measure of recovery.

Laycock, The Scope and Significance of Restitution, supra note 3, at 1282-83 (footnote omitted).

78. See, e.g., Laycock, Modern American Remedies, supra note 21, at 15 (writing that "the essence of compensatory damages" is "to restore the injured party as nearly as possible to the position he would have been in but for the wrong"); cf. McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 362 (1995) (stating in an employment discrimination case that "[t]he object of compensation is to restore the employee to the position he or she would have been in absent the discrimination"); In re Acushnet River & New Bedford Harbor, 712 F. Supp. 994, 1002 (D. Mass. 1989) ("Were the Court to accept the argument that a monetary award is restitutionary simply because it returns a party to pre-injury status, little would be left in the realm of compensatory damages.").
misclassifying monetary restitution.

Rather, it is to acknowledge that both plaintiff’s losses and defendant’s gains can be remedied with either specific or substitutionary relief. We should not call a plaintiff’s monetary remedy for a loss originally of money “restitution” merely because the remedy may be considered “specific.”

By excluding the concept of specific restitution of the loss of money, we could avoid some of the careless court language that sweeps monetary remedies under the “restitution” rubric simply because the remedy “restored” or “returned” money to the plaintiff. Moreover, little would be lost if the concept of specific restitution, whatever its contours, does not apply to the loss of money. Laycock states that a plaintiff may want restored “the specific thing he lost” for one of three reasons: because defendant is insolvent, because the thing the plaintiff lost has changed in value, or because plaintiff values the thing he lost for nonmarket reasons. If a plaintiff’s loss was originally monetary in form, the third of the reasons for preferring specific restitution would not apply. Nonmarket reasons,

79. In Bowen v. Mass., 487 U.S. 879 (1988), the Supreme Court distinguished between specific monetary relief and substitutionary monetary relief for purposes of interpreting section 702 of the Administrative Procedure Act. The Act waives sovereign immunity in actions against federal agencies as long as the plaintiff seeks “relief other than money damages.” 5 U.S.C. § 702 (2000). The Court found that section 702 invokes a distinction between “damages” (which the Court defined as “substitutionary” relief that affords the plaintiff compensation) and “specific remedies” which “are not substituted remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.” Id. at 895 (quoting Md. Dept. of Human Res. v. Dept. of Health & Human Servs., 763 F.2d 1441, 1446 (D.C. Cir. 1985)) (internal citations omitted). The Court in Bowen concluded that the monetary relief sought in the case—reimbursement from the federal government of expenditures made by Massachusetts under the Medicaid program—constituted a specific remedy. By contrast, in Dept. of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999), the Supreme Court held that an equitable lien sought by the plaintiff was not specific relief but rather constituted “money damages” within the meaning of section 702. The contours of the distinction between specific and substitutionary monetary relief need to be analyzed, but such a task is beyond the scope of the present article. Cf. Douglas Laycock, The Death of the Irreparable Injury Rule 12-13 (1991) [hereinafter Laycock, The Death of the Irreparable Injury Rule] (discussing differences between substitutionary and specific remedies).

80. See, e.g., Schwartz v. Gregori, 45 F.3d 1017, 1022 (6th Cir. 1995) (classifying backpay as restitution because it “operates to restore to the plaintiff that to which she would have enjoyed but for the employer’s illegal retaliation”); Babich v. Unisy, No. 92-1473-MLB, 1994 U.S. Dist. LEXIS 4744, at *24-36 (D. Kan. 1994) (asserting that if plaintiff were awarded benefits due him under ERISA § 502(a)(1)(B), the award “would not serve to compensate plaintiff for a harm inflicted on him” by the defendant but would “simply restore plaintiff to his rightful position—the essence of restitution”) (citation omitted); Alexander v. Primerica Holdings, 819 F. Supp. 1296, 1309 (D.N.J. 1993) (citing a definition of restitution as “restor[ing] the status quo” and holding that “[r]eceipt of withheld benefits constitutes relief that is restitutionary”); United States v. S.C. Recycling & Disposal, 653 F. Supp. 984, 1007, n.2 (D.S.C. 1985) (stating that the relief requested under CERCLA was not damages but “equitable restitution—a remedy designed to return plaintiffs to the financial position they were in before incurring cleanup costs”); United States v. Reilly Tar & Chem. Corp., No. 4-80-469, 1983 U.S. Dist. LEXIS 15986, at *10-13 (D. Minn. 1983) (classifying the remedy requested under CERCLA as restitution, not damages, because “the monetary relief requested by the government is only that amount necessary to compensate it for amounts expended . . . in other words, the amount necessary to return the United States to the status quo ante”). See infra notes 316-20 and accompanying text.

81. Laycock, The Scope and Significance of Restitution, supra note 3, at 1294.
such as sentiment, explain why a plaintiff would want a family heirloom back. But with money being fungible (with the exception of a rare coin or bill), there is no reason why a plaintiff would want specific currency back.\textsuperscript{82}

As for the plaintiff wanting the specific thing that has been lost because it has changed in value, this may apply to personal or real property, but it does not apply to money. The money lost will not itself have changed in value. If the defendant who has wrongfully taken plaintiff's money (say $10) invests it for a return of $100, the plaintiff will want the $100, but this requested remedy would not be for specific restitution—the "restoration of the loss in kind." As Professor Kull has said in a slightly different context, "the remedy is hardly specific restitution; on the contrary, the plaintiff recovers property worth ten times what he lost."\textsuperscript{83} Any right to obtain the $100 could be explained more easily by other definitions of restitution. Restitution defined as liability based on and measured by unjust enrichment would explain the plaintiff's right to obtain the $100—the defendant should not be able to profit from conscious wrongdoing at the plaintiff's expense.\textsuperscript{84} Alternatively, the plaintiff's entitlement to the $100 can be explained as the remedy of "giving up" the defendant's gain obtained at the plaintiff's expense.

The ability of a plaintiff under certain circumstances to reach a specific fund held by an insolvent defendant can be explained on grounds other than specific restitution. When the plaintiff can identify as hers a specific fund of money held by the insolvent defendant, and the defendant obtained the fund through mistake, fraud, or misappropriation, courts will impose a constructive trust or equitable lien.\textsuperscript{85} The plaintiff gets the fund

\textsuperscript{82} Cf. Restatement (Third) of Restitution and Unjust Enrichment § 9 cmt. f, illus. 16 (Tentative Draft No. 1, Apr. 6, 2001) (illustrating the right to recover a rare coin given in mistaken payment).

\textsuperscript{83} Kull, Rationalizing Restitution, supra note 4, at 1217 (asserting that if a defendant embezzles $10 and buys property worth $100, the plaintiff is able to obtain the property because liability is based on unjust enrichment, not because the remedy is specific restitution).

\textsuperscript{84} See Restatement (Third) of Restitution and Unjust Enrichment, § 3 (Discussion Draft Mar. 31, 2002); Restatement of Restitution, § 3 (1937); see also Kull, Rationalizing Restitution, supra note 4, at 1217 ("[T]racing allows a plaintiff to follow misappropriated property into its appreciated product. If the plaintiff can prove that $10 embezzled from him was used by defendant to buy property now worth $100, plaintiff has a claim to the property. Restitution concludes that the defendant has been unjustly enriched in the amount of $100, not $10.").

\textsuperscript{85} See, e.g., Cunningham v. Brown, 265 U.S. 1, 11 (1924) (explaining that defrauded claimants—had they been able to trace their funds through the debtor's bank accounts—could have "asserted possession" of the funds "without violating any statutory rule against preference in bankruptcy, because then they would have been endeavoring to get their own money, and not money in the estate of the bankrupt"); Mitsui Mfrs. Bank v. Unicom Computer Corp., 13 F.3d 321 (9th Cir. 1994) (plaintiff entitled to mistaken payment to debtor); City Nat'l Bank v. Gen. Coffee Corp., 828 F.2d 699 (11th Cir. 1987) (plaintiff entitled to property obtained by debtor's fraud). The mere fact that a plaintiff can trace his property to a fund held by an insolvent defendant is not by itself enough to trigger a right to recover the fund as against rival creditors. Circumstances such as fraud, misappropriation, or mistake must justify the imposition of a constructive trust; otherwise, the plaintiff simply has a debt claim like other creditors. See Restatement of Restitution § 160.
back, and thus is given preference over rival creditors.\textsuperscript{86} Kull characterizes the imposition of a constructive trust in these circumstances as a way to avoid the unjust enrichment of rival creditors—"creditors should not be looking to the fruits of the debtor's fraud for satisfaction of their claims."\textsuperscript{87} Describing the insolvency situation as an example of specific restitution of money—when unjust enrichment affords an adequate explanation—comes at the expense of clarity about the distinction between restitution and damages.

No definition of restitution answers all questions about how to classify a monetary remedy for a loss or gain of money. What is apparent, however, is that the concept of specific restitution does not get us very far in classifying a monetary remedy and indeed leads to confusion about restitution and damages. When describing a plaintiff's loss of money, it would be best to avoid the terminology of specific restitution.

C. Statutes Using the Term "Restitution"

Congress has used the term "restitution" in several statutes, sometimes defining in the statute what it means by the term. In the criminal context, Congress has used restitution to describe the money that an offender may be ordered to pay a crime victim, which may cover the amount of the

\textsuperscript{86} See Emily L. Sherwin, \textit{Constructive Trusts in Bankruptcy}, 1989 U. ILL. L. REV. 297, 297-98 (writing that "if the state court would impose a constructive trust on certain property in an action between the claimant and the debtor, the bankruptcy court treats the claimant as the equitable owner of the property and allows her to recover it in bankruptcy, to the exclusion of other creditors"). Some scholars have suggested that there should be limits to the priority that a plaintiff seeking restitution of specific property should have over other creditors of an insolvent defendant. \textit{See id.} at 329-65; Andrew Kull, \textit{Restitution in Bankruptcy: Reclamation and Constructive Trust}, 72 AM. BANKR. L.J. 265, 283-85 (1998) (writing that the "real teaching... of the great case of Cunningham v. Brown" is that a defrauded investor who can identify as his specific property held by the bankrupt debtor should not have priority over other defrauded investors); \textit{see also} LAYCOCK, \textit{MODERN AMERICAN REMEDIES}, supra note 21, at 699 (stating that "[t]here have been repeated efforts to stamp out equitable liens that undermine the [bankruptcy] filing system"); U.S. Bankruptcy Code, 11 U.S.C. § 544(a) (2000) (appearing to invalidate equitable liens that are substitutes for bungled security transactions without invalidating equitable liens or constructive trusts in other contexts).

\textsuperscript{87} Kull, \textit{Rationalizing Restitution}, supra note 4, at 1217-19 (suggesting that in a case of defendant insolvency, the real dispute is between the restitution claimant and the other creditors and that allowing the plaintiff to recover specific property held by the defendant "can be understood as a rule of thumb for resolving certain intractable problems of but-for causation bearing on the question of unjust enrichment").
victim's medical expenses, lost income, and other pecuniary losses. In the civil context—the focus of this article—Congress has employed the term restitution in many different ways.

In several statutes, the term “restitution” is used in the same sequence as “reimbursement,” “refund,” or “repayment.” A few of these “repayment” statutes link restitution with a showing of unjust enrichment as a result of a violation of the statute; most do not require a demonstration of unjust enrichment. Some statutes authorize restitution without also using terms such as repay or refund, but surrounding language in the statute suggests that restitution means paying back.

Congress has at times authorized restitution along with damages and

88. See, e.g., Victim and Witness Protection Act, 18 U.S.C.A. § 3663(a)-(b) (West 2000 & Supp. 2002) (providing that a court may order a defendant convicted under specified federal statutes to “make restitution” to victims or victims' estates, which can include money for the value of property damaged, lost, or destroyed; medical expenses; funeral and related services, lost income; and child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense). Moreover, Congress has provided that in lieu of money, the victim or the victim' estate may consent to “restitution of services” or “restitution to a person or organization designated by the victim or the estate.” Id. at § 3663(b)(5). Cf. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, § 1 cmt. h (Discussion Draft, Mar. 31, 2002) (stating that “it is a natural use of the language to speak of ‘requiring a criminal to make restitution,’ but adding that this usage “is not part of the law of restitution as defined by this Restatement”).

89. In several statutes covering banks and banking, Congress has linked restitution with unjust enrichment, providing that a person or entity may be required to “make restitution or provide reimbursement, indemnification, or guarantee against loss if [the entity or person] was unjustly enriched in connection” with a violation of law or had violated law with “reckless disregard.” See, e.g., 12 U.S.C. §§ 1786, 1818, 4631 (2000).

90. See, e.g., 31 U.S.C. § 3727(e)(1) (2000) (providing that in certain assignments of claims against the United States Government, the assignee “does not have to make restitution of, refund, or repay the amount received because of the liability of the assignor to the Government that arises from or is independent of the contract”); 41 U.S.C. § 15 (2000) (negating liability of assignee of a public contract to “make restitution, refund, or repayment to the United States” because of assignor’s liability); 42 U.S.C. § 1395u (2000) (authorizing Secretary of Health and Human Services “to make a payment to [certain social security beneficiaries] in the nature of restitution for amounts paid by such beneficiary to such physician which was determined to be an excess charge” under provisions of the statute); 15 U.S.C. § 3414 (2000) (authorizing “refund or restitution” in certain enforcement actions under natural gas statutes).

91. See, e.g., 42 U.S.C. § 408(b) (2000) (providing for specified violations of the Social Security Act that if “such violation incudes a willful misuse of funds by the person or entity, the court may also require that full or partial restitution of such funds be made”); 42 U.S.C. § 1007 (2000) (“In any case where the negligent failure of the Commissioner of Social Security to investigate or monitor a representative payee results in misuse of benefits by the representative payee, the Commissioner of Social Security shall make payment to the qualified individual . . . of an amount equal to the misused benefits [and] shall make a good faith effort to obtain restitution from the terminated representative payee.”); 42 U.S.C. § 1383(a)(E), (G) (2000) (same); 28 U.S.C.A. § 613(b)(2) (West 2002) (providing in statute governing the Administrative Office of the U.S. Courts that: “A certifying officer shall be required to make restitution to the United States for the amount of any illegal, improper, or incorrect payment resulting from any false, inaccurate, or misleading certificates made by the certifying officer . . .”); 16 U.S.C. § 2906 (2000) (providing in statute on fish and wildlife conservation that if “any State has received reimbursement . . . for which it is not eligible . . . the State shall thereafter be ineligible to receive reimbursement . . . until restitution satisfactory to the Secretary is made”).
In this setting, if restitution is to be given a meaning distinct from damages, it would seem to be that of a remedy based on the gain of the person or entity covered by the statute. A showing of unjust enrichment would not seem indicated, for Congress has created a new basis of liability for which restitution is one possible remedy of many.

Congress has also used restitution a few times to denote compensation for losses, including not only monetary losses but intangible losses. This usage is unfortunate, for it obliterates any distinction between restitution and compensation. As many scholars and courts have suggested, the terms "damages" or "compensation" should be reserved for loss-based awards and "restitution" used for remedies based on the defendant's gain.

Sometimes, the language surrounding "restitution" will not make evident the meaning that Congress has ascribed to the term. How one defines restitution in such an instance will turn on the mode of statutory interpretation that is used, be it reading the term in light of scholarly definitions, examining usage in precedent, consulting a dictionary, re-

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92. See, e.g., 15 U.S.C. § 3608(d) (2000) (providing that in certain instances of unconscionable leases, court may order relief including "rescission, reformation, restitution, the award of damages . . ."); 12 U.S.C.A. § 1821(a) (West 2001) (referring to actions brought by Federal Deposit Insurance Corporation "for damages or restitution").

93. An open question with statutes that juxtapose damages and restitution (and, arguably, with statutes that associate restitution with repayment) is whether the person covered by the statute need only "give back" what was obtained or also "give up" any profit made on what was obtained. Congress has at times indicated that a person or entity covered by statute could be liable for its gain of profits, without using the term "restitution." See, e.g., 15 U.S.C. § 78t-1(b) (2000) (providing that "damages" to contemporaneous traders for liability based on insider trading shall "not exceed the profit gained or loss avoided in the transaction").


95. See, e.g., Birks, Mismomer, supra note 30, at 11 ("We have the word 'compensation' for loss-based awards. We need 'restitution' for gain-based awards."); Laycock, The Scope and Significance of Restitution, supra note 3, at 1283 ("[R]estitution of the value of what the plaintiff lost is simply compensatory damages. Used in this sense, "restitution" loses all utility as a means of distinguishing one body of law from another.").

96. See, e.g., 5 U.S.C. app. § 106(b)(3) (2000) (providing that if a federal employee is not in compliance with ethics laws and regulations, steps taken to assure compliance may include "divestiture, restitution, the establishment of a blind trust . . ."); 42 U.S.C. § 1395i-4 (2000) (referring to "cases involving claims related to the provision of health care items and services (other than funds awarded to a relator, for restitution or otherwise authorized by law)"). One example of Congress using ambiguous language surrounding the term "restitution" is 15 U.S.C.A. § 78u-2 (West 1997 & Supp. 2002) (stating that in determining a penalty for certain violations of laws governing securities exchanges, "the Commission or the appropriate regulatory agency may consider . . . the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior"). In speaking both of the violator's unjust enrichment and restitution to "persons injured by" the violations, Congress creates a confusing picture as to whether restitution is measured by the amount of the violator's unjust enrichment or by the injury to other persons.
viewing legislative history, looking at other statutes' usage of the term, or some other technique.

To the extent that scholarly definitions of restitution will inform the task of statutory interpretation, the term "restitution" arguably should be read to mean a remedy based on the gain of the person who has violated the statute. The current scholarly consensus is that restitution should not be used to mean compensation of losses. Moreover, a definition of restitution as liability based on and measured by unjust enrichment does not translate easily to a statute in which Congress has created a new liability for which restitution is the remedy. The liability created by Congress may or may not be analogous to a classic unjust enrichment claim, but nonetheless restitution is the specified remedy. An interpretation of restitution as a remedy based on the violator's gain would mean that the statutory remedy is relatively bounded in comparison to a damages remedy that includes the possibility of consequential damages and damages for non-economic loss.

In sum, Congress has used restitution inconsistently. It has used the term to mean return of the statutory violator's gain,97 and it has used the term to mean compensation of losses.98 When Congress has used restitution to mean return of the violator's gain, it has sometimes required a showing of unjust enrichment, but more frequently, it has not required such a showing.99 Congress also has used restitution in a statute without any indication on the face of the statute as to what it means by the term.100 Although I have suggested that in this circumstance, the most apt scholarly definition of restitution is that of a remedy based on the statutory violator's gain, court interpretation of what restitution means may well turn on the mode of statutory interpretation that is used.

This section has focused on statutes explicitly using the term "restitution." As we shall see in a later section, the Supreme Court has employed the terminology of restitution to interpret statutes that make no mention of restitution. In these cases, the ultimate question was whether the monetary relief requested by the plaintiff was equitable. Before examining these cases, I turn to the legal and equitable components of restitution.

II. THE LEGAL AND EQUITABLE FACETS OF RESTITUTION

Restitution has historical roots in both the law and equity courts, a fact that many modern courts overlook. The reporters of the original Restatement of the Law of Restitution, Warren Seavey and Austin Scott, credited Lord Mansfield as the "first to have recognized the fundamental principle

97. See supra notes 89-91 and accompanying text.
98. See supra notes 88, 94 and accompanying text.
99. See supra notes 89-90 and accompanying text.
100. See supra note 96 and accompanying text.
of restitution" in English law.\textsuperscript{101} In \textit{Moses v. MacFerlan},\textsuperscript{102} Mansfield indicated that an action of assumpsit could be brought not only upon an express or implied contract, but also when fairness required that the plaintiff recover against the defendant.\textsuperscript{103} He stated: "If the defendant be under an obligation, from the ties of natural justice to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract."\textsuperscript{104} Mansfield explained that the action "lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express or implied) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances."\textsuperscript{105}

Although Mansfield employed the terms "equity" and "equitable" throughout his opinion in \textit{Moses v. MacFerlan}, he used those terms in a nontechnical way to connote fairness.\textsuperscript{106} Nonetheless, some have read Mansfield's language as supporting a classification of restitution as equitable, rather than legal.\textsuperscript{107} Professor Dobbs has explained the error of this reading: "The use of the term equity . . . does not imply that all restitution cases are brought "in equity" or that equitable relief is given. It is not a jurisdictional statement but a standard about the goal or a standard for judging what qualifies as unjust enrichment."\textsuperscript{108} Indeed, \textit{Moses v. MacFerlan} itself was a case before a court of law—the King's Bench.

Both the law courts and the equity courts entertained actions that were based on restitutionary principles. Through the common counts in general assumpsit, the law courts developed actions based on the notion of unjust enrichment.\textsuperscript{109} One of the common counts—the action for "money had and received"—encompassed a broad range of situations

\textsuperscript{102} \textit{Id.} at 678-81. The law of indebitatus assumpsit on which Mansfield relied is summarized in \textit{JAMES B. AMES, LECTURES ON LEGAL HISTORY} 149-66 (1913).
\textsuperscript{103} \textit{Moses v. MacFerlan}, 97 Eng. Rep. at 681.
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} One of the reporters of the first Restatement, Warren Seavey, explained that: "Restitution is the equitable principle by which one who has been enriched at the expense of another, whether by mistake, or otherwise, is under a duty to return what he has received or its value to the other. Perhaps unjust enrichment would be a better term." Warren A. Seavey, \textit{Problems in Restitution}, 7 \textit{Okla. L. Rev.} 257, 257 (1954).
\textsuperscript{106} See 1 DOBBS, supra note 31, at 558 n.1.
\textsuperscript{107} \textit{See also} 1 PALMER, supra note 31, § 1.2, at 9 ("Although Mansfield's description of quasi contract as "equitable" has been repeated many times, this refers merely to the way in which a case should be approached, since it is clear that the action is at law and the relief given is a simple money judgment.").
\textsuperscript{108} \textit{See} J.H. BAKER, \textit{AN INTRODUCTION TO ENGLISH LEGAL HISTORY} 194-95 (3d ed., 1971) (discussing the common counts that developed at law and the circumstances in which an action could lie "although there was no agreement in any sense," such as with interception by the defendant of fees due the plaintiff, "recovery of money paid by mistake, or under compulsion, or under a void contract where the consideration had totally failed"); \textit{JAMES B. AMES, LECTURES ON LEGAL HISTORY}, 149-66 (1913) (discussing actions that developed under indebitatus assumpsit); RENDLEMAN, supra note 20, at 326-27 (discussing the common counts).
that today would fall within liability based on unjust enrichment. As one
English treatise has summarized:

The action for money had and received lay to recover money which
the plaintiff had paid to the defendant, on the ground that it had
been paid under a mistake or compulsion, or for a consideration
which had wholly failed. . . . The action also lay to recover money
which the defendant had acquired from the plaintiff by a tortious act;
and, in very rare cases where the defendant had received money
which the plaintiff could still identify as his own at the time of receipt
and for which the defendant had not given consideration, the plain-
tiff could assert his claim by means of this action.\textsuperscript{110}

Another of the common counts—the action for “money paid”—was
available when the plaintiff’s claim involved money paid to a third party,
from which the defendant had derived a benefit.\textsuperscript{111} The common counts
of quantum meruit and quantum valebat allowed recovery for services
and goods, respectively, that had been supplied by the plaintiff to the
defendant under circumstances constituting unjust enrichment.\textsuperscript{112} The
actions for money had and received, money paid, quantum meruit, and
quantum valebat eventually were catalogued under the rubric of “quasi-
contract,”\textsuperscript{113} but it is important to appreciate that these actions were not
based on principles of contract, but rather on principles of unjust enrich-
ment.\textsuperscript{114} The “quasi-contract” label apparently resulted from the fact
that these actions developed in assumpsit, where contractual actions also
developed.

The remedy for these restitutionary actions at law historically has been
a money judgment. When the benefit the defendant received is money,
the \textit{Restatement} suggests that the measure of recovery at law is the
amount of money received, plus interest.\textsuperscript{115} If the defendant used the
plaintiff’s money and earned profits, the plaintiff may, under certain cir-
cumstances, have a right to those profits, but the action is in equity, not in
law.\textsuperscript{116} Moreover, if the defendant turned the plaintiff’s money into some

\textsuperscript{110} Goff & Jones, supra note 30, at 3 (footnote omitted).
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} See Goff & Jones, supra note 30, at 3 (“We understand quasi-contract to be that
part of restitution which stems from the common \textit{indebitatus} counts for money had and
received and for money paid, and from \textit{quantum meruit} and \textit{quantum valebat} claims.”)
\textsuperscript{114} See Baker, supra note 109, at 195 (“In these cases [of mistake, compulsion, void
contract, etc.] the defendant had no moral right to retain the money from the plaintiff, but
the basis of recovery was equitable rather than contractual. This type of remedy was given
the name quasi-contract, a misleading anglicisation of the Roman obligation \textit{quasi ex
contractu}.”).
\textsuperscript{115} See Restatement of Restitution, § 150 (1937) (“In an action of restitution in
which the benefit received was money, the measure of recovery for this benefit is the
amount of money received.”); \textit{id.} § 156 (“[A] person who has a duty to pay the value of a
benefit which he has received, is also under a duty to pay interest upon such value from the
time he committed a breach of duty in failing to make restitution if, and only if: (a) the
benefit consisted of a definite sum of money . . . .”).
\textsuperscript{116} See Schoenbrod et al., Remedies: Public and Private 779 (3d ed. 2002)
(stating that “a profit-based measure of recovery has been the exception rather than the
rule where legal restitution is concerned); \textit{but see} 1 Palmer, supra note 31, § 2.12 at 158-59
other asset, the plaintiff may be able to obtain that asset through an action in equity.\textsuperscript{117}

The equity courts developed several restitutionary devices, the most important of which for our purposes are the constructive trust and the equitable lien. The constructive trust results in an order to the defendant to convey property that rightfully belongs to the plaintiff.\textsuperscript{118} The property can take different forms. The defendant may be ordered to transfer property that originally belonged to the plaintiff. If the defendant exchanged the plaintiff's property for a different asset, the defendant may be ordered to give the plaintiff the new asset, even if the new asset is worth more than the plaintiff's original property.\textsuperscript{119} The constructive

\textsuperscript{117} See, e.g., \textit{Restatement of Restitution}, § 202 cmt. b, illus. 3 (1937) (indicating that when the defendant is a conscious wrongdoer who has exchanged the plaintiff's money for other property, the plaintiff can enforce either a constructive trust on the property or an equitable lien on the property to secure the plaintiff's claim for reimbursement from the wrongdoer). See also 1 Palmer, supra note 31, at 59 (asserting that in tort or equitable wrong: “Equitable relief becomes important, through the use of constructive trust, when the owner seeks to trace the converted property into another asset, and obtain a decree either for specific restitution or impressing a lien on the traced property to secure his money claim. Such equitable relief is generally available, both where there has been a conversion of tangible or intangible personal property and where there has been conversion or misappropriation of the plaintiff's money.”).

\textsuperscript{118} See \textit{Restatement of Restitution}, § 160, at 648 (1937) (“A constructive trust does not arise unless there is property on which the constructive trust can be fastened, and such property is held by the person to be charged as constructive trustee”); see also id. at 642 (noting that the chief difference between quasi contract and constructive trust is that “the plaintiff in bringing an action to enforce a quasi-contractual obligation seeks to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money, whereas the plaintiff in bringing a suit to enforce a constructive trust seeks to recover specific property”); 1 Palmer, supra note 31, § 1.3 at 13 (“Quasi contract leads to a simple money judgment, whereas the normal constructive trust decree is one for specific restitution. . . . [T]he typical decree [in a situation of constructive trust] is that the [the defendant] transfer title to the plaintiff.”)

\textsuperscript{119} When the defendant has exchanged the plaintiff's property for a different asset, the plaintiff may be entitled to a constructive trust on the new asset, even though that asset may be worth more than the plaintiff's original property. The \textit{Restatement} treats the plaintiff's right to a constructive trust on the new asset as dependent on the circumstances. The \textit{Restatement} indicates that in instances of conscious wrongdoing, the plaintiff can choose between a constructive trust on the new asset or payment for the value of the original property, secured by an equitable lien on the new asset. \textit{Restatement of Restitution} § 202 (1937). When the defendant is an innocent converter of the plaintiff's property, the \textit{Restatement} specifies that the plaintiff is entitled to an equitable lien upon the new property to secure its claim for restitution, but not to a constructive trust. \textit{Id.} § 203. The \textit{Restatement} explains the different rules as follows: “Where the converter is a conscious wrongdoer, he can be compelled to surrender any profit which he makes by a disposition of
trust may be imposed on a fund of money when the defendant has taken the plaintiff's property and sold it, or it may be imposed on property that was purchased with the plaintiff's money.

An equitable lien may be available to serve as security for a money judgment. When the defendant has exchanged the plaintiff's property or money for another asset, the plaintiff may obtain both a money judgment for the value of the plaintiff's original property and an equitable lien imposed on the new asset to serve as security for the money judgment. Moreover, when the defendant has exchanged the plaintiff's property for money, an equitable lien may be imposed on the money to secure the plaintiff's judgment for the value of the original property.

Historically, the choice between pursuing a claim at law or at equity—be it a claim for contract, tort, or unjust enrichment—was bounded by the jurisdictional limitations of the courts. A suit in equity for specific relief (such as for an injunction) typically could proceed only if the harm was irreparable—in other words, the remedy at law (damages) was inadequate. Because of the inadequacy doctrine, claims for money typically had to be asserted in courts of law. Some claims for money, however,
could only be heard in equity because the equity court had primary jurisdiction over the subject matter, such as in cases involving a fiduciary.\textsuperscript{124} Moreover, under the equitable “clean-up” doctrine, a court of equity could entertain a claim for money if the claim was considered “incidental” to a request for injunctive relief.\textsuperscript{125}

With respect to the particular context of a restitutionary claim for money, the plaintiff historically has had to assert the claim at law.\textsuperscript{126} Even if the plaintiff can identify as his a particular fund of money held by the defendant, the plaintiff generally cannot recover the money in a suit in equity because the legal remedy is deemed adequate.\textsuperscript{127} In the instance of a mistaken payment, the plaintiff must bring the claim at law even though the defendant still holds the plaintiff's “specific” money.\textsuperscript{128} Similarly, when payment of money is procured by fraud, the payor is not entitled to recovery of the money in equity.\textsuperscript{129}

\textsuperscript{124} See 1 John N. Pomeroy, A TREATISE ON EQUITY JURISPRUDENCE § 181, at 257 (5th ed. 1941). Hence, there developed the practice that claims against fiduciaries, including claims for restitution, were asserted in equity. See RESTATEMENT OF RESTITUTION, § 160 cmt. e, at 645 (“Even though what is transferred is money ... the payor or transferor is entitled to maintain a proceeding in equity for specific restitution if the payment or transfer was procured by an abuse of a fiduciary or confidential relation.”); 1 Palmer, supra note 31, § 1.6, at 35 (“equity jurisdiction over accounting by a trustee or other fiduciary usually has been continued even where an adequate remedy at law in quasi contract has become available”).\textsuperscript{125} See Fleming James, Jr., Right to Jury Trial in Civil Actions, 72 YALE L.J. 655, 658-59 (1963) (describing historical development of the equitable clean up doctrine); 1 Pomeroy, supra note 124, §§ 231-32 (discussing clean up doctrine).\textsuperscript{126} See 1 Dobbs, supra note 31, § 4.1(1) at 556 (“Restitution claims for money are usually claims “at law.”); Seavey & Scott, supra note 101, at 39 (noting that “where money is sought to be recovered, equity will frequently release jurisdiction on the ground that the remedy at law is adequate”); Laycock, Modern American Remedies, supra note 21, at 552 (stating that when “plaintiff seeks restitution from a solvent defendant, quasi-contract will often yield the same recovery as constructive trust, and where there are no profits other than the value of the thing taken, damages will work as well”).\textsuperscript{127} See, e.g., Granfinanciera v. Nordberg, 492 U.S. 33, 49 n.7 (1989) (stating that “even if the checks respondent seeks to recovery lay untouched in petitioners' offices, legal remedies would apparently have sufficed”). The Restatement distinguishes between a constructive trust arising (whenever a party was subject to an equitable duty to convey property to another) and a constructive trust being specifically enforceable. The Restatement suggests that when the defendant has property rightfully belonging to the plaintiff, a constructive trust over the property exists, although equity will not specifically enforce the constructive trust if the legal remedy is adequate. See RESTATEMENT OF RESTITUTION, § 160, cmts. e-f (1937); id. § 163 cmt. d. Professor Palmer characterized this analysis as “misleading,” because it suggests that the constructive trust is something more than a remedy; that “it somehow 'exists' even though equity will not enforce the rights of the equitable owner.” 1 Palmer, supra note 31, at 17-18. See also Schoenbrod et al., supra note 116, at 709 (noting that in instances when the defendant was not insolvent, the Restatement “viewed the constructive trust as a substantive legal arrangement that comes into being when property is wrongfully acquired and that ‘exists’ even if a court of equity would not have taken cognizance of the case”).\textsuperscript{128} Id. But see 1 Palmer, supra note 31, § 4.23, at 559 (asserting that “[a]lthough tracing and the imposition of an equitable lien have not been allowed for mere breach of promise to pay the debt, such relief has been given when the loan was obtained through fraud of the borrower” and citing two state cases).
Although the general rule is that recovery of a defendant's gain of money is not available in equity, there are important exceptions: when the money was obtained by abuse of a fiduciary or confidential relationship; when the defendant is insolvent; and when the plaintiff seeks to trace her property into another form or into the hands of a third person.

Recall that in a claim against an insolvent defendant, a plaintiff who can identify as his certain funds held by the defendant is entitled, under certain circumstances, to recovery of the funds. This recovery is accomplished through the equitable remedies of the constructive trust or equitable lien. With mistaken payment, for example, the Restatement notes: "Where . . . the payee is insolvent, the payor can maintain a suit in equity for the specific recovery of the money paid by mistake, if the payee still holds it, since the money is held upon a constructive trust for him."

Aside from being the means by which a plaintiff may recover specific funds held by an insolvent defendant, the constructive trust and equitable lien have been imposed when the plaintiff has been able to "trace" its property or money into a substituted asset or into the hands of a third person. When a solvent defendant gains money from the plaintiff, the key to determining whether the plaintiff's restitutionary remedy is legal or equitable is whether there has been an exchange of the plaintiff's

130. See Restatement of Restitution, § 160 cmt. d at 645 (1937); 1 Palmer, supra note 31, at 11 ("Constructive trust is used . . . to deprive one in a fiduciary position of a gain obtained through a misuse of that position.").

131. See supra notes 85-87 and accompanying text.

132. See Restatement of Restitution, § 202 cmt. e (1937) ("The claimant can reach the product of his property even though the wrongdoer is insolvent. This is true whether the claimant seeks to enforce a constructive trust upon the product or to impose an equitable lien upon it."); see also id. §§ 209, 211 (concerning a plaintiff's ability to recover, via a constructive trust or equitable lien, its funds obtained by a wrongdoer). Palmer criticized the Restatement for allowing a claimant for restitution against an insolvent debtor to obtain the defendant's profits, not just the plaintiff's loss. See 1 Palmer, supra note 31, § 2.4(c) at 184 ("It has been thought fair to permit [tracing] to the point of allowing payment of his claim in full, ahead of general creditors; but it is difficult to discern the fairness of allowing him to recover more than his loss at their expense."). Palmer notes that "almost as a matter of course the decree in favor of the claimant against an insolvent estate goes no further than to impress a lien on the traced asset," and that "[a]part from general statements, almost no support has been found in the decisions for the position of the Restatement." Id.

133. Restatement of Restitution, § 160 at 645 (1937). Cf. 1 Palmer, supra note 31, § 4.23 at 559 (stating that when the plaintiff has loaned money, "the equitable lien will give the lender a secured claim against the estate of an insolvent borrower").

134. See 1 Palmer, supra note 31, § 2.14, at 175 ("Through tracing, a person who in the first instance would be entitled to the restitution of money or other property is often permitted to assert his claim against a substituted asset—an asset which is traceable to or the product of such money or other property. The end result of tracing may be a decree for specific restitution of the traced asset, or imposing a lien on the asset to secure a money claim, or a decree for subrogation when the plaintiff's funds have been traced into the payment of a debt or of a charge on property."); Laycock, Modern American Remedies, supra note 21, at 595 ("The constructive trust can be used to trace the proceeds of specific assets through a series of exchanges."). Some have criticized the availability of tracing. See, e.g., Dale Oesterle, Restitution and Reform, 79 Mich. L. Rev. 337, 359 (1980) (suggesting that "tracing should be abandoned outside of the law of fiduciary relations").
money for something else. If the defendant either has spent the plaintiff's money or still has the money, then the remedy at law is adequate—the plaintiff sues for a money judgment. If instead, the defendant has exchanged the money for a different asset, then the plaintiff has a choice—it may sue for money at law or it may sue to obtain the asset through the constructive trust or equitable lien. Moreover, if the defendant transferred plaintiff's money to a third person who still holds the money, a constructive trust or equitable lien may be imposed on the fund. Conversely, if the defendant obtained property from the plaintiff (rather than money) and sold it, the plaintiff may trace the property into its monetary proceeds and get a constructive trust or equitable lien over the fund of money.

The tracing of money or property into a substitute asset or into the hands of a third person has been treated by U.S. authorities as available only in equity. Thus, although restitution claims for money typically are asserted at law, a monetary remedy generally will be considered equitable restitution if tracing is required to reach the money.

135. See 1 Palmer, supra note 31, § 2.19 (“If the defendant steals or converts $10,000 of the plaintiff's funds and spends the money to purchase land or securities, the plaintiff will be permitted to trace his money into the asset purchased and obtain specific restitution, without regard to whether a money judgment against the wrongdoer for $10,000 would be collectible . . . . Or, if the plaintiff so requests, the court will enter a $10,000 money judgment secured by a lien on the asset.”). The Restatement indicates that in the instance of a conscious wrongdoer, the plaintiff may obtain a constructive trust or equitable lien not only when the defendant has exchanged the plaintiff's money for a different asset but also when the defendant “acquires a chose in action, as . . . by a deposit of the claimant's money in the bank.” Restatement of Restitution, § 202 cmt. g (1937). To illustrate the chose in action situation, the Restatement asserts: “A wrongfully takes $10,000 belonging to B and deposits the money in his individual account in a bank in which he has on deposit no funds of his own. The bank fails and pays fifty cents on the dollar. B is entitled to the $5000 received from the bank and can hold A liable for the balance of the $10,000.” Id. at illus. 10. 136. See 1 Palmer, supra note 31, § 1.6, at 35-36 (“There is little reason to doubt that equitable relief will be given if that is the only means of reaching the particular defendant even though quasi contract would be available against another party.”); 3 Palmer, supra note 31, § 14.3, at 155 (citing as an example of tracing into the hands of a third party the equitable restitution of a portion of a mistaken bank deposit that was held by a third party who was not a bona fide purchaser); cf. 1 Palmer, supra note 31, §1.5, at 15 (noting that equity could trace property into the hands of a third party and give a “simple money judgment” against the third party if the property had been sold).

137. See Restatement of Restitution, § 202 cmt b, illus. 4-5 (1937). Not all efforts to obtain money when the defendant exchanged the plaintiff's property for money are pursued in equity. When the defendant has intentionally converted the plaintiff's goods into money, the plaintiff historically has had a remedy at law for the profits. See supra note 116.

138. See 1 Palmer, supra note 31, § 2.14 at 177 (“Tracing was a creature of equity and has remained almost entirely the sole province of equity. Although there is an occasional instance [in English cases] in which simple forms of tracing have been used in a law action, title to a traced asset can be recovered only in equity under American decisions.”) (footnotes omitted). The original Restatement places its chapter on “Following Property into its Product” under the Part entitled “Constructive Trusts and Analogous Equitable Remedies.” Restatement of Restitution, table of contents at xxii-xxv (1937). See also Laycock, Modern American Remedies, supra note 21, at 597 (“The tracing feature of constructive trusts is not available in any legal remedy”).

139. But see infra note 341 and accompanying text.
bility of tracing can be said to make the remedy at law inadequate.140

Professor Laycock has observed that application of the inadequacy doctrine in modern times rarely results in the plaintiff being relegated to legal relief if the plaintiff prefers an equitable remedy.141 For example, the availability of damages generally will not impede the plaintiff's ability to obtain an injunction or specific performance.142 In the context of restitution, scholars have noted that courts generally will honor a plaintiff's preference for specific property over a monetary award.143 Although the inadequacy doctrine has little effect today on the choice between specific relief and damages, the doctrine remains useful when traditional understandings of the law/equity divide are relevant to the classification of a particular remedy as legal or equitable.144

From this examination of legal and equitable restitution, one can assert, as Seavey and Scott did, that "the entire subject of restitution" is "equitable" in the sense that fairness considerations drive whether the plaintiff is entitled to restitution.145 At the same time, it is important to recognize that restitution has roots in both the courts of law and the courts of equity, with well-established rules indicating which claims are legal and which are equitable. In particular, restitution claims for money typically have been asserted at law, subject to a limited set of circum-

140. Cf. 1 Palmer, supra note 31, § 2.19, at 218 (stating that the attitude of courts with respect to tracing seems to be that "[t]he plaintiff seeks a kind of relief not available at law, and . . . that it is a kind of relief to which he is entitled if he can prove his case") (emphasis in original); id. at 220 ("[W]hen a plaintiff seeks to trace and assert a claim against a specific asset, no case has been found in which the court refused such relief solely because of the adequacy of the legal remedies.").

141. See generally Laycock, The Death of the Irreparable Injury Rule, supra note 79 (surveying over 1400 cases in support of his thesis that the irreparable injury rule rarely affects the results of cases).

142. Id. at 19.

143. Palmer gave as examples of the "erosion of the adequacy test" situations involving the plaintiff's attempt to obtain a constructive trust over specific property or an equitable lien in specific property. Among the examples he offered are: (1) the right of a purchaser of land, who rescinds for the vendor's fraud or breach of the executory contract, to sue in equity to obtain a money judgment and a vendee's lien on the property; (2) the right of one who conveys land because of defendant fraud to recover the land in equity rather than be relegated to a quasi-contract action for the value of the land; and (3) the right of a plaintiff whose corporate shares have been obtained by the defendant through fraud to recover the shares even though a monetary award in quasi contract would be available. 1 Palmer, supra note 31, at 38-39. Professor Dobbs has suggested, in the context of a discussion about the right to jury trial, that "the adequacy of legal remedy seems irrelevant" to the availability of a constructive trust because the plaintiff does not assert a legal right but an equitable interest. 1 Dobbs, supra note 31, at 595. He further asserts that "[a]t least some authorities support the view that a claim for a constructive trust may be pursued even if the legal remedy is adequate and even if the trust would yield only money that could be recovered at law." Id. at 595-96. The only citation for this assertion is a 1946 New Jersey state court case. The view that a constructive trust may be pursued even if the trust would yield only money that could be recovered at law is contradicted at several points in the Restatement. See supra notes 127-29 and accompanying text.

144. See Laycock, The Death of the Irreparable Injury Rule, supra note 79, at viii (writing that although he seeks "to eliminate the last remnant of the conception that equity is subordinate, extraordinary, or unusual," a distinction between legal and equitable remedies nonetheless remains relevant "where it is codified").

145. Seavey & Scott, supra note 101, at 42.
stances: when the defendant was insolvent and the plaintiff could identify as his certain money held by the defendant; when the plaintiff sought to trace property or money into its monetary proceeds or into the hands of a third person; when the monetary award was incidental to an injunction; when abuse of a fiduciary or confidential relationship was involved; or when equity otherwise had primary jurisdiction over the case.\textsuperscript{146}

III. COURT TREATMENTS OF MONETARY REMEDIES AS RESTITUTION

Supreme Court pronouncements about the classification of monetary restitution have occurred primarily in two settings: cases considering whether a statute permitted the remedy requested by the plaintiff and cases involving the right to jury trial. In many of the cases, the ultimate question for the Court was whether the relief requested was legal or equitable. By examining several of the Supreme Court's decisions regarding statutory authorization of relief and the right to jury trial, it is possible to identify the Court's first missteps in classifying monetary restitution and to trace how these comments led the Supreme Court and lower federal courts to commit more significant errors in later cases. These errors have been classifying monetary remedies as restitution when the remedies should have been classified as damages and suggesting that restitution is exclusively an equitable remedy.\textsuperscript{147} After examining the Supreme Court decisions labeling certain monetary remedies as restitution, this Part focuses on the remedy of backpay to exemplify the confused manner in which courts have used the terminology of restitution to classify a monetary remedy as damages or restitution and as legal or equitable.

A. STATUTORY AUTHORIZATION OF RELIEF

In determining whether various statutes authorized the monetary relief sought by plaintiffs, the Supreme Court has at times discussed whether the requested relief was restitution. Interestingly, these discussions have not occurred in cases involving statutes that explicitly allowed restitution, but mainly in two types of cases: (1) where Congress authorized injunctive relief and the question was whether the monetary remedy requested by the plaintiff was permitted as "incidental" to the injunction, and (2) where Congress authorized "equitable" remedies.\textsuperscript{148}

\textsuperscript{146} See supra notes 123-25, 130-40 and accompanying text.

\textsuperscript{147} The practical consequences of these classification mistakes can be significant. For example, classification errors have resulted in deprivation of the right to jury trial. See infra notes 283 and accompanying text.

\textsuperscript{148} The Supreme Court has also referred briefly to restitution in addressing the difference between specific monetary relief and "money damages." Bowen v. Massachusetts, 487 U.S. 879 (1988), discussed supra note 79. One of the reasons the Bowen majority offered for concluding that the relief sought was not "money damages" was that "the specific agency action that reverses a decision [by the agency to disallow reimbursement] is described as 'restitution' in the statute." Id. at 893. See 42 U.S.C. \$ 1316(c) (2000) (mandating that if the agency reverses a disallowance decision, the Secretary "shall certify restitution forthwith in a lump sum of any funds incorrectly withheld or otherwise denied").
The Supreme Court's first important discussion of monetary relief as restitution came in *Porter v. Warner Holding Co.* In *Porter*, the Office of Price Administration brought an action against a landlord for charging rents that exceeded maximums established under the Emergency Price Control Act of 1942. The Administrator brought suit under section 205(a) of the Act, which authorized courts to grant an injunction, a restraining order, or "other order," upon a showing that the defendant had violated or was about to violate the Act. Initially asking the district court to enjoin the landlord from exceeding the rent ceilings, the Administrator later added a request for "restitution" to the tenants of the excessive rents that had already been collected.

The Administrator's use of restitution fits scholarly definitions of the term. The claim for return of the excessive rents seems to fall within a definition of restitution as liability based on and measured by unjust enrichment. Liability for retaining rents in excess of statutory maximums can be analogized to liability for retaining overpayments under a contract—a classic example of unjust enrichment. Moreover, a definition of restitution as the yielding up of the defendant's gains at the plaintiff's expense would also seem to fit the remedy here, although the plaintiff is the Administrator, acting on behalf of the tenants who would receive the money.

The question for the courts was whether the statute permitted restitution of the overpayments. The district court, although granting the Administrator's request for an injunction, declined to order restitution, saying that the statute did not authorize such relief. The Supreme Court disagreed. First, the Supreme Court noted that the Administrator had invoked the equitable jurisdiction of the district court by seeking an injunction under section 205(a). The Court reasoned that unless otherwise provided by statute, once "the equitable jurisdiction of the [district] court has properly been invoked for injunctive purposes, the court has the power to . . . award complete relief," and that the requested restitution could be viewed as an "equitable adjunct to an injunction de-

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Justice Scalia in dissent challenged the implication in the majority opinion that restitution is not "money damages." *Id.* at 917 n.2 ("I doubt that the term [restitution] in the statute is a term of art, or has anything to do with the issue before us here. But if the Court means to suggest otherwise, I point out that "restitution" in the judicial context commonly consists of money damages.").

150. 50 U.S.C. § 925(a) (repealed 1956).
151. 328 U.S. at 396-97.
152. *Id.*
153. *See* RESTATEMENT (THIRD) OF RESTITUTION, § 6 cmt. c, illus. 9 (Tentative Draft No. 1, April 6, 2001) (stating that tenant has a right to restitution of overpayment of rent due to landlord's error in overcharging tenant).
155. *Id.* at 397-99.
156. *Id.* at 398-99.
The Court’s reasoning was consistent with the equitable clean-up doctrine—the notion that an equity court has the power to decree all relief, including incidental legal relief, necessary to achieve justice between the parties. Thus, the Court was not suggesting that restitution of money is an equitable remedy rather than a legal remedy; to the contrary, the Court was careful to note that restitution of the illegal rents "could not be obtained through an independent suit in equity if an adequate legal remedy were available."158

Second, the Supreme Court stated that an order for restitution of the illegal rents could be considered necessary to enforce compliance with the Act and to effectuate the statutory purpose of preventing inflation.159 The Court found that Congress intended that courts of equity have the power under section 205(a) to fashion appropriate remedies.160 The potential barrier to this reasoning was that another portion of the Act, section 205(e), explicitly authorized monetary remedies. Under that section, a tenant could sue on his or her own behalf for recovery of up to three times the amount of the overcharges, plus attorney’s fees and costs.161 If the tenant did not bring suit within thirty days of the violation or for some reason was not entitled to bring suit, the Administrator could sue on behalf of the United States for the same remedies.162 The Court in Porter characterized these monetary remedies as "damages" and found that section 205(e) provided the "exclusive remedy relative to damages."163 It is important to note that the Supreme Court was using the term "damages" in a very broad sense to describe the remedies in section 205(e); certainly those remedies could not be considered solely compensatory damages, because a tenant was entitled to up to three times the amount of overcharges.

The Supreme Court found that a district court under section 205(a) could grant the Administrator’s request for recovery of illegal rents on behalf of the tenants because the relief sought was restitution, unlike the remedies authorized under section 205(e). The Court explained:

Restitution, which lies within [the jurisdiction of equity courts under section 205(a)], is consistent with and differs greatly from the damages and penalties which may be awarded under § 205(e) . . . . When the Administrator seeks restitution under § 205(a), he does not request the court to award statutory damages to the purchaser or tenant or to pay to such person part of the penalties which go to the United States Treasury in a suit by the Administrator under § 205(e). Rather he asks the court to act in the public interest by restoring the

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157. Id. at 399. ("Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief.").
158. Id. (emphasis added).
159. Id. at 400.
160. Porter, 328 U.S. at 401.
162. Id.
163. Porter, 328 U.S. at 401.
status quo and ordering the return of that which rightfully belongs to
the purchaser or tenant. Such action is within the recognized power
and within the highest tradition of a court of equity.\textsuperscript{164}

Later decisions have read the \textit{Porter} language of "restoring the status
quo and ordering the return of that which rightfully belongs to the pur-
chaser or tenant" as a definition that distinguishes restitution from com-
pensatory damages.\textsuperscript{165} Such an interpretation pulls the language out of
context. The Court in \textit{Porter} had no occasion to distinguish compensa-
tory damages from restitution, but rather was faced with deciding
whether monetary relief incidental to an injunction could be awarded
without circumventing the scheme of treble damages and attorney’s fees
set forth in section 205(e). Furthermore, "restoration of a loss to the
plaintiff" does not distinguish restitution from compensation or damages
when the loss is that of money.\textsuperscript{166} The Court’s language should not be
read as providing a meaningful distinction between restitution and
compensation.

The above passage in \textit{Porter} has also been misread as indicating that
restitution is exclusively an equitable remedy.\textsuperscript{167} Again, the context of
the Court’s language is crucial. The Court’s assertion that the restitution-
ary relief requested in \textit{Porter} was "within the recognized power and
within the highest tradition of a court of equity" was made for the limited
purpose of holding that a court whose injunctive powers have been in-
voked also has the power to award incidental monetary relief.\textsuperscript{168} \textit{Porter}
thus does not in any way depart from the historical understanding of res-
stitution as having counterparts both in law and equity.

In \textit{Mitchell v. DeMario Jewelry},\textsuperscript{169} another case involving the availability
of monetary relief incidental to a request for an injunction, the Su-
preme Court cited \textit{Porter} extensively. \textit{Mitchell} involved a suit by the
Secretary of Labor under the Fair Labor Standards Act.\textsuperscript{170} Alleging that
an employer had violated the Act by discriminating against employees
who had lodged labor-related complaints, the Secretary sought an injunc-
tion against the discrimination and an award of backpay for employees
who had been discharged as a result of the discrimination.\textsuperscript{171} The Act
granted courts the power to "restrain violations" of certain provisions of
the Act, but it did not explicitly authorize backpay.\textsuperscript{172}

\begin{footnotes}
\item[164] Id. at 402. Justice Rutledge dissented in \textit{Porter}, asserting that a restitution remedy
should not have been recognized because Congress specified the remedies it intended to
make available. \textit{Id.} at 405-08 (Rutledge, J., dissenting).
\item[165] See infra notes 269, 316-19 and accompanying text.
\item[166] See supra notes 77-78 and accompanying text.
\item[167] See infra note 282 and accompanying text.
\item[168] In the context of the right to jury trial, the Supreme Court has held that when a
claim for legal relief is joined with a claim for equitable relief, the historic power of equity
to award incidental monetary relief does not apply. That is, the Seventh Amendment guar-
\item[169] 361 U.S. 288 (1960).
\item[171] \textit{Mitchell}, 361 U.S. at 289-90.
\end{footnotes}
The issue for the Supreme Court was whether a district court had the authority to award backpay when combined with a request for an injunction. Citing *Porter* for the proposition that a court of equity has the power to render "complete relief" unless Congress has circumscribed that power, the Court determined that a trial court did have the authority to award backpay. Thus, *Mitchell* is another example of the power of a court to award a monetary remedy incidental to an injunction. As *Porter* made clear, "complete relief" includes monetary remedies that, had they not been combined with a request for an injunction, would be considered legal in nature.

The Court equated the backpay remedy in *Mitchell* to the recovery of overcharges in *Porter*, terming both remedies to be "reimbursement." Although the Court also stated that "the measure of reimbursement [sought by the Secretary of Labor] is compensatory," its "reimbursement" terminology, equating backpay to recovery of overcharges, has led to confusion about the nature of backpay, with some courts characterizing backpay as inherently restitutionary and equitable. As will be discussed later, backpay generally should not be characterized as restitution, but rather as damages. Moreover, *Mitchell*, like *Porter*, involved whether equity encompassed monetary relief incidental to an injunction; it is misread when cited for the broad proposition that restitution is equitable.

Although *Porter* and *Mitchell*, decided in 1946 and 1960, respectively, involved monetary remedies that were allowed as incidental to statutorily-authorized injunctions, recent Supreme Court cases discussing monetary restitution have addressed whether a statutory authorization of "equitable relief" permitted the plaintiffs' requested remedies. Beginning in 1993 and culminating most recently with *Great-West*, the Court

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173. *Mitchell*, 361 U.S. at 291. After quoting from *Porter* extensively, the Court in *Mitchell* added that "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Id.* at 291-92. Section 17 of the Fair Labor Standards Act provided that a court did not have the authority to "order the payment to employees of unpaid minimum wages" in an action brought by the Secretary of Labor to restrain discharge or discrimination against employees who had lodged labor-related complaints. The majority determined that this statutory language applied only to current employees and did not limit a court's ability to award backpay to former employees who had been discharged in violation of the Act. *Id.* at 293-96.

174. *Id.* at 291-96.

175. *Id.* at 291 (describing *Porter* as upholding the "implied power to order reimbursement" of rent overcharges); *id.* at 289 (characterizing question in *Mitchell* as whether district court had the power to "order reimbursement for loss of wages" caused by discrimination).

176. Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 570-71 (1990) (in case determining whether litigant was entitled to a jury trial, characterizing backpay in *Mitchell* as restitutionary and stating that damages are "equitable where they are restitutionary"); Schwartz v. Gregori, 45 F.3d 1017, 1022 (3d Cir. 1995) (citing *Mitchell* in support of conclusion that backpay awarded for retaliatory discharge under ERISA is restitution and therefore an equitable remedy).

177. *See infra* Part III.C.
has discussed restitution in interpreting various provisions of the Employee Retirement Income Security Act (ERISA). 178

In *Mertens v. Hewitt Associates*, 179 the plaintiffs sought a monetary award against a nonfiduciary alleged to have knowingly participated in a fiduciary's breach of duties under ERISA. Justice Scalia, writing for a five-member majority that included Justices Kennedy, Thomas, Souter, and Blackmun, first described the remedies that ERISA provides against fiduciaries, in contrast to nonfiduciaries. 180 The Court characterized the statutory language that a fiduciary must "make good to [the] plan any losses to the plan resulting from each such breach" as a provision for "damages," while it characterized the statutory language that a fiduciary must "restore to [the] plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary" as a provision for "restitution." 181 Here, the Court's use of "restitution" is consistent with scholarly definitions of the term. The statutory liability created is analogous to a classic claim for unjust enrichment—the claim for restitution of profits against a fiduciary who acquired a benefit by breaching a duty to the beneficiary. 182 Moreover, under a definition of restitution as the yielding up of defendant's gain at the plaintiff's expense, the return to the plan of the fiduciary's profits is appropriately characterized as restitution.

Having described the ERISA remedies against fiduciaries, the Supreme Court then turned to the plaintiffs' claim for relief against a nonfiduciary. The plaintiffs sued the actuary of a qualified pension plan (Hewitt), claiming that it had knowingly participated in a breach of fiduciary duties by plan fiduciaries. The plaintiffs sought monetary relief for the losses the plan sustained as a result of the alleged breach of duties. The plaintiffs brought their claim against Hewitt under section 502(a)(3) of ERISA, which authorizes a plan beneficiary or participant to bring a civil action:

(A) to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan . . . ." 183

The plaintiffs asserted that their request that Hewitt make the plan whole for the losses to the plan would constitute "other appropriate equitable relief" under section 502(a)(3). 184

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180. *Id.* at 252. Among a fiduciary's duties under ERISA are "'the proper management, administration, and investment of [plan] assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest.'" *Id.* at 251-52 (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142-43 (1985) and citing 29 U.S.C. § 1104(a) (2000)).
The Court majority expressed doubt as to whether section 502(a)(3) affords a cause of action—irrespective of the remedy—against nonfiduciaries who participate in a fiduciary's breach of duty.\textsuperscript{185} Nonetheless, the Court majority did not decide whether a cause of action existed because the defendant expressly disclaimed reliance on that point. The majority decided only whether the relief sought could be considered equitable.\textsuperscript{186}

The Court characterized the remedy requested by the plaintiffs as "compensatory damages—monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties."\textsuperscript{187} This is an accurate characterization, for the remedy sought was directed at the plaintiffs' losses. Certainly the relief could not be characterized as restitution, because Hewitt had not gained any benefit at the plaintiffs' expense.\textsuperscript{188}

The Court acknowledged that damages are "the classic form of legal relief,"\textsuperscript{189} but because ERISA had roots in the law of trusts, the Court considered whether the damages sought by the plaintiffs could fall within the authorization of "appropriate equitable relief" in section 502(a)(3).

\textsuperscript{185} Id. at 253-54. The Court explained:
\begin{quote}
We note at the outset that it is far from clear that, even if this provision does make money damages available, it makes them available for the actions at issue here. It does not, after all, authorize "appropriate equitable relief" at large, but only "appropriate equitable relief" for the purpose of "redress[ing] any violations or . . . enforce[ing] any provisions" of ERISA or an ERISA plan. No one suggests that any term of the Kaiser plan has been violated, nor would any be enforced by the requested judgment. And while ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries, including actuaries, no provision explicitly requires them to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty. . . . [A]lthough we acknowledge the oddity of resolving a dispute over remedies where it is unclear that a remediable wrong has been alleged, we decide this case on the narrow battlefield the parties have chosen, and reserve decision of that antecedent question.
\end{quote}

Id. at 254.

\textsuperscript{186} Id. at 254-55.

\textsuperscript{187} Id. at 255.

\textsuperscript{188} The Supreme Court noted that the Court of Appeals held that restitution was unavailable and that the plaintiffs had not challenged that holding. Id. The appellate court's reasoning as to why restitution was unavailable helpfully distinguishes between compensation and restitution:
\begin{quote}
[T]he plaintiffs had not alleged that Hewitt received anything other than its compensation for actuarial services. . . . Restitution was not available because unjust enrichment to support the plaintiffs' claim was not alleged. . . . The plaintiffs allege that Hewitt was paid by Kaiser, not from assets of the plan. It is not possible, therefore, to frame a claim for restitution in terms of the recovery of plan assets wrongfully obtained by Hewitt. The plaintiffs argue that to the extent Kaiser was paying Hewitt, it was doing so as remuneration for breach of Hewitt's statutory duty and that all payments received by Hewitt were thus "unjust enrichment." The plaintiffs, however, have provided no authority that supports this theory. Moreover, to accept the plaintiffs' argument would be to obliterate the already blurry distinction between restitution and damages at law.
\end{quote}

See Mertens v. Hewitt Assoc., 948 F.2d 607, 612 (9th Cir. 1991).

\textsuperscript{189} Mertens, 508 U.S. 248 (citations omitted).
The Court commented that the language "appropriate equitable relief" could mean "whatever relief a court of equity is empowered to provide in the particular case at issue." Because courts of equity historically had primary jurisdiction over breach of trust actions and had the power to render all appropriate relief against the trustee, such an interpretation would mean that section 502(a)(3) authorized the relief sought by the plaintiffs. The Court, however, determined that Congress chose the terms "equitable relief" to connote "those categories of relief that were typically available in equity." The Court reasoned that if the statute were read to authorize all relief available in an equity court for breach of trust, the statutory language "would limit the relief not at all." The four dissenting justices disagreed with this interpretation of the statute, arguing that the phrase "appropriate equitable relief" should be read to mean remedies that were available in equity courts for breach of trust, which would include compensatory damages. Because the majority concluded that compensatory damages were not "typically available in equity," it concluded that the plaintiffs did not seek relief authorized by the statute. Rather than leaving it at that, the Court made unnecessary and inaccurate statements about restitution. It declared that "injunction, mandamus, and restitution" were typically available in equity. Elsewhere in the opinion, the Court asserted that restitution, like the injunction, is a "remedy traditionally viewed as 'equitable.'" It also commented that equitable relief "includes restitution of ill-gotten plan assets or profits." The Court did not offer any precedent or other support for these statements.

There are serious problems with the way Mertens characterized restitution. The Court erred in lumping restitution (and mandamus) together with injunctive relief and terming these remedies typically available in equity. The injunction is the quintessential equitable remedy, historically available only in the courts of equity. The writ of mandamus, contrary to the Court's claim, was the prerogative of courts of law, not courts of equity. Restitution was available in the law courts as well as the equity courts.

190. Id. at 256.
191. Id. at 255-57.
192. Id. at 256.
193. Id. at 257.
194. Id. at 263 (White, J. dissenting). Justice White was joined by Chief Justice Rehnquist, Justice Stevens, and Justice O'Connor. The dissent pointed out the anomaly of construing ERISA in such a way as to "afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." Id. at 264 (citation omitted).
195. Mertens, 598 U.S. at 256.
196. Id. at 255 ("Petitioners ... do not seek ... a remedy traditionally viewed as "equitable," such as injunction or restitution.").
197. Id. at 260 ("[E]ven in its more limited sense, the 'equitable relief' awardable under section 502(a)(5) of ERISA includes restitution of ill-gotten plan assets or profits.").
199. See Part III.A. Some have suggested that restitution at law is "the most ancient and significant part of restitution." Goff & Jones, supra note 30, at 3 ("Restitutionary
Moreover, the Court’s comment in *Mertens* that equitable relief includes restitution of ill-gotten assets or profits sweeps much of what historically would have been considered restitution at law under the scope of equity. Recall that most claims for monetary restitution proceeded at law, in the action of quasi-contract. Aside from cases where equity had primary jurisdiction of the subject matter (as with trusts) or could grant a monetary award incidental to an injunction, a claim for “ill-gotten assets or profits” would proceed in equity only if the plaintiff had need of a constructive trust. Defendant insolvency or the necessity of tracing the plaintiff’s property or money into its proceeds were the triggering conditions for the constructive trust.

A dissenting opinion, authored by Justice White and joined by Chief Justice Rehnquist, Justice Stevens, and Justice O’Connor, disagreed with the majority’s reading of the statutory language “appropriate equitable relief” as meaning relief “typically available in equity.” Rather, the dissent suggested that the statutory language should mean “that relief which was available in the courts of equity for a breach of trust.” Such relief included “a compensatory monetary award . . . not only against trustees for breach of duty, but also against nonfiduciaries knowingly participating in a breach of trust.” The dissent did not comment on the majority’s assertion that restitution was a remedy typically available in equity.

Although *Mertens* did not explicitly reject the proposition that restitution can be a legal remedy, its language associating restitution with equity obscured the existence of restitution at law. The Supreme Court in the past had acknowledged that restitution was available both at law and equity, but other cases, like *Mertens*, had used the phrase “equitable res-

claim are to be found in equity as well as at law. But the common law of quasi-contract is the most ancient and significant part of restitution and, for that reason, restitution is more easily understood if approached through that topic.”).

201. *Id.* at 263.
202. *Id.*
203. See, e.g., *Porter*, 328 U.S. at 399 (noting that restitution of overcharges could not be obtained through an independent suit in equity if remedy at law would be adequate); Atlantic Coast Line R.R. Co. v. Florida, 295 U.S. 301 (1935). In *Atlantic Coast Line*, the Court considered whether a railroad should refund freight charges that exceeded lawful rates—relief that the Court termed “restitution.” The case had been brought on the equity side of the U.S. district court because the plaintiffs initially had sought injunctive relief. *Id.* at 306, 310-14. The Court found that there were several equitable considerations favoring the railroad and denied restitution. *Id.* at 310-17 (citing *Moses v. MacFerlan*, the Court remarked that these equitable considerations would have affected the claim of restitution even if the case had been brought in a court of law). *Id.* at 313-14. *Atlantic Coast Line* was decided before the merger of law and equity accomplished by the Federal Rules of Civil Procedure in 1938, and before the publication of the *Restatement of Restitution* in 1937. The Court accurately indicated that restitution was available in both law and equity courts and that equitable considerations relevant to whether restitution should be awarded in a particular case apply to both types of courts.
In *Great-West Life & Annuity Insurance Co. v. Knudson*, the Supreme Court majority distinguished between legal and equitable restitution. The Court revisited the question of the types of monetary relief that fall within the ambit of section 502(a)(3). Eric Knudson had a health plan through his employer. His wife at the time, Janette Knudson, was injured in a car accident. The plan covered $411,157.11 of her medical expenses, most of which was paid by the plan’s insurance company, Great-West. Under reimbursement provisions, the plan had a right to recover from a beneficiary any payment for benefits paid by the plan that the beneficiary was entitled to recover from a third party. Specifically, the plan had a first lien over recovery from a third party, and if the beneficiary failed to reimburse the plan for such recovery, the beneficiary became "personally liable to [the plan] . . . up to the amount of the first lien." A separate agreement assigned to Great-West the plan’s rights to any reimbursement claim.

The Knudsons settled a lawsuit they had filed against the manufacturer of their car and other alleged tortfeasors, with the bulk of the $650,000 recovery going to attorney’s fees and to a Special Needs Trust for Janette’s medical care. Of the settlement, approximately $13,000 (the portion of the settlement attributable to past medical expenses) was earmarked to satisfy Great-West’s reimbursement claim. The amount of the settlement dedicated to a trust for Janette’s medical care was allocated directly to the trust. The remaining amount of the settlement went to the Knudsons’ attorney, who was in turn obliged to tender a check to Great-West.

Instead of cashing the check sent by the Knudsons’ attorney, Great-West filed suit in federal court under section 502(a)(3) of ERISA, seeking injunctive and declaratory relief to enforce the reimbursement provisions of the plan by requiring the Knudsons to pay the plan $411,157.11. For Great-West’s claim to fall within the coverage of section 502(a)(3), its requested remedy had to be considered a request "to enjoin any act" that violates the terms of the plan or "other appropriate equitable relief" that would redress violations of the plan or enforce provisions of the plan.

Justice Scalia authored the five-person majority opinion, joined by Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Thomas, and he qualified some of his earlier language in *Mertens*. The majority determined that Great-West had not stated a claim for relief authorized

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205. 534 U.S. 204 (2002).
206. Id. at 207-08.
207. Id. at 207.
208. Id.
209. Id.
210. Id. at 208.
by section 502(a)(3) because it was seeking “to impose personal liability on respondents for a contractual obligation to pay money—relief that was not typically available in equity.” The majority rejected two arguments submitted by Great-West to characterize its action as covered by section 502(a)(3): (1) that Great-West was seeking to “enjoin” a violation of the plan; and (2) that the relief requested was equitable because it was restitution.211

The majority asserted that Great-West could not seek an injunction or specific performance to “enforce a contractual obligation to pay money past due,” because such relief was not typically available in equity.212 Thus, the lawsuit did not fall within the statute as an attempt “to enjoin any act.” Justice Stevens was the lone dissenter on this point.213 As to whether Great-West’s suit could be characterized as one for “other equitable relief,” the majority assumed that the relief requested was for restitution, as did the four-person dissent authored by Justice Ginsburg and joined by Justices Souter, Breyer, and Stevens. The majority and dissent differed over whether the remedy was legal or equitable.214

The majority opinion did not discuss why the requested remedy should be characterized as restitution. Also problematic is that the majority conflated damages with restitution, stating: “[T]he restitution sought here by Great-West is . . . a freestanding claim for money damages.”215 Elsewhere in the opinion, the majority equated the plaintiff’s requested relief to damages,216 but it later discussed the remedy as if it were restitution. The majority’s language mixing restitution and damages is likely to perpetuate confusion in the courts about the difference between the two.

Justice Ginsburg’s dissent claimed that “it was beyond dispute” that the

211. Great-West, 534 U.S. at 210.
212. The majority also rejected an argument by the United States, as amicus, that the common law of trusts provided Great-West with equitable remedies. Id. at 219.
213. Id. at 210-12.
214. Justice Stevens was the lone dissenter on this point. Id. at 221-23 (Stevens, J., dissenting) (“I am persuaded that Congress intended the word ‘enjoin,’ as used in § 502(a)(3)(A), to authorize any appropriate order that prohibits or terminates a violation of an ERISA plan, regardless of whether a precedent for such an order can be found in English Chancery cases.”).
215. None of the opinions in Great-West discussed whether Great-West could be seen to be requesting equitable relief in its effort to enforce the “first lien” that was created by the plan on a beneficiary’s recovery from a third party.
216. Great-West, 534 U.S. at 218 n.4. This is not the first time that Justice Scalia has expressly equated restitution with damages. See Bowen v. Massachusetts, 487 U.S. 879, 917 n.2 (1988) (Scalia, J., dissenting) (“I doubt that the term [restitution] in the statute is a term of art, or has anything to do with the issue before us here. But if the Court means to suggest otherwise, I point out that ‘restitution’ in the judicial context commonly consists of money damages.”). For further discussion of Bowen, see supra notes 79, 148.
217. Great-West, 534 U.S. at 210-12. The Great-West majority quoted from a dissent by Justice Scalia in which he had stated broadly that “[a]lmost invariably . . . suits seeking . . . to compel the defendant to pay a sum of money to the plaintiff are suits for ‘money damages,’ as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant’s breach of legal duty.”). Bowen v. Massachusetts, 487 U.S. 879, 918-19 (1988) (Scalia, J., dissenting) (quoted in Great-West, 534 U.S. at 210).
requested relief was restitution. For support, she asserted that: “the relief would operate to transfer from the Knudsons funds over which Great-West claims to be the rightful owner”; “Great-West alleges that the Knudsons would be unjustly enriched if permitted to retain the funds”; and “Great-West sued to recover an amount representing the Knudsons’ unjust gain, rather than Great West’s loss.”

It is debatable whether the monetary remedy requested by Great-West should have been classified as restitution. Great-West was seeking money from the Knudsons pursuant to reimbursement provisions in the health plan contract that Eric Knudson had with his employer. The obligation of the Knudsons to reimburse Great-West was based directly on contract liability. Although one might say that the defendants would be unjustly enriched if permitted to retain the money owed to Great-West, the unjust enrichment theory seems secondary, for the contract theory more conventionally describes the basis of liability. A tentative draft of the Restatement (Third) of Restitution and Unjust Enrichment supports this characterization, for it differentiates claims for subrogation based on insurance contracts from claims for subrogation that are “independent of contract” and based on principles of restitution and unjust enrichment.

The remedy Great-West requested was payment of a debt rooted in the contractual obligation. The remedy could be said to be measured in some sense by the gain to the Knudsons—the amount of double recovery they received as a result of payments from both Great-West and the tort defendants. The remedy, however, could just as easily be characterized as measured by Great-West’s loss resulting from the breach of contract, a contract that defined the terms of repayment. Characterized as such, the remedy would be for damages, a legal remedy. If the majority had clearly defined the predominant theory of liability in the case as contract rather than restitution, it could more easily have explained its conclusion that the relief requested was legal.

Under a definition of restitution as the yielding up of defendant’s gain at the plaintiff’s expense—indeed of liability based on unjust enrichment—then Great-West’s claim could be classified as restitution. The health plan contract called for the beneficiary to reimburse the plan if the

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218. Great-West, 534 U.S. at 229.
219. Id.
220. Although the Great-West majority at times deemed the remedy requested by Great-West to be restitution, it also characterized Great-West’s claim as based on contract. Id. at 214 (“The basis for petitioners’ claim is not that respondents hold particular funds that, in good conscience, belong to petitioners, but that petitioners are contractually entitled to some funds for benefits that they conferred.”).
221. See note 68 and accompanying text. See also Kull, Rationalizing Restitution, supra note 4, at 1197 (asserting “that a rationalized law of restitution—a law of restitution based exclusively on unjust enrichment—has no independent role to play in legal disputes arising out of enforceable contracts”).
222. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, § 26 cmt. a (Tentative Draft No. 2, Apr. 1, 2002).
Reimbursement to the plan after the beneficiary received payments from a third party is essentially a "yielding up" of the beneficiary's gain.

Although it is arguable whether the remedy requested should have been classified as restitution, the ultimate question for the Court was whether the remedy was legal or equitable. Justice Scalia's majority opinion relied on historical differences between restitution at law and restitution at equity to conclude that the relief sought by Great-West was legal. Justice Ginsburg's opinion stressed that because restitution could be afforded in equity courts (in addition to law courts), it was relief "typically available in equity" as required by Mertens. Ginsburg accordingly concluded that Great-West sought an equitable remedy within the scope of section 502(a)(3).

Justice Scalia in Great-West qualified his earlier language in Mertens that restitution is relief that was "typically available in equity." Quoting an opinion by Judge Posner, Scalia asserted that "all the [Supreme] Court meant [in Mertens and other cases] was that restitution, in contrast to damages, is a remedy commonly ordered in equity cases and therefore an equitable remedy in a sense in which damages, though occasionally awarded in equity cases, are not." Scalia noted that some prior Supreme Court decisions, including Mertens, had not distinguished between legal and equitable restitution because such a distinction was not relevant to disposition of those cases.

In deciding that Great-West sought legal restitution, the majority contrasted imposition of personal liability on the defendant, which it said was a legal remedy, with imposition of a constructive trust or equitable lien on particular property held by the defendant, which it said was an equitable remedy. In describing historical practice, the majority stated:

In cases in which the plaintiff "could not assert title or right to possession of particular property, but in which he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him," the plaintiff had a right to restitution at law through an action derived from the common law writ of assumpsit. In such cases, the plaintiff's claim was considered legal be-

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223. Birks likely would call the health plan reimbursement provisions a contract for restitution. Birks, Introduction to the Law of Restitution, supra note 30, at 19 (describing as a contract to make restitution the handing over of money "in exchange for a promise by the other to return it in certain events"). See also Birks, Unjust Enrichment, supra note 30, at 1775 ("If I lose my wallet on Friday evening and have to borrow $100 from you to get me through the weekend, your right to demand $100 on Monday is clearly restitutionary: I must give back the value received, but the source of the restitutionary right is contract, not unjust enrichment. It is just the same where, by contract, we lay down a regime for the repayment of sums to be paid by one of us in the event of the other's failing to come up with the expected quid pro quo.").

224. Great-West, 534 U.S. at 212-17.

225. Id. at 215 (quoting Mertens, 508 U.S. at 256).

226. Id. at 215 (quoting Reich v. Cont'l Cas. Co., 33 F.3d 754, 756 (7th Cir. 1994)).

227. Id. at 215.

228. Great-West, 534 U.S. at 212-18.
cause he sought "to obtain a judgment imposing a merely personal
liability upon the defendant to pay a sum of money."

... In contrast, a plaintiff could seek restitution in equity, ordinarily
in the form of a constructive trust or an equitable lien, where money
or property identified as belonging in good conscience to the plaintiff
could clearly be traced to particular funds or property in the defend-
ant's possession.230

Because Great-West was not seeking particular funds in the possession
of the Knudsons—the funds paid by the tort defendants were in the Special
Needs Trust—the majority reasoned that Great-West was not seeking eq-
uitable relief.231

The majority's language might be read to suggest that restitution of
property belonging to the plaintiff but in the defendant's possession is
always equitable. The Great-West majority's characterization of Harris
Trust & Savings Bank v. Salomon Smith Barney, Inc.232 lends support for
such a reading. In Harris Trust, a unanimous Supreme Court found that
"an action for restitution against a [nonfiduciary] transferee of tainted
plan assets" requests equitable relief within the scope of section
502(a)(3).233 The Great-West majority stated that "the relief we described
in Harris Trust—a claim to specific property (or its proceeds) held by the
defendant—accords with the restitution we describe as equitable
today."234

With respect to a restitutionary claim for money, however, a plaintiff
generally cannot sue in equity, even when the plaintiff can identify as hers
a specific fund of money held by the defendant.235 This is because the
remedy at law (historically available at quasi-contract) is deemed ade-
quate.236 Thus, the Great-West majority incorrectly suggested that a claim
for specific money in the possession of the defendant by itself implies
equitable, as opposed to legal, restitution.

Rather than resting the distinction between legal and equitable restitu-
tion of a fund solely on whether the defendant holds the fund that the
plaintiff seeks, the majority should have cited those unique circumstances
when equity can entertain a restitution claim for a specific fund of money.

230. Id. at 213 (citations omitted). See also id. at 214 ("For restitution to lie in equity,
the action generally must seek not to impose personal liability on the defendant, but to
restore to the plaintiff particular funds or property that are in the defendant's
possession.").
231. Id. at 214.
233. Id. at 253.
235. See supra notes 115-17, 126-29 and accompanying text.
236. See RESTATEMENT OF RESTITUTION, § 160 at 644-45 ("[W]here money paid by one
person to another as a result of a mistake of such character that the payor is entitled to
restitution, he is ordinarily not entitled to maintain a suit in equity for the specific recovery
of the money, even though the payee still holds the money so that specific restitution
would be possible, since a quasi-contractual action at law would given an adequate rem-
edy."); Seavey & Scott, supra note 101, at 39 (noting that "where money is sought to be
recovered, equity will frequently refuse jurisdiction on the ground that the remedy at law is
adequate"). See also supra notes 123-24 and accompanying text.
The most prominent are the instances of defendant insolvency or of plaintiff necessity to trace property or money into its proceeds, either because the property or fund has been converted into another form or because it has been transferred to someone else. The power of courts to impose a constructive trust on a fund held by a transferee explains why the restitution requested in *Harris Trust* is appropriately characterized as equitable.

Under the majority's reasoning in *Great-West*, the insurance company apparently could have sued the trustee of the Special Needs Trust because the Trust had "possession" of the requested funds. Justice Ginsburg argued that under this view, "whether relief is 'equitable' would turn entirely on the designation of the defendant." She noted that the substance of the relief Great-West could have obtained in a suit against the trustee—a judgment ordering the return of wrongfully withheld funds—is identical to the relief Great-West in fact sought from the Knudsons. This seeming anomaly, however, is explained by the historical divide between law and equity. The way to reach funds in the possession of the Special Needs Trust (essentially a transferee of the Knudsons) is through the equitable remedy of the constructive trust. By suing the Knudsons instead, Great-West had a remedy at law, whether we call it damages pursuant to breach of contract or legal restitution.

This raises the question whether the outcome would have been different if the funds from the settlement with the tort defendants had gone directly to Janette Knudson, rather than to the Special Needs Trust set up for her care. According to the majority's emphasis on whether a defendant has possession of the plaintiff's property, it would seem that a claim by Great-West against the Knudsons (in possession of the settlement funds) would be one for the equitable remedy of constructive trust. In this situation as well, however, the constructive trust does not apply simply because the defendant has possession of a fund that the plaintiff claims belongs to it. Rather, the remedy at law—money—is adequate.

One might wonder what Congress intends when it restricts relief to "equitable" remedies in section 502(a)(3) and in other statutes, but that is a question that is beyond the scope of this article. As the facts of *Great-West* indicate, limiting a plaintiff's cause of action to "equitable relief" can make a significant difference on the viability of the cause of action, depending on whom the plaintiff sues. Ironically, the procedural history of the case reveals that Great-West unsuccessfully tried to amend its complaint to add the trustee of the Special Needs Trust as a defendant once

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237. *Great-West*, 534 U.S. at 225 (Ginsburg, J., dissenting) ("[The majority] opinion surely contemplates that a constructive trust claim would lie; hence, the outcome of this case would be different if Great-West had sued the trustee of the Special Needs Trust, who has "possession" of the requested funds, instead of the Knudsons, who do not").

238. *Id.* at 226.

239. *Id.*

240. *See supra* notes 118-20, 134-40 and accompanying text.

241. *See supra* notes 126-29 and accompanying text.
the state court approved that settlement funds be paid into the trust.\textsuperscript{242} Congress may not have intended that monetary remedies under ERISA be so tied to procedural intricacies, but its limitation of relief to "equitable" remedies necessitates court interpretation of what that language means. The majority in \textit{Great-West} suggested that Congress employed the phrase "equitable relief" in juxtaposition to legal relief, and that historical practice should guide the differentiation between legal and equitable remedies.\textsuperscript{243} Justice Ginsburg criticized the majority's historical approach. She asserted that because law and equity merged into "one form of action" with the advent of the Federal Rules of Civil Procedure, it was wrong to rely on premerger jurisdictional boundaries in interpreting a later-enacted statute.\textsuperscript{244} Quoting \textit{Mertens}, she suggested that a better way to interpret congressional provision for "equitable relief" is to inquire into the "substance of the relief requested and ask whether relief of that character was 'typically available in equity.'"\textsuperscript{245} Although Ginsburg acknowledged that restitution was "also available in cases brought at law,"\textsuperscript{246} she asserted that restitution met the "typically available in equity" standard.\textsuperscript{247} Justice Ginsburg could have made her point by citing instances of restitution afforded in equity courts. Instead, she stated that "our cases have invariably described restitutionary relief as 'equitable,'"\textsuperscript{248} and she cited \textit{Mertens} and some right to jury trial cases that described restitution unqualifiedly as equitable.\textsuperscript{249} She also cited \textit{Mitchell} in support, which, as we have seen, is misread for the broad proposition that restitution is equitable.\textsuperscript{250} Justice Ginsburg argued that reading section

\begin{footnotesize}
\begin{enumerate}
\item Great-West named the Knudsons as defendants before the Special Needs Trust had been approved. Once the state court approved that the settlement funds be paid into the Special Needs Trust, Great-West moved for leave to amend its complaint to add the trustee as a defendant. The federal court denied the motion without consideration in light of its judgment for the Knudsons on the merits. \textit{Great-West}, 534 U.S. at 226-27 (Ginsburg, J., dissenting).
\item \textit{Id.} at 218 ("Respecting Congress's choice to limit the relief available under \textsection 502(a)(3) to 'equitable relief' requires us to recognize the difference between legal and equitable forms of restitution."). As we have seen, the majority did not read historical practice correctly.
\item \textit{Id.} at 225. Justice Ginsburg noted, however, that reference to historical practice might be warranted to preserve rights established before the merger of law and equity. \textit{Id.} The prime example is the Seventh Amendment right to jury trial, which extends only to suits at common law. U.S. \textsc{Const.} amend. VII.
\item \textit{Id.} at 228.
\item \textit{Id.} (Ginsburg, J., dissenting) (quoting \textit{Mertens}, 508 U.S. at 256). Justice Scalia, author of the majority opinion in \textit{Mertens}, attempted to distinguish the quoted \textit{Mertens} language in \textit{Great-West}, stating what was intended was "'that restitution, in contrast to damages, is a remedy commonly ordered in equity cases and therefore an equitable remedy in a sense in which damages, though occasionally awarded in equity cases, are not.'" \textit{Id.} at 234 (quoting Reich v. Continental Casualty Co., 33 F.3d 754, 756 (7th Cir. 1994)).
\item \textit{Great-West}, 534 U.S. at 234.
\item \textit{Id.}
\item \textit{Id}. Among the other cases Justice Ginsburg cited for the proposition that restitution is equitable are two right to jury trial cases, \textit{Tull} v. United States, 481 U.S. 412 (1987) and \textit{Chauffeurs, Teamsters and Helpers, Local No. 391} v. \textit{Terry}, 494 U.S. 558 (1990), both discussed \textit{infra} notes 259-89 and accompanying text.
\item \textit{See supra} notes 169-77 and accompanying text.
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as authorizing restitution would not mean that "equitable relief" under the statute meant "all relief" because such a reading would exclude compensatory and punitive damages.251

I do not make a choice here as to which of the two approaches is appropriate for interpreting the statutory language "equitable relief."252 Rather, I suggest that if restitution is employed to give content to the phrase "equitable relief"—an approach that I question in Part IV—then the legal or equitable classification of the restitutioary remedy should be made in a careful manner. It was a mistake in Mertens for the majority to state that restitution is a "remedy typically viewed as 'equitable.'" Justice Scalia, the author of the majority opinion in Mertens, had to backtrack on that statement in Great-West. Justice Ginsburg compounded the confusion about restitution by citing cases that carelessly asserted that restitution is an equitable remedy. Some of the cases she referenced in Great-West involved the right to jury trial, the topic of the next section.

B. THE RIGHT TO JURY TRIAL

In decisions involving the constitutional right to jury trial, the Supreme Court has discussed restitution as a means to determining whether the remedy sought was legal or equitable. Under the Seventh Amendment, legal, but not equitable, remedies trigger an entitlement to jury trial.253 The Supreme Court has held that a remedy is legal if it is identical or analogous to remedies available in English common law courts before the adoption of the Seventh Amendment in 1791.254 Moreover, the Supreme Court has indicated that for purposes of construing the right to jury trial, the historical equitable clean-up doctrine does not apply—if a case involves requests for both injunctive and legal relief, a court may not deny the right to jury trial on the legal claim by stating that the legal remedy is incidental to the request for an injunction.255 Thus, unlike the ambiguities that might be present in construing what "equitable relief" means in a statute, the difference between legal and equitable remedies for Seventh

251. Great-West, 534 U.S. at 233-34 (noting that compensatory and punitive damages, "though occasionally awarded in equity under the 'clean up doctrine' . . . were not typically available in such courts") (citations omitted).

252. Regarding the different meanings the Supreme Court gave the statutory phrase "equitable relief" in Mertens and Great-West, Professor Laycock has stated that “[p]erhaps the proper lesson from Mertens and Great-West is that courts and legislatures should quit using law and equity as doctrinal and statutory categories.” Laycock, Modern American Remedies, supra note 21, at 8.

253. When a statutory or common law action is deemed to afford a legal as opposed to an equitable remedy, the litigants have a constitutional entitlement to a jury trial in federal court. See, e.g., Terry, 494 U.S. at 570-74 (stating that a request for legal relief confers an entitlement to jury trial under the Seventh Amendment).


Amendment purposes is based on the historical divide between law and equity courts.

In *Curtis v. Loether*,256 the Supreme Court addressed whether a defendant had a right to jury trial where the plaintiff sought an injunction and compensatory and punitive damages under the fair housing provisions of Title VIII of the Civil Rights Act of 1968.257 The Court held that the request for compensatory and punitive damages triggered a right to jury trial because the monetary relief sought was legal. The Court compared the damages in *Curtis* to the remedies of reinstatement and backpay authorized under the employment discrimination provisions of Title VII. While refusing to express any view on whether backpay under Title VII is equitable or legal relief, the Supreme Court noted that the courts of appeals had “characterized backpay as an integral part of an equitable remedy, a form of restitution.”258

In *Tull v. United States*,259 the Supreme Court contrasted restitution with civil penalties. The federal government sought massive civil penalties and an injunction against the defendant for violations of the Clean Water Act. The Court stated that civil penalties, because of their punitive character, were the type of remedy available only in courts of law.260 Thus, the defendant was entitled to a jury trial on the issue of liability.261 In reaching its conclusion, the Court mischaracterized restitutionary relief.

The Court summarized the Government's position as suggesting that “a suit enforcing civil penalties under the Clean Water Act is similar to an action for disgorgement of improper profits, traditionally considered an equitable remedy.”262 It is unclear from this language whether the Supreme Court itself considered disgorgement to be an equitable remedy or whether it was simply characterizing the Government's argument. However, elsewhere in the opinion, the Court labeled disgorgement of profits as equitable relief, stating that the calculation of civil penalties under the statute was not to be made “solely on the basis of equitable determinations, such as the profits gained from violations.”263 It did not explain the basis for its characterization of disgorgement of profits as equitable. The Court has since cited *Tull* for the proposition that disgorgement of profits and restitution are equitable.264

260. *Id.* at 422-23.
261. *Id.* The Supreme Court found, however, that the Seventh Amendment did not guarantee jury determination of the amount of civil penalties. *Id.* at 425-27.
262. *Id.* at 424.
263. *Id.* at 422.
264. *See, e.g.,* *Terry*, 494 U.S. at 570 (“we have characterized damages as equitable where they are restitutionary, such as in 'action[s] for disgorgement of improper profits'”) (quoting *Tull*, 481 U.S. at 424); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 341 (1998); *see also Great-West*, 534 U.S. at 229 (“restitution ‘traditionally considered an equitable remedy’”) (quoting *Tull*, 481 U.S. at 424) (Ginsburg, J., dissenting).
“Disgorgement” is just another term for the concept that the defendant must yield up gains that it cannot justly retain. As discussed earlier, obtaining the defendant’s gains could be accomplished both at law and equity, depending on the circumstances of the case. Thus, the unqualified characterization of disgorgement of profits as an equitable remedy is misleading.

The Court in *Tull* rejected the analogy of civil penalties to disgorgement and restitution, quoting *Porter* for the proposition that “[r]estitution is limited to ‘restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant.’” Because the civil penalties at issue were not limited to restoration of the status quo, the Court concluded that they could not be considered restitutionary. In both *Porter* and *Tull*, the Court contrasted statutory penalties with restitution, and a definition of restitution as restoring the status quo and returning the plaintiff to its rightful position was arguably a helpful basis on which to distinguish the two types of remedies. Some lower courts, however, have taken the definition of restitution in *Porter* and *Tull* out of context and used it as a basis for distinguishing restitution from damages or compensation. This is erroneous, for while statutory penalties may not have as their purpose restoring the status quo and returning the plaintiff to its rightful position, compensatory damages most

265. See Schoenbrod, *Remedies: Public and Private*, supra note 116, at 727 (“[R]estitution aims at the defendant’s [rightful position]. Disgorgement is the key concept. By making the defendant disgorge the benefits he cannot justly retain, the law of restitution returns the defendant to the position he should, ‘in equity and good conscience, have occupied.’”).

266. See supra notes 109-40 and accompanying text. Cf. 1 Palmer, *supra* note 31, § 2.12 at 160 (stating that “when the case is within the reach of quasi contract, and recovery of profits does not require the use of techniques available only in equity, we should discard the notion that profits are recoverable only in equity” and noting that “[t]here is ambiguity . . . in the term ‘profits’”).


268. Id.

269. See, e.g., Babich v. Unisys, No. 92-1473-MLB, 1994 U.S. Dist. LEXIS 4744, at *24-36 (D. Kan. 1994) (citing *Tull* definition of restitution and stating that if damages were assessed in the case, those damages “would not serve to compensate plaintiff for a harm inflicted on him” by the defendant but would “simply restore plaintiff to his rightful position—the essence of restitution”) (citation omitted); Alexander v. Primerica Holdings, 819 F. Supp. 1296, 1308 (D.N.J. 1993) (citing *Tull* definition and holding that “[r]eceipt of withheld benefits constitutes relief that is restitutionary and equitable in nature” and therefore plaintiff was not entitled to a jury trial); Pegg v. Gen. Motors, 793 F. Supp. 284 (D. Kan. 1992) (citing *Tull* definition and holding that backpay is restitutionary and equitable and therefore that plaintiff was not entitled to a jury trial); United States v. S.C. Recycling & Disposal, 653 F. Supp. 984, 1007 n.2 (D.S.C. 1985) (citing *Porter* definition of restitution and stating that the relief requested under CERCLA was not damages but “equitable restitution—a remedy designed to return plaintiffs to the financial position they were in before incurring cleanup costs”); United States v. Reilly Tar & Chem. Corp., No. 4-80-469, 1983 U.S. Dist. LEXIS 15986, at *10-13 (D. Minn. 1983) (citing *Porter* definition of restitution and classifying the remedy requested under CERCLA as restitution, not damages, because “the monetary relief requested by the government is only that amount necessary to compensate it for amounts expended . . . in other words, the amount necessary to return the United States to the status quo ante”).
certainly do.270

In Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry,271 the Court stated that restitutary remedies are equitable as opposed to legal.272 The question presented in Terry was whether employees had a right to jury trial on a claim against their union for breach of the duty of fair representation. The employees sought monetary relief measured by the wages and benefits they would have received from the employer had the union processed their grievances properly.273 The Supreme Court characterized this relief as “compensatory damages representing backpay and benefits,”274 and concluded that the employees were entitled to a jury trial because they sought legal relief. The Court correctly deemed the plaintiffs’ requested relief to be compensatory damages because the employees were seeking to have the Union “make good” the lost wages they did not receive from the employer.

Rather than simply explain why the relief sought was compensation, the Court digressed into a discussion of restitution. It asserted that the relief requested by the employees was not restitution because the employees were not seeking “money wrongfully held by the Union.”275 Defining restitution in terms of whether the plaintiff seeks money “wrongfully held” by the defendant is overbroad. Such a definition would convert even claims for unpaid debts into restitution.

Terry is problematic in other ways. It characterized as restitutionary the backpay sought from the employer in Mitchell, but it did not explain this characterization.276 Although Curtis simply reported that lower courts had deemed backpay to be restitution, Terry cited Curtis as support for the assertion that “the Court has noted that backpay sought from an employer under Title VII would generally be restitutionary in nature.”277 Terry also stated that “Congress specifically characterized

270.  Cf. In re Acushnet River & New Bedford Harbor, 712 F. Supp. 994, 1002 (D. Mass. 1989) (“Were the Court to accept the argument that a monetary award is restitutary simply because it returns a party to pre-injury status, little would be left in the realm of compensatory damages.”)
272. Id.
273. The employees also sued the employer for breaching the collective-bargaining agreement in violation of the Labor Management Relations Act. The employer subsequently filed for bankruptcy, and the employees’ claim against it was dismissed. Id. at 561-63.
274. Id. at 570.
275. Id. at 570-71.
276. Id. at 571 (describing holding in Mitchell that court had power to award backpay under the Fair Labor Standards Act as incidental to its injunctive powers but then asserting that “backpay in that case was restitutary”). As discussed, Mitchell turned on the equitable “clean-up” power of the federal courts. See supra notes 169-75 and accompanying text. Mitchell did not use the term “restitution” to describe lost wages for unlawful discharge, but rather spoke of “reimbursement.” See Mitchell, 361 U.S. at 289-92, 295. Mitchell used “restitution” to describe payment for work that had already been done; see id. at 293, a usage that indicates liability based on unjust enrichment.
277. Terry, 494 U.S. at 572.
backpay under Title VII as a form of ‘equitable relief.’”\(^\text{278}\) As I will discuss in the next section, backpay in most instances should not be described as restitution, nor for jury trial purposes should it be considered equitable.

Beyond mischaracterizing backpay and relief for “money wrongfully held” as restitution, \textit{Terry} made an even more troubling pronouncement that restitutory remedies are an exception to the “general rule” that damages are legal relief.\(^\text{279}\) Specifically, the Court stated that “we have characterized damages as equitable where they are restitutory, such as in ‘action[s] for disgorgement of improper profits.’”\(^\text{280}\) For this proposition, the Court cited \textit{Tull}, which did not itself offer any support for the unqualified assertion that restitution is equitable. \textit{Terry} also cited \textit{Curtis}, a case that expressly refrained from commenting on the legal or equitable character of backpay.\(^\text{281}\) Finally, \textit{Terry} cited \textit{Porter}, a case that does not support the proposition that restitution is exclusively an equitable remedy.\(^\text{282}\) The Court’s language in \textit{Terry} also makes the mistake of defining “damages” so broadly as to encompass restitution.

Although the Court has not yet directly held that a claim for restitution falls outside the scope of the Seventh Amendment—\textit{Curtis}, \textit{Tull}, and \textit{Terry} all involved monetary relief that the Court deemed to be legal—the language is quite strong in \textit{Terry} that a restitutory remedy would not trigger a right to a jury trial. Several lower federal courts have seized on the \textit{Terry} language and denied jury trials when the relief sought was deemed restitutory, without investigating whether the restitution was legal or equitable.\(^\text{283}\)

A later decision by the Supreme Court could be read as a retreat from the blanket assertion in \textit{Terry} that monetary relief is equitable if it is restitutory. In \textit{Wooddell v. International Brotherhood of Electrical Work-

\(^{278}\) \textit{Id.} (citing language in Title VII authorizing reinstatement “with or without backpay . . . or any other equitable relief as the court deems appropriate”).

\(^{279}\) \textit{Id.} at 570.

\(^{280}\) \textit{Id.}

\(^{281}\) \textit{See supra} notes 256-58 and accompanying text.

\(^{282}\) \textit{See supra} notes 149-68 and accompanying text.

\(^{283}\) \textit{See}, e.g., Wilson v. Belmont Homes, 970 F.2d 53, 56 (5th Cir. 1992) (citing \textit{Terry} for the proposition that “backpay obviously would be restitutory” and denying a right to jury trial in a Title VII case); Adams v. Cyprus Amax Minerals Co., 149 F.3d 1156 (10th Cir. 1998) (citing \textit{Terry} and denying right to jury trial in part because the recovery of benefits under a provision of ERISA, 29 USC § 1132(a)(1)(B), is “equitable/restitutory”); Invest Almaz v. Temple-Inland Forest Prods. Corp., No. 97-374-JM, 1999 U.S. Dist. LEXIS 18398 (1999) (unpublished opinion) (denying a right to jury trial because the plaintiff sought restitution and citing \textit{Terry} for the proposition that “[r]estitution is a prime example of a form of monetary relief that courts impose as an equitable remedy”); Broadnax Mills, Inc. v. Blue Cross, 876 F. Supp. 809, 817 (E.D. Va. 1995) (denying a right to jury trial because a “substantial portion of the monetary relief sought is for restitution” and citing \textit{Terry} for the proposition that where “monetary relief actually seeks restitution . . . the nature of the relief is generally equitable”); Colonial Williamsburg Foun. v. Blue Cross & Blue Shield, 909 F. Supp. 386 (E.D. Va. 1995) (following \textit{Broadnax} and denying jury trial request under ERISA § 1132(a)(1)(B) because the plaintiff “seeks purely equitable remedies such as restitution”).
the Court followed *Terry* in holding that a suit by employees against their union for breach of the duty of fair representation is a suit for compensatory damages. It interpreted *Terry* as finding that monetary relief for such a cause of action is not "analogous to equitable restitutionary relief." In using the adjective "equitable," the Court in *Wooddell* implicitly left open the possibility that certain types of restitutory relief could trigger the right to jury trial if deemed legal in nature. There is little indication, however, that lower courts have read *Wooddell* in such a nuanced fashion.

*Tull* and *Terry*, with their unsupported and misleading assertions that restitution is equitable, have had repercussions beyond the right to jury trial context. They have surfaced in opinions concerning whether a monetary remedy falls within a statutory authorization of equitable relief. A prime example is Justice Ginsburg's dissent in *Great-West*, which cites *Tull* and *Terry* in asserting that "our cases have invariably described restitutory relief as equitable."

*Tull* and *Terry* labeled restitution as equitable without any inquiry into historical practice. Well-established Supreme Court precedent requires, however, that the legal or equitable nature of a remedy under the Seventh Amendment must be tied at least by analogy to historical practice as of 1791. The widely cited statement in *Terry* that damages are "equitable where they are restitutary" was based on careless readings of prior Court decisions; *Tull* cited no cases to support its classification of restitution as equitable. If a remedy is classified as restitutary, the Seventh Amendment inquiry should not end. There remains a further question—whether the restitutary remedy and the claim to which it is associated would have been brought in a law court or an equity court as of 1791.

C. BACKPAY AS AN EXAMPLE OF MISCLASSIFICATION

Having shown how the Supreme Court has mischaracterized restitution, I turn now to an examination of one remedy—backpay—to illustrate how federal courts have applied their understanding of restitution. We will see that courts have reached conflicting decisions on whether backpay is damages or restitution and is legal or equitable. Some of the cases involved whether the applicable statute authorized the plaintiff's claim for backpay; other cases involved whether a request for backpay

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285. *Id.* at 97.
286. A Lexis search on June 23, 2002, found only one federal case that quoted *Wooddell*’s language of "equitable restitutary relief." See Cellular Dynamics, Inc. v. MCI Telecomm. Corp., No. 94-C-3126, 1997 U.S. Dist. LEXIS 7466, at *28. The court in *Cellular Dynamics* found that the plaintiff sought compensatory and punitive damages, not restitution, so it did not elaborate on the phrase "equitable restitutary relief."
289. *See supra* notes 253-54 and accompanying text.
triggered an entitlement to jury trial under the Seventh Amendment. I suggest that whether one uses a definition of restitution as liability based on or measured by unjust enrichment or as the yielding up of defendant’s gain at the plaintiff’s expense, backpay in most cases should not be considered restitution.\(^{290}\) Even if one were to characterize backpay as restitution, the historical divide between law and equity indicates that it is legal, not equitable.

Let us begin first with treatments of backpay by the Supreme Court. In addition to the fleeting remark in *Terry* that backpay is restitutionary and equitable, the Justices in *Great-West* briefly discussed backpay. Justice Ginsburg read *Terry* and *Curtis* as recognizing that backpay is a form of restitution, and she quoted *Terry* for the proposition that Congress had characterized backpay as equitable under the employment discrimination provisions of Title VII.\(^{291}\) Moreover, she cited approvingly lower court cases that suggested that backpay is equitable because it is restitutionary.\(^{292}\) The majority argued that Congress treated backpay as equitable under Title VII “only in the narrow sense that it allowed backpay to be awarded *together with* equitable relief.”\(^{293}\) This reasoning seems to be another iteration of the equitable clean-up doctrine—that is, when reinstatement or hiring is ordered, equity can award money as incidental to the injunction. Yet, the Supreme Court has held that when a claim for legal relief is joined with a claim for equitable relief, the clean-up doctrine may not result in a denial of a jury trial on the legal claim.\(^{294}\) Moreover, in cases between *Terry* and *Great-West*, the Supreme Court has expressly stated that it has not yet decided whether backpay under Title VII is legal or equitable for jury trial purposes.\(^{295}\)

The lower federal courts have split on whether backpay is restitution, and, if so, whether it is equitable. Many of the decisions have involved whether a request for backpay under Title VII triggers an entitlement to jury trial. Title VII authorizes courts to “order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay... or any other equitable relief as the court deems appropriate.” 42 U.S.C. § 2000e-5(g) (2000).

\(^{290}\) Possible exceptions are discussed infra notes 325-27 and accompanying text.\(^{291}\) *Great-West*, 534 U.S. at 230 (Ginsburg, J., dissenting). Title VII provides in part that courts may order “reinstatement or hiring of employees, with or without back pay... or any other equitable relief as the court deems appropriate.” 42 U.S.C. § 2000e-5(g) (2000).\(^{292}\) *Id.* at 230 n.2.\(^{293}\) *Id.* at 218 n.4.\(^{294}\) Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (asserting that when a claim for legal relief is joined with a claim for equitable relief, the clean-up doctrine may not result in a denial of a jury trial on the legal claim); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). See also *Curtis* v. Loether, 415 U.S. 196 n.11; 2 DOBBS, supra note 31, at 227 (suggesting that *Dairy Queen* means that when a plaintiff seeks backpay under Title VII, a jury trial is guaranteed notwithstanding any characterization of the backpay claim as “merely incidental” to the equitable claim of reinstatement).\(^{295}\) See Landgraf v. USI Film Prods., 511 U.S. 244, 253 n.4 (1994) (noting that the Court had not yet determined “whether a plaintiff seeking backpay under Title VII is entitled to a jury trial”); Lytle v. Household Mfg., Inc., 494 U.S. 545, 549 n.1 (1990) (stating that the Supreme Court has “not yet ruled on the question of whether a plaintiff seeking relief under Title VII had a right to a jury trial”).
ment or hiring of employees, with or without backpay... or any other equitable relief as the court deems appropriate.\textsuperscript{296} In enacting Title VII in 1964, Congress apparently chose the "equitable relief" language to foreclose the possibility of a jury trial, for fear that juries would be hostile to employment discrimination plaintiffs.\textsuperscript{297} Thus, it is not surprising that before Terry, most lower courts interpreted backpay under Title VII to be equitable.\textsuperscript{298} After Terry, courts have cited the case for the proposition that backpay under Title VII is restitutory and thus equitable.\textsuperscript{299}

Outside the Title VII context, several decisions on the right to jury trial have rejected the notion that backpay is restitutory and thus equitable.\textsuperscript{300} In Waldrop v. Southern Co. Servs.,\textsuperscript{301} the U.S. Court of Appeals for the Eleventh Circuit deemed backpay to be compensatory and accordingly found that a plaintiff who sued for reinstatement and backpay under the employment discrimination provisions of the Rehabilitation

\textsuperscript{296} 42 U.S.C. § 2000e-5(g)(1). Congress in the Civil Rights Act of 1991 authorized compensatory and punitive damages for various forms of intentional discrimination, with caps on awards tied to the size of the employer. 42 U.S.C. § 1981a(a)-(b) (2000). Congress provided that these possible remedies are in addition to those authorized under Title VII. \textit{Id.} at § 1981a(a)(1). In limiting the amount of compensatory and punitive damages that are recoverable, Congress specified that compensatory damages under section 1981a "shall not include backpay, interest on backpay, or any other type of relief authorized under" the remedial provisions of Title VII. \textit{Id.} at § 1981a(b)(2). Although a demand for compensatory or punitive damages will trigger an entitlement to jury trial because such damages are "legal," the issue remains whether a right to jury trial exists when a plaintiff suing under Title VII seeks only backpay. This situation might arise when a plaintiff sues an employer with 14 employees or less, because compensatory and punitive damages are not available against such an employer under § 1981a. \textit{See id.} at § 1981a(b)(3).

\textsuperscript{297} \textit{See Laycock, Modern American Remedies, supra} note 21, at 1117 ("The statutory talk of equitable relief was a deliberate attempt to avoid jury trial, recognized as such at the time."); Hornsby v. St. Louis Southwestern Ry. Co., 963 F.2d 1130, 1135 (8th Cir. 1992) (Arnold, J., dissenting) ("Title VII . . . appears to be the only exception to the general rule that backpay is legal relief. Although I cannot see how to justify this anomaly, the difference in treatment may have resulted from the particular language Congress chose . . . "). \textit{Cf.} Curtis v. Loether, 415 U.S. 189, 191-92 (1974) (noting that with respect to the fair housing provisions of Title VIII, the legislative history indicates that some members of Congress "were concerned that the possibility of racial prejudice on juries might reduce the effectiveness of civil rights damages actions" while other comments indicate "an awareness that jury trials would have to be afforded in damages actions under Title VIII").


\textsuperscript{299} \textit{See, e.g.,} Wilson v. Belmont Homes, 970 F.2d 53, 56 (5th Cir. 1992); Taylor v. Gilbert & Bennett, No. 95-C-7228, 1997 U.S. Dist. LEXIS 608 (Jan. 15, 1997) (finding that backpay is equitable under Title VII and therefore judge determines claim for backpay).

\textsuperscript{300} \textit{See, e.g.,} Crocker v. Piedmont Aviation, 49 F.3d 735 (D.C. Cir. 1995) (discussed \textit{infra} notes 305-09 and accompanying text); Waldrop v. S. Co. Servs., 24 F.3d 152 (11th Cir. 1994) (discussed \textit{infra} notes 301-04 and accompanying text); Hill v. Winn-Dixie, 934 F.2d 1518 (11th Cir. 1991) (deciding that mandatory backpay under Jury System Improvements Act is not restitutory).

\textsuperscript{301} 24 F.3d 152 (11th Cir. 1994).
Act was entitled to a jury trial. The court declared that backpay under the Act did not fall within the ambit of restitution, reasoning that the defendant was not unjustly enriched by its termination of the plaintiff, and the plaintiff would not, by obtaining backpay, receive “restoration in kind of a specific thing.” Similarly, in *Crocker v. Piedmont Aviation*, the U.S. Court of Appeals for the District of Columbia Circuit found that a plaintiff who sued for reinstatement and backpay under a “first right of hire” provision of the Airline Deregulation Act of 1978 was entitled to a jury trial. The court asserted that backpay was compensatory rather than restitutionary. First, it noted that the plaintiff’s “recovery would not be measured by any hypothetical gain [the defendant] had enjoyed.” Second, the court stated that backpay is compensatory because any income from alternative employment usually is subtracted from an award of backpay. Although citing the language in *Terry* that restitutionary relief is an exception to the general rule that monetary relief is legal, neither *Waldrop* nor *Crocker* attempted to square their conclusions that backpay is compensatory with the comments in *Terry* suggesting that backpay sought from an employer is restitutionary.

Federal courts have examined whether backpay is restitution in contexts other than those involving the right to jury trial. One example arises under section 702 of the Administrative Procedure Act, which waives sovereign immunity in actions against federal agencies as long as the plaintiff seeks “relief other than money damages.” The Supreme Court has interpreted this statutory language to waive sovereign immunity if the plaintiff seeks “specific relief.” In *Hubbard v. Adm’r, EPA*, the D.C. Circuit concluded in an en banc opinion that backpay constitutes “money damages,” thus falling outside the APA waiver of sovereign immunity. The court reasoned that an award of backpay “essentially pays the plaintiff for the economic losses suffered as a result of the employer’s wrong; it does not return to the plaintiff anything which was rightfully his in the first place.” The court gave short shrift to the plain-
tiff’s argument that backpay is “specific because it is restitutionary,” stating that the inquiry under section 702 is not whether the remedy is restitutionary but whether “it gives the plaintiff the specific thing to which he was originally entitled.”313 The court continued that the backpay sought by the plaintiff was not restitutionary, stating: “Giving back pay to [the plaintiff] would return to him the ‘value’ of the job from which he was wrongfully excluded and is thus compensatory damages, not ‘in kind’ restitution.”314

Although Hubbard determined that backpay is not restitution, other federal appellate courts have described backpay as restitution in reaching the conclusion that backpay is equitable relief authorized by ERISA § 502(a)(3).315 In Schwartz v. Gregori,316 the Sixth Circuit relied on the language in Terry that backpay from an employer is restitutionary, but it noted that Terry had not itself explained this characterization.317 To buttress its classification of backpay as restitution, Schwartz suggested that neither unjust enrichment nor in kind restoration is required for a remedy to be considered restitutionary; rather, what is essential is that the remedy “operates to restore to the plaintiff that to which she would have enjoyed but for the employer’s illegal retaliation.”318 By applying a definition of restitution as “restoration” of a plaintiff’s loss, the opinion in Schwartz falls into the trap of obliterating any distinction between restitution and damages.319 Having classified the backpay remedy as restitution, Schwartz then cited the Mertens language (since qualified in Great-West) that restitution is a remedy typically available in equity and thus within section 502(a)(3).320

Scholarly commentary has divided over whether backpay is damages or restitution, and, if restitution, whether it is legal or equitable. For example, an earlier version of Moore’s Federal Practice & Procedure commented that backpay should be considered equitable because it constitutes “restitution to the employee of the wages which he would

313. Id. at 538.
314. Id. at 539 n.12 (citing Laycock, The Scope & Significance of Restitution, 67 Tex. L. Rev. 1217, 1279 (1989)).
316. 45 F.3d 1017 (6th Cir. 1995). See also Russell v. Northrop Grumman Corp., 921 F. Supp. 143 (E.D.N.Y. 1996) (following Schwartz in concluding that backpay is restitutionary and thus equitable under § 502(a)(3)).
317. 45 F.3d at 1022.
318. Id. The court stated:

While restitution generally is awarded to prevent unjust enrichment to the defendant, this is not required in every case . . . . Nor is it necessary that restitution be made in kind, for a court may restore the plaintiff to the position he formerly occupied “either by the return of something which he formerly had or by the receipt of its equivalent in money.”

Id.
319. See supra notes 77-80 and accompanying text.
320. 45 F.3d at 1022-23.
have earned except for the employer’s violation” of law.\footnote{321} Professor Dobbs, on the other hand, asserts that a claim for backpay is a legal claim for damages, which does “not differ remedially from the personal injury claim for lost wages, or the contract claim for past wages due.”\footnote{322} He rejects the assertion that backpay is equitable because it is restitutionary as “doubly wrong, since a claim does not become equitable by being restitutionary and since backpay does not seem to fit the restitutionary category in any event.\footnote{323}

The main problem with defining backpay as restitution is that the defendant generally will not have received a benefit at the plaintiff’s expense. Such a benefit is an essential element of restitution, whether we define restitution as liability based on or measured by unjust enrichment or as a remedy based on the defendant’s gain at the plaintiff’s expense. The employer can be said to have saved the plaintiff’s wages after discharge, but the employer will not have received any work from the plaintiff.\footnote{324} The backpay remedy is more appropriately characterized as damages for the plaintiff’s losses and thus legal relief.

Situations exist, however, in which a defendant might be viewed as having gained a benefit at the employee’s expense—for example, when a defendant discharges an employee to foreclose the employee’s receipt of

\footnote{321}{\textit{JAMES W. MOORE ET AL., MOORE’S FEDERAL PRACTICE} § 38.24[2] (2d ed. 1988). The treatise offered two alternative explanations for why a statutory action for employment and backpay “involves only equitable remedies” and thus should not trigger the right to jury trial: The action may be “regarded as a suit for specific performance of an employment contract, with the re-employment features supplied by the Act, and incidental damages” or “as an action to enjoin continued violation of the Act and for restitution to the employee of the wages which he would have earned except for the employer’s violation of the Act.” \textit{Id.}}

\footnote{322}{2 \textit{DOBBS, supra} note 31, at 226.}

\footnote{323}{\textit{Id.} at 227. In rejecting the notion that restitution is equitable, Dobbs comments: Restitution claims at law include all the quasi-contract claims based on assumpsit, such as those based on common counts like money had and received and quantum meruit . . . Restitutionary claims many others may be equitable in the sense that they appeal to the judge’s sense of justice or fairness or discretion, but not equitable in the jurisdictional sense that they could have been brought in an equity court and tried without a jury. \textit{Id.} at 227 n.14. In asserting that backpay is not restitutio

\footnote{324}{See also \textit{LAYCOCK, MODERN AMERICAN REMEDIES}, supra note 21, at 1117 (“[T]he essential element of a restitution claim is missing: plaintiff performed no work, so the employer got no benefit and is not unjustly enriched.”). Of note is that Laycock’s discussion of backpay does not refer to the concept of “specific restitution.”}
retirement benefits or when the employee worked but was underpaid. In these circumstances, we might say that backpay can be considered either damages or restitution. Even if a backpay remedy is deemed restitution, however, there remains the question whether it is legal or equitable.

If we have a situation in which backpay is appropriately called restitution, the legal or equitable characterization of the remedy may depend on the necessity of the characterization. If the court is determining whether a right to jury trial exists, then the historical divide between law and equity courts will govern. Recall that most restitutionary claims for money were asserted in the law courts. With the example of the employee discharged so as to foreclose the employee’s receipt of retirement benefits, the remedy at law is adequate. There is no need for “tracing” the plaintiff’s money and thus no need for an equitable remedy. The possible exception to this would be an instance of defendant insolvency; in such a situation, the plaintiff could claim need of the equitable remedy of a constructive trust.

A court may determine that a particular request for backpay is appropriately classified as restitution, and face the further question whether the remedy falls within a statutory provision authorizing only “equitable relief.” In this circumstance, the method of statutory interpretation used may well make the difference. If the historical division between law and equity is to be the guide, then a restitutionary remedy for money in most circumstances would be legal. Under the equitable clean-up doctrine, however, backpay could be considered within a court of equity’s jurisdiction as a remedy incidental to reinstatement. Note that the application of the equitable clean-up doctrine does not depend on labeling backpay to be restitution or equitable. The doctrine can be applicable to even damages awards that are considered “incidental” to an injunction. Techniques of statutory interpretation other than historical reference might lead to different conclusions as to whether “equitable relief” includes backpay.

* * * *

The cases discussed in this Part—involving whether the plaintiff stated a claim for relief permissible under a statute and whether the litigants had a right to jury trial—expose the consequences of applying imprecise definitions of restitution to the classification of monetary remedies. In the context of interpreting statutes, mistakes about restitution have contributed to contorted Supreme Court opinions and further confusion in the lower courts. In the context of determining whether a right to jury trial exists, expansive and inaccurate definitions of restitution have led courts to deny the constitutional right to jury trial.
IV. CLEARING UP THE CONFUSION OVER MONETARY RESTITUTION

With the muddled manner in which courts have treated the classification of monetary restitution, it is worth exploring possible sources of the confusion. One simple explanation is that lawyers and judges are unfamiliar with the law of restitution in general. Restitution as a separate course was dropped in the mid-1960's from the curriculum of U.S. law schools; many lawyers, law clerks, and judges today thus have little grounding in the topic. With the resurgence of scholarly interest in restitution and with the forthcoming publication of a new Restatement, one may hope that lawyers and judges will gain greater understanding of the subject. Another explanation for court mistakes about monetary restitution is the inexact application of precedent. This article has identified how language about monetary restitution in Supreme Court decisions was misread in later cases by both the Court and lower federal courts.

In addition to these explanations, much of the incoherent treatment of monetary restitution can be traced to the courts' use of restitution to distinguish between law and equity and to define the equitable powers of federal courts. Employing restitution in this manner causes needless complexity and generally does not help answer the ultimate questions involved. Restitution has been used to solve problems for which it is ill-suited, and the frequent result is mischaracterization of monetary remedies.

The American Law Institute, with its effort to produce a Restatement (Third) of Restitution and Unjust Enrichment, has an opportunity to clarify for lawyers and judges the differences between monetary restitution and damages and between legal and equitable restitution. After suggesting in this Part that courts should not use restitution to differentiate between legal and equitable relief, I will make recommendations for how the new Restatement might contribute to greater understanding of the classification issues surrounding monetary restitution.

A. THE MISUSE OF RESTITUTION TO ADDRESS THE LAW/EQUITY DIVIDE AND THE EQUITABLE POWERS OF FEDERAL COURTS

The modern Supreme Court has been engaged in a far-reaching debate over how to interpret statutory authorizations of equitable relief and, more generally, how to define the equitable powers of federal courts. One manifestation of this debate appears in Mertens, with the Scalia opinion for a majority of five interpreting the statutory language "other appropriate equitable relief" under ERISA section 502(a)(3) to mean restitution because plaintiffs "demand the return of that which, under the Plan, allegedly belongs to them" and stating, "[c]onsequently, Plaintiffs seek equitable relief.

329. See supra note 19 and accompanying text.
330. See supra Part III.
lief "typically available in equity," but the dissent reading the statutory
language more broadly to mean remedies historically available in courts
of equity for breach of trust, which would include a variety of reme-
dies.\footnote{332} In Grupo Mexicano v. Alliance Bond Fund,\footnote{333} a 1999 case deci-
ding whether a federal court may issue a preliminary injunction preventing
a defendant from disposing of its assets, the Supreme Court split over the
power of federal courts to fashion equitable remedies that were not his-
torically available. Justice Scalia, joined by Chief Justice Rehnquist and
Justices O'Connor, Kennedy, and Thomas, asserted that the federal
courts' equitable powers are defined by the jurisdiction in equity exer-
cised by the High Court of Chancery in England at the time of the adop-
tion of the Constitution and the enactment of the original Judiciary Act
of 1789.\footnote{334} Justice Ginsburg, joined by Justices Stevens, Souter, and
Breyer, dissented, criticizing the "static conception of equity jurisdiction"
adopted by the majority and arguing for a more flexible interpretation of
the federal courts' equitable powers.\footnote{335} In Great-West, the same line-up
of Justices as in Grupo Mexicano divided over the meaning of the Mert-
tens "typically available in equity" standard for interpreting a statutory
authorization of equitable relief.\footnote{336}

It is beyond the scope of this article to delve into the Supreme Court's
debate about how to define equitable remedies and the federal courts'
equitable powers.\footnote{337} Moreover, I do not attempt here to suggest general
guidelines for discerning whether a monetary remedy is legal or equitable
for purposes of interpreting a statutory authorization of equitable relief
or of determining whether a litigant has a right to jury trial. These impor-
tant and difficult questions are left for future discussion.

Rather, what this article shows is that the Supreme Court has often
needlessly or improperly used restitution in trying to solve broader ques-
tions about the law/equity divide and the remedial powers of the federal
courts. I suggest that using restitution to differentiate legal from equita-
ble monetary remedies is complicated and generally unhelpful. First,
there is the tough question of whether to call the monetary remedy resti-
tution or something else. We have seen how scholars and courts have
used varying definitions of restitution. I have argued that the concept of
"specific restitution" generally does not apply to a loss of money, but
there remains the question whether a remedy should be called restitution
only when liability is based on unjust enrichment or whenever the remedy

\footnote{332} See supra notes 190-94 and accompanying text.
\footnote{333} 527 U.S. 308 (1999).
\footnote{334} Id. at 318-19.
\footnote{335} Id. at 335-37 (Ginsburg, J., dissenting).
\footnote{336} Professor Laycock has commented that in Great-West, "the four moderates voted
for the corporate plaintiff, and the five conservatives for the injured employee spouse—
they had turned it into another ideological battle about the scope of federal equity." LAY-
COCK, MODERN AMERICAN REMEDIES, supra note 21, at 1116-17.
\footnote{337} For an argument that Grupo Mexicano "rewrote the history of remedies in eq-
uity," see Stephen B. Burbank, The Bitter with the Sweet: Tradition, History, and Limita-
is based on the defendant's gain rather than the plaintiff's loss. It makes little sense to have courts grapple with this uncertain definitional problem when the ultimate question is not whether the monetary remedy is restitution or something else but whether the remedy is legal or equitable.

Second, even if courts could achieve some certainty and consistency about when a monetary remedy is restitution, labeling a particular monetary remedy as restitution has no direct impact on the decision whether the remedy is legal or equitable.\textsuperscript{338} With respect to the right to jury trial, there must be inquiry into whether the remedy was the type that law courts or equity courts would have entertained as of 1791. Typically, plaintiff requests for money were heard in the courts of law, whether they were requests for damages or requests for restitution.\textsuperscript{339} The relatively rare restitution claims for money handled by equity (that did not involve fiduciary relationships or insolvent defendants) were those in which the plaintiff needed to trace its money or property.\textsuperscript{340} Rather than addressing whether the plaintiff seeks restitution or damages, one could go directly to the question whether the remedy sought requires equitable tracing.\textsuperscript{341} That is, in determining whether a remedy is legal or equitable for jury trial purposes, it is not as important that the constructive trust and the equitable lien are considered restitutioanary remedies as that they are remedies that equity courts developed.\textsuperscript{342}

With respect to a statutory authorization of "equitable relief," labeling the remedy as restitution is beside the point because ultimately, the question comes down to how courts interpret the meaning of "equitable relief." In Great-West, the Justices might have focused directly on whether the remedy fell within the statutory authorization of equitable relief. Instead, the Justices meandered into a debate about whether the remedy

\textsuperscript{338} The facts of Great-West are illustrative. The majority and dissent assumed that the remedy requested was restitution, but they argued over whether the remedy was legal or equitable.

\textsuperscript{339} See supra notes 123-29 and accompanying text. As discussed, Terry erred in stating that damages are "equitable where they are restitutioanary."

\textsuperscript{340} See supra notes 134-40 and accompanying text.

\textsuperscript{341} The term "equitable tracing" is used here to recognize that although U.S. authorities have considered tracing to be available only in equity, see supra note 138 and accompanying text, at least two English decisions reported before adoption of the Seventh Amendment recognized simple forms of tracing at law. See Scott v. Surman, Willes 400, 125 Eng. Rep. 1235 (1742) (cited in 1 PALMER, supra note 31 § 2.14 at 177 n.11); Golightly v. Reynolds, (1772) Lofft. 88 (referenced in GOFF & JONES, supra note 30 at 100). A prior edition of GOFF & JONES characterizes Golightly as establishing "the common law right to follow property into its product." ROBERT GOFF & GARETH JONES, THE LAW OF RESTITUTION 45 (1966). If determination of a right to jury trial in a given case turns on the need for tracing, current Seventh Amendment doctrine seemingly would require an inquiry into whether the type of tracing at issue would have been available at law or in equity in late-eighteenth century England.

\textsuperscript{342} Although this is a possible way to interpret the Seventh Amendment, the scope of which is tied to practices in 1791, it might not be an appropriate tool for interpreting what a modern-day Congress intended in authorizing only "equitable relief." Using this method would mean that a monetary remedy under the statute would be available if the plaintiff needs tracing, but not necessarily if the plaintiff can sue at law for the money. This raises the question whether the statutory right to a remedy should turn on such a technicality.
was legal restitution or equitable restitution, a debate that was riddled with errors.343

In sum, courts often are faced with difficult problems of deciding whether a plaintiff’s request for money falls within a statutory scheme authorizing equitable relief or is legal or equitable for right to jury trial purposes. A coherent approach to such problems is needed. Using restitution, however, is not an answer. At best, inquiring into whether the remedy is restitution does not get us very far, and at worst, it is a distraction that courts too often get wrong.

B. SUGGESTIONS FOR THE NEW RESTATEMENT

The American Law Institute should take the opportunity with its new Restatement to illuminate the classification of monetary restitution. Most fundamentally, it would be helpful if the ALI used an unambiguous definition of restitution that would be consistently applied throughout the new Restatement. Whether this can be achieved is questionable, however, given the scholarly debate over whether restitution is solely the law of unjust enrichment or something more. The ALI drafts circulated thus far and the very title of the new Restatement, referring both to “Restitution” and “Unjust Enrichment,” suggest some ambiguity in how restitution will be defined.344

Even if the definitional debate is not resolved in the new Restatement, some lesser steps could be taken that would advance understanding about the classification of monetary restitution. First, the Restatement should differentiate monetary restitution from compensation or damages, with monetary restitution reserved for relief measured by the defendant’s gain and compensation or damages reserved for relief measured by the plaintiff’s loss. This distinction could be drawn explicitly in Section 48, which will be devoted to “Monetary Relief” as a remedy in restitution.345 Moreover, as discussed earlier in this Article, the current drafts contain some language using “compensation” to describe the remedy for unjust enrichment; this usage should be avoided.346

Second, to minimize confusion about the distinction between monetary restitution and damages, the Restatement should make clear that the concept of specific restitution does not apply to a loss of money.347 The best place to make this point would be Section 55 of the new Restatement,

343. Although the majority and dissent made mistakes in Great-West about restitution, the majority at least recognized that restitution has roots in both law and equity, correcting the impression left in prior decisions that restitution is solely equitable.
344. See supra notes 54-55 and accompanying text.
345. Restatement (Third) of Restitution and Unjust Enrichment, projected overall table of contents at xxii (Discussion Draft, March 31, 2000). Chapter 6 in the Projected Overall Table of Contents is titled “Remedies in Restitution” and includes separate sections on “reformation,” “monetary relief,” and “proprietary rights.” Id.
346. See supra notes 63-64 and accompanying text.
347. See supra notes 77-87 and accompanying text.
devoted to "Specific Restitution." An assertion that specific restitution should not describe a monetary award for a loss of money should be accompanied by a notation that a monetary award nonetheless might be appropriately considered "specific relief."

Third, the Restatement should stress that monetary restitution has roots in both law and equity. The current Discussion Draft reserves section 1, comment f for discussion of the point that restitution is "an amalgam of legal and equitable elements" that "can be historically distinguished if need be." Such a discussion will be an important and necessary contribution to the understanding of restitution in general. Because of the propensity of courts to label monetary restitution as equitable, however, the Restatement should address specifically the problem of classifying monetary awards. Either in comment f or in a comment to Section 48 on monetary relief, the Restatement should remark that monetary restitution historically was available at both law and equity, with most claims for monetary restitution asserted in the law courts. A statement to this effect should be accompanied by some acknowledgement that considerations other than historical practice might have a role to play in deciding whether a monetary remedy—be it restitution or something else—is labeled legal or equitable.

With these suggested clarifications, the new Restatement could contribute significantly to greater understanding about how to classify monetary restitution. Hopefully, lawyers, judges, and Congress will also begin to recognize the distinctions between monetary restitution and damages and between legal and equitable restitution.

348. Restatement (Third) of Restitution and Unjust Enrichment, projected overall table of contents at xxii (Discussion Draft, March 31, 2000). Section 55 on Specific Restitution is placed in Chapter 8, "Rights in Identifiable Property." Id. It remains to be seen whether the Restatement (Third) will discuss specific restitution only as related to liability based on unjust enrichment or whether it will treat specific restitution as a remedy that restores something specific to the plaintiff, regardless of the basis of liability. See supra notes 56-62 and accompanying text. The question of rights to an identifiable fund of money held by an insolvent debtor—which Laycock draws within the rubric of "specific restitution"—apparently will be addressed in Section 60 ("Restitution in Bankruptcy") and Section 64 ("Competing Claimants"). Restatement (Third), supra, at xiii (Discussion Draft, March 31, 2000).

349. Restatement (Third) of Restitution and Unjust Enrichment, projected overall table of contents at xxii (Discussion Draft, March 31, 2000). Section 55 on Specific Restitution is placed in Chapter 8, "Rights in Identifiable Property." Id. It remains to be seen whether the Restatement (Third) will discuss specific restitution only as related to liability based on unjust enrichment or whether it will treat specific restitution as a remedy that restores something specific to the plaintiff, regardless of the basis of liability. See supra notes 79-80 and accompanying text. The question of rights to an identifiable fund of money held by an insolvent debtor—which Laycock draws within the rubric of "specific restitution"—apparently will be addressed in Section 60 ("Restitution in Bankruptcy") and Section 64 ("Competing Claimants"). Restatement (Third), supra, at xiii (Discussion Draft, March 31, 2000).

350. Restatement (Third) of Restitution and Unjust Enrichment, § 1, cmt. f at 10 (Discussion Draft, March 31, 2000).

351. See supra notes 126-40 and accompanying text.

352. See supra Part IV.A.
CONCLUSION

Courts at times have misclassified monetary remedies as restitution when they should have been characterized as damages. This misclassification is often a product of imprecise assertions that restitution restores the plaintiff to its rightful position or restores the status quo. Moreover, courts frequently have ignored or misunderstood the differences between legal and equitable restitution, mistakenly characterizing restitution as exclusively equitable. These mistakes of classification often have occurred in cases in which the ultimate question was whether the plaintiff sought legal or equitable relief.

To avoid future confusion and mistakes, courts should not employ the terminology of restitution as a path to distinguishing between legal and equitable monetary relief. To the extent that courts continue to characterize certain monetary remedies as restitution in an effort to discern whether the remedies are legal or equitable, they should respect the differences between restitution at law and restitution in equity.