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Andrew Kull

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# RESTITUTION'S OUTLAWS

ANDREW KULL\*

## INTRODUCTION

Restitution, meaning the law of unjust enrichment, is not supposed to be punitive in purpose or effect.<sup>1</sup> The first *Restatement of Restitution* treats this proposition as axiomatic:

Actions for restitution have for their primary purpose taking from the defendant and restoring to the plaintiff something to which the plaintiff is entitled, or if this is not done, causing the defendant to pay the plaintiff an amount which will restore the plaintiff to the position in which he was before the defendant received the benefit. If the value of what was received and what was lost were always equal, there would be no substantial problem as to the amount of recovery, *since actions of restitution are not punitive*.<sup>2</sup>

As an observation this is much more true than false, and in the contexts where it is typically repeated it conveys a useful reminder. The basis of a liability in restitution is that the defendant has been enriched without legal justification at the expense of the plaintiff; it is not that the defendant has necessarily done anything wrong. This means that the defendant's innocence or passivity in the transaction will not of itself constitute a defense. It also means that the defen-

\* Professor of Law, Boston University; Reporter, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT. Comments by Mark Gergen and Daniel Friedmann are gratefully acknowledged.

1. The statement assumes a sharp distinction between "restitution" as a term of art meaning "unjust enrichment law," and "restitution" as part of the sentence imposed in some criminal cases. The present Essay is concerned with the first sort of restitution. In the sentencing context, by contrast, the question whether restitution is punitive is actively litigated, with important practical consequences in a variety of contexts. (In both these respects it is unlike the question under discussion, with which indeed it has nothing to do.) *Compare* Kelly v. Robinson, 479 U.S. 36, 52–53 (1986) (restitution order following conviction for welfare fraud is punitive, with the consequence that it is not dischargeable in bankruptcy), *with* United States v. Christopher, 273 F.3d 294, 299 (3d Cir. 2001) (restitution order following conviction for social security fraud is not punitive, with the consequence that it is not abated by the death of the convicted criminal and may be enforced against the decedent's estate).

2. RESTATEMENT OF RESTITUTION, introductory note to ch. 8, Topic 2, at 595–96 (1937) (emphasis added).

dant's bad conduct will not be the basis for enhanced or exemplary liability.

As an axiom, however, the statement that restitution is not punitive is false. Perhaps we might say, instead, that an affirmative claim to restitution never depends on a punitive rationale. The reason to hedge the simpler formula is that restitution does punish, but it punishes negatively: not by imposing liability on disfavored parties, nor by enhancing the liability to which disfavored parties are subject, but by denying a restitutionary claim (or counterclaim) to which the disfavored party would otherwise be entitled. Naturally, any claimant whom a court finds unattractive will tend to find his legal recourse restricted, whatever the theory of his cause of action. But restitution's systematic use of this negative sanction—a kind of limited outlawry—appears to distinguish claims based on unjust enrichment from claims based on contract or tort.

The object of this preliminary Essay is to indicate two contexts in which restitution applies its negative sanction; and to offer an explanation, not especially surprising, for the association between restitution and this distinctive form of punishment. First, however, we attempt to clear the ground by distinguishing some features of restitution that should *not* be regarded as punitive, despite initial appearances to the contrary.

## I. RESTITUTION IS NOT PUNITIVE WHEN IT ALLOWS A CLAIM.

The idea that restitution is not punitive is probably most instructive at the point where it first appears doubtful. The salient feature of most restitution for wrongs—the fact that the remedy gives the plaintiff more than he lost—seems to point toward a punitive rationale. Indeed, both the fact of the windfall to the plaintiff and its most compelling explanation make restitution resemble an award of punitive damages. Restitution strips the conscious wrongdoer of a gain realized in violation of the plaintiff's rights, in order to preclude any possibility that an unauthorized invasion of the protected interest of another might be profitable notwithstanding a liability for damages.<sup>3</sup> Both disgorgement and punitive damages are therefore

3. In *Taylor v. Meirick*, 712 F.2d 1112, 1120 (7th Cir. 1983), a case of copyright infringement, Judge Posner states the utilitarian justification for the disgorgement remedies in restitution:

By preventing infringers from obtaining any net profit [, restitution] makes any would-be infringer negotiate directly with the owner of a copyright that he wants to use,

justified by the need to create a stronger disincentive to wrongful conduct—conduct that the threat of liability for actual damages does not adequately deter.

Despite these shared attributes, it seems clear that disgorgement-type restitution, on its face at least, is not usefully regarded or accurately described as a punitive sanction. Unlike liabilities and remedies whose starting objective is indemnity and compensation—and which accordingly require additional justification whenever the plaintiff is being overcompensated—there is no need to refer to punishment objectives to explain what restitution is doing. Restitution's starting objective is not to compensate the plaintiff, but to strip the defendant of a wrongful gain. More fundamentally: disgorgement, *prima facie* at least, does not punish. We will see that the accounting to which the wrongdoer is subject may be conducted in such a way that it includes a punitive element. On the face of the matter, however, the gains to the wrongdoer from the unauthorized interference with another's interests are calculated as nearly as possible, and liability is fixed at that amount, no more and no less. The wrongdoer is left back where he started. Concededly, the liability so calculated might not seem adequate, in a particular case, to deter a malefactor with the defendant's vast resources, or to embody a sufficient sanction for his reprehensible behavior. Unlike a regime of punitive damages, however—in which merely to state an objection in such terms is to justify the appropriate adjustment of the penalty—nothing in the outward law of restitution authorizes any modification, up or down, of the defendant's liability.

Assuming (without pursuing the matter further) that there is nothing intrinsically punitive about the disgorgement liability associated with restitution for wrongs, is there any other feature of restitution that requires or at least suggests (*Restatement* to the contrary notwithstanding) a rationale in terms of punishment? Liability in restitution is presumptively measured by a benefit previously conferred on the defendant, so the cases to be examined are those in which a defendant is left with less than he had to start with. Such

rather than bypass the market by stealing the copyright and forcing the owner to seek compensation from the courts for his loss. Since the infringer's gain might exceed the owner's loss, especially as loss is measured by a court, limiting damages to that loss would not effectively deter this kind of forced exchange.

For a broader look at the disgorgement remedy see Mark P. Gergen, *What Renders Enrichment Unjust?*, 79 TEX. L. REV. 1927, 1933–38 (2001).

outcomes can certainly be identified, but we may distinguish several types before we reach the punitive ones.

A first set of examples involves restitution defendants whose bad behavior has in some way contributed to the claimant's loss. For example, a defendant whose land is improved by the claimant's mistake is ordinarily liable, if at all, only to the extent of the realized increase in the value of the property.<sup>4</sup> Because the cost of a noncontractual improvement is almost always more than the value it produces, the transaction results in a loss that restitution allocates to the mistaken improver. But the outcome is reversed if the defendant, knowing that the claimant is acting under a mistake, merely sits back and watches him perform: now the defendant will be liable for cost of the improvement, notwithstanding that the benefit to the defendant was something less.<sup>5</sup> If we insist that the owner's liability in both cases is exclusively in restitution, the second case might appear to involve a punitive remedy: to the extent that the liability exceeds the benefit realized, the defendant has been left worse off than if the mistaken improvement had not been made. But it seems far easier to view the remedy in such a case as compensatory, indemnifying the claimant against a loss that is properly charged to the defendant on a theory of estoppel, implied contract, or tacit misrepresentation. That the remedy may have some punitive consequence may further recommend it, but the existence of plausible explanations in terms of the defendant's fault means that the remedy would be the same if punishment played no role. It would seem that in any case in which (a) the defendant is at fault in some way; (b) the remedy, although formally in restitution, is measured by the claimant's loss; and (c) the defendant's liability exceeds the benefit received, an explanation in terms of fault-based liability is both more direct and more persuasive than an explanation that the remedy is partly directed at unjust enrichment and partly at punishment.

If this reasoning is adopted, any instance of punitive restitution will have to satisfy two conditions: as compared with the status quo ante it must *both* leave the favored party with a net enrichment (thereby excluding cases whose rationale is primarily compensatory)

4. See, e.g., *McKay v. Horseshoe Lake Hop Harvesters, Inc.*, 491 P.2d 1180, 1183 (Or. 1971) (noting that a claimant who has improved another's property through a good faith mistake as to title "cannot obtain reimbursement for his costs, only for the enhancement of market value").

5. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 10, cmt. d, illus. 8 (Tentative Draft No. 1, 2001).

and leave the disfavored party with a net loss. Yet outcomes may be skewed in this direction by an intention to protect the innocent claimant, as well as by an intention to punish the wrongdoing defendant. Remedies in restitution frequently “overcompensate” in this fashion, taking from the defendant more than he probably gained and awarding the claimant more than he probably lost; but where such results may be plausibly seen as the consequence of a determination to protect the innocent party, they serve a remedial objective distinct from punishment.

Examples are presented by cases in which a claimant obtains rescission and restitution of a transaction induced by (possibly innocent) misrepresentation, or one that is subject to avoidance by reason of the claimant’s incapacity. So a purchaser of bonds who has relied on the seller’s representation that they are listed on the New York Stock Exchange can rescind the transaction when it transpires that the bonds were not in fact so listed. Because the bonds have lost value in the interim (along with the rest of the bond market), the purchaser shifts an unrelated loss to the seller.<sup>6</sup> Because the purchaser could have ratified the transaction had the market moved the other way, restitution allows him to speculate at the seller’s expense: the value of the free option is the enrichment he retains.

Rescission for incapacity yields the same results, wherever incapacity is employed—contrary to Lord Mansfield’s injunction—as a sword and not as a shield.<sup>7</sup> If a seventeen-year-old may purchase a car, drive it, and then recover the purchase price without deduction, the effect of restitution is to leave the buyer with a benefit he never paid for and the seller with an uncompensated loss.<sup>8</sup> Whatever their status within the modern law of restitution, such outcomes are obviously not explained in terms of unjust enrichment. But an explanation in terms of punishment does not fit them either. The seller whose misrepresentation is neither fraudulent nor negligent is not a candidate for punishment; nor is the seller who deals in good faith and on reasonable terms with an incapacitated buyer. Losses are allocated in such cases in consequence of the law’s determination

6. See *id.* § 13, cmt. h, illus. 17 (Tentative Draft No. 1, 2001).

7. “A third rule deducible from the nature of the privilege [*viz.*, the legal incapacity of infancy], which is given as a shield and not as a sword, is ‘that it never shall be turned into an offensive weapon of fraud or injustice.’” *Zouch v. Parsons*, 97 Eng. Rep. 1103, 1107 (K.B. 1765) (Mansfield, C.J.).

8. See *Dodson v. Shrader*, 824 S.W.2d 545, 547, 549 (Tenn. 1992) (rejecting the outcome described, after surveying the conflicting authorities on this issue).

to protect the buyer from a potentially disadvantageous transaction. Such protection comes at the expense of the seller, if need be; but a willingness to impose this expense is independent of any determination that the seller need be punished.

Under the same heading are countless recoveries in restitution that are simply “rounded up” to give the innocent party the benefit of the doubt. The standard measure of liability in restitution is the amount of the defendant’s unjustified gain at the claimant’s expense; the calculations necessitated by this standard offer significant opportunities to weight the outcome in favor of the claimant. By systematically resolving uncertainties against the wrongdoer, a court will systematically overstate the wrongdoer’s unjust enrichment, imposing a liability that might be called punitive in effect. But there is no need to infer a punitive motive if outcomes can be justified by a rule requiring that the malefactor, rather than his victim, bear the risk of any uncertainty.

On this view of the question, we need not describe as punitive even a recent decision that measures liability in restitution by the full rental value of a converted road grader, although the grader sat unused for most of the time it was in defendant’s possession and there was little reason to think that the owner would have been using it either.<sup>9</sup> Such an outcome is explained by a determination to protect the innocent party, insuring an award “which by no possibility shall be too small,” by adopting “a figure which will favor the plaintiffs in every reasonable chance of error.”<sup>10</sup> By the same token, the “tracing fictions” make no claim to evenhandedness in deciding the ownership of a commingled fund as between the wrongdoer and his victim;<sup>11</sup> nor will the murdering heir be permitted to argue, by pointing to the actuarial tables, that he is not unjustly enriched because he would soon have received the money in any event.<sup>12</sup> Presumptions displace

9. See *Cross v. Berg Lumber Co.*, 7 P.3d 922, 936 (Wyo. 2000).

10. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 51 (2d Cir. 1939) (L. Hand, J.).

11. “Equity marshals the withdrawals against the fiduciary’s own funds so long as it can because that result is deemed fairer.” *In re Kountze Bros.*, 79 F.2d 98, 102 (2d Cir. 1935) (Swan, J.). The one-sidedness of the tracing rules goes further than this. The defendant is presumed to withdraw his own funds when the money in question is subsequently dissipated. Conversely, he is presumed to be handling the claimant’s money whenever that presumption would favor the claimant—as where the funds withdrawn may be followed into some valuable asset.

12. “With rare exceptions there is no attempt to assess the degree of probability that the benefit was the result of the crime. A legatee will be deprived of his legacy, an heir of his inheritance, and an insurance beneficiary of the policy proceeds, without inquiry into the possibility or probability that he might have obtained the benefit in any event by outliving his victim.” 4 GEORGE E. PALMER, *LAW OF RESTITUTION* § 20.8 (1978).

probabilities in all these instances. The presumptions applied are manifestly hostile to the wrongdoer, but the evident purpose of protecting other parties to the transaction supplies a justification independent of punitive motives.

## II. RESTITUTION IS PUNITIVE WHEN IT WITHHOLDS A CLAIM

Restitution, like the law generally, calculates its remedies liberally when deciding a claim between an innocent party and a wrongdoer. The argument so far has been that such a response is not necessarily punitive. But restitution does something else that the law generally does *not* do: it withholds its assistance from certain disfavored wrongdoers. This negative sanction—the refusal to hear an otherwise well-founded claim—appears to be punitive, in purpose and effect, whenever the result of the court's abstention is a windfall to the other party that is not justified by prophylactic concerns.

Punitive restitution in this distinctive, negative form may be illustrated by two sets of outcomes—one prominent, the other latent. The first and more salient consists of cases in which courts announce, usually in so many words, that certain persons before them will be denied the relief they are seeking—not for failure to state a cause of action, but because those persons, by their bad conduct, have forfeited their right to the court's assistance. That such a disposition is intended (at least in part) to punish the rejected litigant is probably self-evident. That these outcomes pertain to the punitive side of *restitution* is less obvious, because the categories in which these cases are usually classified—somewhere within the maze of “illegal contracts”—tend to disguise the fact that the claims being disallowed are predominantly restitution claims.

These prominent instances of punitive restitution are to be found among a set of outcomes traditionally described by some quaint-sounding maxims, to the effect that *ex turpi causa actio non oritur*, that *in pari delicto potior est conditio defendentis* (or *possidentis*); in plain English, that no one may found a right upon his own wrong, and that he who comes into equity must come with clean hands. The common thrust of these propositions has become more difficult to perceive—and their significance harder to gauge—now that the Latin clichés are no longer much used. Modern lawyers of any sophistication must doubt that a *maxim* (aren't those the things that travel in pairs?) could ever be the vehicle for the transmission and enforcement of a serious legal rule. And yet we have no better formula to



designate the rule in question: namely, that a party whose behavior the court finds sufficiently reprehensible will be denied a remedy in restitution to which he would otherwise be entitled as against the defendant. The result of applying the rule is that the defendant is enriched at the expense of the claimant, being allowed to retain a benefit that—had the claimant been a better person—the defendant would have been liable to restore. Such an outcome must surely be classified as a punitive sanction, though it consists in the denial of a remedy rather than in the imposition of a penalty. To the extent of what would otherwise be his rights in restitution, the claimant is treated as an outlaw.

The visible instances of this punitive sanction are the cases that deny restitution because the unjust enrichment of which the claimant complains is the result of a transaction that is fraudulent, illegal, or both. Sheikh Abdul Aziz bin Ibrahim al-Ibrahim wanted to avoid paying federal income tax on his gambling winnings. He persuaded an employee, a Mr. Edde, to accompany him on his trips to Las Vegas and to declare the winnings as his own. Edde did so, then wound up paying the tax on the winnings he had fraudulently declared. When the Sheikh failed to reimburse him for these expenditures, Edde brought suit for breach of contract and restitution. The court granted the Sheikh's motion to dismiss. Plainly the court would not enforce the Sheikh's executory obligations, whatever they may have been, under a contract of this character. The more striking result is the dismissal of the restitution claim—a claim that on its face was unanswerable. Induced by fraud or by a broken promise or both, Edde had paid the Sheikh's obligations to the United States Treasury; the Sheikh was to that extent unjustly enriched at Edde's expense. Denial of restitution is inexplicable unless the reason is to punish Edde.<sup>13</sup>

13. *Al-Ibrahim v. Edde*, 897 F. Supp. 620 (D.D.C. 1995). Denial of restitution is the traditional punishment of the claimant who has entrusted his property to the defendant in furtherance of a scheme to defraud a third person, only to find himself defrauded by the defendant. *See, e.g., Primeau v. Granfield*, 193 F. 911, 916–17 (2d Cir. 1911) (no accounting for profits between partners to a fraudulent scheme). In hundreds of cases, relief has been withheld when the claimant (in fraud of creditors) either conveys to the defendant as a secret trustee, or purchases property in the defendant's name, and the defendant thereafter denies the claimant's ownership interest. *See, e.g., Kirkpatrick v. Clark*, 24 N.E. 71, 73 (Ill. 1890). The result is the same when the claimant's agent buys the claimant's property on execution at an artificially low price, pursuant to a scheme to stifle bidding in fraud of claimant's creditors, then asserts ownership as against the claimant. *See, e.g., Walker v. Hill's Ex'rs*, 22 N.J. Eq. 513, 528–29 (1871). In *Barnes v. Starr*, 28 A. 980, 981 (Conn. 1894), the claimant sought cancellation of what she described as a sham antenuptial agreement, executed at the instance of her deceased

We will find some of the most striking and characteristic instances of punitive restitution among the cases in which the courts withhold relief on the familiar ground that “the law will not aid either party to an illegal contract,” but some sifting is necessary here as well. The most obvious feature of the sanctions imposed on illegal bargains—the refusal to enforce a contract calling for an illegal performance—is not a matter of restitution law, nor does it depend on a punitive rationale. Where the illegal contract has been performed on one side, however, the salient aspect of the sanction becomes the denial of restitution. Here we might draw one further distinction. When the allowance of restitution would be tantamount to enforcing the contract, denial of restitution is not notably punitive: contract law denies enforcement, and the law will not stultify itself by providing enforcement under another name.<sup>14</sup> By contrast, the denial of restitution is inescapably punitive where the consequences of enforcement and restitution are easily distinguished; where restitution would be easy to accomplish, requiring only the restoration of money or property previously delivered by the claimant to the defendant; and where the denial of restitution leaves the defendant with a manifest unjust enrichment at the expense of the plaintiff.

The best cases are the simplest ones, in which the claimant has given something of value to the defendant as the first part of a projected illegal exchange. Chapman paid Haley \$300 for \$3000 in counterfeit money. Chapman later testified that Haley had told him to “sit down here on the walls of the water works, and he would step right across the street here, and would get it, and be back in twenty minutes, and he never returned.” Restitution was denied.<sup>15</sup> Thompson suffered a more elaborate version of the same punishment after he sold and delivered two cows to Williams on Sunday, the price to be

husband, in which she purported to disclaim any interest in his property at death; the purpose of the agreement was to deceive his children by his first wife, who would otherwise have raised objections to their elderly father’s remarriage. The deceased husband induced the claimant to sign the document by promising to destroy it after the marriage took place, then failed to do so. The court denied cancellation and enforced the agreement as written.

14. So we need not explain in punitive terms a decision that denies restitution for valuable legal services performed by an unlicensed attorney. It is enough to observe that a recovery in quantum meruit would be too close to enforcement of the illegal contract. *See, e.g.*, *Spivak v. Sachs*, 211 N.E.2d 329, 331 (N.Y. 1965). Peter Birks argues that the objection to restitution in such a case is not really a matter of illegality: “The question is always whether allowing the claim in unjust enrichment would make nonsense of the law’s condemnation of the illegal conduct in question and of its refusal to enforce the illegal contract. . . . In other words, there is a widespread defense of stultification.” Peter Birks, *Recovering Value Transferred Under an Illegal Contract*, 1 THEORETICAL INQUIRIES IN LAW 155, 202 (2000).

15. *Chapman v. Haley*, 80 S.W. 190, 192 (Ky. 1904).

paid at a later date. Williams failed to pay, and Thompson retook the cows. Williams obtained a judgment for conversion in the amount of \$75, which Thompson satisfied. Thompson's subsequent suit in restitution for the value of the cows (\$75) was dismissed on the ground of the illegality of the original sale.<sup>16</sup>

Restitution's punitive sanction may be applied to wrongdoing falling short of illegality. Despite the liberal tendency of modern decisions favoring the "plaintiff in breach"—authorizing restitution for the value of partial performance under a contract that the plaintiff subsequently breached—it must be doubtful whether the claim has even been allowed to a plaintiff whose default impressed the court as particularly reprehensible.<sup>17</sup> An employee whose breach of contract was merely to walk off the job may or may not have a claim to restitution in a given jurisdiction, but he stands a much better chance than the employee who (after rendering a valuable part performance) was dismissed for cause.<sup>18</sup> A jurisdiction that automatically allows a defaulting purchaser to recover payments in excess of the seller's damages might still insist that a lawyer who withdraws from his client's case without just cause forfeits any entitlement to compensation.<sup>19</sup> If restitution is denied in circumstances where the defendant retains a net enrichment, the result is a punitive sanction for breach.

The same punishment may even be visited on a person whose conduct, while reprehensible, does not constitute a legal wrong. Norton, the town junk man, feuded with Hagggett. Conceiving that he would be better able to injure his enemy if he could become his creditor, Norton inquired around the village to see if Hagggett owed any money. Learning that Hagggett had a note outstanding at the local bank, Norton went to see a bank officer and offered to "take up" or "pay off" Hagggett's debt. The banker took Norton's money and handed over the canceled note. Realizing only later what he had done, Norton came into court to complain—as was certainly the case—that he had made a crucial mistake in offering to "pay off" the note: what he had really intended to do was to buy it. This mistake

16. *Thompson v. Williams*, 58 N.H. 248, 249 (1878).

17. Compare RESTATEMENT OF CONTRACTS § 357(1)(a) (1932) (denying a claim in restitution to a plaintiff whose breach of contract was "willful and deliberate"), with RESTATEMENT (SECOND) OF CONTRACTS § 374 (1981) (omitting any such limitation).

18. See generally 1 PALMER, *supra* note 12, § 5.13(a), (c).

19. Compare *Neri v. Retail Marine Corp.*, 285 N.E.2d 311, 313 (N.Y. 1972) (acknowledging that U.C.C. § 2-718(2) authorizes restitution in favor of a breaching buyer of goods), with *Klein v. Eubank*, 663 N.E.2d 599, 600 (N.Y. 1996) (referring to a New York rule that an attorney withdrawing without just cause forfeits entitlement to compensation and statutory lien).

on Norton's part would ordinarily entitle him to restitution from Haggett. Without meaning to do so, Norton had discharged his enemy's debt; Haggett was unjustly enriched at Norton's expense. The standard remedy would be to rescind Norton's transaction with the bank or else to subrogate Norton to the bank's discharged claim against Haggett. The court denied Norton any relief.<sup>20</sup> The poetic justice of the outcome is irresistible—*tel est pris qui voulait prendre*—and unmistakably punitive.

The dramatic instances of punitive restitution are cases of this sort, in which the outlawed party is made to forfeit altogether what would otherwise be a straightforward entitlement to restitution as a plaintiff. A disguised version of the same punishment runs in the other direction, when the court denies a restitution claim (or more typically, ignores it) asserted by a disfavored *defendant*. The punishment is no longer an explicit refusal to hear the claim, merely a failure to perform a full accounting of the transactions between claimant and defendant for which defendant is liable in restitution.<sup>21</sup>

Restitution does not generally impose forfeitures. Even within the context of restitution for wrongs—where the defendants are malefactors by definition—standard remedies in restitution devote considerable effort to measuring the extent of the defendant's enrichment at the claimant's expense. Where the defendant's enrichment derives from multiple sources—partly from an unlicensed interference with the claimant's interests, partly from the defendant's own contributions—the ordinary methods of restitution include an accounting designed to identify that portion of the disputed assets constituting net unjust enrichment. An accounting that omitted an item from the defendant's side of the ledger would overstate net enrichment, resulting in a liability that, to the extent of the excess, might fairly be described as punitive.

In the case that stands as the classic illustration of this relationship, *Metro-Goldwyn-Mayer* was found liable for copyright infringement: its film *Letty Lynton* made unauthorized use of the plaintiffs'

20. *Norton v. Haggett*, 85 A.2d 571, 574 (Vt. 1952).

21. The technique described is one of several methods by which courts, in awarding restitution for wrongs, will calibrate the defendant's restitutionary liability to the circumstances of the particular case. For an insightful review of the different approaches see Daniel Friedmann, *Restitution for Wrongs: The Measure of Recovery*, 79 TEX. L. REV. 1879, 1880–1903 (2001).

stage play on the same subject.<sup>22</sup> This was not a case of innocent infringement: the court found that “the borrowing was a deliberate plagiarism.”<sup>23</sup> Even so, the defendants’ liability in restitution was to disgorge that portion of the overall profits from the film that was fairly attributable to the infringement, not the profits derived from “such factors as they bought and paid for; the actors, the scenery, the producers, the directors and the general overhead”—all of which contributed largely to the film’s success.<sup>24</sup> By the same reasoning, when the sale of a chain of retail stores was induced by fraud, and the stores were profitably managed and expanded for several years thereafter by the fraudulent buyer, the Pennsylvania Supreme Court approved an accounting for profits that allowed a credit for the value of the buyer’s services in running the business:

The wrong that Conston committed was in his original acquisition of the stores, not in his operation of them; that operation was not in competition with or to the detriment of, or in hostility to, some other business of plaintiffs, nor will it ultimately cause them any loss; on the contrary it has considerably enhanced the value of their subsequently returned property; while Conston did not, of course, realize it at the time, he was in fact, in conducting the business, not working against, but for, plaintiffs’ interests. *Actions of restitution are not punitive. . . .*<sup>25</sup>

Here as elsewhere, punitive remedies are essentially a matter of discretion; so the opposite position is easily adopted. As the Supreme Court explained in an earlier case of copyright infringement, denying a claimed deduction from profits for the salaries of the infringing publisher’s employees:

We do not think that the value of the time of an infringer, or the expense of the living of himself or his family, while he is engaged in violating the rights of the plaintiff, is to be allowed to him as a

22. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45 (2d Cir. 1939), *aff’d*, 309 U.S. 390 (1940). *Letty Lynton* was a major MGM production, and its success plainly owed much more to the studio’s legitimate contributions than to any plagiarism. The film (released in 1932) starred Joan Crawford and Robert Montgomery; it was directed by Clarence Brown; Miss Crawford’s gowns were by Adrian. According to a contemporary reviewer for *The Motion Picture Herald*, “Almost everything one can wish for in entertainment has been injected into this superbly acted and directed production. The gowns which Miss Crawford wears will be the talk of your town for weeks after . . . and *how* she wears them!” In fact, MGM had arranged for Macy’s to sell an inexpensive copy of one of Adrian’s creations in what proved to be a successful promotional tie-in for the film. These and other details about *Letty Lynton* can be found (in late 2002) on numerous web sites devoted to Joan Crawford, including <http://www.joancrawfordonline.com>.

23. *Sheldon*, 106 F.2d at 51.

24. *Id.*

25. *Brooks v. Conston*, 72 A.2d 75, 79 (Pa. 1950) (emphasis added).

credit, and thus the plaintiff be compelled to pay the defendant for his time and expenses while engaged in infringing the copyright.<sup>26</sup>

The result of this approach is that the claimant obtains profits without deduction of the expense of producing them, and the defendant is liable in excess of net enrichment. Such an outcome is punitive.

The courts just quoted acknowledged the choice they were making, but the wrongdoer's claim to the value of his contributions is more commonly passed over in silence if the claim is denied. Examples include some famous cases. The award of a fractional share of the profits derived from the Great Onyx Cave, to which the defendant admitted paying customers in the knowledge that they were trespassing under the claimant's land, seemingly took account of defendant's out-of-pocket expenditures for such items as electric light (inasmuch as the liability was based on "net profits" from the enterprise), but allowed nothing for defendant's labor and enterprise in developing the cave as a tourist attraction.<sup>27</sup> The judgment requiring Frank Snapp to turn over to the United States the royalties derived from the book he wrote in breach of his contractual and fiduciary obligations to the Central Intelligence Agency made no allowance for the value of his contribution as an author.<sup>28</sup> A distiller who made corn into whiskey, knowing that the corn was stolen, had to surrender the whiskey to the former owner of the corn—without compensation for his labor in transforming the original materials.<sup>29</sup>

In each of these cases, the claimant recovers more than the defendant's net enrichment because the court declines to recognize the defendant's implicit claim for his own contribution to the assets in dispute. The outcomes mirror those in the first set of cases—denying an entitlement to restitution altogether, where the disfavored party presents himself as the plaintiff—because the implicit claim that is rejected in each case is a claim in restitution. Each, moreover, is a claim that would succeed if asserted in other circumstances. If the

26. *Callaghan v. Myers*, 128 U.S. 617, 664 (1888).

27. *Edwards v. Lee's Adm'r*, 96 S.W.2d 1028, 1032 (Ky. 1936).

28. *Snapp v. United States*, 444 U.S. 507, 510–11 (1980).

29. *Silbury & Calkins v. McCoon & Sherman*, 3 N.Y. 379, 392–93 (1850). The transformation of corn into whiskey makes an exotic variation of the standard case in American law, which involves liability for converted timber. A knowing converter who transforms stolen logs into finished lumber remains liable to the timber owner for the products or their value, wherever they are found, with no allowance for the cost of cutting, hauling, sawing, and planing; while the innocent converter (typically someone who has mistaken a boundary in the woods) is liable to the owner for stumpage only. *See, e.g., Wooden-Ware Co. v. United States*, 106 U.S. 432, 434–35 (1882).

distiller were an innocent converter, he could set off against his strict liability in conversion the value of his unrequested services in improving the owner's corn. Had Snepp's wrongdoing consisted merely of copyright infringement, he might have retained the portion of his royalties that was attributable to his own skill as an author—as opposed to the material in which the CIA claimed a protectible interest. Had the trespass within the Great Onyx Cave been innocent, the defendant would (at the very least) be entitled to compensation for his services in creating the valuable business of which the claimant, his neighbor, is revealed as part owner.

### III. THE NEGATIVE SANCTION IS CHARACTERISTIC OF RESTITUTION.

Restitution is commonly said not to be punitive, because the people who make that observation are looking at what restitution does. The punitive side of restitution is found in what restitution refuses to do. In a number of recurring situations, some highly visible and some less so, the law of restitution denies to disfavored litigants entitlements that it acknowledges in others. Our hypothesis is that this negative sanction (by contrast to the affirmative imposition or enhancement of a penalty) is somehow characteristic of restitution, and not a feature of the law's treatment of disfavored parties generally.

The frequency with which restitution imposes this negative punishment is not as apparent as it might be, because the pattern of decisions has to be pieced together from sources we might not immediately think of consulting. The unaccustomed form of the rules that authorize courts to treat some litigants as outlaws—a miscellaneous collection of Latin and English maxims—tends to disguise the fact that the cases in which those maxims actually determine outcomes are typically concerned with restitution. Again, the cases revealing the richest vein of punitive restitution tend to be discussed in the older *contracts* treatises, in the chapters devoted to “illegal contracts.”<sup>30</sup> Even here, the true instances of punitive restitution are lumped together with decisions that merely refuse to enforce illegal bargains,

30. Thus, the general topic of “Illegal Bargains” occupies an entire volume of Corbin's treatise in its 1962 edition. See 6A ARTHUR L. CORBIN, CORBIN ON CONTRACTS (1962). A few sections in the concluding chapter address directly the denial of restitution as one of the “effects of illegality,” but instances of punitive restitution (as described in the present article) are scattered throughout the volume.

making the distinctiveness of restitution's negative sanction harder to perceive.

The legal entitlements that are denied for punitive effect tend to be restitution claims, rather than claims based on other sources of liability. A tort plaintiff need not display clean hands to collect damages.<sup>31</sup> Property law protects the thief against theft.<sup>32</sup> Contract law presents a somewhat more complicated question. Plainly the law will not lend its aid to the commission of a wrong, so an executory contract that is illegal, or fraudulently induced, is obviously unenforceable at the instance of a wrongdoer. But when the suit to enforce such a contract is dismissed, is the outcome properly regarded as punitive? We might respond, without quibbling, that the proponent of the illegal or fraudulent contract has lost nothing he ever had. (His disappointed expectation is not one the law should protect, assuming he knew of the illegality.) By contrast, once the same contract has been performed on the plaintiff's side, his viable claim is in restitution; and to deny that entitlement is unmistakably punitive. Suppose that A pays a bribe to B in exchange for B's promise to take some illegal action. B takes the money but fails to keep his promise. Given a hypothetical suit by A against B for specific performance or consequential damages, would the dismissal of the claim—a foregone conclusion—be a punitive result? But if A sues B in restitution, seeking only to recover the money paid as a bribe, can the dismissal of the claim be described any other way?<sup>33</sup>

In short: restitution, unlike tort or contract, will sometimes treat the claimant's bad behavior as an affirmative defense. (This is not the way these outcomes are ever described in the decisions, but it accurately indicates their effect.) Unlike the other affirmative defenses to restitution—mostly versions of good-faith purchase and change of

31. So while the landowner may owe the trespasser only a qualified duty of care—particularly if the trespasser's presence is unknown—it has been long been a judicial commonplace that “the trespasser is not an outlaw.” See, e.g., *Hynes v. N.Y. Cent. R. Co.*, 131 N.E. 898, 899 (N.Y. 1921) (Cardozo, J.). By extension:

A person who gets upon a railroad train without obtaining a ticket or paying his fare is a trespasser and may be put off the train at some convenient place, but he is not to be regarded as an outlaw, and if he has been driven off the train and shot with a gun by an authorized employee of the railroad company, the railroad company is liable for the tort.

*Lampkin v. Chicago Great W. R. Co.*, 44 P.2d 210, 210–11 (Kan. 1935).

32. See *Armory v. Delamirie*, 93 Eng. Rep. 664 (K.B. 1722) (rejecting defense of *ius tertii* in action for conversion of jewel brought by chimney sweep, who had found it, against goldsmith, whose apprentice had taken it).

33. See, e.g., *Womack v. Maner*, 301 S.W.2d 438, 439 (Ark. 1957) (dismissing a claim to restitution of a bribe paid to a judge for an illegal act that was not performed).



position—the function of this one is not to protect the defendant but to punish the plaintiff.

The inspiration for punitive restitution is not difficult to infer. It might at first be supposed that a concern for the probity of litigants is peculiar to equity (hence the “clean hands” maxim), and that restitution is peculiarly equitable.<sup>34</sup> This would be an elementary error on two counts. The operative rules (such as “in pari delicto”) are as much legal as equitable, as are the instances of punitive restitution. For example, the claim to recover the bribe from the defaulting bribe-taker, if it were allowed, would be purely a matter of law. On the other hand, it is perfectly true that the bribe-giver’s restitution claim—like every claim in unjust enrichment, whether legal or equitable—is usually thought to involve an assertion that the bribe-taker is subject to a duty (namely, to return the bribe) imposed on him by equity and good conscience. The obvious idea for punishment is that a person who in some transaction has not acted conscientiously should potentially forfeit his claim to conscientious behavior in others in the same connection.

The idea becomes irresistible in many of its applications, because the punishment that results from this forfeiture has an aptness that legal sanctions generally lack. Unlike a fine or a prison term—by which the court merely imposes an arbitrary and extraneous injury on the wrongdoer—the denial of restitution to the bribe-giver causes him to suffer as a direct consequence of his own misdeeds.

It is doubtful that punishment of this kind has any deterrent effect whatsoever. The person who is considering whether to offer a bribe is unlikely to weigh the chances of a later recourse in restitution.<sup>35</sup> But as retributive justice it has an unmistakable charm.

34. For a survey of the prevailing confusion (notably in the U.S. federal courts) about the extent to which restitution is “equitable,” see Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577 (2002).

35. See John W. Wade, *Benefits Obtained Under Illegal Transactions—Reasons For and Against Allowing Restitution*, 25 TEX. L. REV. 31, 48–51 (1946).