Restitution for Intangible Gains

Paul T. Wangerin
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I. INTRODUCTION

Two questions about remedies have, for the most part, escaped the attention of practicing lawyers and commentators: (1) under what circumstances, if any, should claims for restitution be filed rather than claims for compensation?; (2) under what circumstances, if any, should recovery be sought for intangible gains? Consider the following cases:

(1) Every single morning, Bob "The Bull" Connor stops Smith and Jones as they enter the plant where they work. The Bull then asks Smith, an African-American male, why he is not wearing his "watermelon" tie. He also asks Jones, an attractive young woman, whether it is "her time of month." Each time The Bull asks these questions, i.e., every single morning, a group of his buddies roars with laughter. Regrettably, technical problems prevent both Jones and Smith from recovering compensation from either The Bull or his employer for The Bull's harassing conduct.

(2) Several months ago, Pecs, a remarkably handsome and muscular young man, tricked Gotrocks, a wealthy but very elderly widow, into giving him a priceless painting. That painting now hangs over the bed in Pecs's flat and, not surprisingly, makes quite an impression on the countless young women Pecs entertains when he is not conning elderly widows. Gotrocks realizes her mistake; however, she also realizes that the backlog of cases in the court system of her jurisdiction makes her recovery against Pecs anytime before she dies highly unlikely.

(3) Because of a mistake made by a firm that specializes in finding the owners of abandoned property, Hopkins, a university professor, obtained title to a beautiful summer home on a small island in a lake in the upper peninsula of Michigan. Hopkins used that home for several summers before the true owner of the property discovered the mistake. The true owner, a notorious recluse, owns hundreds and hundreds of resort properties. He never actually uses any of them.

(4) Executives at Widget Company consciously chose to market a product that they knew was likely to cause serious injury or death to a small number of its potential users. These executives made this choice because they determined that the extraordinary profits they would reap

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from the sale of this product would greatly exceed any liability that they
might incur. Further, they made this choice knowing that the courts in
their jurisdiction had a strong policy against awarding "punitive"
damages.

(5) Nerd, an extraordinarily gifted but naive graduate student, put off
his own educational plans for several years in order to prepare a
"preliminary report" for a major governmental project that Congressman
William "Billy Bob" Boondoggle was thinking of putting together.
Later, Billy Bob published a book on this project. The book caused a
nationwide sensation and, not surprisingly, did wonders for Billy Bob's
political reputation. However, despite the fact that this book was
nothing more than a verbatim copy of Nerd's preliminary report, Billy
Bob gave Nerd no credit whatsoever.

The following analysis attempts to answer both of the remedies questions
raised by these hypotheticals. For both functional and strategic reasons, the
analysis suggests that claims for restitution sometimes make much more sense
than claims for compensation. Further, in at least some situations, restitution
should be allowed for intangible gains. The analysis has three parts. The first
part contains a summary of the overall system of American civil remedies. This
picture reveals close connections between seemingly separate parts of that body
of law. The second section of the analysis describes, in somewhat more detail,
"restorative" or "restitutionary" remedies. It characterizes these kinds of
remedies as conceptually quite different from "compensatory" remedies. Further,
and more importantly, this part of the paper shows how skilled lawyers can use
restitutionary remedies to overcome serious problems that often arise in
connection with compensatory remedies. Finally, part three of the paper explores
the notion of intangibles generally. This part suggests that symmetry truly exists
between the law dealing with compensatory remedies and the law dealing with
restitutionary remedies in connection with intangibles.

II. A GENERAL PICTURE OF CIVIL REMEDIES

Most lawyers probably think that the best overall method for classifying civil
remedies starts with the distinction between "legal" remedies and "equitable"
remedies.1 Unfortunately, however, this law/equity distinction really makes no
sense in the modern world. Although some technical distinctions still exist
between the methods used to obtain the so-called legal remedies versus the so-
called equitable remedies, these two historically separate systems have now, for
the most part, been combined. Hence, classification of civil remedies based on
a law/equity distinction is outdated.

1. See generally Dan B. Dobbs, Law of Remedies § 1.2 (2d ed. 1993). See also Douglas
Perhaps a better classification system for civil remedies would turn on the present day functions of the various civil remedies rather than on their historic origins. Such a functional system would concentrate upon what present day remedies do, rather than upon what they are called. One function-based system for classifying civil remedies, it is suggested, might look like this.

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Civil Remedies
  /\                           /
 /   \                         /    
Declaratory Remedies   Act Remedies   Money Remedies
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All current civil remedies, this classification system suggests, can be thought of as serving one of three conceptually distinct functions. First, one group of civil remedies—which will be called “declaratory remedies”—provides successful litigants with judicial orders declaring rights or responsibilities. A second group—which will be called “act remedies”—provides successful litigants with judgments ordering other people or entities to act or not act in certain ways. The final group—which will be called “money remedies”—provides successful litigants with judgments for money.

Declaratory remedies—the most common of which are “declaratory judgments” and “interpleader”—need only brief comment here because they are not widely used by most practicing lawyers. These remedies provide successful litigants with judicial declarations of rights or responsibilities. Only one point need be made here about this kind of remedy, a point that in significant part explains why it is so rarely used. Whereas suits for declaratory remedies produce only a declaration of rights or responsibilities, suits for money or act remedies produce both a declaration of rights and responsibilities and a money or act remedy. Thus, except in unusual situations, injured parties in a dispute, i.e., traditional plaintiffs, are better served by seeking money or act remedies rather than declaratory remedies. Conversely, injuring parties in a dispute, i.e., traditional defendants, generally cannot seek money or act remedies. Thus, if a traditional defendant wants a judicial remedy in a particular situation—perhaps to preempt litigation that he anticipates will be filed against him—he must file suit for a declaration.

Act remedies—the most common of which are “injunctions” and “specific performance”—are remedies that require a party to act or not act. Act remedies themselves have three distinct functions.

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Act Remedies
 /\                       /
 /   \                    /    
Prevention   Compensation  Restoration
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First, litigants seeking to prevent future harm sometimes ask a court to require someone or some entity to do or not do something in the future. The most commonly granted act remedy aimed at preventing future harm requires someone or some entity not to do something and is generally called a “prohibitory injunction.” Conversely, the other act remedy with the same purpose requires someone or some entity to do something and is generally called a “mandatory injunction.” Second, litigants seeking compensation through actions for past injury sometimes ask a court to order someone or some entity to do something in addition to compensating. When contract law provides the basis for the action, the remedy is generally called “specific performance.” Conversely, when tort law provides the basis for the action, the remedy is generally called a “reparative injunction.” Third, and finally, litigants seeking restoration of gains reaped by opposing parties sometimes ask a court to order someone or some entity actually to return the unjustly reaped gain. This kind of remedy is generally called “specific restitution” or “replevin.” It is rarely used.²

Money remedies, the last of the three distinct kinds of judicially imposed civil remedies, also serve three distinct functions, two of which are identical to those of act remedies.

Money Remedies

- Compensation
- Restoration
- Punishment/Prevention

The first kind of money remedy, a kind often loosely called “damages,” provides compensation for past injuries. This kind of money remedy, therefore, does exactly the same thing as compensatory act remedies, i.e., compensates for past injury. Thus, the only real difference between compensatory money remedies (“damages”) and compensatory act remedies (“reparative injunctions” or “specific performance”) is that in the former, compensation for the past injury takes the form of money, whereas in the latter, compensation comes in acts. A second kind of money remedy, a kind that is often loosely called “punitive damages” or “exemplary damages,” serves one of two related functions. Sometimes punitive or exemplary damages are thought to punish for exceptionally bad conduct, and sometimes they are thought to serve as a mechanism for preventing future wrongful conduct. The punitive function of this kind of money remedy reveals its relation to criminal law remedies. Conversely, the prevention

² Whether this kind of remedy is rarely used because it has such a narrow function or because it is simply unknown to most practicing lawyers cannot be determined. See Douglas Laycock, The Scope and Significance of Restitution, 67 Tex. L. Rev. 1277, 1279-83 (1989).
function reveals that this kind of remedy is closely related to preventive injunctions, the most important of the act remedies.3

The third distinct function of money remedies—the restorative or restitutionary function—seems to be unknown to most practicing lawyers. This function, however, like the restorative or restitutionary function of certain kinds of act remedies, is an extraordinarily important one.

III. RESTORATIVE OR RESTITUTIONARY REMEDIES

Restitutionary remedies are perhaps best described by contrasting them to compensatory remedies. Compensatory remedies, it should be recalled, either compensatory money or compensatory act remedies, deal with losses to injured parties caused by past harm. Restitutionary remedies, on the other hand, either restitutionary money or restitutionary act remedies, focus on recovery of gains acquired by wrongdoers rather than recovery for losses to injured parties. Thus, in connection with compensatory money remedies, courts turn past losses into money, and in connection with compensatory act remedies, courts turn past losses into acts. Conversely, in connection with restitutionary money remedies, courts turn past gains into money, and in connection with restitutionary act remedies, courts turn past gains into acts.

3. Dobbs, supra note 1, §§ 3.11(1)-3.11(3).
Note carefully two critically important points about restitutionary remedies. First, many judges and lawyers use the term “restitution” quite loosely.5 For example, judges and lawyers often talk and write about requiring criminals to make “restitution” to the victims of their crimes.6 These judges and lawyers then describe a process that requires the criminals to compensate their victims for losses experienced. This, however, is not restitution. Rather, it is compensation. Likewise, judges and lawyers often talk and write about requiring tortfeasors or contract breachers to make “restitution.” But these judges and lawyers then describe a process that requires these wrongdoers to compensate injured parties for losses. Again, however, this is not restitution, but compensation.7 Further, people involved in the current debate about the ownership and return of “cultural treasures” often use the term restitution.8 The Greek people, goes the argument, and not the British Museum, own the Elgin Marbles. Thus, those sculptures must be returned to Greece. Again, however, since the protagonists in these debates often spend most of their time discussing losses rather than gains, the debates really turn on compensation rather than restitution. Finally, people involved in civil rights litigation sometimes talk about the need to make “restitution” to the victims of racial or sexual prejudice.9 These references, however, generally describe losses to the victims of prejudice rather than gains to the victimizers. Again, therefore, what actually is being discussed is compensation rather than restitution.10

5. This point is also made by Laycock. See Laycock, supra note 2, at 1282-83.
6. Countless discussions of this topic exist. An early and influential one is Alan T. Harland, Monetary Remedies for the Victims of Crimes, 30 UCLA L. Rev. 52 (1982).
7. It is not at all clear how this kind of loose thinking started in connection with the law of torts and contracts. One thought, however, is this: The notion of “promissory estoppel” only took solid root in American law during the middle part of the 20th century. Prior to that time, therefore, mere reliance on a promise could not generate a remedy in contract. Thus, many relying promisees experienced severe losses for which no compensation seemed available. Since many courts wished to grant compensation in these situations, however, they simply stated that “restitution” should be available. Of course, these cases had nothing whatsoever to do with restitution. But, nobody in those early days seemed to be thinking very carefully about this topic.
10. Admittedly, real restitutionary remedies could be employed in all three of the situations just described. In the criminal context, for example, criminals sometimes sell their stories to the movies. When they do this, they reap unjust gains. If these gains were the subject of suit, a real claim in restitution would be raised. Likewise, contract breachers and tortfeasors often experience gains from their wrongful acts. If judges and lawyers focused on these gains, they would actually be talking about restitution. Further, if the discussion of cultural treasures turned on the fact that the new owners gained something unjust, rather than on the fact the original owners lost something unjustly, then clearly the debate would be one about restitution. Finally, in the civil rights context, attempts might be made to calculate the gains that Anglo-Saxon people have experienced over the years as a result of prejudice against African-Americans. These gains—if any way could be devised to calculate them—might then be the subject of restitutionary claims. On this last point, see School of Business Administration, University of California, Berkeley, An Illustrative Estimate: The Present
Second, in many litigation situations, the losses injured parties experience are equal to the gains injuring parties reap. When this equality exists, there is no functional need to differentiate between restitutionary and compensatory remedies. In many breach of contract situations, for example, the monetary losses of the non-breaching party are roughly the same as the monetary gains of the breaching party. The same is true in many tort situations.

However, sometimes a major difference exists between the amount of loss and the amount of gain. Three kinds of situations tend to produce most cases in which losses are not equivalent to gains, i.e., when compensation will differ from restitution. First, in some situations, losses will exceed gains. In connection with most incidents involving negligence, for example, the injured party experiences losses but the injuring party gains nothing. In these situations, therefore, claims for compensation are all that injured parties can seek. Second, in some situations, gains as well as losses exist, but the losses significantly exceed the gains. Obviously, in these situations, injured litigants should seek compensation rather than restitution. Conversely, injuring parties should attempt to turn claims for compensation into claims for restitution. Third, sometimes, albeit rarely, gains exceed losses. In a famous case, for example, someone made a substantial profit through the use of an "egg-washing" machine that belonged to someone else. The user reaped a significant gain. The owner of the machine, however, did not even know it was gone, and thus experienced no real loss. In this case, as in all comparable ones, a restitutionary remedy produces a better remedy for the plaintiff than a compensatory remedy.

Major procedural or strategic differences also exist between compensatory and restitutionary remedies. There are seven in all. First, technical problems sometimes make it difficult or impossible for an injured party to recover any compensation at all for losses incurred. For example, a necessary writing might be missing in a contract case, or some technical aspect of a cause of action in tort might not be provable. Because the law of restitution does not require proof of anything other than unjust enrichment, however, these technical problems would not foreclose a claim for restitution. Second, statutes of limitations for compensatory and restitutionary remedies may differ significantly. The limitation period for restitutionary claims is often substantially longer than the limitation period for tort claims. Third, procedural or strategic difference between restitutionary and compensatory remedies involves the meaning of the term "damages" in some statutes and insurance policies. In an important recent case, for example, an insurer claimed that the term "damages"
in pertinent statutes and policies did not include claims that are essentially restitutionary in nature. Hence, the insurer disclaimed liability for such claims. Fourth, most suits for compensatory money remedies are suits “at law” while many suits for restitutionary money remedies—most notably suits for “constructive trusts” or “accounting”—are suits “in equity.” Thus, substantial procedural differences may exist between the way suits for money compensation and suits for money restitution are prosecuted. Litigants seeking compensatory money remedies, for example, almost certainly will be able to get jury trials, whereas litigants seeking restitutionary money remedies may not. Fifth, litigants seeking remedies in jurisdictions in which long delays exist in connection with law remedies might be able to move relatively quickly to judgment by seeking restitution rather than compensation. Sixth, skilled lawyers can sometimes use claims for restitution as a back door method for collecting punitive damages. Thus, in jurisdictions in which punitive damages are difficult to obtain, claims for restitution might lead to essentially punitive awards. Consider, for example, situations in which someone or some entity consciously balances the likelihood and costs of injury to others against potential gains and seeks to gain at the expense of others. (The “exploding Pinto” cases are a perfect example of this.) In these situations, restitution, i.e., the value of the gain to the wrongdoer, might provide an equally large money remedy as punitive damages.

The seventh and last strategic difference between compensatory and restitutionary remedies is perhaps the least understood by most lawyers yet the most important. This difference turns on the nature of judgments for restitution. Although many law professors and most law students seem to think that civil litigation simply ends when courts enter judgments, all experienced practicing lawyers know the entry of judgments for money or acts is often just the end of the first part of a long process. Losing defendants, after all, do not just automatically write out checks when money judgments are entered against them, or comply with orders to act or not act. Rather, losing defendants often thumb their noses at the judgments, or, for whatever reason, argue that they cannot comply. At this stage, a major strategic difference between restitutionary money remedies and compensatory money remedies comes into play. As a general rule, a judgment for a compensatory money claim turns the loss of an injured party into a “debt” of the injuring party. Injured parties usually can collect these debts only alongside all of the other debts of the injuring party. Thus, if the assets of an injuring party are limited, or if other debts of that party take precedence over the judgment, or if bankruptcy is a viable option, the holder of a judgment for a compensatory money remedy may end up with little or no actual money.

16. Id. at 369 n.30 (citing Boeing Co. v. Aetna Casualty and Surety Co., 784 P.2d 507 (1990)).
17. This point is indirectly raised in Laycock, supra note 2, at 1288-90.
18. Laycock, supra note 2, at 1290-91.
19. For an extensive discussion of the points made here, see Emily L. Sherwin, Constructive Trusts in Bankruptcy, 1989 U. Ill. L.F. 297.
Different rules, however, apply to judgments for restitutionary money remedies. Three such different rules are critical. First, unlike judgments for compensatory money remedies, which are, essentially, unsecured debts, judgments for restitutionary money are, in effect, determinations of "ownership." The unjust gain, in short, was never owned by the defendant. If, for example, a piece of property changes possession because of mistake or fraud, a judgment for restitution states that the piece of property was never owned by the defendant. Likewise, if a particular and identifiable pot of money is the source of unjust enrichment, a judgment for restitution of that pot of money is, in effect, a statement that the defendant never owned the pot. The consequences of this are profound. If the item that is the object of a judgment for restitution is in the possession of the defendant, collection of that judgment takes precedence over all of the other debts of the defendant. Thus, if the subject of a judgment for restitution is a particular item or a particular pot of money, the holder of that judgment can claim the entire value of that pot or the entire value of that thing, even though the debtor has many other creditors and limited assets. This is so, of course, because the defendant never actually owned the item.

Second, because judgments for restitution are directly tied to specific things, changes in values of those things that occur after the wrongful act may accrue to the benefit of the original owner. If, for example, a defendant converts property that subsequently increases in value, the plaintiff in a suit for restitution might be able to recover the increase. This might not be so if the suit were brought for compensation.

The third advantage judgments for restitution enjoy over those for compensation is perhaps even more important than this ownership idea, and turns on the extraordinarily arcane notion of "tracing." The notion of tracing allows the holder of a judgment for restitution to trace or follow an unjustly reaped gain from one form to another. Thus, if the defendant was unjustly enriched by the acquisition of an object, and if that object is sold or otherwise converted into money, the holder of the judgment for restitution can trace or follow the thing to the money. That money itself becomes the object of the secured judgment. Thereafter, the holder of this judgment can take all of this money even though the debtor has numerous other creditors and limited assets.

Consider now the extraordinary implications of the differences just noted between judgments for compensation and judgments for restitution: Assume that Jones, by fraud, gets both Smith and Adams to sell her their Ming vases for $100 apiece. (Each vase is worth about $50,000.) Jones then sells the vases and buys a $100,000 Rolls Royce for her boyfriend. Later, Smith sues Jones in tort for a compensatory money remedy, and Adams sues Jones for a restitutionary money remedy based on "constructive trust" theory. Both Smith and Adams

20. Laycock, supra note 2, at 1291.
21. Id. at 1291-92.
22. Id. at 1291.
obtain judgments for $49,900. Smith's judgment, of course, is for his loss. Adams's judgment, however, is for Jones's gain. Then the problems begin. Jones's financial situation is bleak. She has no money. She owes various creditors approximately $100,000. Her house is completely encumbered with a mortgage. Finally, her boyfriend has taken up with a new woman, and won't give back the car.

What then happens with Smith and Adams? Smith, it should be recalled, has a judgment for a compensatory money remedy. Thus, she has, simply, a "debt" against Jones. However, since Jones has no assets available to pay her debts, Smith gets nothing. Further, even if Smith can somehow draw the now-missing car back into Jones's pool of assets, she would have to share the proceeds from the sale of that car with all of the creditors. Thus, Smith would only collect a few cents on his dollar. Adams, however, is in much better shape. He has a judgment for a restitutitory money remedy. He has, in effect, a "mortgage" against the specific thing (or money) that constitutes Jones' gain. Further, Adams gets to "trace" that gain into other forms, including the car now owned by Jones's former boyfriend. Ultimately, therefore, Adams may well get the entire $49,900 of his judgment and avoid the claims of Jones's other creditors.

Many judges, lawyers, and students might now argue that this discrepancy of civil remedies is illogical and unjust. In the foregoing situation, of course, the injuries incurred by Adams and Smith were identical, as were the gains reaped by Jones. Further, since in this situation losses equaled gains, the only real difference between the suits brought by Adams and Smith was the name assigned to the remedy sought. Thus, only a hyper-technical system of civil remedies, a system with no place in the modern world, would generate the different results described. Similar factual circumstances ought to generate similar remedial results.

Rules that create wildly different results in the remedies available within essentially identical factual circumstances are subject to criticism. Nevertheless, they are available to practitioners and their clients. Thus, regardless of the inconsistencies described, the rules of restitution and compensation, as noted, make the above hypothetical a real possibility, and the restituionary remedy a significant alternative.

IV. INTANGIBLES

One additional distinction between restitution and compensation now deserves extended comment. Rules regarding restitution and rules regarding compensation produce very different results in very similar circumstances in the context of "intangibles."

Compensatory money remedies deal with two conceptually distinct kinds of losses: tangible (or economic) losses and intangible (or non-economic) losses.23

23. For an interesting historical discussion of changing notions of "property," notions ultimately
Tangible (or economic) losses—which are sometimes called "pecuniary" losses—are losses that can be readily and precisely converted into money amounts. To be more precise, tangible losses have physical substance and are detectable to the senses. If, for example, Fretter must spend $5,000 to repair the damage to her car caused by Henderson, that $5,000 is an economic (or tangible or pecuniary) loss to Fretter. Likewise, if Prestige loses $10,000 on a forward contract because of a breach by Tacky, that $10,000 is an economic (or tangible or pecuniary) loss. Conversely, intangible losses (or non-economic losses)—which might also be called "non-pecuniary" losses—are losses that cannot be readily or precisely converted into money amounts. They are losses that do not have physical substance and are not detectable to the senses. If, for example, Fretter incurred losses due to "pain and suffering" in connection with the automobile accident just described, compensation for these losses would be of the non-economic (or intangible or non-pecuniary) type. Or, if the reputation of Prestige was seriously damaged by the words or actions of Tacky, the compensation for these losses would be non-economic (or intangible or non-pecuniary).

That compensation for non-tangible losses should be allowed is generally undisputed. Admittedly, agreement on this issue did not always exist. Further, some dispute exists even now as to whether some particular types of non-economic losses should be compensated. Tort reformers, for example, believe that limitations should be placed on a plaintiff’s ability to recover for pain and suffering. Also, certain kinds of intangible losses, such as those involving reputation and privacy are limited by constitutional restraints. And substantial differences of opinion exist regarding what is, and what is not, an


25. Dobbs, supra note 1, § 3.1.

26. Smith and Parr, supra note 24, at 78.


28. See Vandevelde, supra note 23.
intangible. In their book on valuation of intangibles and intellectual property, for example, Smith and Parr define intangibles quite broadly. Conversely, in his general treatise on remedies, Dobbs defines intangibles narrowly. Nevertheless, total agreement now exists: intangible losses can be compensated.

Regrettably, the same thing cannot be said about a comparable notion in the law of restitution. No agreement whatsoever exists as to whether remedies are available for intangible gains. However, this lack of consensus is not the product of scholarly discourse or well-reasoned dissension, but inattention. No traditional restitution cases have been found, for example, in which the notion of restitution for intangible gains was addressed. Further, none of the major commentators on restitution has specifically addressed this issue.

This is not to say, however, that restitution for intangible gains is not a viable remedy. In fact, as the following analysis will demonstrate, it should be granted. If restitution were granted for intangible gains, the restorative function of money remedies would duplicate the compensatory function.

Interestingly, the notion of restitution for intangible gains, though seemingly an obscure idea, has come up in three important areas of law: intellectual property, divorce, and corporations. Since these three areas, however, are

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31. Levmore has explored this discontinuity between rules dealing with compensation and restitution at some length. Levmore, supra note 4, at 70-72.
32. Jeanblanc, for example, does not touch on this point in his two important 1950 works on restitution. Jeanblanc I, supra note 4; Jeanblanc II, supra note 4. Likewise, Dawson skips over it in his important 1959 essay, John P. Dawson, Restitution or Damages?, 20 Ohio State L.J. 175 (1959), and Childres and Garamella miss it in their 1969 piece. Childres and Garamella, supra note 4. Further, Perillo, supra note 4, Levmore, supra note 4, Laycock, supra note 2, and Dobbs, supra note 1, all address the concept of restitution at length, but do not address restitution for intangible gains. Finally, and most significantly, even Wendy Gordon, whose recent series of essays on restitution surely constitutes the most provocative discussion to date of that topic, barely hints at the notion of restitution for intangible gains. Gordon, Of Harms and Benefits, supra note 4, Gordon, On Owning Information, supra note 4, and Gordon, An Inquiry, supra note 4.
33. Interestingly, terminology similar to the terminology used in this article has been used in areas other than these. Further, in other contexts ideas related to those discussed herein have been described. In these other contexts, however, the actual issues involved are different. Laycock notes, for example, that the remedy of "specific restitution," a remedy that herein is classified as a restorative act remedy, can be used to deal with intangibles. Laycock, supra note 2, at 1292-93.
outside the mainstream of the law of restitution, they have never been examined together.

Though the law of intellectual property is, by far, the largest repository of cases granting restitution for intangible gains, hardly any of the cases and commentary in that field actually discuss this issue. This lack of discussion is due to the well-established availability of restitution for intangible gains in this context. Intellectual property law deals with property that is, almost by definition, intangible. An idea, for example, is as intangible as anything can be. But much of the law of intellectual property is designed to protect the rights of the developer of ideas. Hence, claimants in this context routinely seek restitutionary remedies. Also, in intellectual property cases the gains to wrong-acting parties usually are easier to identify and calculate than the losses to the others. It is much easier to show, for example, that the company that stole an

Plaintiffs sometimes have personal or idiosyncratic reasons for valuing particular things. These plaintiffs might seek restoration of the particular things rather than the money equivalent of those things. These situations, however, principally focus on losses rather than gains. Hence, they do not deal with the topic addressed herein.

Anthony Waters recently advanced a new theory regarding the reasons that third party beneficiaries may have rights in contract situations. Waters, supra note 23. The rights of a third party beneficiary, Waters argues, are not really contractual rights at all. Rather, he suggests, they are a "restitutionary right to intangible property." Id. at 1199. This intangible property, according to Waters, is the right to the benefits of a promise. Although, superficially, Waters' ideas seem to be in alignment with the analysis in this paper, in fact no similarity exists. When Waters uses the term "restitution," he means what herein is called "compensation." In other words, in the terminology of the present analysis, third party beneficiaries have a right to compensation for injuries suffered in connection with a promise.

The notion of intangible gains or benefits also arises in cases and commentary dealing with the tort of "wrongful birth." In wrongful birth cases, a child is born due to medical negligence. (Typical of these cases are situations in which a child is born to a parent who has had a vasectomy or tubal ligation.) In these situations, courts often conclude that the intangible benefits to the parents of raising a child outweigh the losses caused by the negligence. See generally James M. Parker, Jr., Wrongful Life, 16 St. Mary's L.J. 639, 662-63 (1985).

Finally, the notion of intangible benefits or gains has been addressed by commentators remarking on judicial reasons for enforcing promises or requiring people to pay in contract situations. Farber and Matheson, for example, have noted that courts realize that at least some promises have non-quantifiable yet tangible benefits. Daniel A. Farber and John H. Matheson, Beyond Promissory Estoppel, 52 U. Chi. L. Rev. 903, 921 n.77 (1985). These intangible benefits can become, in effect, the consideration needed to make a promise enforceable. Further, several California cases have addressed the notion of intangible benefits in restitution cases. In Earhart v. William Low Co., 600 P.2d 1344 (Cal. 1979), the California Supreme Court, distinguishing an earlier case, suggested that relatively intangible benefits could satisfy the "direct benefit" requirement of California restitution law. In Elliott v. Elliott, 231 Cal. App. 2d 205, 41 Cal. Rptr. 686 (Cal. Ct. App. 4th Dist. 1964), the court concluded that a constructive trust—i.e., a restitutionary remedy—could come into existence even if the only benefit to the constructive trustee was intangible. In these cases, however, and in the cases Farber and Matheson discuss, the notion of providing restitution for the intangible gains themselves is not specifically addressed.

For an excellent discussion of intangible property generally, and intellectual property as a type of intangible property, see Smith and Parr, supra note 24.
idea gained $10 million by using it than it is to show that the company that had the idea lost $10 million due to the theft. Therefore, claimants in intellectual property cases routinely seek restitutionary remedies.

The point, of course, is this. Though the ideas about restitution of intangible gains to be described below may well be quite controversial, or even dismissed out of hand, in at least one very important area of law—intellectual property—total agreement exists.

Unfortunately, such uniformity of opinion does not prevail in connection with the second area of law in which the notion of restitution for intangible gains arises. Indeed, it is probably safe to say that in this second field—divorce law—most judges and lawyers hold that restitution should not be granted for intangible gains.

The issue of intangible gains in divorce law generally arises when one spouse slaves away at home or at a relatively low wage job for several years, enabling the other spouse to attend a professional school. Soon after the student spouse graduates from school, often quite soon thereafter, divorce ensues. Then, since this couple has not yet accumulated many tangible assets and since often no children exist, neither spouse gets much. However, the student spouse walks away from the marriage with a professional degree. The working spouse walks away with nothing, or relatively little.

The working spouses in this situation should seek restitution for intangible gains. From a functional perspective, a claim for restitution should be made in this situation because the gain to the student spouse—the value of an advanced degree and the value of a happy family—almost certainly exceeds the loss to the working spouse—the money equivalent of the work done. Strategic reasons also suggest using a claim for restitution in this context. As noted earlier, many claims for restitutionary money remedies, most notably claims for constructive trusts or an accounting, are claims "in equity" rather than claims at law. Hence, suits for restitution in this context potentially allow the working spouse to invoke all of the extraordinary powers of the so-called "equity" courts. Further, suits for restitution in this context might not be subject to the delays associated with


law remedies and allow for punitive damages. Finally, restitutionary claims carry with them "security" and "tracing." Hence, though a judgment for compensation in this context might simply get lost among all of the defendant's other debts, a judgment for restitution could allow the working spouse to get ahead of the student spouse's other creditors. This would be particularly important, of course, if the student spouse had limited assets and many creditors.

June Carbone, who has written extensively on marriage, divorce and restitution, perhaps best summarizes the rationale for thinking of alimony in restitutionary terms, and for allowing restitution for intangible gains in the context of divorce:

37

Restitution provides a way to acknowledge the contributions married women are continuing to make to childrearing and the accommodations inevitable in two-career families without a return to a system of life-long separation [for women] of home and [outside-the-home-work]. Under a restitution system . . . the prototypical award will go to a woman who interrupts a promising career to care for her children . . .

Near the end of her analysis, Carbone specifically makes the point addressed herein.

By focusing on the benefits rather than the debits of marriage, restitution offers the possibility of a different approach in symbolic as well as monetary terms. Under a true restitution system, alimony as a continuation of the guilty husband's duty of support, as a form of welfare for needy spouses, even as damages for injury inflicted or reliance misplaced would disappear. In its place would be a reaffirmation of both spouses' obligations to contribute to the benefits that the marriage made possible. Those benefits—children and, to a lesser degree, enhanced earning capacity or lifestyle—often will be intangible. . . . [R]ecognizing that the benefit conferred and retained after the divorce gives rise to the obligation will place divorce payments on a different footing. Such awards will be obligations, not charity, installment payments for benefits retained, not punishment and not antiquated remnants of an otherwise severed relationship.

38. Carbone, supra note 35, at 1493 (footnote omitted).
39. Id. at 1500-01 (footnotes omitted). Baker makes the same point in a similar way.

At marriage dissolution, courts attempt to divide a couple's valuable assets, but many commonly recognized sources of wealth, even if labelled as property, are very difficult to divide. Business goodwill, education, employment promotion, and future income streams are but a few examples of sources of wealth that courts are either reluctant to define as property or are unable to divide. These sources of wealth provide much of the economic security in the majority of marriages, and it is precisely these intangible benefits

37. Carbone, supra note 35. See also Carbone and Brinig, supra note 35; Cohen, supra note 35; Ellman, supra note 35; Kay, supra note 35; O'Connell, supra note 35; Scott, supra note 35.
38. Carbone, supra note 35, at 1493 (footnote omitted).
39. Id. at 1500-01 (footnotes omitted). Baker makes the same point in a similar way.
The notion of restitution for intangible gains has also arisen, albeit indirectly, in cases and commentary dealing with corporation law issues. *Dirks v. SEC*\(^4\) is the most important corporations law case dealing with the notion of intangible gains. Securities law, *Dirks* notes, creates liability for insider trading only if the insider, among other things, obtains a personal benefit.\(^4\) Though the securities laws focus on these benefits as the source of criminal liability, the law of civil remedies would clearly make them subject to restitutionary claims. Traditionally, the personal benefit that generated liability in this context was thought to encompass only quantifiable or economic gains. Thus, insiders were liable only if they personally reaped financial gain from the trading. *Dirks* suggested, however, that something else might be deemed a personal benefit. The majority suggested, for example, that "reputational benefit[s] that will translate into future earnings"\(^4\)\(^2\) and gifts of information to friends or relatives\(^4\)\(^3\) might well satisfy the personal benefit requirement. The dissent caustically stated that the foregoing language meant that "the good feeling of exposing a fraud" would constitute a personal benefit.\(^4\)\(^4\) Such things surely are intangibles.

*Dirks* spawned a host of cases dealing with insider trading and intangible personal benefits. Indeed, as Garten notes in her excellent discussion of this topic, the SEC pursued tippers who obtained personal benefits in the form of "friendship, sexual favors, desire to impress a celebrity or to obtain the good will of a professional colleague."\(^4\)\(^5\) Admittedly, the SEC has not prevailed in many of these cases. In fact, it is probably safe to say that, presently, a tangible, economic benefit is a prerequisite to liability in this context. Nevertheless, the issue of intangible gains in context of insider trading has clearly been raised, and the SEC still seems willing to pursue the matter.\(^4\)\(^6\)

The notion of restitution for intangible gains has also arisen in connection with the liability of corporate directors. Directors, some cases and commentators have recently suggested, may be liable for failure to respond to stockholders if those directors have reaped intangible benefits in connection with their failure to respond.\(^4\)\(^7\) Further, and perhaps more importantly, *Heckmann v.*...
Ahmanson suggests that intangible benefits might generate liability in the takeover context. In Heckman, "greenmail" was paid in order to attempt to avoid a takeover. The intangible benefit of "retention of control" of the company satisfied the personal benefit requirement of the law.

The notion of intangible gains has also arisen in the corporate context in connection with fee awards. In an important recent article, Block, Radin, and Schieffelin note that the Delaware courts have intimated that something other than loss to lawyers, i.e., hours expended, should be the controlling issue in fee cases. These writers suggest that Delaware courts are making inquiries into the gain to the litigants in determining damages, which would represent a move toward a restitutionary basis for fee awards. The article suggests that Delaware courts are beginning to question whether intangible gains to litigants are sufficient to justify large fees awards.

One additional point must be made about restitution for intangible gains, a point addressed directly in the fee cases just noted and in intellectual property cases, and indirectly in the corporate and marriage cases and commentary. The problem of "measuring" intangible gains is prevalent in all of these contexts. In one of the fee cases, for example, a fee award was reduced by more than fifty percent because the benefit achieved was "so highly speculative that no one has attempted to define its value." Likewise, all of the commentators on divorce issues in this context have noted how difficult it is to calculate the money value of the benefits associated with having, say, happy children, or a stay-at-home spouse, or an enhanced education. Finally, a host of commentary deals with valuation issues in intellectual and intangible property cases.

Interestingly, calculation problems come up in one of the very few comments in the mainstream literature of restitution. Wade squarely addressed the measuring problem as he stated:

A reasonably certain measurement of the enrichment is also needed. Thus, where the plaintiff saves the defendant’s life, it certainly would not be thought that the total value of the defendant’s life expectancy is the measure of the enrichment. There is, indeed, no accurate basis for measuring the benefit, and this may well be an important reason why courts have been slow to grant recovery in this situation.

921-24 (Del. Ch. 1987).
51. Id. at 310-11.
52. Id. (quoting In re Triton Group, Ltd. Shareholders Litigation, No. 11429, 1991 WL 33571 (Del. Ch. 1991)).
53. See, e.g., Smith and Parr, supra note 24.
54. Wade, supra note 4.
55. Id. at 1187 (footnote omitted). See also John P. Dawson, Rewards for the Rescue of
Wade's observation about the difficulty of quantifying the gain reaped from a saved life reveals the reason why courts outside of the field of intellectual property do not routinely award restitution for intangible gains. Intangible gains, Wade's comments suggest, are, by definition, difficult to quantify. Thus, since remedies necessarily require some quantification, the easy way out for courts is to simply deny restitution for intangible gains.

Inconsistency arises, however, because intangible losses are also, by definition, difficult to quantify. Nevertheless, as noted earlier, courts now routinely award remedies for intangible losses. In other words, the quantification problem that seemingly inhibits courts from awarding remedies for intangible gains does not trouble them whatsoever when it comes to awarding remedies for intangible losses. 56

V. CONCLUSION

If, as the foregoing analysis suggests, restitution for intangible gains should routinely be granted, then an overall chart of the classification system described herein would look like this. This chart, obviously, does not include the many sub-ideas flowing from act and declaratory remedies. Nor, of course, does it include sub-ideas flowing from the tangible/intangible dichotomy. Nevertheless, it provides a comprehensive picture of the ideas discussed in this article and places the separate ideas in their appropriate remedial context.

56. For an interesting discussion of measurement issues in connection with intangible losses, see Vinegrad, supra note 27.
The analysis then comes full circle. The paper began with several hypothetical situations. In the first of these, technical reasons prohibited a female employee and an African-American employee from recovery from a male manager who harassed them. In the second hypothetical, Pecs defrauded an elderly widow of a beautiful painting. She faced enormous delay if she sought a legal remedy though her age made time essential. In the third hypothetical, a university professor with limited assets but many creditors obtained the use for several years of beautiful resort property by mistake. In the fourth hypothetical, a manufacturing company consciously chose to develop a dangerous but highly profitable product believing it was immune from punitive damages. In the last hypothetical, a political figure plagiarized the work of a student assistant and reaped enormous reputational gains.

The plaintiffs in all of these situations should seek restitution as well as or instead of compensation for both functional and strategic reasons. Since, in all of those hypotheticals, the gains to the wrongdoers were at least equal to—and probably greater than—the losses to the others, restitution is the preferred remedy. Further, since in the race/sex harassment case, technical problems stood in the way of recovering compensation, a claim for restitution that might circumvent those technicalities is appropriate. Further, since in the fraud/painting case, delay was a major issue, the speed with which an “equitable” claim in restitution can be prosecuted is an important consideration. Similar strategic reasons for seeking restitution are prevalent in the resort property/mistake case. Arcane notions such as the mortgage-like nature of judgments in restitution and the doctrine of “tracing” might allow the plaintiff in this situation to collect his remedy despite the defendant’s limited assets and numerous creditors. The dangerous product case exhibits another strategic advantage of claims for restitution. As stated, such claims can serve as a back door method for obtaining punitive damages. Finally, in the politician/plagiarism case, the notion of governmental or sovereign immunity might limit the ability of the student to collect compensation for his loss. However, a claim for restitution might not be hindered by that doctrine.

Also, the potential plaintiffs in all of these hypothetical situations should seek restitution for intangible (or non-economic) gains as well as, or instead of, restitution for tangible (economic) gains. Intangible gains clearly arose in each of these cases. Harassers, after all, clearly reap enjoyment and pleasure from their acts. Further, people who come into the possession of beautiful homes or paintings clearly reap aesthetic pleasure. Likewise, individuals who experience exceptional success in business or politics undeniably reap tremendous emotional rewards.

Admittedly, measurement problems will arise if the claimants seek restitution for intangible gains. At first glance, these problems may seem insurmountable.

How can the sick pleasure reaped from sexual or racial harassment be quantified? Likewise, how can a dollar amount be placed on the value of a beautiful view or the opportunity to look at an exquisite painting? And how can the emotions associated with great success in business or politics be turned into dollar amounts? Two easy responses to these measuring problem exist. First, if courts can measure intangible gains in intellectual property cases—and courts do that all the time—then surely they can measure such gains in standard cases.58 Second, if courts can measure intangible losses in standard cases—and courts do that all the time—then surely they can measure intangible gains.

58. As noted earlier, Levmore has also explored this point about the discontinuity between rules dealing with compensation and restitution. Levmore, supra note 4, at 69-72.