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## IT'S NOT MY JOB!

*Michael B. Kelly\**

Where does Restitution fit in the law school curriculum? In what course should it be taught? There are at least three candidates: Remedies, Restitution, and Contracts. At a conference of Remedies teachers, one might expect me to expound the case for Remedies. However, as the title may suggest, I reach a different conclusion. Contracts offers significant advantages over the alternatives. I want to lay them out here.

First, let me define terms. By Restitution, I mean the cause of action for Unjust Enrichment, not merely the ways we might measure the benefit to the defendant when another cause of action justifies recovery. If we focus only on the remedial components of Restitution, the questions posed above are too easy: all of the above, plus some others. Any substantive course where a violation gives rise to a restitutionary remedy should address those remedies. Thus, Securities Regulation should address rescission for unregistered securities. A course covering criminal sentencing, where restitution often is a condition of probation, should address its brand of restitution.<sup>1</sup> Restitution should be mentioned in every context where it might arise.

The cause of action for Unjust Enrichment is not susceptible to such a facile answer. Securities Regulation covers a lot of ground, including statutory provisions allowing restitution. But taking time out to teach the general action for Unjust Enrichment diverts it from its normal goals. Similarly, a course covering criminal sentencing—where restitution means something quite different from Unjust Enrichment—is an odd place to cover a civil cause of action for

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1. Restitution here often resembles damages. A thief may be required not only to return the stolen goods, but also to pay the cost of repairs caused by forced entry.

Unjust Enrichment. Other courses with limited subject matter pose the same difficulties. Their coverage has a different focus. As a result, their casebooks have a different focus. We cannot expect these courses to cover Unjust Enrichment in anything more than a superficial manner. In fact, these courses would be more easily taught if students had some familiarity with Unjust Enrichment before coming into the course.

Second, let me suggest that the question matters. While I have no systematic evidence, my own experience suggests that many students manage to graduate with virtually no idea that Unjust Enrichment offers an alternative cause of action to Tort and Contract. If they know anything about Restitution, it is from Fuller and Perdue's article<sup>2</sup>—studied in Contracts—which treats Restitution as an interest that might provide a measure of recovery in an action for breach of contract. Having no formal exposure to Unjust Enrichment, they may not (no, I did not) spot the issue in cases where it offers the most direct claim for relief.<sup>3</sup> Teaching students—as many students as possible—about the existence of this cause of action seems vital.

At this point, it may seem that I have defined my way to the conclusion. Once I posit that every student needs exposure to Unjust Enrichment, of course it must be included in a course that all students take (probably because they are required to take it). Of the three alternatives identified, only Contracts fits that description.

Universality is part of my argument. The key problem with teaching Restitution as a separate course is that relatively few students elect it. We can dream about making Restitution a required course—maybe in the first year, to coincide with Contracts and Torts. But as a practical matter, Restitution seems likely to remain an upper-class elective course. We can discuss ways to encourage students to elect it, such as testing it on the bar exam (a strong incentive in some states) or providing better counseling as students make course selections. However, these efforts, even if undertaken with energy (far from a given), will fall short of introducing Restitution to all or even most students. The same might be said of

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2. See Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 54–55, 60–61 (1936).

3. My suspicions are shared by others. See Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1195–96 (1995).

Remedies, though the case is closer. Remedies is tested on some bar exams, creating an incentive for students to take it. Large enrollments are common, at least at some schools.<sup>4</sup> This approaches the goal of universal exposure to the concepts of Unjust Enrichment—if Remedies courses deal with Unjust Enrichment. Still, many schools either do not offer Remedies or do not promote it as an essential part of a student's education. Thus, Contracts would hold an advantage if universality were the only goal.

Yet the argument cannot rest there. We could achieve universality by teaching Restitution in Civil Procedure or any other required course. If the link between Contracts and Restitution is no greater than the reference in Fuller and Perdue,<sup>5</sup> then the arguments applicable to Securities Regulation and Criminal Procedure would apply to Contracts as well. At that point, Remedies and Restitution would have the upper hand. At least in these courses, Restitution is part of the core of the subject—it holds an undeniable claim to significant coverage.

This Article seeks to establish that the claim is just as strong, or even stronger, in Contracts. Restitution—not just the remedy, but the cause of action for Unjust Enrichment—is integrally tied to the action for breach of contract. Understanding Restitution is critical to understanding Contracts—or, at least, the two actions interact at so many different points that discussing Restitution in the Contracts course is as natural as discussing Sales (Article 2 of the UCC) in the course. Teaching section 2-207 (the UCC's innovative revision of the mirror image rule) is no more closely related to offer and acceptance than Restitution is related to contract defenses and half a dozen other issues central to the Contracts course. That claim, not the claim to universality, provides the foundation for my contention that Restitution should be taught in Contracts.

One further preliminary consideration seems in order. The argument relies on a definition of Restitution that does not exclude contract rescission. Andrew Kull has proposed such an exclusion.<sup>6</sup> However, I disagree. Rescission of a contract usually fits comfortably within Unjust Enrichment as Kull defines it. We may

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4. At the University of San Diego, we typically offer three sections each year. About three-fourths of the students elect the course.

5. See Fuller & Perdue, *supra* note 2, at 71–75.

6. See Kull, *supra* note 3, at 1219–20.

wish to limit the occasions when rescission may be granted. I share Kull's concern for allowing rescission when enforcing the contract seems more appropriate—as when a party who has nearly completed performance seeks to rescind the contract, usually as a means of obtaining a better deal than the one negotiated in the contract.<sup>7</sup> However, this problem suggests that material breach should not be a basis for rescission, not that rescission falls outside Unjust Enrichment.

Unjust Enrichment sits at the center of rescission. A party rejects the contract (for any valid reason), offers to return any benefits received under the contract, and requests the return of any benefits bestowed under the contract. This last point is critical. Plaintiff seeks to recover the benefit received by the defendant from the plaintiff. This is a straightforward definition of Restitution—not just restoration,<sup>8</sup> but Unjust Enrichment. The defendant has been enriched at the expense of the plaintiff, having received performance from the plaintiff. Plaintiff seeks to recover the amount of the enrichment. The focal point of the dispute is whether the enrichment was unjust.

Of course, it is not unjust to retain the benefit of a contract, any more than it is unjust to retain a gift or benefit provided by a volunteer. No obligation to compensate the person providing the benefit (aside from the compensation specified in the contract) arises in either context. Thus, a contract might establish a defense to a claim of Unjust Enrichment, where it established a right to keep the performance. Grounds for rescission negate the claim that the defendant has a right to retain the benefit by negating the contract itself. Rescission is nothing more than the judgment that the contract does not create a right to retain the benefit. Wiping out the contract

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7. See Andrew Kull, *Restitution as a Remedy for Breach of Contract*, 67 S. CAL. L. REV. 1465, 1467 (1994).

8. Kull treats rescission in the course of discussing remedies that provide restoration when the underlying rationale falls outside Unjust Enrichment law. See Kull, *supra* note 3, at 1219–22. I do not think that the argument here undermines the larger position Kull stakes out in the article. I accept Kull's position that Restitution focuses on Unjust Enrichment. We differ, if at all, only in that I believe rescission involves Unjust Enrichment, putting it near the core of Restitution, not on the sidelines with remedies that provide restoration without Unjust Enrichment.

does not establish a right to recovery; it simply removes an impediment to the action for Unjust Enrichment.<sup>9</sup>

Is this just a facet of contract law? One could try to define it as such. Kull does so in an effort to preserve the conceptual clarity of Restitution.<sup>10</sup> Yet to preserve the conceptual clarity of Contract, the opposite result seems justified. Contract, too, has a central organizing premise: the law of voluntarily agreed exchanges.<sup>11</sup> Contract law speaks to the legal consequences of breach of an enforceable agreement.<sup>12</sup> It addresses unenforceable agreements only to define them out of the law of Contracts. Once defined away, Contracts has nothing more to say about the rights and wrongs of partial performance.<sup>13</sup> Courts that enforce contract law also enforce tort law, property law, and Unjust Enrichment. A claim for how to handle a rescinded contract may arise in any of those contexts; however, it is not Contract.

Restitution, on the other hand, provides an easy explanation for the result. The measure of recovery is the benefit bestowed—not as a volunteer, but under color of a contract, though a contract that ultimately does not establish the just position between the parties.<sup>14</sup> This is not some aberrant transformation of Unjust Enrichment principles, but an ordinary application of them.

If that point is valid, then Restitution runs throughout Contracts. The easiest place to start is not with contract remedies, but with contract defenses. Duress, undue influence, mistake, misrepresentation, and incapacity all provide grounds for rescission. That is, they arise not only when a breaching party is sued and seeks to defend the contract action with these defenses, but also when the breaching party seeks compensation from a non-breaching party for

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9. See Kull, *supra* note 7, at 1466–67.

10. See Kull, *supra* note 3, at 1197–98.

11. See RESTATEMENT (SECOND) OF CONTRACTS § 71 (1979).

12. See Kull, *supra* note 7, at 1466–67.

13. Contract law does not govern the resolution of agreements that are not contracts (no matter how close) any more than criminal law governs the resolution of wrongs that are not crimes (no matter how close) or defamation law governs the resolution of statements that are not defamation (no matter how close). Conduct may be legally actionable even if it does not breach a contract, violate a criminal statute, or constitute defamation. However, in each case, the legal consequences are governed by other principles, independent of those the conduct did not implicate.

14. See Kull, *supra* note 7, at 1466–67.

the benefits bestowed under a voidable contract.<sup>15</sup> Without an action for rescission, fraudfeasors (for example) could avoid any liability simply by obtaining the victim's performance up front. The perpetrator will not need to sue the victim, so the defense will be unimportant. Only if the ground for rescission permits the victim to sue the fraudfeasor will justice be available. Thus, whenever the contract should not be enforced, the law needs a cause of action for Unjust Enrichment.

Teaching contract defenses without mentioning actions for rescission seems unnatural. It could be done. Books could limit themselves to cases where the victim was sued on the contract. Professors could avoid mentioning the alternative: that the victim might need to sue the other party. Such willful blindness to one way—perhaps the primary way—defenses arise requires some justification. The possibility is there, begging to be raised and it would be strange to ignore it. Once the rescission claim is raised, can it possibly be explored adequately without noting the cause of action for Unjust Enrichment that forms the basis for the claim?<sup>16</sup>

Like all rhetorical questions, this one deserves a little attention. One might assume that rescission here really belongs in Torts. Misrepresentation can be a tort, wherein a refund would be part of the damages. Duress, too, could be a tort. Incapacity and Undue Influence might be addressed in Property or another course that deals with wills. Contracts instructors could hope that Unjust Enrichment would be addressed in these other courses, as an adjunct to these lessons. There are pragmatic objections here: other courses may omit the topics;<sup>17</sup> if covered, each instructor may expect another to cover Unjust Enrichment. Communication might overcome these concerns. But the connection between Contracts and Restitution is

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15. *See, e.g.*, *Britton v. Turner*, 6 N.H. 481 (1834) (holding that the plaintiff, who agreed to work for one year but left after nine months without the defendant's consent, was entitled to recover a reasonable sum for the services he actually performed).

16. Even if Kull is right and rescission is not a claim for Unjust Enrichment, the similarity between Unjust Enrichment and rescission might deserve note. That similarity could be explored—and Unjust Enrichment distinguished—only if students received some grounding in Unjust Enrichment. So perhaps my argument is not as dependent on the definition as I first thought.

17. Torts often omits Misrepresentation or covers it quite quickly. Property may spend relatively little time on wills.

more pervasive than just the defenses. The full inter-relationship, once recognized, should overcome the relatively weak claim that Torts or Property might cover Unjust Enrichment as it relates to these defenses.

Restitution also plays a role when discussing contract formation. When one party claims it did not assent to a contract, a similar problem arises. Where the objection is raised before either party has begun to perform, restitution is unnecessary. However, once either party has conveyed even part of the consideration, refusing to enforce the contract (based on the absence of assent) does not end the matter. The recipient has no claim to retain the benefits of part performance without compensating the provider.<sup>18</sup> One could teach assent without confronting this component, focusing on cases where either there has been no performance or there was assent. Yet again, the abdication seems unnatural. Having raised the issue of assent, how do we justify ignoring the ramifications of that issue? Not, I think, by assuming another course will deal with it. No action for breach of contract will permit recovery, since the contract is unenforceable (it never arose). No tort exists—refusal to assent is not a tort, in most instances. One might place the restitution claim in the Property course—a non-donative transfer that did not convey good title.<sup>19</sup> However, again, the possibility that Property will cover it offers a relatively weak reason to ignore the issue in Contracts.

The absence of consideration poses an equally important context. When an agreement fails for want of consideration, partial performance may require a restitutionary recovery.<sup>20</sup> Again, Contracts teachers could ignore the implications by avoiding cases involving partial performance. More commonly, the problem is relegated to promissory estoppel, where reliance creates a claim for enforcement.<sup>21</sup> In this manner, a claim for restitution might recede. But what about the estoppel claim that fails, say because the promisor had no reason to expect reliance of this sort?<sup>22</sup> Restitution remains the primary way to deal with the failed contract. Again,

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18. See Kull, *supra* note 7, at 1468–71.

19. See Christopher T. Wonnell, *Replacing the Unitary Principle of Unjust Enrichment*, 45 EMORY L.J. 153, 196–204 (1996).

20. See *id.*

21. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

22. See *id.*

unlike the defenses, other courses seem unlikely to address the material.

Consideration is important for another reason. Most books discuss the exception for moral obligation.<sup>23</sup> That is, where a promisor has already received a benefit from the promisee and makes the promise out of a sense of moral obligation to compensate the promisee for the benefit, the promise is enforceable.<sup>24</sup> The restitutionary basis of this exception is patent. Indeed, one wonders why the promise is necessary at all; a benefit from promisee to promisor might justify recovery without a promise. The exception is less an exception to the requirement of consideration and more an exception to Restitution rules that might reject or limit recovery. For instance, the most famous case involves a rescuer who saved his employer from a large pine block thrown from an upper-story window (by the rescuer).<sup>25</sup> Some courts might limit recovery to health care professionals, where fees are more easily established and where the expectation of compensation more credible.<sup>26</sup> In effect, these rules call this rescuer a volunteer. The promise makes room for Contract law to provide a remedy even if Restitution would not. Contracts teachers could teach that exception without discussing the cause of action for Unjust Enrichment, but the lesson is so much fuller placed in context of Restitution.

The statute of frauds offers another example. Perhaps the discussion simply repeats the points raised above. Though taught in chapters on formation or formality, the statute resembles the defenses. It arises when both parties initially expected a contract, but where one has changed her mind and now pleads the statute as a justification for nonperformance.<sup>27</sup> Contracts again spends a good deal of time discussing the extent to which reliance justifies enforcement (at least compensation for the reliance interest) in these

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23. See, e.g., E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, CASES AND MATERIALS ON CONTRACTS § 4 (The Foundation Press, Inc. 5th ed. 1995).

24. See RESTATEMENT (SECOND) OF CONTRACTS § 86.

25. See *Webb v. McGowin*, 168 So. 196 (Ala. Ct. App. 1935), *cert. denied*, 168 So. 199 (Ala. 1936).

26. See RESTATEMENT (SECOND) OF CONTRACTS § 86(2)(a) (denying compensation where the promise "conferred the benefit as a gift or for other reasons promisor has not been unjustly enriched."); Fuller & Perdue, *supra* note 2, at 74.

27. See RESTATEMENT (SECOND) OF CONTRACTS § 110.

cases. However, the restitution claim preceded the reliance claim and does not suffer from many of the problems the reliance exception poses.<sup>28</sup> Even if reliance does not justify an exception to the statute (either generally or in the specific case), recovery for restitution would follow. No gift was intended, no contract gave a right to retain the benefit, so retention would enrich the defendant unjustly. Again, we could ignore this component in the Contracts course but it seems vain to hope that any other course will address this uniquely contractual twist.

It may seem as though I am making the same point over and over. If, for any reason, a contract is not enforceable, partial performance may give rise to a claim for restitution.<sup>29</sup> The specific reasons—defenses, assent, consideration, statutes—may not seem to make the argument any stronger when repeated. In fact, they do. Each context involves a different chapter of the typical Contracts casebook. Having located Restitution in the chapters on Assent, Consideration, and Defenses, the pervasiveness of Restitution's role in Contracts begins to emerge. Restitution is not just a single point in a big course. Rather, it is a background matter lying behind nearly every chapter in the book. Indeed, the decision about whether to stretch the law of Contracts to cover situations plausibly but not squarely within Contract law may depend in part upon the availability of other legal doctrines to provide just compensation if Contract is not extended. Thus, understanding Unjust Enrichment may help students understand some of the reluctance to enforce borderline agreements that courts sometimes display. Nor is Restitution's influence limited to the situations where contractual obligations do not exist. Even once the validity and enforceability of a contract are acknowledged, Restitution continues to arise.

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28. The point of this Article does not require a full discussion of how a robust exception for reliance threatens erosion of the statute bordering on repeal. Here, let me simply note that the message of the statute—"get it in writing before you rely"—differs substantially from the message of the exception for reliance—"rely immediately to avoid the requirement of a writing." Compare RESTATEMENT (SECOND) OF CONTRACTS § 110, with § 139. This characterization naturally omits many nuances, mostly related to the reliance interest rather than to Restitution. To avoid turning this Article into yet another tirade against reliance, I will leave these nuances unexplored.

29. See Kull, *supra* note 7, at 1468–71.

Consider the issue of material breach as an excuse for nonperformance of a contract. This issue does not involve the validity of the obligation *ab initio*. Rather, it arises when a party seeks to avoid obligations under an admittedly enforceable contract.<sup>30</sup> When material breach precedes performance by the non-breaching party, no restitution is required.<sup>31</sup> A declaration that the contract no longer requires performance is all the party requires. Where partial performance has already occurred, however, the non-breaching party may require compensation. Restitution provides a (controversial) means to provide that compensation. The outline of the argument was identified above: Plaintiff seeks return of the performance rendered under the contract, defendant claims a contract entitlement to keep the performance, plaintiff replies by arguing that the breach justifies rescission, destroying the claim under the contract. If the reply succeeds, the remedy is to make defendant pay plaintiff for any benefit already received—not necessarily at the contract price, but at the fair market value of the services.<sup>32</sup>

The remedial issue here drives the entire controversy over material breach. The law could decree that any breach justifies termination of the contract by the non-breaching party. Yet if it did, that would invite parties to cancel contracts whenever the market had changed in their favor. Where services today are worth more than the contract price, plaintiff would seek rescission, even on the most insignificant of breaches. Restitution would exceed the contract price, allowing the non-breaching party to recapture a benefit initially bargained away: the right to charge more if the market price changed. The requirement of a material breach arises almost entirely from concern that parties might act strategically, canceling contracts for petty reasons, and perhaps even inducing the other party to breach in order to take advantage of the right to cancel and seek

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30. See RESTATEMENT (SECOND) OF CONTRACTS § 237.

31. See *id.*

32. Where a contract is divisible, a court may order payment of the contract price for the portion of the performance that has been received and cancel only the portions that were not performed. See *id.* § 240. Where the contract cannot easily be divided into corresponding pairs of part performances that can be taken as agreed equivalents, division is impossible. Plaintiff may recover the fair market value of the performance today, measured either by the amount defendant was enriched by the performance or the amount defendant saved by not having to pay someone else to provide the performance. See *id.* § 371.

restitution instead of expectation.<sup>33</sup> Here, more than ever, the Contracts course needs to establish Restitution as the backdrop for the doctrine. Without it, the doctrine itself is harder for students to understand and apply.

At the risk of reiterating the argument in a context only slightly different, let me raise impracticability and frustration as yet another example. Here again, the contract is valid initially. Subsequent events excuse performance under the contract—just as a material breach excuses performance. Yet, the right of one party to suspend or cancel performance based on impracticability or frustration will not end the issue if the other party has already performed part of the contract and has not yet been compensated for that performance. Absent a divisible contract, the party must rely on Restitution as the basis of her claim.<sup>34</sup>

You will notice that I have not yet discussed Restitution in the context of a remedy for breach. The restitution interest identified by Fuller and Perdue<sup>35</sup> arises in yet another chapter. There, it serves as a possible remedy when neither defense nor excuse arises.<sup>36</sup> I saved this for last in part because I think this application really duplicates the other aspects covered above. Restitution is not, in fact, a remedy for breach of contract. To put plaintiff in the position she would

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33. Material breach may not go far enough. By allowing rescission for breach in some cases, the problems can arise, especially where rescission would produce a recovery in excess of damages for breach. Kull's masterful analysis of these issues needs no elaboration here. *See* Kull, *supra* note 7.

34. In this context, I find Kull's argument that the issues really fall within Contracts, not Restitution, more persuasive. He states that the real issue is interpretative: whether the contract, expressly or by implication, makes it just for the person who received the performance to keep it. *See* Kull, *supra* note 3, at 1209–10. Yet it seems to me the interpretation is still aimed at the defense, not the claim. One party seeks to recover an unearned benefit, the other claims a contract right to the benefit. Contract law governs the legitimacy of the asserted defense, but, if the defense fails, Unjust Enrichment provides the basis for recovery. Unlike rescission for invalidity, an interpretation of the contract could provide the basis for recovery. If great portents turn on whether we infer a clause requiring return of unearned performance or simply negate a defense against a general principle requiring the return of unearned performance, I will not quibble. I maintain at least, however, that understanding Restitution will help students understand the choices Contract law makes here, even if the choices should not be ascribed to Restitution law directly.

35. *See* Fuller & Perdue, *supra* note 2, at 71–75.

36. *See id.*

have occupied if the wrong had not occurred requires expectation recovery, not restitution.<sup>37</sup> If the wrong—the breach, that is—had not occurred, plaintiff would not have recovered the fair value of her performance, but the contract rate. Any restitution in excess of expectation can be justified only if the contract is eliminated as the proper measure of recovery. That, in turn, requires a basis for rescission. When seeking restitution for breach, that typically means plaintiff must show a material breach.<sup>38</sup> Plaintiff then elects to cancel the contract and recover the amount of Unjust Enrichment. This election of remedies is not merely a technicality. It explains why the breach produces a recovery that leaves the plaintiff better off than if the contract had been performed. Of course, contract law could eliminate this feature; it could limit recovery to the expectation interest, regardless of restitution. That, in effect, rejects material breach as a ground for rescission, a perfectly plausible doctrine. In so doing, we would wipe restitution from the Remedies chapter and, perhaps, from the chapter on material breach, but not from the other chapters.

Of course, the best books include more than just restitution for breach. They include restitution sought by the breaching party.<sup>39</sup> Here again, it is awkward to explain why the breaching party deserves any recovery at all without introducing the cause of action for Unjust Enrichment. Defendant did not breach, so it cannot be a contract claim. Defendant committed no tort either. The breaching party's only claim is to benefits bestowed (but not compensated) prior to the breach (after accounting for any losses the non-breaching party suffered as a result of the breach).

My claim here is not that Restitution should be taught anew in each of these chapters. Rather, I contend that Unjust Enrichment arises in so many portions of the Contracts course that the cause of action should be introduced at the outset of the course. This could be done in the traditional case method, laying out a few Unjust Enrichment cases and socratically helping students to identify the (existence and) components of the cause of action. Once the fundamentals are established, students (with or without cues from the

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37. *See id.*

38. *See* Kull, *supra* note 7, at 1468.

39. *See, e.g.*, RANDY BARNETT, *CONTRACTS: CASES & DOCTRINE* (Aspen 2d. ed. 1999).

professor) may recognize Restitution when it arises in later chapters. They will be armed to discuss these issues on a much more sophisticated level whenever the professor elects to make the Restitution aspects explicit. When the professor elects not to be explicit, at least the students have the tools to sort out claims based on part performance.

On this take, Remedies may be the third best world for teaching Unjust Enrichment. A course in Restitution might be best, if we could get enough students to take it.<sup>40</sup> A course in Contracts is an excellent place to teach Restitution, independently of the fact that everyone takes the course. We teach it in Remedies largely because we cannot rely on Contracts professors. Rather than let Restitution fall through the cracks, we take the onus upon ourselves to teach the cause of action for Unjust Enrichment.

I want to conclude by noting how odd this is. I think Remedies occupies much the same position as Securities or Criminal Procedure when it comes to teaching Unjust Enrichment. Remedies is not about causes of action. We do not teach liability rules covered in Contracts or Torts, except peripherally. We do not teach liability on copyrights or § 1983, either—and we should not. Our cases and our lessons focus on how to provide an appropriate remedy, given that liability has been established under whatever rules govern. We cannot avoid liability issues entirely. Some discussion of the wrong is inherent in applying the standard of putting plaintiff where she would have been had the wrong not occurred. Yet we do not see Remedies as the course where students should learn liability rules. Restitution is the one exception we make—if we make any at all—and we make it reluctantly. We make it only out of fear that Restitution, the remedy, cannot be taught unless students understand Restitution, the cause of action (a.k.a., Unjust Enrichment). If only to avoid the confusion of having two different animals identified by the same name, we must address the issue in some way.

Perhaps all I have done is to set forth a grievance against Contracts teachers. This is the wrong audience in which to voice a call for reform among Contracts teachers. Yet our fear that Restitution may fall through the cracks remains justified until

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40. Other courses offer somewhat more opportunity to contrast Restitution with similar doctrines, but that argument might justify teaching Contracts in the Torts class, a fate I do not seek.

Contracts courses really do include significant discussion of Unjust Enrichment. I do not propose that Remedies professors change practices until our Contracts professors change theirs.<sup>41</sup> Contracts professors, pressed by reforms that reduce the number of credit hours for the course and/or assign responsibility to cover Sales in addition to Contracts generally, may find it increasingly difficult to alter their courses in the manner proposed here. So perhaps this Article simply bemoans the realities of life at a law school.

Or possibly a few Contracts professors may read this Article. Many may already be doing just what I describe—perhaps at your school, where a little communication will usher in a better day. Perhaps we should continue to teach Unjust Enrichment as a review, for people who missed it the first time around.<sup>42</sup> At the very least, I hope that identifying the close relationship between Contracts and Restitution helps us focus our teaching of Unjust Enrichment. Some argue that Restitution enforces Contracts that people should have made (but did not make).<sup>43</sup> While rejecting that view, I nonetheless think the close ties between Contracts and Restitution are an important component of any discussion of Restitution.

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41. This can be done on a school-by-school basis. Once the Contracts professors at Washington and Lee respond, the Remedies teachers here can adjust, even if the Contracts professors at the University of San Diego never catch on. The number of transfer students is sufficiently small not to let potential gaps there drive our practices.

42. Students often are counseled to take Remedies in their final semester because it serves as a review of Contracts, Torts, and other courses taken earlier. I find the advice both annoying, since I do not want to teach a review of Contracts and Torts, and unimpeachable, because cases in Remedies books often do raise a number of contract issues that serve to reinforce lessons introduced during the first year.

43. Conversation with Christopher T. Wonnell, Professor of Law, University of San Diego School of Law (Oct. 2000).