1983

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APPLYING RESTITUTION TO REMedy A DISCRIMINATORY DENIAL OF PARTNERSHIP

Candace S. Kovacic*

I. INTRODUCTION

Despite saying that discrimination in any form must not be tolerated, the United States Court of Appeals for the Eleventh Circuit has held that a federal statute prohibiting employment discrimination on the basis of sex does not apply to a large law partnership's decision whether to elevate an associate to partner or to ask her to leave the firm.1 The effect of this decision is to give partnerships the right to discriminate in the selection of partners without violating federal law, although, according to the Eleventh Circuit, the law firm might be liable under a state contract or misrepresentation action. Contract and tort damages, however, may not provide a plaintiff with an adequate remedy because the damages may be either speculative or nominal. If federal law is inapplicable and contract and tort damages are inadequate, one is initially left with a sense of injustice that there has been an injury without a remedy.

To induce well qualified lawyers to join their firm, partners of a large law firm often tell prospective associates that if they join the firm, they will be eligible to compete for partnership—they will be on the “partnership track.” This assurance of eligibility is a material promise by the firm to those associates who would not join the firm without that promise and to those who work exceptionally long hours, not only because they want to do well professionally, but also because they are competing for partnership positions for which they are assured they are eligible. When a law firm discriminates on the basis of sex, race or religion in the selection of part-

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ners, the law firm breaks its promise that the associate was eligible to compete for partnership and ignores the diligent work of the associate that was materially motivated by that promise.

The law firm also pockets a benefit from that associate. The firm typically bills the hours that an associate works on various client matters to those clients at an hourly rate. The proceeds from the "billable hours" are generally substantially higher than the salary, related overhead, and other benefits the associate receives at the firm’s expense, particularly if the associate is industrious and working to become a partner. For example, if an associate bills 1600 hours per year for six years before a discriminatory denial of partnership, the benefit to the firm, after deduction of salary and related overhead may be $270,000. If an associate is extraordinarily hard working and bills 60 hours a week for 48 weeks per year for six years before a discriminatory denial of partnership, the benefit to the firm, after deduction of salary and related overhead, may be more than $800,000.

There is an action, not always well understood and as a result sometimes underutilized, that will remedy this type of injustice. That action is restitution, or liability based upon unjust enrichment. Restitution is independent of federal law and provides a remedy different from typical tort and contract damage remedies.

Under restitution a defendant is required to disgorge the benefit that the defendant received at the plaintiff’s expense when the defendant’s retention of the benefit would be unjust. A material breach of contract, such as the breach of a promise of eligibility to compete for partnership, is one of the situations for which recovery in restitution is granted. Discrimination itself could be another. An action in restitution, unlike an action under the federal anti-discrimination statute as interpreted by the Eleventh Circuit, permits a plaintiff to conduct discovery and attempt to prove that she was discriminated against on the basis of sex, race, color, religion or national origin and, therefore, that the partners failed to keep their promise that she was eligible for partnership.

If she succeeds in this proof and also proves that she would not have joined the firm but for the promise of eligibility, the partnership would not be entitled to retain any benefit. It would there-

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2. See infra Table 1, p. 777.
3. See infra Table 3, p. 778.
Restitution and Discrimination

fore have to disgorge the value of her billable hours after deducting the value of salary and related overhead. If she proves she would have joined the firm but would have worked fewer hours, the firm would have to disgorge its benefit from the extra hours worked. If no discrimination in the denial of partnership is proved, then the defendant did not breach its contract with the associate and would be entitled to retain the benefits from that contract. These would include the benefit of the work of the associate who was rejected for partnership for reasons other than ineligibility because of sex, race, color, religion or national origin.

The purpose of this article is to demonstrate that restitution is an appropriate action to remedy a discriminatory denial of partnership. This article assumes a plaintiff can prove discrimination. Thus, the article does not include in its scope a discussion of how to prove discrimination. Part II of this article will discuss why federal law is currently inapplicable in one circuit and why contract and tort damage actions are inadequate to remedy this discrimination, thus demonstrating that an action in restitution is important. Part III of this article will describe how restitution can remedy such discrimination, discussing the general principles of restitution, why it is underutilized, and its advantages. Part IV will apply the three major elements of restitution to a discriminatory denial of partnership: (1) the defendant received a benefit, (2) at the expense of the plaintiff, (3) which would be unjust for the defendant to retain.

The analysis of this article is equally applicable to discrimination on the basis of sex, race, color, religion or national origin. Because the case in the Eleventh Circuit involved sex discrimination, this article will discuss the issue in terms of sex discrimination. The analysis will also apply to any business with benefits analogous to those gained by law firms from the associate's billable hours.

The Supreme Court of the United States has granted a writ of certiorari to review the Eleventh Circuit's judgment. If the Supreme Court affirms the judgment and holds that federal law is inapplicable to partnership decisions, the theory described in this

4. See infra notes 9-60 and accompanying text.
5. See infra notes 61-125 and accompanying text.
6. See infra notes 126-208 and accompanying text.
article is useful because it provides plaintiffs with an alternative state law action. If the Supreme Court reverses the judgment and holds that federal law is applicable to partnership decisions, this theory is still useful in two ways. First, it provides a plaintiff with a pendant state cause of action. The pendant action is useful because it provides relief if a plaintiff can prove she was discriminated against in the partnership decision by not being considered for partner because she is a woman or by being considered more stringently than a man. Under Title VII of the Civil Rights Act of 1964, if a plaintiff seeks an injunction ordering that the law firm make her a partner, she may have to prove not only discrimination in the selection process, but also that she would have been made a partner but for the discrimination. Second, restitution might be an appropriate remedy in a Title VII action.

II. THE NECESSITY OF RESTITUTION TO REMEDY A DISCRIMINATORY DENIAL OF PARTNERSHIP

A. Hishon v. King & Spalding: Title VII Does Not Apply to Partnership Decisions

In Hishon v. King & Spalding, Elizabeth Hishon brought suit against a law firm, King & Spalding, claiming that the firm's decision not to promote her to partnership was based upon sex discrimination in violation of Title VII of the Civil Rights Act of 1964. Hishon had accepted a position as an associate with King &
Spalding in 1972.11 Approximately six years later, in May, 1978, the partners of King & Spalding “decided not to invite her to join the partnership” in the 100 lawyer firm.12 As a result of that decision, which Hishon claimed was based on sex discrimination, King & Spalding required Hishon to leave the firm after a reasonable time to find other employment.13 After receiving this decision, Hishon filed a sex discrimination claim with the Equal Employment Opportunity Commission. The Commission issued a notice of right to sue and Hishon filed a complaint in district court.14 King & Spalding moved to dismiss Hishon’s suit pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure “on the ground that in selecting partners the defendant is not subject to Title VII . . . .”15 The district court granted the law firm’s motion to dismiss.16

On June 17, 1982, the Eleventh Circuit in Hishon stated that “discrimination in any form must not be tolerated.”17 Ignoring its all inclusive prohibition, however, the Eleventh Circuit, by a vote of two to one, affirmed the district court’s judgment. The court held “that Title VII does not apply to decisions regarding partnership.”18 The basis for the majority’s holding was that a partnership is a “voluntary association.”19 The dissenting judge on the Elev-
enth Circuit’s panel would have held that Title VII applies when the “direct consequence” of a decision not to elect an associate into membership in the partnership was, as here, “to terminate her employment” although he agreed that “Title VII would not apply to the discrete decision whether to take on a new partner,” such as “invitations to lawyers who were not associates in the firm.”

As a result of the Hishon case, unless it is reversed by the Supreme Court, Title VII cannot be used in the Eleventh Circuit to prevent or remedy discrimination in partnership decisions by law firms.

Title VII does prohibit law firms from discriminating in the initial hiring of associate lawyers. It is extraordinary that Title VII could be interpreted to require law firms to consider without discrimination applicant lawyers for a job that will end after six years because of discrimination. The Eleventh Circuit’s opinion conflicts with a district court opinion in the Eastern District of

“Even under the most liberal reading we cannot find the requisite congressional intent to permit Title VII’s intervention into matters of voluntary association.” Hishon, 678 F.2d at 1026.

In rejecting Hishon’s first argument, the Eleventh Circuit said:

We find a clear distinction between employers of a corporation and partners of a law firm. In making this distinction, we do not presume to exalt form over substance. In this instance, however, the form is the substance, and we are unwilling to dictate partnership decisions under the guise of employee promotions protected by Title VII. The very essence of a partnership is the voluntary joinder of all partners with each other.

Id. at 1028. In rejecting appellants second argument, the Eleventh Circuit said: “[W]e decline to extend the meaning of ‘employment opportunities’ beyond its intended context by encroaching upon individuals’ decisions to voluntarily associate in a business partnership.” Id. In rejecting Hishon’s third argument, the majority stated: “[W]hen the termination is a result of the partnership decision, it loses its separate identity and must fall prey to the same ill-fate as her original attempt to apply Title VII to partnership decisions.” Id. at 1029.

By holding that the form is the substance, the Eleventh Circuit has created different Title VII results for different law firms, depending upon which organizational structure they have chosen. Many law firms use the corporate structure and are therefore subject to Title VII. See Note, Tenure and Partnership as Title VII Remedies, 94 HARV. L. REV. 457, 463 & nn. 35-36 (1980) [hereinafter cited as Note, Tenure and Partnership]. For discussions by commentators anticipating and suggesting the inaccuracy of the court’s conclusion, see infra note 24.

20. Hishon, 678 F.2d at 1030 & n.1.


New York and with the conclusions of commentators. It rests on conclusory reasoning.

The Eleventh Circuit’s assertion that matters of voluntary association are exempt from Title VII applicability was made without authority. The court did not call “voluntary association” a right nor could it have done so. The Eleventh Circuit did not quote any language from Title VII to support the “voluntary association” exemption, nor did it discuss why Title VII, with its many explicit exemptions, would also contain an implicit exemption for “voluntary association.” Generally, where exceptions to a general

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25. The district court had ruled that the law firm had a constitutional right to voluntary association. See Hishon v. King & Spalding, 24 Fair Empl. Prac. Cas. (BNA) 1303, 1306 (N.D. Ga. 1980); see also supra note 16. The Eleventh Circuit, however, did not discuss the Constitution nor call voluntary association a right.

The district court in Hishon had relied on Justice Goldberg’s dicta in Bell v. Maryland, 378 U.S. 226, 313 (1964), that “it is the constitutional right of every person . . . to choose his . . . business partners.” Hishon, 24 Fair Empl. Prac. Cas. (BNA) at 1303. The district court stated: “The Supreme Court has, of course, recognized ‘freedom of association.’ Unfortunately, however, it has not dealt with the subject in the context of business and commercial partnerships, except for the comments of Mr. Justice Goldberg . . . .” Id. The district court also quoted Justice Harlan in NAACP v. Alabama, 357 U.S. 449 (1958), who said that “beliefs sought to be advanced by association [can] pertain to economic . . . matters . . . .” Id. at 460. Associating to express views about economic beliefs, however, is different from associating to earn money. The latter is not an expression of belief. The district court in Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977), recognized this distinction. The court said that the Supreme Court “does not recognize any First Amendment privacy or associational rights for a commercial, profit-making business organization of the nature of [a large law] partnership. Cases recognizing such First Amendment rights refer to fraternal or social organizations not business organizations.” Id. at 129. See Bartholet, supra note 24, at 983-84; White, supra note 24, at 1107 n.93; Note, Tenure and Partnership, supra note 19, at 468-69; Note, Selection of a Law Partner, supra note 24, at 312-18 for discussions as to why there is no Title VII exemption for voluntary association. See generally Waintroob, supra note 24, at 119. But cf. Wright v. Cork Club, 315 F. Supp. 1143, 1156 (S.D. Tex. 1970): “[A]ny truly private organization or association, such as . . . a business partnership . . . would be beyond the bounds of government regulation with regard to membership.” Id. at 1156 (dictum).

prohibition are explicit, additional exceptions are not implied. Given the broad remedial purpose of Title VII, implicit exclusions are all the more disfavored. In addition, by prohibiting employment discrimination, Title VII deliberately regulates association that otherwise would be voluntary.

Hishon had raised three separate grounds why a discriminatory denial of partnership violates Title VII. She analogized large partnerships to corporations and argued that elevation to partnership is an employment relationship of the type governed by Title VII because partners in a large partnership are employees of that partnership for purposes of Title VII. Next she argued that an "opportunity" for "elevation to partnership" is a "term, condition or privilege of employment" of an associate protected from discrimination by Section 703(a)(1) of Title VII and/or an "employment opportunity" of an associate protected from discrimination by Section 703(a)(2) of Title VII. Finally, she argued that partnerships are explicitly included in the definition of "person," which is included in the definition of "employer." Id. §§ 2000e(a), (b). The term "employer" explicitly exempts private clubs as voluntary associations but only if they are exempt from federal taxation. Id. § 2000e(b). No other voluntary association is explicitly exempted. The term "employer" also exempts industries not affecting commerce, industries with less than fifteen employees, the United States, United States-owned corporations, Indian tribes, and certain District of Columbia agencies. Id. In addition, the phrase "unlawful employment practices" has a number of statutory exclusions or defenses, none of which mention voluntary association. See id.

27. See North Haven Bd. of Educ. v. Bell, 456 U.S. 461 (1982) (Title IX's broad protection of "persons" includes employees of educational institutions because employees extensive statutory exemptions do not include such employees and will not be extended).

28. See Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979). That court stated that "because [Title VII] is remedial in character, it should be liberally construed, and ambiguities should be resolved in favor of the complaining party." Id. at 831 (footnotes omitted). The Hishon court cited Spirides. See 678 F.2d at 1027.

29. See Bartholet, supra note 24, at 983-84.

30. Hishon, 678 F.2d at 1026. Title VII prohibits "unlawful employment practices" and thus requires an "employment context." Id. For an analysis of why law partners are employees for purposes of Title VII and why a discriminatory denial of partnership is "an unlawful employment practice," see Note, Selection of a Law Partner, supra note 24, at 286-92; see also Paone & Reis, supra note 24, at 639; Note, Tenure and Partnership, supra note 19, at 461-63. But cf. Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977) (partners not employees for purposes of determining whether accounting firm has 15 employees within the meaning of 42 U.S.C. § 2000e(b)).

31. 678 F.2d at 1028.

32. Id. at 1026.


34. Id. § 2000e-2(a)(2). For an analysis of why advancement to partnership is either a "term, condition or privilege of employment" or an "employment opportunity," see Note, Selection of a Law Partner, supra note 24, at 292-95; see also Paone & Reis, supra note 24,
the requirement that an associate leave the firm after an adverse partnership decision when that decision is based on sex is a "discharge... because of... sex" which is "an unlawful employment practice" prohibited by Section 703(a)(1) of Title VII.36

The Eleventh Circuit rejected the first argument by dismissing, without useful explanation, analogous cases. For example, it dismissed a United States Supreme Court case that "held that partnerships have 'an established institutional identity independent of its individual partners'"38 by saying "[f]or many purposes, such as the fifth amendment's protection, this 'separate identity' will yield results similar to those for corporations, but not for Title VII."37 The Eleventh Circuit gave no reasoning or authority for why a partnership should be treated one way for purposes of the fifth amendment and another for purposes of Title VII.38

35. 678 F.2d at 1028. The dissenting judge in Hishon would have found Title VII applicable on this ground. See id. at 1030; supra text accompanying note 20; see also Note, Selection of a Law Partner, supra note 24, at 295 n.82.

36. 678 F.2d at 1028 (citing Bellis v. United States, 417 U.S. 85 (1974)).

37. Id. at 1028.

38. See id. The Eleventh Circuit similarly rejected Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28 (1961) and Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974), with insufficient analysis. The Eleventh Circuit characterized these cases as holding "that part ownership of a business does not preclude a person's classification as an employee subject to federal employment legislation." 678 F.2d at 1027. Apparently agreeing that these cases could support a holding that a partner can simultaneously be classified as an employee for purposes of Title VII, the Eleventh Circuit said: "It would be unrealistic to assume a person cannot maintain a proprietary interest and simultaneously work in the business. Mutual exclusivity neither exists nor is required in a law firm in order for the firm to maintain its desired partnership structure." Id. In the next sentence, however, the Eleventh Circuit rejected these cases by changing the issue. The court stated that "this lack of exclusivity, however, does not render the term 'partner' equivalent to the term 'employee' for purposes of Title VII." Id. The issue, however, was not whether the terms were equivalent but whether one person could be dually classified, as Goldberg and Pettway held. No further authority was given to distinguish them.

The Eleventh Circuit relied upon Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977). In Burke, the court held that partners are not employees for the purpose of determining whether an employer had 15 employees. Id. Title VII defines an "employer" as a person "who has fifteen or more employees. . . ." 42 U.S.C. §§ 2000e(b). The Seventh Circuit in Burke did not mention Bellis, Goldberg or Pettway; rather, it quoted definitions of partnerships and concluded that since partners are employers who own a business they cannot be employees. See Burke, 556 F.2d at 869. Burke also cited dicta in Equal Employment Comm'n v. Rinella & Rinella, 401 F. Supp. 175, 181 (N.D. Ill. 1975), which held that associates of a law firm were employees, for the proposition that if the associates had been partners they might not have been employees. 556 F.2d at 869 n.1.
As to Hishon's second argument, the Eleventh Circuit stated: "We have no quarrel with the premise that an 'opportunity' can include promotion to a position beyond that of an 'employee' covered by Title VII." The court then rejected that premise for an associate in a law firm, again without explanation beyond distinguishing or rejecting cases to the contrary, by stating that "once again, we decline to extend the meaning of 'employment opportunities' beyond its intended context by encroaching upon individuals' decisions to voluntarily associate in business partnerships." The Eleventh Circuit did not explain what the "intended context" includes, whose intent it is, how the intended context is determined, or why the context does not include voluntary association.

In regard to Hishon's final argument, the Eleventh Circuit apparently ignored the reality of the discharge. The court rejected the discharge argument with an inexplicable metaphor, stating that Hishon was seeking to establish her cause of action "through the proverbial back door." While noting that "discriminatory termination alone may have stated a cause of action under Title VII for an unlawful discharge," the court, again without authority, stated that "when the termination is a result of the partnership decision, it loses its separate identity and must fall prey to the same ill-fate as the original attempt to apply Title VII to partnership decisions."

The court did not explain how a termination loses its identity.

39. 678 F.2d at 1028.
40. The Eleventh Circuit distinguished Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974), a case which prohibited discrimination in an election of employees to a board that owned the stock of the company in trust for the employees, on the ground that the employees elected to the board remained employees of the company and were owners of the company as trustees, not in their individual capacities. Id. That point, however, goes to the argument that partners are employees. Whether or not the "trustees" remain employees is irrelevant to the holding that an election to a board of "trustees" (or a partnership) can be an opportunity of employment.

The Eleventh Circuit also "disagree[d]" with the holding of the District Court of the Southern District of New York that "the opportunity to become a partner was a "term, condition or privilege of employment" and an "employment opportunity."" Hishon, 678 F.2d at 1029 (quoting Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 125, 127 (S.D.N.Y. 1977)).

41. Id. at 1028.
42. See supra notes 25-29 and accompanying text.
43. 678 F.2d at 1029.
44. Id.
45. Id.
except by an apparent “assumption of the risk” theory. The court stated that “just as she [Hishon] accepted a representation made to her concerning partnership consideration, appellant likewise assumed the risk that an unfavorable decision would set in motion the termination procedure under the firm’s ‘up or out’ policy.”

For application of assumption of the risk, however, the plaintiff must be aware of the risk and undertake it voluntarily. While Hishon assumed the risk that she would not be made a partner in the normal course of competing with others, she did not assume the risk that she would be discriminated against because she is a woman. Thus, the Eleventh Circuit held that a promise of partnership will not create Title VII liability when the promise is discriminatorily breached, but the breach of that promise will insulate what would otherwise be a prohibited discriminatory discharge from Title VII consequences. The dissenting judge found this last rationale “too glib.”

The reasoning of the Eleventh Circuit does not effectively rebut Hishon’s arguments; therefore, the court’s conclusion that partnership decisions are exempt from Title VII should not survive for long. Having granted the plaintiff’s writ of certiorari, the United States Supreme Court has the opportunity to reverse the Eleventh Circuit’s judgment. If the Court does not reverse the judgment, as discussed earlier, restitution will provide an alternative state action. If the Court does reverse, restitution will provide a pendant action with relief and proof different from that in a Title VII action or restitution might provide a remedy under Title VII.

B. State Contract and Tort Causes of Action

Possibly recognizing that its holding was leaving a wrong without a remedy, the Eleventh Circuit in Hishon stated that “perhaps” Hishon would have “an action in breach of contract or mis-

46. Id. at 1029-30.
48. 678 F.2d at 1030.
49. See supra text accompanying notes 1-8.
50. See Brown v. GSA, 425 U.S. 820 (1976), holding that “Title VII does not preempt other remedies in private employment.” Id. at 833; see also infra text accompanying notes 205-07.
51. Since this article does not discuss the applicability of Title VII, whether and how restitution would fit within Title VII remedies are outside the scope of this article.
representation.”52 State contract and tort actions, however, are generally inadequate to remedy a plaintiff’s discriminatory denial of partnership because damages may be nominal or impossible to ascertain or an element of the cause of action may be lacking.

For example, if the partnership promises an associate that she would become a partner upon satisfactory completion of work,53 damages for a breach of contract might be difficult to measure because the value of a partnership is not readily apparent.54 Even if they could be measured, damages might be nominal or nonexistent because of a plaintiff’s duty to mitigate. If the plaintiff finds an equally lucrative or more lucrative position, there will be no damages for the discrimination.55 If the partnership’s promise was the more typical promise of an opportunity to compete for a limited number of partnership slots, contract damages might be speculative. Even though the plaintiff may prove that she was excluded from eligibility because of her sex, she may not be able to prove that she would have received one of the partnership slots had she not been discriminated against.56

With respect to a cause of action in tort for “deceptively made” representations,57 an action in deceit generally requires that the defendant intended to deceive the plaintiff.58 Proof of a deceitful denial of partnership might be difficult because a partnership may not have decided to discriminate in choosing partners when

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52. 678 F.2d at 1029.
53. The Eleventh Circuit said that Hishon alleged that the law firm had represented “to her that in return for satisfactory work as an associate for a designated number of years, an invitation to partnership would be forthcoming.” Id. at 1028.
54. One author suggests that monetary compensation for a discriminatory denial of partnership under Title VII could be awarded at the rate of a partner’s earnings until the associate finds another position or as a lump sum “that would fully compensate the employee for the lost opportunity with the . . . firm.” Note, Tenure and Partnership, supra note 19, at 465 n.51. The author did not suggest how the lump sum would be calculated, but said that a “monetary award . . . presents administrative difficulties in computing the amount of the award and determining whether the plaintiff has made an appropriate effort to mitigate damages.” Id. at 466 (footnotes omitted).
55. See generally Note, Selection of a Law Partner, supra note 24, at 320. The author suggests that compensatory damages under Title VII could be ordered “in an amount equivalent to the plaintiff’s expected earnings as a partner less mitigation.” Id. Another commentator suggests that compensation for severe mental distress could be awarded as well. See Wald, supra note 21, at 54-58.
56. See infra text accompanying note 199.
57. See Hishon, 678 F.2d at 1029.
58. See W. Prosser, supra note 47, § 105, at 686.
the associate originally was hired. That decision, conscious or unconscious, may have been made six or more years later.

Thus, because contract and tort damage actions are often inadequate to remedy discrimination, when a court, such as the Hishon court, denies the applicability of Title VII to partnership promotions, there is a sense of injustice from the conclusion that a wrong may have been committed for which there is no remedy, or no adequate remedy. That conclusion is unnecessary.

III. RESTITUTION OR UNJUST ENRICHMENT AS AN ADEQUATE AND EFFECTIVE ALTERNATIVE TO TITLE VII

The sense of injustice caused by Title VII’s inapplicability to partnership decisions is derived not only from the fact of discrimination, but also from the fact that a large law partnership typically promises newly hired associates that they are eligible to compete for a limited number of partnership positions. This promise of eligibility often motivates a lawyer to join the firm, and this need to compete for partnership often motivates an associate who seeks partnership to work many hours, often taking on extra work. When a firm discriminates, or claims the right to discriminate, in making its partnership decisions, it breaches its promise that the associate was eligible to compete for partnership and ignores the

59. Discrimination can be unconscious. See, e.g., Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106, 114 (1st Cir.), cert. denied, 445 U.S. 1045 (1979) (sex discrimination can be conscious or unconscious); Mitchell v. Rose, 570 F.2d 129, 135 (6th Cir. 1978) (racial discrimination can be conscious or unconscious in grand jury selection).

60. "[I]n order of logic Right comes before Remedy. There ought to be a remedy for every wrong . . . ." F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 6 (1948).

61. See infra text accompanying notes 166-87.

62. In Hishon the plaintiff never had the opportunity to prove that she was discriminated against. Because the defendants moved for a dismissal under Fed. R. Civ. P. 12(b)(1), the district court assumed the existence of discrimination for purposes of holding that Title VII was inapplicable to partnership decisions. Thus, the effect of the law firm’s argument, which was upheld, was that for purposes of Title VII the firm either discriminated or had the right to discriminate in selecting partners. The majority in Hishon held that a “dismissal under Fed. R. Civ. P. 12(b)(1) is proper only when ‘it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim, which would entitle [her] to relief.’” 678 F.2d at 1026 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The dissent agreed: “Hishon alleges, and we must assume, that King & Spalding discriminated against her on account of her sex by its decision to deny her partnership and to terminate her employment.” Id. at 1030; see also United Air Lines v. Evans, 431 U.S. 553 (1977), stating that “[b]ecause the District Court dismissed her complaint, the facts which she has alleged are taken as true.” Id. at 554.
many hours of work its promise motivated.

Those many hours, however, financially benefit a partnership. The firm bills the associates's work on an hourly basis to a client. The total yearly value of the hours is generally substantially higher than what the associate received from the firm at its expense, and that excess benefits the firm. Thus, the injustice of the *Hishon* case is based on the facts that the law firm was enriched by the work of the associate, that the work was materially motivated by the firm's promise of an opportunity to compete for partnership, and that this motivation was disregarded by the firm when it discriminated against the associate.

Restitution or "liability based in unjust enrichment" is a "generally accepted and widely applied" source of liability that can remedy this sort of injustice. Restitution prevents a defendant's unjust enrichment by enabling a plaintiff to seek recovery, in law or equity, of a benefit that the defendant unjustly gained or retained at the plaintiff's expense. If the benefit to be recovered is money, the action is at law and is often referred to as quasi-contract. If the benefit to be recovered is specific property or money that has been traced, the action is in equity and is often referred to as a constructive trust.

A. Definition of Restitution

In 1937, the *Restatement of Restitution* defined liability based on unjust enrichment by saying: "A person who has been unjustly enriched at the expense of another is required to make restitution
to the other." In 1983, the Tentative Draft No. 1 of the Restatement (Second) of Restitution elaborated that definition. The Second Restatement provided that “[a] person who receives a benefit by reason of an infringement of another person's interest, or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment.”

Professor Palmer, in his recent four volume treatise, The Law of Restitution, avoided one overriding definition. He said:

Unjust enrichment is an indefinable idea in the same way that justice is indefinable. But many of the meanings of justice are derived from a sense of injustice, and this is true of restitution since attention is centered on the prevention of injustice. Not all injustice but rather one special variety: the unjust enrichment of one person at the expense of another. This wide and imprecise idea has played a creative role in the development of an important branch of modern law.

Despite “imprecision,” the many definitions of restitution articulated throughout the years consistently contain the following

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69. Id. § 1, at 9. The Restatement's introductory note on the measure of recovery states:
   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.

Id. §§ 150-59, at 595-96. For a discussion of the dual meaning of the word restitution see infra note 91. The Reporters for the American Law Institute's Restatement of Restitution, Warren A. Seavey and Austin W. Scott, described the Restatement's definition as follows:
   A person has a right to have restored to him a benefit gained at his expense by another, if the retention of the benefit by the other would be unjust. The law protects this right by granting restitution of the benefit which otherwise would, in most cases, unjustly enrich the recipient.

Seavey & Scott, Restitution, 54 Law. Q. Rev. 29, 32 (1938). In 1954, almost 20 years later, Professor Seavey said:
   Restitution is the equitable principle by which one who has been enriched at the expense of another, whether by mistake, or otherwise, is under a duty to return what he has received or its value to the other. Perhaps unjust enrichment would be a better term. But at least restitution, which connotes both legal and equitable remedies, is more descriptive of its content than is “equitable remedies,” and it is not misleading, as is “quasi contract.”


70. RESTATEMENT (SECOND) OF RESTITUTION § 1, at 9 (Tent. Draft No. 1, 1983).

71. 1 G. PALMER, supra note 64, § 1.1, at 5 (footnote omitted).

72. Sir William David Evans' essay, The Action for Money Had and Received, in Essays (1802) was, according to Dean Wade, “[t]he first significant writing in the field of Res-
three elements: "(1) the defendant has been enriched by the re-

stitution." Wade, The Literature of the Law of Restitution, 19 HASTINGS L.J. 1087, 1087 (1968). Evans described "the action for money had and received as enforcing an obligation to refund money which ought not to be retained." Evans, supra, at 5. He stated:

This obligation was enforced according to the general principles of natural equity, the foundation of it being a retention by one man of the property which he had unduly received from another, or received for a purpose, the failure of which rendered it improper that he should retain it. The mere legal liability to the original payment was not the question in consideration, but the injustice of permitting the money or other property, under all the circumstances, to be retained.

Id. at 6.

Dean Ames stated: "Quasi-contracts are founded . . . upon the fundamental principle of justice that no one ought unjustly to enrich himself at the expense of another." Ames, The History of Assumpsit, 2 HARV. L. REV. 53, 64 (1888). Professor William A. Keener's, A Treatise on the Law of Quasi-Contracts was, according to Dean Wade "[t]he first true treatise." Wade, supra, at 1088. Professor Keener articulated three bases for quasi-contractual liability: "(1) upon a record; (2) upon a statutory, or official, or customary duty; or (3) upon the doctrine that no one shall be allowed to enrich himself unjustly at the expense of another." W. KEEN, A TREATISE ON THE LAW OF QUASI-CONTRACTS 16 (1893). The first two sources of liability are not based on unjust enrichment. See Comment, Restitution: Concept and Terms, 19 HASTINGS L.J. 1167, 1167-68 & n.24 (1968) (discussion of analytic difference) [hereinafter cited as Comment, Concept and Terms]. Professor Keener regarded the third as the major basis of quasi-contractual liability, stating:

By far the most important and most numerous illustrations of the scope of quasi-contract are found in those cases where the plaintiff's right to recover rests upon the doctrine that a man shall not be allowed to enrich himself unjustly at the expense of another.

As the question to be determined is not the defendant's intention, but what in equity and good conscience the defendant ought to do, the liability, while enforced in the action of assumpsit, is plainly of a quasi-contractual, and not contractual nature.

W. KEEN, supra, at 19-20.

Professor Woodward defined quasi-contracts as "legal obligations arising . . . from the receipt of a benefit the retention of which is unjust, and requiring the obligor to make restitution." F. WOODWARD, THE LAW OF QUASI-CONTRACTS § 3, at 4 (1913). Professor Sullivan stated: "Whether the defendant is a tortfeasor or a contract breacher, a showing that the defendant unjustly has reaped a tangible gain at the expense of the plaintiff usually will support recovery in quasi-contract." Sullivan, The Concept of Benefit in the Law of Quasi-Contract, 64 GEO. L.J. 1, 7-8 (1975). Professor Childres and Mr. Garamella stated that "[t]he core of the law of restitution . . . is settled, clear and unobjectionable. . . . [R]estitution disgorges the actual economic unjust enrichment, i.e., plaintiff's property wrongfully held by the defendant. . . ." Childres & Garamella, The Law of Restitution and the Reliance Interest in Contract, 64 NW. U.L. REV. 433, 441-42 (1969).

Professor Douthwaite stated that:

[R]estitution can be had by either harnessing doctrines which have their origins in the common law—or doctrines which spring from the equity side of our jurisprudence. . . . [T]he underlying principle remains constant—recovery of a benefit should be allowed where one has received the benefit under circumstances which render it unjust that he should retain it.

G. DOUTHWAITE, ATTORNEY'S GUIDE TO RESTITUTION § 8.1, at 323 (1977) (footnote omitted).
receipt of a benefit; (2) the defendant’s enrichment is at the plaintiff’s expense; and (3) it would be unjust to allow the defendant to retain the benefit.”

Because it is unjust for the defendant to retain the gain, plaintiff’s recovery is generally measured by the amount of the defendant’s gain, not by the amount of the plaintiff’s loss.

There are a wide variety of situations in which courts define when a benefit is unjust. One of those situations is a defendant’s total, or material, breach of a contract. With such a breach the plaintiff has a choice of relief. The plaintiff can seek contract damages when they are adequate and capable of proof. The amount of damages is measured by what she would have gained had the contract been performed, less her mitigation of damages. In the alternative, she can seek restitution, which measures the defendant’s benefit received from the plaintiff. A discriminatory denial of partnership, when the associate had been promised that she was eligible to become a partner, is a material breach of a contract, which enables the plaintiff to sue to recover the defendant’s benefit. That benefit is the value of the associate’s billable hours minus salary and related overhead.

B. Advantages of Restitution

A restitution remedy has a number of advantages over contract or tort remedies for a discriminatory denial of partnership. First, because the defendant’s gain is substantial, a plaintiff’s re-

Recently, in comparing restitution with damages in tort, Professor Friedmann stated: “The law of restitution aims at preventing unjust enrichment. The law of torts deals with the reparation of damage wrongfully inflicted.” Friedmann, Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong, 80 COLUM. L. REV. 504, 504 (1980).


The principle of unjust enrichment is capable of elaboration. It presupposes three things: first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff’s expense; and thirdly, that it would be unjust to allow him to retain that benefit.

R. Goff & G. Jones, The Law of Restitution 13-14 (2d ed. 1978). This work is British, but the authors survey American and British law, as well as law from other countries. See also Wade, supra note 72, at 1095.

74. See infra text accompanying notes 126-28.
75. See infra note 161.
76. See infra text accompanying notes 163-200.
77. See infra text accompanying notes 129-53.
covery can provide a major deterrent to discrimination. Second, restitution provides a plaintiff with an opportunity to prove that she was discriminated against. Third, restitution can be premised on a promise of an opportunity to compete for partnership, not a promise of a guarantee of partnership. Fourth, restitution requires proof that the plaintiff was not considered for partnership because of discrimination or was more stringently considered, not proof that she would have obtained one of the partnership slots. Fifth, restitution does not require proof that the partners intended to make a discriminatory partnership decision with respect to an associate at the time they hired her. Sixth, restitution measures plaintiff's recovery not by the amount of plaintiff's loss but rather by the amount of defendant's gain, which, because of the readily available computation of "billable hours," should not be a difficult amount to ascertain. Seventh, restitution results in a monetary recovery, not an injunction mandating working relationships, which courts at times appear reluctant to order. Eighth, generally the statutes of limitations for restitution are six years. Ninth, although restitution is not limited to situations for which other causes of action are inadequate, it has frequently provided a remedy where others fail. Finally, and perhaps most importantly, restitution permits society to provide a remedy for a wrong rather than to legitimate discrimination by providing no remedy at all.

78. For discussions of the deterrent effect of damages for discrimination, see generally Paone & Reis, supra note 24, at 642, 645; Note, Tenure and Partnership, supra note 19, at 466 n.56; Note, Selection of a Law Partner, supra note 24, at 320 n.208.
79. See supra note 62.
80. See supra note 53; infra text accompanying notes 159-93.
81. See infra text accompanying notes 194-200.
82. See supra text accompanying note 58; infra text accompanying notes 159-93.
83. See supra text accompanying notes 54-55; infra text accompanying notes 126-53.
84. It has been noted that some courts may be reluctant to mandate work relationships at high levels of employment. See Bartholet, supra note 24, at 983; Hunt & Pazunick, Special Problems in Litigating Upper Level Employment Discrimination Cases, 4 Del. J. or Corp. Law 114, 133 (1978); Note, Employment Discrimination Suits by Professionals: Should the Reinstatement Remedy Be Granted?, 39 U. Prrr. L. Rav. 103, 109-10 (1977) [hereinafter cited as Note, Discrimination Suits by Professionals]; Note, Selection of a Law Partner, supra note 24, at 303; Note, Subjective Employment Criteria and the Future of Title VII Professional Jobs, 54 U. Del. J. Urb. L. 165, 167 (1976) [hereinafter cited as Note, Subjective Employment Criteria]; infra note 195.
85. See infra note 208.
86. See infra text accompanying notes 205-07.
87. See supra note 60.
C. Restitution is Unnecessarily Underutilized

The reason that the Eleventh Circuit in *Hishon* did not suggest restitution as a possible cause of action or remedy may have been that restitution "has been slow to emerge as a general theory" and is not well understood. As Professor Dawson said in 1951, "it is doubtful even now whether most lawyers have an adequate concept of the range and resources of the remedy." It is doubtful whether the situation has much improved in the last thirty years.

One reason restitution is not well understood may be that there is a great deal of confusion in terminology. The word "restitution" is used to refer both to a cause of action and a remedy.

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88. 1 G. PALMER, supra note 64, § 1.1, at 2. Dean Ames said in 1888:
The equitable principle which lies at the foundation of the great bulk of quasi-contracts, namely, that one person shall not unjustly enrich himself at the expense of another, has established itself very gradually in the Common Law. Indeed, one seeks in vain today in the treatises upon the Law of Contract for an adequate account of the nature, importance, and numerous applications of this principle. Ames, supra note 72, at 66 (footnote omitted); see also Childres & Garamella, supra note 72, at 434. "Restitution, as a unified concept, is even newer than the reliance damages doctrine." Id.

89. J. DAWSON, UNJUST ENHICMENT 22 (1951). Professor Dawson also said: "[M]any lawyers still approach the restitution remedies with uncertainty and wonder." Dawson, Restitution or Damages?, 20 Ohio St. L.J. 175 (1959); see also Seavey & Scott, supra note 69, at 32. "[Restitution's] outlines have been dimly perceived and little discussed." Id.

90. For example, Professor Douthwaite stated:
When considering the measure of compensation for a wrong, the practitioner typically thinks in terms of proven damages . . . . But if he so restricts his thinking he may be depriving his client of a considerable sum of money.

. . . . [A] wrongdoer's profits as an alternative to his victim's proven damages can, more often than not, be recovered on the theory of a constructive trust . . . .[or] in quasi contract. Douthwaite, The Tortfeasor's Profits—A Brief Survey, 19 Hastings L.J. 1071, 1071 (1968). Professor Douthwaite said, over ten years later, that "[i]t simply isn't true to say that restitutorial problems don't often come up on the practitioner's desk. The trouble is that usually he hasn't thought about the restitutionary implications or potential of the problem before him." G. DOUTHWAITE, supra note 72, § 1.1, at 2.

91. See Comment, Concept and Terms, supra note 72, at 1191-98 for a discussion and documentation of the dual usage of the word "restitution." The Restatement of Restitution itself uses the term with both meanings. Not only does it use the title Restitution and speak of "restitutionary rights," but it also speaks of the requirement "to make restitution." Compare RESTATEMENT OF RESTITUTION 2 (1937) (general scope note) with id. § 1, at 12. The Tentative Draft No. 1 of the Second Restatement states: "The distinction [between rights and remedies] cannot be so clearly marked in restitution law as is usually possible in tort or contract law." RESTATEMENT (SECOND) OF RESTITUTION 3 (Tent. Draft No. 1, 1983).
At times restitution is used synonymously with “unjust enrichment” and “quasi-contract.” Quasi-contract, in turn, is used synonymously with contract-implied-in-law and both are at times confused with contract-implied-in-fact. In addition, restitution “sometimes refer[s] to the disgorging of something which has been taken and other times refer[s] to compensation for injury done.”

The confusion has a historic base. Much of the common law developed and evolved through the expansion of forms of action or the substitution of a procedurally preferable form for an older form. Fictions were frequently used to facilitate the expansion or substitution. In order to prevent a defendant’s unjust enrichment by applying the well utilized form of action of assumpsit, for example, the law courts used the fiction of an “implied promise.” The law courts held that the law implied a promise to pay in situations in which no intent on the part of the defendant to pay the plaintiff could be inferred from the defendant’s words or deeds. This came to be known as a contract-implied-in-law or quasi-contract. As Professor Palmer stated: “The fiction of a contract was being used to allow recovery in a contract form of action, and in retrospect the reason for doing so was to deprive the defendant of an unjust en-

92. See Comment, Concept and Terms, supra note 72, at 1188-92. Even books by the leading writers on the subject are differently titled. See, e.g., J. Dawson, supra note 89 (Unjust Enrichment); W. Keener, supra note 72 (A Treatise on the Law of Quasi-Contracts); G. Palmer, supra note 64 (The Law of Restitution); Restatement of Restitution § 1 (1937).

93. See infra note 104.


95. For a detailed history of the development of the common law, see J. Baker, An Introduction to English Legal History (2d ed. 1979); S. Milson, Historical Foundations of the Common Law (1969).

96. For detailed discussions of the historical development of restitution, see J. Baker, supra note 95, at 300-14; J. Dawson, supra note 89, at 9-40; R. Goff & G. Jones, supra note 79, at 3-14; W. Keener, supra note 72, at 14-15; 1 G. Palmer, supra note 64, §§ 1.1–5, at 1-33; Ames, supra note 72, at 63-69; Douthwaite, supra note 90, at 1074-75; Perillo, supra note 94, at 1210-12; Seavey & Scott, supra note 69, at 32-33; Sullivan, supra note 72, at 2-4; Comment, Concept and Terms, supra note 72, at 1167-70. Courts of law also applied the common counts of money had and received, quantum meruit, and quantum valebat to situations of unjust enrichment. See, e.g., G. Douthwaite, supra note 72, § 1.3, at 7; R. Goff & G. Jones, supra note 73, at 3; Childress & Garamella, supra note 72, at 435-36 n.14; Dawson, supra note 89, at 175-76. The courts of equity also developed liability based on unjust enrichment under doctrines of constructive trust, equitable lien, subrogation and accounting. J. Dawson, supra note 89, at 34-40; see also supra note 68.
Similarly, the equity courts used the fiction of a constructive trust, implying that the defendant, as a constructive trustee, was holding property for the plaintiff, although, again, the defendant had evidenced no intent to act as a trustee and did not have a fiduciary relationship with the plaintiff.

When the old forms of action were abolished, however, the "fictitious promise seemed immortal," and that fiction now creates confusion. For example, sometimes a court will deny liability in quasi-contract because no agreement between the parties was proven or will deny liability in contract-implied-in-fact because the defendant was not enriched. Quasi-contract, or contract-implied-in-law, is, however, an action to prevent unjust enrichment and does not necessarily require proof of consensual elements of contract law, although the action may involve "unwinding" unenforceable or frustrated agreements or remedying a material breach of contract. A contract-implied-in-fact is, in contrast, an actual contract. A similar confusion exists with respect to con-

97. 1 G. Palmer, supra note 64, § 1.2, at 7; see also G. Douthwaite, supra note 72, § 1.1, at 3. As Professor Keener said:

It was only natural, therefore, that the courts in using a purely contractual remedy to give relief in a class of cases possessing none of the elements of contract, should have resorted to fictions to justify such a course. This was done in the extension of assumpsit to quasi-contract; and the insuperable difficulty of proving a promise where none existed was met by the statement that 'the law implied a promise'. . . . The fiction of a promise was adopted then in this class of cases solely that the remedy of assumpsit might be used to cover a class of cases where, in fact, there was no promise.

W. Keener, supra note 72, at 14-15.

98. See G. Douthwaite, supra note 72, § 1.1, at 3; 1 G. Palmer, supra note 64, § 1.3, at 12-13.

99. J. Baker, supra note 95, at 312.

100. See infra note 104 for discussions by commentators who review the cases.


102. Perillo, supra note 94, at 1208, 1209.

103. See infra text accompanying notes 163-200.

104. See W. Keener, supra note 72, at 7-11; Ames, supra note 72, at 63-64; Corbin, Quasi-Contractual Obligations, 21 Yale L.J. 533, 546-547 (1912) [hereinafter cited as Corbin, Quasi-Contractual Obligations]. This confusion between contract-implied-in-law (quasi-contract) and contract-implied-in-fact has existed for a long time.

In 1893, Professor Keener stated: "Notwithstanding the existence and recognition of this well-defined line of demarcation between genuine contracts, whether express or implied, and quasi-contracts, there exists the greatest confusion in the application thereof in practice. Thus Blackstone confuses contracts implied in fact and quasi-contracts. . . ." W. Keener, supra note 72, at 7. Professor Corbin also stated in this regard:

The new rights are actually different from the old rights, but it requires a clear head
The continued use of the old terms that evolved from the old fictions has not only made application of the terms difficult, but has also obscured the fact that restitution, or liability in unjust enrichment, is an important source of liability. Restitution can

for analysis and some knowledge of legal history to tell them apart and to understand their true character. A great many of those rights now usually referred to as quasi-contractual are among these newly recognized rights. But they have long been described in the terms applicable to real contracts and enforced as if they were really contractual. An examination of the cases dealing with them will quickly demonstrate how many are the judges who do not understand their true character, and how easy it is to be led astray by the misleading terminology.

Corbin, Waiver of Tort and Suit of Assumpsit, 19 Yale L.J. 221, 222 (1910) [hereinafter cited as Corbin, Waiver of Tort].

Confusion still exists today. See G. Douthwaite, supra note 72, § 1.1, at 2-3; 1 G. Palmer, supra note 64, § 1.2, at 8; Dawson, supra note 89, at 176; see also York, Extension of Restitutional Remedies in the Tort Field, 4 U.C.L.A. L. Rev. 499 (1957). “The distinction between contracts implied in fact and those implied in law continues to trouble the courts both as to the nature of the distinction and the practical procedural consequences.” Id. at 501 n.6; see Comment, Concept and Terms, supra note 72, at 1189-90. “The principal criticism of the term [‘quasi-contract’] is its connection to contract, and although this connection has been occasionally defended, it seems clear that it is fallacious and has caused considerable confusion in the courts.” Id. (footnotes omitted).

Professor Perillo appears not to dispute that there has been confusion with respect to contracts and quasi-contracts, but he cautioned that the assumptions “that there is nothing contractual about quasi-contractual obligations [and] that quasi-contractual obligations are imposed by law to prevent unjust enrichment . . . are only partly correct.” Perillo, supra note 94, at 1208. He said that courts should not be limited to awarding a plaintiff the benefit received by the defendant when the dispute at issue involves unwinding a contract that cannot or can no longer be enforced. Restricting recovery to what the defendant gained does not always restore the plaintiff to the status quo ante and “tend[es] to obscure the need to protect a party from unjust impoverishment.” Id. at 1220. Thus, limiting the unwinding of contracts to the law of quasi-contract or unjust enrichment does not provide sufficient justice. See id. at 1223-26.

105. 1 G. Palmer, supra note 64, § 1.3, at 12.

106. Restitution is widely recognized as a source of liability. The Second Restatement provides:

A given set of circumstances may give rise to both a right to restitution and a tort claim, or to both a right to restitution and to some other relief for breach of contract. Rules of tort and contract law are important, in many circumstances, as guides determining whether or not a right to restitution exists. Yet a duty to make restitution has a basis independent of those rules. . . . Restitution law shares some of the aims of tort law and contract law, but is distinct from both.

Restatement (Second) of Restitution § 1 comment a (Tent. Draft No. 1, 1983).

Professor Palmer began his 1978 four volume treatise on Restitution by saying: “It has been traditional to regard tort and contract as the two principal sources of civil liability at common law . . . . There is another category that must be separated from . . . these; this is liability based in unjust enrichment.” 1 G. Palmer, supra note 64, § 1.1, at 1-2. Professor Palmer also mentioned liability arising out of a fiduciary relationship as a separate source of
provide a plaintiff with a remedy that is measured by the amount

liability. Id.; see also J. Baker, supra note 95, at 314. "It was only in the last twenty years that restitution began to be firmly established in England as a discrete body of principles wholly independent of contract . . . ." Id.; see G. Douthwaite, supra note 72, § 1.1, at 2. "In this country Restitution has come into its own as a third branch of the law, as important in its potential as are Contracts and Torts." Id.; see Oesterle, supra note 73, at 336. "Knowledgeable observers of American Law have recognized for over fifty years that restitution is a discrete body of legal and equitable rights and remedies based on the principle of rectifying situations of unjust enrichment." Id. (footnotes omitted). Professor Teller stated:

Restitution is a separate branch of law. Its distinguishing feature, one which sets it apart from other categories of legal liability, lies in its measure of recovery. The purpose is not to enforce contracts nor to award damages but to prevent unjust enrichment. It looks not to the plaintiff's damages but to the benefit which the defendant obtained or retains and to which he is not entitled.

Teller, Restitution As An Alternative Remedy for a Tort, 2 N.Y.L.F. 40, 47 (1956); see also Comment, Concept and Terms, supra note 72, at 1170-82.

This recognition of restitution as a separate source of liability began in the late 1800's: "Interest was excited by a memorable article by Dean Ames on "The History of Assumpsit" (2 Harv. L. Rev. 1, 1888). Under the inspiration of Ames, Keener in 1893 produced a short treatise entitled 'Quasi Contracts' which, for the first time, set out at considerable length the principles of the subject and a discussion of the cases.

Seavey & Scott, supra note 69, at 34. "It was not till the end of the nineteenth century that anyone saw the interconnections between these scattered and diffused results, and Keener's book on Quasi-Contract was published." J. Dawson, supra note 89, at 21. "Keener and his contemporaries sought to place the entire law of quasi-contracts on the foundations of the unifying principles of unjust enrichment. Their efforts were remarkably successful." Perillo, supra note 94, at 1212-13; see also Comment, Concept and Terms, supra note 72, at 1168-69.

Major efforts to give unified treatment to restitution occurred in 1937 with the American Law Institute's The Restatement of Restitution (1937), and in 1978 with Professor George P. Palmer's four volume treatise The Law of Restitution, which discusses the theory and catalogues and explains the many existing uses of restitution. According to Professor Palmer, recognition of one unified doctrine of restitution "probably began with the publication of The Restatement of Restitution." 1 G. Palmer, supra note 64, § 1.1, at 4. The Reporters Seavey and Scott said: "The purpose of the American Law Institute is to analyze the most important topics of the law and to state succinctly the rules which are shown by analysis to represent the predominant American authority." Seavey & Scott, supra note 69, at 29.

That restitution as a source of liability was not recognized earlier and is not always well understood at present may be because, through fictions, the same language, such as assumpsit, was used to provide remedies for many diverse situations. "[T]he application of old remedies to new rights caused lawyers and judges, from that day to this, to describe the new rights in the same terms as the old rights. The habit is inveterate and the results are often pernicious." Corbin, Waiver of Tort, supra note 104, at 221-22. Professor Keener stated:

Although from time to time the judicial view of substantive rights broadened under the leavening effect of equity and other considerations, the broadening process did not lead to the creation of remedies sounding in neither contract nor tort. The judges attempted, however, by means of fictions, to adapt the old remedies to the new rights, with the result usually following the attempt to put new wine into old bottles.
of the defendant’s gain in situations that could alternatively be remedied with typical tort damages, which compensate for a plaintiff’s loss, or with contract damages, which put a plaintiff in the

W. Keener, supra note 72, at 14; see also Comment, Concept and Terms, supra note 72, at 1169. “The development of restitution has been sporadic and more the result of attempts to bring new actions within the existing framework of the common law, than the result of a purely logical progression.” Id. “[T]he development of that part of the law of restitution called quasi contract has been impeded by its historical connection with a contract form of action.” 1 G. Palmer, supra note 64, § 1.2, at 8. Professor Palmer also stated: “The term ‘constructive trust’ has the same disadvantage as ‘quasi contract’: it invites confusion with express trust much as quasi contract invites confusion with contract.” Id. § 1.3, at 12. “A tendency to describe quantum meruit as a remedy in itself does little to clarify this distinction [between contract-implied-in-law and contract-implied-in-fact].” G. Douthwaite, supra note 72, § 1.1, at 3 (Supp. 1980).

In 1893, Professor Keener stated: “[T]his identification in classification of quasi-contracts with genuine contracts [has] led to a confusion of ideas . . . .” W. Keener, supra note 72, at 11. Baker noted that “legal fictions were abolished [in England] in 1852 . . . . Lawyers still spoke of implied promises and waiving the tort, but as they lost familiarity with the forms in which those ideas had been clothed it was easy for misconceptions to flourish.” J. Baker, supra note 95, at 313. Goff and Jones said, 85 years after Keener, that “study of the cases reveals that emphasis on implied contract, and the spurious connection with contract which it implies, has inhibited discussion of substantive issues.” R. Goff & G. Jones, supra note 73, at 9. They also said:

[A]further the abolition of the forms of action . . . the fiction grew rather than diminished in importance. The abolition of the forms of action, which had for so long provided the skeleton of the law, forced lawyers to find some new method of classifying claims. This they found in the dichotomy of contract and tort; and the apparently intractable quasi-contractual claims were relegated to the status of an appendix to the law of contract . . . .

Yet there is no reason why the common law should be rigidly stratified into contract and tort; and the assertion that the requirement of implied contract leads to certainty is unintelligible. When is a contract to be implied? No logical answer can be given to the question when recourse should be had to a fiction.

R. Goff & G. Jones, supra note 73, at 8-9 (footnotes omitted). “This characterization [‘contract-implied-in-law’] resulted in strained and artificial analysis.” Perillo, supra note 94, at 1211.

In 1938, the Restatement of Restitution’s Reporters explained restitution’s lack of recognition, saying:

That [restitution’s] outlines have been dimly perceived and little discussed is due, we think, to the fact that the English law has developed through forms of action; the writings of analytical jurists have had little effect upon a bench and bar largely historically minded and educated through the study of decisions in which procedure has long played a predominant part.

Seavey & Scott, supra note 69, at 32. They explained further:

But although [the principle of restitution] has since [1760] been sporadically recognized and although it underlies the decisions of many cases, the diverse sources of the individual rules and the adherence by legal treatise writers and law teachers to the divisions of the law created by historical accident rather than by analysis, have prevented its common acceptance and a unified treatment.

Id. at 33-34.
position she would have been in if the contract had been performed.\textsuperscript{107} Restitution can also provide that the defendant disgorge his benefit in situations in which neither contract nor tort actions will provide relief.\textsuperscript{108}

There is a debate as to whether restitution is a cause of action or a remedy for other causes of action,\textsuperscript{109} but that debate is irrele-

\begin{itemize}
\item[107.] "For us an important use of restitution is an alternative remedy for various kinds of wrongs." J. Dawson, supra note 89, at 146. Professor Dawson said further that "in many situations contract and unjust enrichment doctrines merge in application . . . ." Dawson, supra note 89, at 176. As Professor Friedmann said recently with respect to the law of restitution and torts:
\begin{quote}
Overlap between these two fields [restitution and torts] is not uncommon: it often happens that an act tortiously injuring another benefits the tortfeasor. In such cases, the law has long recognized the right of the injured party to "waive the tort," foregoing his claim for damages and seeking instead restitution of the tortfeasor's gain.
\end{quote}
Friedmann, supra note 72, at 504. Professor Teller stated that "[f]or a tort or material breach of contract by which the defendant is unjustly enriched, restitution is an alternative remedy." Teller, supra note 106, at 47. With respect to the law of torts:
\begin{quote}
There is on the one hand the quasi-contractual relief against torts developed in the common law actions—the venerable formula of waiver of the tort and suit in assumpsit. The proposition is one of almost classical simplicity, i.e. if the tort-feasor obtained a benefit directly from the injured party as a result of the commission of the tort he had alternative duties of compensating for the harm done the injured party in tort or of making restitution of the benefit thus obtained. The latter duty could be enforced by the common law action of quasi-contract.
\end{quote}
York, supra note 104, at 504.

Overlap is evidenced in part by the fact that restitution is indexed under a variety of headings. See Wade, supra note 72, at 1087. "It has been only in recent years that legal writings have undertaken to cover more than particular areas of the law of Restitution. In the digests, the cases have not been grouped together, and any attempt to collect and collate them necessarily runs into serious difficulties." Id.; see also G. Douthwaite, supra note 72, § 1.1, at 3; Seavey & Scott, supra note 69, at 34-35; Comment, Concept and Terms, supra note 72, at 1173.

\item[108.] "[I]n numberless situations, (e.g. mistake, duress, innocent misrepresentation, many cases of illegal transaction, contracts discharged by impossibility) restitution is commonly the sole remedy." Teller, supra note 106, at 47 (footnote omitted). "In [a described] situation plaintiff has another remedy, that is an action for damages for breach, whereas in the other [described] situations, the only possible remedy open to him is restitution." 1 G. Palmer, supra note 64, § 4.1, at 365. "The only remedy available to the plaintiff [in certain situations] is some form of restitution." 2 G. Palmer, supra note 64, § 6.1, at 2; see also Hand, Restitution or Unjust Enrichment, 11 Harv. L. Rev. 249, 250-257 (1898).

Professor Oesterle stated that "restitution must be separated from torts, contracts, and fiduciary responsibility because restitution can provide a right to relief when none of the other theories are helpful." Oesterle, supra note 73, at 342; see also Perillo, supra note 94, at 1215. "In many of the situations in which there is a right to restitution there is no right upon any theory of the law of contracts or of tort." Seavey & Scott, supra note 69, at 35.

\item[109.] As Professor Oesterle noted in his review of Professor Palmer's 1978 treatise:
\begin{quote}
Unfortunately, Professor Palmer's valuable treatise may turn out to be underused,
vant to plaintiff's recovery for a discriminatory denial of partner-

perhaps for reasons similar to those that explain the declining popularity of classes in restitution at American law schools. Law school curricula and statements by commentators have led lawyers to regard the law of tort and contract (and, perhaps, fiduciary responsibility) as the principal source of civil liability at common law. Restitution is viewed solely as an alternative remedy for tortious conduct or breaches of contract.

Oesterle, supra note 73, at 341-42 (footnotes omitted). Professor Oesterle then discussed the erroneousness and shortsightedness of this view. See id. at 351-64. For a commentator who viewed restitution as a remedy see Abbot, Keener on Quasi-Contracts 1, 10 HARV. L. REV. 209 (1896). “[Professor Keener’s thesis should have been that restitution] is a remedy, differing from, but alternative with, damages...” Id. at 227. Abbot’s critique of Keener is criticized by Learned Hand. See generally Hand, supra note 108. See Jackson, The Restatement of Restitution, 10 Miss. L.J. 95 (1938). Jackson says that restitution is a remedy, while unjust enrichment is a category of law “but its contents would be unlikely to agree with the scheme of the Restatement.” Id. at 96; see also Professor Palmer’s discussion of the statements of Professors Corbin and Woodward, 1 G. PALMER, supra note 64, § 4.1 at 365-66 & n.3.

It would appear to make analytic sense to analyze restitution as an alternative cause of action rather than an alternative remedy because recovery in restitution is different from recovery in tort or contract, see supra text accompanying note 74, because restitution provides remedies for situations that neither tort nor contract actions cover, see supra note 108, and because restitution protects interests different from those protected by tort or contract actions. The Reporters for the Restatement of Restitution said that the American Law Institute has recognized the tripartite division of the law into contracts, torts and restitution, the division being made with reference to the purposes which each subject serves in protecting one of three fundamental interests. In this division, the postulate of the law of contracts . . . is that a person is entitled to receive what another has promised him . . . . The law of torts is based upon the premise that a person has a right not to be harmed by another . . . . Besides these two postulates there is a third, sometimes overlapping the others, but different in its purpose. This third postulate . . . can be expressed thus: A person has a right to have restored to him a benefit gained at his expense by another, if the retention of the benefit by the other would be unjust. The law protects this right by granting restitution of the benefit which otherwise would, in most cases, unjustly enrich the recipient.

Seavey & Scott, supra note 69, at 31-32. Professor Seavey also stated that:

Restitution is a term unknown to legal treatises, encyclopedias and digests, yet it represents one of a trinity of principles which actuate the proceedings for remedial justice. The law of contracts enforces promises. The rules of tort provide compensation for harm. Restitution is the equitable principle by which one who has been enriched at the expense of another, whether by mistake, or otherwise, is under a duty to return what he has been received or its value to the other.

Seavey, supra note 69, at 257. Perillo noted, however, that prevention of unjust enrichment is one rationale for enforcing some contracts. See Perillo, supra note 94, at 1213.

If restitution is viewed as a cause of action, attention could be focused on the elements of restitution to determine when it is appropriate to apply the recovery. Even if an element of restitution is also an element of a breach of contract or a tort, that element could still be a restitutionary element. Tort and contract actions can at times provide alternative remedies for the same situation, but those actions are not, therefore, viewed as merged. As Goff
ship based on a breach of a material promise of eligibility. Whether restitution is a remedy for that breach or whether that breach triggers the applicability of the cause of action of restitution, the result will be the same.\footnote{110}

Another reason restitution may not be well understood is that its application has at times been confused and inconsistent,\footnote{111} without a precise framework delimiting its outer boundaries.\footnote{112} Recognition of restitution, however, is more recent than recognition of torts and contracts. Even they developed slowly and were subject to criticism.\footnote{113} Because the framework is not fully devel-

and Jones stated:

In any event, that there may, on occasion, be an overlap between restitutionary and other claims simply reflects the fact that the rubrics of the law are not watertight compartments, so that the same set of facts can well give rise to alternative claims. A similar overlap often occurs between claims in contract and tort, as, for example, when a bailee negligently damages goods, or a carrier negligently injures passengers in his care. R. Goff \& G. Jones, \textit{supra} note 73, at 45. The fact that restitution is analyzed as a cause of action does not mean that all of the old actions in quasi-contract, such as the unwinding of agreements, must be categorized as restitutionary actions rather than as contract actions. See \textit{supra} note 104 for a discussion of Perillo's view that unwinding of unenforceable contracts should not be limited to returning unjust enrichment.

110. \textit{See infra} text accompanying notes 163-200.

111. "Confusion is probably inevitable in any large body of doctrine that has grown so rapidly, from so many different directions, by the methods of case law." J. Dawson, \textit{supra} note 89, at 112. "The law of quasi-contract looks like a grab bag of isolated instances rather than a picture of the orderly development of a broad doctrine covering situations of unjust enrichment." Douthwaite, \textit{supra} note 90, at 1074.

112. Professor Palmer said that his treatise "will have served its principal purpose if it contributes to an understanding of one of the important bases of legal liability: liability based in unjust enrichment." 1 G. Palmer, \textit{supra} note 64, at Preface. He disclaimed, however, "comprehensive" treatment of restitution: "I do not know whether a truly comprehensive treatment of restitution can be written." \textit{Id}.

Professor Oesterle said of Professor Palmer's work: "In this definitional morass, Professor Palmer operates with remarkable clarity . . . . [He provides] a herculean attempt at providing integrity to this neglected branch of law." Oesterle, \textit{supra} note 73, at 340. "Far more substantial problems than proper nomenclature, however, pervade the law of restitution. The cardinal outlines of this branch of law are in dispute." \textit{Id}. at 338. "Professor Palmer, by focusing on the venerable and classic questions in restitution, avoids grappling directly with the definition of restitution's outer limits." \textit{Id}. at 340; \textit{see also} Nicholas, \textit{Unjustified Enrichment in the Civil Law and Louisiana Law}, 36 Tul. L. Rev. 605 (1962). "The principal problem which has been faced in evolving the doctrine has been precisely that of defining the limits within which it operates." \textit{Id}. at 607. "The development in this area of the law [restitution] would be more uniform and consistent, with less overlap and confusion, if the actions and remedies had an accepted framework within which to expand, rather than growing pell-mell in all directions." Comment, \textit{Concept and Terms}, \textit{supra} note 72, at 1173-74 (footnote omitted).

113. Seavey and Scott described the historical development of torts and contracts as
oped, and because one of the elements of restitution is justice, or "unjustness" to be more precise but less grammatical, a few commentators have criticized restitution as overbroad. This con-

follows:

Unfortunately, the profession thought in terms of procedure and it was not until shortly before the beginning of the nineteenth century that we find treatises which in any way can be said to represent much more than collections of cases arranged in accordance with the forms of action. Contracts had but a few pages in Blackstone, and not until 1807 did a comprehensive treatment appear . . . . Not until 1859 was the collective name of "Torts" given in a treatise to the wrongs for which actions of trespass and trespass on the case were permitted in a great variety of situations. Seavey & Scott, supra note 69, at 33 (footnote omitted). Goff and Jones said that "[i]n the past restitution was considered to be no more than a heterogeneous collection of unrelated topics." R. Goff & G. Jones, supra note 73, at 5 (footnote omitted). They also noted:

At one time a similar charge was levelled against the law of tort: "We are inclined to think that tort is not a proper subject for a law book" see 5 Am. L. Rev. 340-341 (1871) [O.W. Holmes, Jr., reviewing an abridged edition of Addison's Torts. Three years later Holmes came "to recognize there were satisfactory reasons, both historical and analytical, for including the subject in the corpus juris"; Mark De Wolfe Howe, Mr. Justice Holmes, The Proving Years, 1870-1882, pp. 65, 184.

Id. at n.10.

114. Not only is "unjustness" an element of the cause of action of restitution, but the concept of justice permeates any discussion of the topic of restitution. Seavey & Scott, in their explanation of the Restatement of Restitution said:

Lord Mansfield seems first to have recognized the fundamental principle of restitution in an opinion remarkable for its insight . . . in which he stated that "the gist of this kind of action (the action of general assumpsit) is that the defendant upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money" [citing Moses v. Macferlan, 2 Burr. 1005 (1760)].

. . . .

These [described] cases and numerous others where relief is properly given indicate that a theory of restitution is essential to dealing justly between the parties. Seavey & Scott, supra note 69, at 33, 35-36.

Professor Douthwaite stated:

What is the relation between the quasi-contractual suit in assumpsit and the equitable suit to impress a constructive trust? The answer is this: Of old, both common law and chancery judges came upon situations of unjust enrichment where justice cried out for some remedial relief not within the existing framework. Douthwaite, supra note 90, at 1074. Professor Teller stated that "[restitution] is a vehicle for effectuating justice in numerous situations where accustomed remedial categories may prove inadequate." Teller, supra note 106, at 40 (footnote omitted). He added that "[e]nlarging the measure of justice was the grand design." Id. at 46.

115. The Tentative Draft of the Second Restatement noted that "at times the courts have expressed discomfort with wide generalizations about restitution. A statement of principle about 'unjust enrichment' leaves the expression to be defined or explained, it cannot serve as a precise guide to decisions." Restatement (Second) of Restitution § 1 comment d (Tent. Draft No. 1, 1983). Professor Friedmann said:

The concept of unjust enrichment is notoriously difficult to define. It has on occasion been regarded as too indefinite and vague to be recognized as a general
cern with overbreadth may have contributed to the underutili-

cation of restitution.

Criticism that restitution is too broad not only ignores the fact
that restitution is in earlier stages of development than other areas
of the law, but also ignores the analysis of jurists such as Learned
Hand and Seavey and Scott, the Reporters of the Restatement of
Restitution. Learned Hand, responding to criticism of Professor

legal principle, with concern expressed that its adoption might undermine legal sta-

tability, confuse legal thinking, and jeopardize clear, systematic organization of the
law.
Friedmann, supra note 72, at 504-05 (footnotes omitted).

Goff and Jones stated that “[i]t has been said that the principle of unjust enrichment is
too vague to be of any practical value.” R. Goff & G. Jones, supra note 73, at 11. Another
commentator noted that “[i]t has been contended that ‘unjust enrichment’ is an excessively
vague concept upon which to base a category of the law, that it is so broad as to be mean-
ingless.” Comment, Concept and Terms, supra note 72, at 1175. Professor Oesterle con-
cluded his book review of Professor Palmer’s treatise by stating:

While most recognize and applaud the separation of the principles of unjust enrich-
ment from the early foundations, the irony of the evolution is that only the restric-
tive vestiges of these foundations have been systematically disregarded; those ves-
tiges that support broad relief—overbroad in new contexts—remain and are
uncritically accepted.
Oesterle, supra note 73, at 364 (footnote omitted).

Some commentators who complain about restitution’s breadth have quoted Professor
Dawson’s comment in the introduction of his book, Unjust Enrichment, “that a general
principle prohibiting enrichment through another’s loss appears first as a convenient expla-
nation of specific results . . . Yet once the idea has been formulated as a generalization, it
has the peculiar faculty of inducing quite sober citizens to jump right off the dock.” J. Daw-
son, supra note 89, at 8, quoted in Oesterle, supra note 73, at 364 n.117; Friedmann, supra
note 72, at 505 n.3. To the extent anyone uses this statement as a reason to dismiss restitu-
tion, that person would have missed the premise of Professor Dawson’s book that “any high-
developed legal system needs restitution remedies and cannot get on without them.” J. Daw-
son, supra note 89, at 11. Professor Dawson also said that “most mature systems of law
have found it necessary to provide, outside the fields of contract and civil wrongs, for the
restoration of benefits on grounds of unjust enrichment.” Id. (footnote omitted). Professor
Sullivan said: “The appeal of a legal rule requiring the disgorgement of gains unjustly ac-
cquired or retained is so compelling that scholars from classical times to our own era may be
cited in its support.” Sullivan, supra note 72, at 1.

In his book, Professor Dawson discussed analytic problems in the area of restitution,
but not from the point of view that restitution should be abandoned or its use restricted,
but rather that it should be better analyzed so that it can be given wider application. The
problems with restitution that Professor Dawson describes involve voluntarily conferring a
benefit, management of the affairs of another, and mistake. J. Dawson, supra note 89, at
127-44. None of those problems is relevant to the application of unjust enrichment for a
discriminatory denial of partnership. Professor Dawson’s point is not that restitution should
not be extended, but that it should be extended more than it is. He said: “We have only the
practical limitations of our own working method and are accordingly less generous than we
could otherwise afford to be.” Id. at 127.
Keener's 1893 treatise on quasi-contract, stated that "Professor Keener's principle is logically perfect and of a kind far from anomalous." He pointed out that if unjust enrichment is vague, so too are the concepts of the "ordinary prudent man" and "enjoyment" of land. Seavey and Scott also noted that the concepts of "promises" in contract law and "wrong" and "harm" in tort law are no more narrow than the concept of restitution. They noted

116. See Abbot, supra note 109, at 209-27 (criticizing W. Keener, A Treatise on The Law of Quasi-Contracts (1893)).
118. Id. at 250. Learned Hand stated:
I believe that reference to indefinite standards, such as that of conscience, is a common characteristic of legal rules. Take, for example, the rule of responsibility for unlawful acts, that none of their results create legal liability except those against which an ordinarily prudent man would have provided under the same circumstances. Surely the standard of what such results are in any given case is quite as incapable of precise definition as that of what acts are unjust.
Or consider the rule governing the extent to which one man may injure the property of another in the enjoyment of his own . . . . The standard is really no other than that by which the interference of each with the enjoyment of his neighbors, balanced with his own enjoyment, results in the maximum of freedom, a rule quite as incapable of clear definition as that of injustice.

Id.
119. Seavey & Scott, supra note 69, at 36. "If it is alleged, as it frequently has been, that [restitution's] basic premise is so broad as to be meaningless, it may be answered that the same is equally true of the generalizations made with reference to contracts and torts."

Id. (footnote omitted). Professor Seavey later reiterated:
The generality of [restitution's] premises has led some writers and judges to disparage its usefulness. But, as a principle, it is no more vague than the tort generality that one must pay for the harm he negligently causes another . . . . [W]e find its principles not very difficult of application by one familiar with Anglo-American theories of justice. It has some trick phrases, but they are not as technical as "consideration" in the law of contracts nor as ambiguous as "legal cause" in torts.

Seavey, supra note 69, at 257.

Goff and Jones stated:
It has been said that the principle of unjust enrichment is too vague to be of any practical value. Nevertheless, most rubrics of the law disclose, on examination, an underlying principle which is almost invariably so general as to be incapable of any precise definition. Moreover, in a search for unifying principles at this level we should not expect to find any precise "common formula," but rather an abstract proposition of justice which is "both an aspiration and a standard for judgment."
Unjust enrichment is no more vague than the tortious principle that a man must pay for harm which he negligently causes another, or the contractual principle that pacta sunt servanda. The search for principle should not be confused with the definition of concepts.

R. Goff & G. Jones, supra note 73, at 11 (footnotes omitted); see also Williams, Language and the Law—II, 61 Law Q. Rev. 179, 193 (1945); Comment, Concept and Terms, supra note 72, at 1175-76.
that what was required in tort and contract law was merely "a large number of individual rules to determine when relief will be given . . . . The situation is the same in the case of the fundamental conception of restitution. It requires an extensive set of individual rules to spell out what is meant by 'unjust' . . . ."¹²⁰ In fact, courts have developed a number of rules to define unjust enrichment.¹²¹ These rules can be easily applied to a variety of situations, including those not previously remedied by restitution. As Professor Dawson stated, "there is nothing in our present conceptions that prevents an appropriate unjust enrichment remedy from being used in any field."¹²² He added:

My own conclusion is that restitution remedies in our law have a roving commission. The generalizations now built around them and the techniques they provide have implications that reach in every direction, in unsuspected ways. No area is marked off as exempt. We have not yet absorbed all the contributions they have made or foreseen those still in the making.¹²³

Professor Douthwaite noted that "[r]estitutionary problems arise in a bedazzling variety of situations."¹²⁴

The purpose of this article is not to explore the outer limits of restitution but to describe one area of the law in which restitution has been unnecessarily underutilized. A discriminatory denial of partnership fits easily into at least one portion of the framework of restitution that has been widely accepted. Thus, restitution enables a plaintiff to prove and remedy the wrong that the court in

¹²⁰. Seavey & Scott, supra note 69, at 36.
¹²¹. See infra note 161. The Second Restatement provides: "Repeated and consistent applications of the principle [of unjust enrichment] can, however, give support to its further application in like cases." RESTATEMENT (SECOND) OF RESTITUTION § 1 comment d (Tent. Draft No. 1, 1983). Goff and Jones said: "In fact as one might expect, close study of the law of restitution reveals as with contract and tort, a highly developed and reasonably systematic complex of rules." R. Goff & G. Jones, supra note 73, at 13. The authors added that "[the cases] suggest that the law is now sufficiently mature for the [English] courts to recognize a general[ized] right to restitution. . . . The principle of unjust enrichment is capable of elaboration." Id. English law, unlike American law, does not explicitly recognize such a right. See id.; see also 1 G. Palmer, supra note 64, § 1.1, at 2, 5-6; J. Dawson, supra note 89, at 20-21.
¹²². J. Dawson, supra note 89, at 113.
¹²³. Id. at 117. Professor Dawson also said that "[a]t every point . . . one finds the same push for expansion [of the doctrine of restitution]." Id. at 145. He noted that restitution is expanded by liberal application of concepts of fraud, innocent misrepresentation, materiality, mistake and duress. See id. at 145-46.
¹²⁴. G. Douthwaite, supra note 72, § 1.1 at 3.
Hishon left unremedied by holding Title VII inapplicable even if discrimination was proven.125

IV. RESTITUTION APPLIED TO A DISCRIMINATORY DENIAL OF PARTNERSHIP

A. The Defendant Has Been Enriched by Having Received a Benefit

Since restitution provides relief when a defendant is unjustly enriched by having received a benefit at the plaintiff's expense,126 it follows that recovery involves disgorging the defendant's benefit. Professor Dawson stated:

[I]t is the presence of some kind of gain-loss equation that explains the extraordinary progress of the unjust enrichment idea in most of its modern application. For persons who have suffered loss, the loss alone is bad enough. But when it has produced an identifiable gain in another person, the sense of loss is greatly aggravated.127

In restitution a defendant can benefit by receiving money, goods, services, and a variety of other gains. The Restatement of Restitution answers its question "what constitutes a benefit," by stating:

A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage.128

125. Hishon v. King & Spalding, 678 F.2d 1022, 1024 (11th Cir. 1982), cert. granted, 103 S. Ct. 813 (1983). Restitution is, of course, a matter of state, not federal, law.
126. See supra text accompanying notes 69-74.
127. Dawson, supra note 89, at 177.
128. RESTATEMENT OF RESTITUTION § 1 comment b (1937); see also RESTATEMENT (SECOND) OF RESTITUTION § 1 comment f (Tent. Draft No. 1, 1983) (concept of benefit is expandable and remains flexible). Professor Dawson also said:

It is broadly true of the modern remedy in the United States that there are no distinctions based on the form or nature of the gain received . . . . The benefit may consist of the acquisition or use of chattels, services rendered or acts performed, the use of ideas, or the discharge of an obligation. The list is not yet closed.

J. Dawson, supra note 89, at 22. Professor Dawson later added:

The "gain" can consist of money, the discharge of an obligation, the use of a physical asset or an idea, or a desired course of action by another human being—the latter being described as "services" or "bargained for performance" and thereby made to seem almost as real as land or a shovel.

Dawson, supra note 89, at 176-77.
In the case of a discriminatory denial of partnership, the law firm's benefit is the net monetary gain from the proceeds of the "billable hours" the associate worked. Typically, the hours an associate works are exchanged directly by a law firm for a specific amount of money that is easily measured. The law firm bills a client for each productive hour that the associate devotes to that client's work. The firm pays the associate an annual salary. The value of the associate's "billable hours" generally exceeds by a substantial amount the associate's salary, related overhead, and other benefits from the firm not reimbursed by clients. This excess is the firm's net benefit from the associate's work. Thus, when a firm

In the case of services provided to a defendant, whether a plaintiff can recover the value of the services in excess of the defendant's benefit is subject to debate. See infra note 148. As long as the defendant has received an "actual benefit," however, the concept of benefit in restitution is widely accepted and uncontroversial. See Childres & Garamella, supra note 72, at 435-36. The authors note that restitution is "recovery of the actual benefit conferred upon the defending party . . . " Id. at 435. See generally Jeanblanc, Restitution Under the Statute of Frauds: What Constitutes a Legal Benefit, 26 Ind. L.J. 1 (1950); Sullivan, supra note 72 (review of types of benefits in restitution).

In any specific case utilizing the theory of restitution for a discriminatory denial of partnership, the plaintiff would need to prove the structure and billing practices of the law firm. Because this information is relevant to the action in restitution, the information is obtainable through discovery. See Fed. R. Civ. P. 26.

The number of hours that the firm bills a client is not necessarily the number of hours the associate worked. A firm may not bill a client for all the hours worked if a partner believes that the project did not warrant that many hours or that the associate was inefficient. If, however, the firm did bill for the hours but the client did not pay all or part of the bill, although the firm did not benefit, the plaintiff may still recover under a quantum meruit theory of restitution. See infra note 148.

This benefit is in addition to the money the partners earn from their own "billable hours." Salary and overhead related to an associate's work are deducted on the theory that the plaintiff must tender to the defendant the benefit that she received from the defendant. See Restatement (Second) of Contract, § 384 (1981); Restatement (Second) of Restitution § 19 (Tent. Draft No. 1, 1983); infra notes 185-87 and accompanying text. These rules provide symmetry to prevent plaintiff's unjust enrichment.

What constitutes plaintiff's benefit is a matter of proof. Salary would include fringe benefits. Related overhead might include: (1) the plaintiff's share of the cost of support staff and facilities and rent not separately billed to clients; (2) the plaintiff's share of the proportionate salaries devoted to office administration not billed to clients of those people who spend time running the firm and generating business; and (3) the plaintiff's share of the cost of training seminars or time the plaintiff received from others in the firm that was not billed to clients. To the extent that the overhead and other related benefits have been reimbursed by clients, plaintiff should not be required to give the defendant, who breached the contract by discriminating, a double recovery. See generally Kosian v. American Nat'l Ins. Co., 254 Cal. App. 2d 657, 62 Cal. Rptr. 225 (1967). In addition, to the extent that a plaintiff is enriched by not deducting benefits reimbursed by clients, she is not enriched at the defen-
discriminates or claims the right to discriminate in choosing partners, the hours and efforts of an associate were for naught as far as her future with that law firm is concerned, but not as far as the partners are concerned.

Using the Hishon example of an associate who worked for a firm for six years before the alleged discriminatory partnership rejection and hypothetical annual salary, overhead, billing rate, and hours worked, a law firm's hypothetical benefit can be seen in the following three tables. Each table uses the same hypothetical salary, overhead and billing rates, changing only the number of hours worked. Thus, the tables show how the partnership benefit increases as the associate works more hours.

As Table 1 demonstrates, if an associate works 1600 billable hours per year, the firm receives a net benefit of $270,000 over six years.

dant's expense since the defendant has been reimbursed. Unjust enrichment requires enrichment to be at the other party's expense. See infra text accompanying notes 155-56.

The Tentative Draft of the Second Restatement provides that a plaintiff need not tender a benefit that is not produced, "at least in part either (a) at a cost to the defendant or (b) by a performance owed or expected by one of the parties in connection with the exchange." Restatement (Second) of Restitution § 21 comment b (Tent. Draft No. 1, 1983). Subsection (b) does not discuss the situation when a third party has reimbursed the defendant, and for the reasons stated above, should not apply to such a situation. Comment a of § 21 states that a plaintiff may be required to account for "new technical competence or production capacity through his own performance." Id. § 21 comment a. To the extent that comment implies that a plaintiff should account for her increased competence that is gained by virtue of working for six years and that is the result of her own efforts, however, it is inconsistent with the well-settled theory that "receipt of gain is not unjust enrichment to the extent that the recipient generated it by his own rightful contribution of effort, capital, or skill...." Id. § 1 comment i; see infra note 143. To the extent the firm paid for training seminars for the plaintiff or provided in-house training to her that was not reimbursed by clients, however, the plaintiff should account.
Table 1
1600 “Billable Hours” Worked Per Year

<table>
<thead>
<tr>
<th>Year</th>
<th>Year 2</th>
<th>Year 3</th>
<th>Year 4</th>
<th>Year 5</th>
<th>Year 6</th>
</tr>
</thead>
<tbody>
<tr>
<td>Salary</td>
<td>$25,000</td>
<td>$30,000</td>
<td>$35,000</td>
<td>$40,000</td>
<td>$45,000</td>
</tr>
<tr>
<td>Related overhead</td>
<td>$25,000</td>
<td>$30,000</td>
<td>$35,000</td>
<td>$40,000</td>
<td>$45,000</td>
</tr>
<tr>
<td>Total</td>
<td>$50,000</td>
<td>$60,000</td>
<td>$70,000</td>
<td>$80,000</td>
<td>$90,000</td>
</tr>
<tr>
<td>Hourly billing rate</td>
<td>$50</td>
<td>$60</td>
<td>$70</td>
<td>$80</td>
<td>$90</td>
</tr>
<tr>
<td>Number of hours billed</td>
<td>x1,600</td>
<td>x1,600</td>
<td>x1,600</td>
<td>x1,600</td>
<td>x1,600</td>
</tr>
<tr>
<td>Total billing</td>
<td>$80,000</td>
<td>$96,000</td>
<td>$112,000</td>
<td>$128,000</td>
<td>$144,000</td>
</tr>
<tr>
<td>Salary and related overhead</td>
<td>-$50,000</td>
<td>-$60,000</td>
<td>-$70,000</td>
<td>-$80,000</td>
<td>-$90,000</td>
</tr>
<tr>
<td>Law firm’s net benefit</td>
<td>$30,000</td>
<td>+36,000</td>
<td>+42,000</td>
<td>+48,000</td>
<td>+54,000</td>
</tr>
</tbody>
</table>

An average associate, however, bills 1600 hours per year. Many associates who actively compete for partnership, motivated by the assurance that they are eligible, bill far more than 1600 hours per year. Thus, the benefit to the law firm becomes considerably higher. Table 2 shows that if an associate billed 2,000 hours per year, the law firm would retain a net benefit of $450,000. Finally, as Table 3 demonstrates, if an associate were exceptionally hard working and billed 2,880 hours per year (60 hours a week for 48 weeks), the partnership would receive a net benefit of $846,000.

133. The hypothetical overhead is 100 percent of salary. See, e.g., Pollock, Applying the “Principal” Principle, The American Lawyer, July, 1982, at 8. Actual overhead may not be a fixed percentage of salary. It may decline as a percentage of salary as salary increases.

134. The hypothetical billing rate is “based on the traditional formula of twice the annual salary divided by $1,000 an hour.” Pollock, supra note 133, at 8.

135. Ms. Epstein stated:
A Price-Waterhouse study found that the average Wall Street associate billed clients for 1,667 hours of work in 1976, but this is considered sluggish. Associates at various firms say they are expected to bill 2,000 hours a year. . . . Many lawyers bill far in excess of 2,000 hours and a woman lawyer I have kept in touch with who was billing 200 hours a month in 1976, in 1980 said she had been billing 300 hours a month for one three-month period on a particularly demanding case.

C. Epstein, supra note 131, at 209 (footnotes omitted). Ms. Epstein quoted one attorney in a large law firm who said: “[T]here are people who spend every night here, and every weekend here. . . .” Id. at 210.
It is not uncommon for an associate seeking partnership to bill 2000 or more hours per year. Some associates may even bill more than 2800 hours, motivated not only by the desire to do a professional job, but also by the competition for partnership. Thus, the tables may understate the benefit to the law firm from an ambitious associate.

In addition, in many law firms associates work more than six years before the partnership decision. Thus, for each extra year worked as an associate, the total benefit to the partnership will increase. The benefit will increase by well over $100,000 per year if an associate works 2880 billable hours per year. If such an associate worked 10 years before being discriminatorily denied partnership, the benefit to the firm could be over $1,500,000.

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136. See supra note 135.
137. “Promotion in Wall Street firms is similar to the tenure system in academia. Young lawyers serve as associates for six to ten years while they await final appraisal, leading to partnership or departure from the firm.” C. Epstein, supra note 131, at 202.
138. If the last four years were all at the same salary and billing rate as year six,
may again, therefore, understate the benefit of an associate’s work to the partners of many firms.

The tables show the benefit to the law partnership based upon the total number of billable hours an associate works. As will be discussed below, the benefit that must be disgorged is the benefit unjustly retained. Therefore, the tables should show only the hours worked as a result of the promise of eligibility for partnership. The hours that would have been worked without this promise should be subtracted. In order to have a figure to subtract, the plaintiff would have had to have been willing to work for a firm in which she would not have been eligible for partnership. The tables assume that she had other offers of employment and would not have worked for a firm where she was ineligible for partnership; therefore, the amount subtracted is zero.

An associate's recovery is not necessarily lessened by the hours she worked on pro bono publico or office administration matters. First, the value of "nonbillable" hours could be recovered under a quantum meruit theory of restitution. Second, unless the pro bono client was represented by the firm at the request of the associate, the client was represented by the choice of the firm. The associate assigned by the firm to pro bono tasks or office administration work saves the time of another associate at the same level for billable work. Benefit in restitution can include "an expense saved by the defendant."

$752,000 (4 x $188,000) added to the total benefit for six years of $846,000 results in a ten year total of $1,598,000.

139. See infra text accompanying notes 159-200.
140. Pro bono publico work is work that a law firm chooses to do at little or no charge as a public service.
141. "Office administration" work is generally work for the partnership, such as research on legal issues of interest to the firm or work on firm committees.
142. See infra note 148.
143. Sullivan, supra note 72, at 10. Professor Sullivan stated:

Although a venerable strain of American case law exists that defines benefit narrowly so as to preclude recovery where the plaintiff has not proven tangible gain by the defendant, most jurisdictions in recent times have developed a much broader definition of benefit. The Virginia Supreme Court decision in Raven Red Ash Coal Co. v. Ball [185 Va. 534, 39 S.E. 2d 231 (1946)] typifies this recent trend . . . an expense saved by the defendant.

Id. (footnotes omitted). The Restatement of Restitution provides that a person "confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss." Restatement of Restitution, § 1 comment b (1937); see Restatement (Second) of Restitution § 1 comment f (Tent. Draft No. 1, 1983); see also 1 G.
The monetary benefit that a firm receives from an associate, as illustrated above, is not direct in the sense that an associate handed the law firm $500,000 or more, which the law firm must now return. Such directness, however, is not an element of restitution since restitution “does not mean that the gain to the defendant need be equated to the loss to the plaintiff . . . .”144 The Restatement of Restitution states that “if a person receives something other than money and exchanges it for money, he may be under a duty of restitution for the money thus received . . . .”145 In the case of a law firm, an associate’s work is measured by hours. The firm has acquired the associate’s hours and directly “exchanged” them for money. This situation is analogous to one in which a defendant who acquires a chattel from the plaintiff and sells it becomes liable in restitution to the plaintiff for the proceeds.146

144. 1 G. PALMER, supra note 64, § 2.12, at 162 (saving of expense applied in modern decisions to measure unjust enrichment in wrongful use of a trade secret). See generally Olwell v. Nye & Nissen Co., 26 Wash. 2d 282, 173 P.2d 652 (1946). In Olwell, a machine was converted and used by the defendant. The court measured recovery not by the rental value of the machine but by what the defendant saved by not having to employ workers. Id. Professor Palmer questioned whether this measure of recovery was proper on the ground that it could be viewed as “awarding to the plaintiff values that were the product of the defendant’s own enterprise.” 1 G. PALMER, supra note 64, § 2.12, at 161. He noted that “the point is sufficiently demonstrated by the wide discrepancy between the probable market value of the use of the machine, and the amount of recovery authorized under the court’s formula.” Id. That criticism is inapplicable in the case of an associate’s hours. When a firm bills the hours an associate works to a client, the firm does not add its work product to those hours, nor does it add its work product to another associate’s hours that are billed in lieu of the time spent by an associate working on pro bono matters. The ingenuity and time spent are the associate’s. In addition, the market value of the hours saved is the same as the market value of the use of the hours, so the discrepancy of Olwell does not exist. The Olwell case is discussed in Douthwaite, supra note 89, at 1076, as a case that measures the value of the benefit by its value to the defendant rather than by its “objectively regarded” or market value. The value to the law firm and the market value of the associate’s time are generally the same and are measured by what clients pay the firm for the hours of an associate.

145. Restatement of Restitution, § 150 comment b, at 597-98 (1937).

146. Professor Palmer stated that if the benefit “consisted of the transfer of goods or services, the usual measure of recovery is their fair market value. If the goods have been sold by the tortfeasor, the plaintiff may recover the amount of proceeds.” 1 G. PALMER, supra note 64, § 2.12, at 157-58. Early quasi-contractual theory permitted a plaintiff to recover only if the defendant had sold the chattel, not if he or she had consumed it. See J. Dawson, supra note 89, at 22; 1 G. PALMER, supra note 64, § 2.2, at 53-55; Restatement of Restitution § 128 comment b (1937). This limitation was based upon the fiction that the plaintiff had agreed to the defendant’s sale of the chattel with the expectation of receiving the proceeds. D. Dobbs, Law of Remedies § 5.15, at 414-15 (1973). But the “agreement” in
An associate's hours are also analogous to services. The concept of benefit in restitution encompasses the value of services provided to the defendant at his request.\textsuperscript{147} Generally, the difficulties with restitutionary theory and requested services involve situations in which the services did not financially benefit the defendant or in which the defendant's benefit was less than the market value of the services. In those situations, the question becomes whether recovery is measured by the value of the services to the defendant or by the reasonable value of plaintiff's services.\textsuperscript{148} In the case of a

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\textsuperscript{147} See, e.g., \textit{Restatement of Restitution} §§ 40, 134 (1937) (Reporters' Notes at 25); \textit{Restatement (Second) of Contracts} § 370 comment a (1981); see also 1 G. Palmer, supra note 64, § 4.2, at 135. With respect to services, Professor Keener said:

If restitution be the theory upon which the plaintiff recovers, when that which he gave the defendant was money, and if the amount paid is the measure of recovery in such cases, it would seem to follow logically that where the plaintiff renders services, . . . and the defendant fails to perform the contract, the plaintiff can if he desires sue in \textit{indebitatus assumpsit}. Such is the law. Not only should this result follow, but it should follow that the measure of the plaintiff's recovery should be not what the defendant contracted to pay, but the actual value received by defendant from the plaintiff. When a plaintiff sues in a count for money had and received, what he recovers is not the money that he paid, but an equivalent amount; and the law says that he is entitled to recover an equivalent amount, for the reason that it is unjust for the defendant to keep what the plaintiff gave him without performing the contract on his side. But if this be true of money, why should it not be equally true in the case of services . . . . Why should not the plaintiff recover on the theory of restitution in value, and not upon the theory of compensation, as much where services have been rendered . . . as in the case of money paid, since what the plaintiff receives is not the money paid but its equivalent?

W. Keener, \textit{supra} note 72, at 300 (footnote omitted). Childres and Garamella stated that “[t]he defendant has received the plaintiff's property or its value and should be made to return it since he possesses no legitimate claim to the property or its value, whether in employment, sales, or the various ‘services’ cases.” Childres & Garamella, supra note 72, at 442 (footnote omitted). Professor Teller writes that “[i]f the jailer or the applicable division of government receives money from the contractor for the services of a person unlawfully imprisoned, restitution may be had for the amount received.” Teller, \textit{supra} note 106, at 51.

\textsuperscript{148} For example, Childres and Garamella noted that the law of restitution sometimes covers both “actions to recover actual benefits conferred and actions to recover the reasonable value of expenses and services.” Childres & Garamella, \textit{supra} note 72, at 436 (footnote omitted). The latter is referred to as \textit{quantum meruit}. Id. at 435-36 n.14. Professor Palmer
law firm, with the exception of non-client work and unpaid bills, neither of those difficulties is present because the benefit to the firm and the value of the associate's services are identical and easily measured by looking at the bill that the firm sent to the client. The client's bill when paid is the benefit received by the firm and, by definition, the "market value" of the services of the associate at that firm.

stated that: "The two most important meanings [of benefit] are, first, that there has been an addition to the defendant's wealth or an increase in his estate; and second, that a performance requested by the defendant has been rendered." 1 G. PALMER, supra note 64, § 1.8, at 44-45.

Childres and Garamella noted that in cases in which the defendant has breached a contract before the plaintiff has completed performance, under quantum meruit the plaintiff can sometimes recover the value of the services performed in reliance upon the contract even if that value exceeds both the contract price and the value to the defendant. They believed that this upset risk allocations inherent in contracts and that such reliance damages should be recoverable only as contract damages, limited by the terms of the contract and considerations of economies of scale. Childres & Garamella, supra note 72, at 441, 444-54. They distinguished this problem from restitution. Where the defendant has received an "actual benefit," they would allow recovery of that benefit even if it exceeds the contract price. Id. at 441-44. On the other hand, Professor Palmer would permit recovery in both situations. "In general, the benefit is the requested performance . . . . If the performance consists of services, . . . a court should order restitution measured by the fair value of the part performance, even though that was in excess of the contract price." 1 G. PALMER, supra note 64, § 1.8, at 45 (footnote omitted); see also id. § 4.2, at 370-77.

Professor Dawson maintains that "gain to the wrongdoers can exist without any showing of ultimate profit or utility to him, provided the interest invaded is one that others commonly pay for or might conceivably pay for." Dawson, supra note 89, at 178.

Professor Perillo's thesis is that the concept of benefit as an actual gain unnecessarily restricts the applicability of quasi-contract as a cause of action and does not always allow plaintiff to recover for "unjust impoverishment." Perillo, supra note 94, at 1220. He suggests that the goal should be "to determine the extent the status quo ante will be restored." Id. at 1224; see also Comment, The Necessity of Conferring a Benefit for Recovery in Quasi-Contract, 19 HASTINGS L.J. 1259 (1968) (liability in quasi-contract should be based on either unjust enrichment of the defendant or unjust loss of the plaintiff).

149. For unpaid bills, an associate could recover only under a traditional quantum meruit theory of restitution for the reasonable value of her services, which is the dollar value as billed. See 1 G. PALMER, supra note 64, § 1.8, at 45, § 4.2, at 370-79; see also supra note 148. For nonclient work plaintiff could recover under either a theory of quantum meruit or of savings to the defendant. See supra notes 130, 140-43, 148.

150. For law firms that do not itemize the bill they send their clients, the amount of the bill attributed to the work of the associate would have to be determined from internal work papers.

151. While the billing rate of an associate's hours reflects the prestige of the firm, it also reflects the quality of the work of partners and associates of the firm. Just as when someone who wrongfully sells a chattel is liable in restitution for the proceeds of the sale, so too is the firm liable in restitution for the proceeds of the associate's hours. The fact that the reputation of the seller of the chattel enabled him to sell it does not diminish the value
Upon superficial reflection one might think that the salary of an associate is the reasonable market value of the associate's services, but that would ignore the fact that salary is only part of an associate's compensation. The other part is the promise that the associate is eligible to compete for partnership. Thus, salary alone underestimates the value of the associate's services.

There is an appropriate symmetry in the application of restitution to remedy a discriminatory denial of partnership in a law firm. The more qualified and productive the associate who was discriminated against is, the greater the benefit to the firm and the more likely the adverse partnership decision was based on discrimination. Thus, the more grievous the wrong of discrimination against her in her chosen career, the greater the recovery under

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of the chattel. Nor would a law firm argue that the hours of the associate are not worth the amount for which the firm bills its clients. Since restitution measures the defendant's benefit, what an associate would have earned as a sole practitioner is irrelevant.

152. See infra text accompanying notes 166-87.

153. Law firms at times refer to the benefit they receive from the billable hours of associates as "profit." See generally C. Epstein, supra note 131, at 179. This benefit is not the type of "profit" that may not be recoverable by a plaintiff in restitution. First, as Professor Palmer noted, "[t]here is ambiguity . . . in the term 'profits.'" 1 G. Palmer, supra note 64, § 2.12, at 159. He added that "[o]ne of the recurring problems in the law of restitution is to determine whether, or the extent to which, the defendant's gain is the product not solely of the plaintiff's interest but also of contributions made by the defendant." Id. at 161. When the profits are entirely or almost entirely "the fruits of defendant's labor," restitution will be denied. Id. § 2.9, at 130 (quoting Hart v. E.P. Dutton & Co., 197 Misc. 274, 93 N.Y.S.2d 871, aff'd, 277 A.D. 939, 98 N.Y.S.2d 773 (1949) (restitution not available for profits from defendant's book which allegedly libeled plaintiff)). With a discriminatory denial of partnership, however, the benefit comes from billing the associate's work by the hour at a fixed fee, not from the firm's additional labor. Thus, the value of the associate's work is not unrecoverable "profit." Even if it were, recovery of profits may be available when the defendant's acts are tortious or in breach of a relationship of trust. See, e.g., National Merchandising Corp. v. Leyden, 370 Mass. 380, 348 N.E.2d 771 (1976). See generally Douthwaite, supra note 90; Douthwaite, Profits and Their Recovery, 15 Vill. L. Rev. 346 (1970); York, supra note 104. Discrimination could be analogized to tortious, or wrongful, conduct. Professor Palmer has said that "recovery of profits may be granted because there is no other feasible means of measuring the wrongdoer's enrichment." 1 G. Palmer, supra note 64, § 2.12, at 166.

Second, when commentators say that generally a plaintiff cannot recover the profits a defendant made from breaching his contract, they are referring to a defendant who "[i]nstead of supplying the promised performance . . . uses or disposes of it for his own benefit . . . ." Id. § 4.9, at 437-38; see also Dawson, supra note 89, at 186-87. That is not the situation with a discriminatory denial of partnership. The associate seeks to recover the value of what she gave to the law firm, not any gain that the firm made by selling elsewhere what it had promised to deliver to the associate. "[R]estitution of . . . performance in specie or in value" is well accepted. 1 G. Palmer, supra note 64, § 4.9, at 451; see also Dawson, supra note 89, at 189.
restitution. Conversely, if the associate were unproductive, inefficient, and unqualified, the smaller the benefit, if any, to the firm, and the more likely the adverse partnership decision was based on the associate's lack of merit rather than her sex.

The well-qualified, productive associate, however, provided the firm with a measurable monetary benefit. The law firm cannot restore the status quo so that the associate can begin her career again in a place where she is eligible to advance.\textsuperscript{154} It is impossible for the firm to return an associate's time for the past six or more years. The partnership, however, can and should return the benefit it has reaped at the associate's expense—the value of the associate's time\textsuperscript{155}—when it discriminates against the associate in selecting partners.

B. The Defendant's Benefit Was at Plaintiff's Expense.

The second element of restitution is that the defendant's benefit is at the plaintiff's expense. Just as the defendant's benefit need not equal the plaintiff's loss,\textsuperscript{156} "[p]ecuniary loss should not be an essential element of the restitution claim . . . ."\textsuperscript{157} In the case of a law firm, an associate's loss is her time and effort spent competing for a partnership slot for which, unknown to her, she was ineligible.

In the case of the associate discriminated against, not only is the defendant's gain—the value of the associate's billable hours—at the associate's expense, but the gain and the loss are equivalent.\textsuperscript{158} Each hour worked by the associate was the associ-
ate's loss, measured by the value that the client paid for the hour. That value per hour was also the benefit that the defendant received.

C. The Defendant's Retention of the Benefit Would Be Unjust

1. Breach of Contract

Broad concepts in the law, such as "harm" in tort law and "promise" in contract law, are defined by a series of rules developed from case law. In restitution as well, there are a number of well-recognized rules developed from case law to specify when a benefit is unjustly acquired or retained and thus must be disgorged. Total or material breach of contract is one of the many situations in which courts have ruled that a defendant's retention of a benefit is unjust. A discriminatory denial of partnership

Keener and Woodward maintain that the plaintiff must prove both that the defendant has committed a wrong and that the defendant has benefitted at the expense of the plaintiff: "the facts must show not only a plus, but a minus quality." Since the idea that the defendant should not be entitled to retain a benefit wrongfully obtained at plaintiff's expense partially underlies quasi-contract, the Keener-Woodward view makes some sense. If the defendant's gain cannot be shown to have caused plaintiff a loss, no basis exists for permitting recovery in quasi-contract.

Despite the Keener-Woodward conclusion that quasi-contractual recovery on such facts would not be appropriate, the law today is otherwise. The Restatement of Restitution, for example, intimates that plaintiff's recovery in quasi-contract does not require a showing that plaintiff's loss corresponds precisely to defendant's gain.

Sullivan, supra note 72, at 23 (footnotes omitted). Referring to Professor Keener's "plus and minus" statement, Professor Palmer stated: "Whatever the statement may mean, the decisions amply demonstrate that economic loss to the plaintiff is not a requisite." 1 G. PALMER, supra note 64, § 2.10, at 134. A case frequently cited by commentators held:

The point is not whether a definite something was taken away from plaintiff and added to the treasury of defendant. The point is whether defendant unjustly enriched itself by doing a wrong to plaintiff in such manner and in such circumstances that in equity and good conscience defendant should not be permitted to retain that by which it has been enriched.

Federal Sugar Ref. Co. v. United States Sugar Equalization Bd., Inc., 268 F. 575, 582 (S.D.N.Y. 1920) (footnote omitted); see also Dawson, supra note 89, at 176 ("loss" need not involve any physical diminution or subtraction from the assets of the complaining party).

Supra text accompanying notes 119-20.

160. What all these situations have in common, beyond the three elements of restitution, is not the subject of this article. The purpose of this article is to demonstrate that restitution is applicable to remedy a discriminatory denial of partnership.

161. Professor Palmer's four volume treatise contains 23 chapters. They specify that a defendant's benefit is unjust in certain situations involving conversion, trespass, fraud, misrepresentation, breaches of both enforceable and unenforceable contracts, mistakes, donations and bequests. See 1-4 G. PALMER, supra note 64. Professor Oesterle noted that Profes-
when the associate was promised eligibility for partnership is such a breach of contract.\textsuperscript{162}

The Restatement (Second) of Contracts provides in pertinent part: "On a breach by non-performance that gives rise to a claim for damages for total breach . . . the injured party is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance."\textsuperscript{163} When a plaintiff seeks restitution for a breach of contract, the plaintiff is not seeking ex-

sor Palmer could have included problems of infancy, mental incapacity and undue influence. Oesterle, supra note 73, at 340 n.23. The Restatement of Restitution contains chapters on the applicability of restitution for, \textit{inter alia}, mistake, fraud, coercion, and benefits acquired tortiously and by request. Professor Dawson said:

\begin{quote}
The most common grounds [for restitution] are also grounds for rescission of contracts, such as fraud, mistake, compulsion, undue influence, impossibility or frustration, sometimes substantial breach, and certain kinds of illegality. To these we must add certain others: the threatened forfeiture of a contractual performance as a result of the plaintiff’s own breach, the invalidity of an intended bargain for failure to comply with formal requirements or through a want of authority in one party to make or perform it, certain limited types of justified though unsolicited intervention, and a very large and inclusive group of legal and equitable wrongs through which gains are realized.
\end{quote}

J. Dawson, supra note 89, at 117-18. He added that “the catalogue is not merely heterogeneous; it is neither closed nor complete.” Id. at 118. Professor Dawson said, in an article written eight years later, that he would not “attempt to survey all the grounds for restitution that have been recognized in American law, for this would require a major treatise.” Dawson, supra note 89, at 175; see also Seavey & Scott, supra note 69, at 30-31, 34.

162. Other possible examples of restitution that could apply to a discriminatory denial of partnership include innocent misrepresentation: the partnership represented that the associate would be eligible for partnership. Since she was not eligible because she was not considered for partnership on account of her sex (or because the partnership claimed the right not to consider her for partnership), the statement of eligibility was a misrepresentation. This statement would be an innocent one, however, if the partnership did not know it would discriminate when she was hired. Analogous to misrepresentation is the doctrine of mistake. The associate was mistaken as to her eligibility for partnership through no fault of her own but rather through the fault of the partnership. Similarly, since the law firm stated that the associate was eligible for partnership, and since the associate’s eligibility for partnership was in its control, the partnership is estopped from denying eligibility.

163. \textsc{Restatement (Second) of Contracts} § 373(1) (1981). The Second Restatement of Restitution provides: “A breach of contract often results in unjust enrichment of the party in breach and gives rise to a right to restitution in the other party.” \textsc{Restatement (Second) of Restitution} § 1 comment a (Tent. Draft No. 1, 1983). Comment c adds that “[a] right to restitution may also arise when one of the parties to a contract fails to perform as agreed. . . .” Id. § 1 comment c. The Second Restatement of Restitution cross-references section 373 of the Second Restatement of Contracts: “This Restatement [of Restitution] does not deal with rights to restitution resulting from breach of contract . . . . Restitution is awarded . . . . as stated in the Restatement, Second, Contracts §§ 373 and 374 . . . . Nevertheless, this Restatement deals with many situations in which a bargaining process or a contract is an element.” Id. § 1 comment 1.
pectation damages normally associated with a breach of contract. Instead, the plaintiff is seeking recovery in restitution, which has the dual purpose of returning to the plaintiff the benefits conferred upon the defendant and of depriving the defendant of the benefits it obtained from the plaintiff.164 A discriminatory denial of part-

The Restatement of Restitution provides:

A person of full capacity who, pursuant to a contract with another, has performed services or transferred property to the other or otherwise has conferred a benefit upon him, is not entitled to compensation therefor other than in accordance with the terms of such bargain . . . unless the other has failed to perform his part of the bargain.

RESTATEMENT OF RESTITUTION § 107 (1937).

Section 373, subsection 2, of the Second Restatement of Contracts provides that restitution is not available if the only remaining performance by the breaching party is payment of a sum certain. RESTATEMENT (SECOND) OF CONTRACTS § 373(2) (1981); accord RESTATEMENT (SECOND) OF RESTITUTION § 17 (Tent. Draft No. 1, 1983). This limitation is known as the “full performance” doctrine. See 1 G. PALMER, supra note 64, § 4.3, at 378. In a discriminatory denial of partnership, the full performance doctrine is inapplicable because the breach is not the failure to pay a sum certain, but the failure to consider the plaintiff for partnership. See, e.g., Coon v. Schoeneman, 476 S.W.2d 439 (Tex. Civ. App. 1972). In that case, plaintiff had contracted with an owner of a lot to build 11 houses in exchange for profits from their sale. The lot owner breached the contract with the builder, who sued for the value of his services. Id. at 440. The court held that:

[E]ven if the profits were apportionable to each house, the amount was not liquidated. It depended on the sale price and the various factors making up the cost . . . .

The case is analogous to one in which the agreed exchange of services is something other than a determinable amount of money, such as property or an interest in the business. In that case even a plaintiff who has fully performed may recover the reasonable value of his services rather than the value of what was promised to him.

Id. at 443.

164. The Second Restatement of Contracts provides: “An injured party usually seeks, through protection of either his expectation or his reliance interest, to enforce the other party’s broken promise . . . . However, he may, as an alternative, seek, through protection of his restitution interest, to prevent the unjust enrichment of the other party.” RESTATEMENT (SECOND) OF CONTRACTS § 373 comment a (1981).

Professor Palmer described the theory of restitution for breach of contract, saying, “restitution is not enforcement of a contract, implied or otherwise, but is based upon the prevention of unjust enrichment; that when benefits are transferred pursuant to contract, the defendant’s breach frequently entitles the plaintiff to disregard the contract and recover the value of those benefits . . . .” 1 G. PALMER, supra note 64, § 4.3, at 386. He added that “[r]estitution is grounded on the fact that [the injured party] conferred a benefit through performance of the contract, in whole or in part, without receiving the promised exchange because of the other party’s breach.” Id. § 4.5, at 416. He described the dual purpose of restitution as thus: “The central aim of restitution for the defendant’s breach is to recover benefits transferred by the plaintiff in performance of the contract”, as well as “to deprive the breaching party of benefits obtained under the contract.” Id. §§ 4.1-.2, at 369-70.

Professor Corbin stated:
nership is a total breach of a contract between the partnership and the associate.\textsuperscript{165}

\textit{a. The Contract}

The court in \textit{Hishon} mentioned the possibility of a breach of contract action\textsuperscript{166} and noted that Hishon had claimed that the firm had promised her that “in return for satisfactory work” partnership would be “forthcoming.”\textsuperscript{167} Most large law firms, however, do not guarantee that partnership will be forthcoming to any associate when she is hired. The typical law firm promises that the associate is eligible to compete for partnership.\textsuperscript{168} In an analogous situation, courts uphold promises of competitions as contractual offers that, upon acceptance by performance, become binding con-

\begin{itemize}
  \item An unjust enrichment occurs in another large class of cases where there has been an agreement between two parties and one has performed his part without receiving the consideration to which the agreement entitled him. The failure of consideration consists of a non-performance by the defendant of his part of the agreement.

  Corbin, \textit{Quasi-Contractual Obligations, supra} note 104, at 533. He added: “Where the defendant has broken his contract in a vital matter without excuse, the plaintiff has two remedies—\textit{ex contractu} for damages, or \textit{quasi ex contractu} by rescinding the contract and contenting himself with restitution of what the defendant has received, or its value.” \textit{Id.} at 542 (footnote omitted). Professor Dawson said: “Restitution on the ground of substantial breach, like restitution on other grounds, can be accomplished through specific remedies. . . . But by far the most common remedy is the quasi-contract money judgment.” Dawson, \textit{supra} note 89, at 189. Professor Sullivan remarked that “[w]hen a breaching party is shown to have received a tangible benefit, courts have been willing to force disgorgement on quasi-contractual grounds.” Sullivan, \textit{supra} note 72, at 7 (footnote omitted).

  166. If the promise of eligibility for partnership were not viewed as a part of an express contract, it could be viewed as a promise that induces substantial reliance. \textit{See Restatement (Second) of Contracts} § 90 (1981). Section 373, which provides that restitution is available for a total breach of an express contract, also provides that “[t]he rule stated in this Section applies to all enforceable promises, including those that are enforceable because of reliance.” \textit{Id.} § 373 comment a; \textit{see also} 1 A. Corbin, \textit{Corbin on Contracts} § 205, at 246-47 (1963).

  165. The court stated:

  \begin{quote}
  We do have serious concerns about any representations made to the appellant regarding her future consideration for partnership . . . . If in fact these representations were deceptively made, then perhaps an action in breach of contract or misrepresentation may provide a more appropriate vehicle for the appellant to drive toward a legal remedy.
  \end{quote}

  \textit{Hishon v. King \\& Spalding, 678 F.2d} at 1029 (footnote omitted).

  167. \textit{Id.} at 1028.

  168. The promise that the associate is eligible to compete for partnership is generally one that will not be completed within a year. It is not governed by the statute of frauds because when it is time for the partnership to consider an associate for partnership, the associate will have completely performed her portion of the contract. \textit{See Restatement (Second) of Contracts} § 130 (1981).
tracts. Similarly, a promise of an "opportunity to bid" to be the contractor for a construction project is an enforceable promise.

The promise that an associate is on a "partnership-track" may be explicitly stated or it may be implied. In response to a question by the associate, the partnership may even explicitly promise that it does not discriminate in choosing partners. The typical firm also promises to pay the associate a salary, including fringe benefits and possibly bonuses, and to provide support staff and facilities. The corresponding promises of the associate are that the associate will join the firm, possibly foregoing other offers of employment, and will work sedulously, possibly foregoing other activities.

b. The Promise of Eligibility for Partnership is Material

The Restatement of Restitution describes the breaching party as one who "has failed to perform his part of the bargain," while


171. While some firms may guarantee partnership upon satisfactory performance, others will state that an associate is hired as a "potential partner"; that is, as someone who is eligible to compete for partnership. Cf. Note, Selection of a Law Partner, supra note 24, at 293, n.69. The author stated:

   It is not unusual for the recruiting literature of firms to intimate that advancement to partnership is almost automatic by stating that it assumes every associate hired is a potential partner and that its expectation is that the associate will become a partner in a certain number of years.

Id. Often associates ask, before choosing which firm to join, whether they will be eligible for partnership. Thus, an associate might specifically have been told that she is eligible for partnership. The promise might be repeated periodically in work evaluations if the associate is told that she is partnership material and is encouraged to keep up the good work and long hours.

172. It may be the practice of a firm that all associates hired are eligible to compete for partnership; therefore, it might be reasonable for an associate hired to assume she is eligible for partnership. Similarly, a firm might have a policy that all associates are eligible to compete for partnership unless the associate and the firm negotiate a different arrangement. Sometimes part-time associates will negotiate a permanent associate position. Any associate not having negotiated permanent associate status when hired might reasonably assume that she was eligible to compete for partnership.
the *Restatement of Contracts* refers to a "total breach." The requirement of a total breach does not mean that restitution is unavailable if the defendant has delivered a portion of the promised consideration. Rather it means that the breach must be material and that the contract must not be divisible.

The consideration of the law firm under the contract includes a performance—payment of salary—and a promise—that the associate will be eligible for partnership. There is a presumption in the law that when a party’s consideration under a contract is a combination of performance and a promise the two are treated collec-

173. See *supra* note 163 and accompanying text.

174. Professor Palmer noted that "[i]t is common to describe restitution as a remedy generally available for substantial breach of contract," but he also cautioned that this "can be a dangerously misleading generalization." 1 G. PALMER, *supra* note 64, § 4.1, at 367 (footnote omitted). He added: "The word 'essential' is not being used as a term of art . . . ['Essential' and similar expressions] are used merely to stress the fact that the breach must be of a relatively high degree of importance." Id. § 4.3, at 409. Illustration 2 of Section 373 of the Second Restatement of Contracts describes a breach for which restitution is not available as "not material." See *Restatement (Second) of Contracts* § 232 & comment a (1981); see also id. § 241 (describing "significant circumstances" in determining materiality).

175. "Sometimes a contract is 'divisible' in the sense that parts of the performances to be exchanged on each side are properly regarded as a pair of agreed equivalents. See § 240." *Restatement (Second) of Contracts* § 373 comment c (1981). Illustration 9 describes a situation in which someone who contracts to build a house is paid in monthly progress payments of 85% of the price of the previous month's work. Upon breach, restitution for the reasonable value of the services is available because the work and the payments "are not agreed equivalents under the rule stated in § 240." Id. § 373 illus. 9.

See also *Lopp v. Peerless Serum Co.*, 382 S.W.2d 620 (Mo. 1964). There, the plaintiff agreed to sell pharmaceutical product formulas and a company name to defendant in exchange for an employment agreement with the defendant company. When defendant breached the employment agreement defendant claimed that the plaintiff could not seek restitution for the value of the formulas because the sale of the formulas was a divisible part of the contract. The court held:

[T]he matters of consideration are entire and are not apportionable—that $7,500 was not all that [plaintiff] was to receive for the formulas, but, in addition, he was to have an employment contract. The question of whether a contract is entire or severable is primarily one of intention which "is to be determined from the language which the parties have used and the subject matter of the agreement." Swinney v. Continental Bldg. Co., 340 Mo. 611, 102 S.W.2d 111, 120, where it is also said, quoting Williston, *Contracts*, 1552, § 963, that the essential test "can be nothing else than the answer to an inquiry whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever if any promise or set of promises were struck out." (Emphasis added). Considering the words used in the instant contract, if the matter of the sale and purchase of the formulas and name . . . were stricken, clearly the parties would not have reached the agreement which they did.

*Id.* at 624; see also *Coon v. Schoeneman*, 476 S.W.2d 439 (Tex. Civ. App. 1972) (contract rate of payment does not make contract divisible).
tively and a breach of the promise is material and thus is a total breach of the contract.\footnote{176}

\footnote{176. Restatement (Second) of Contracts § 232 & comment a (1981). Section 241 provides that:

[A]n important circumstance in determining whether a failure is material is the extent to which the injured party will be deprived of the benefit which he reasonably expected from the exchange . . . . If the consideration given by either party consists partly of some performance and only partly of a promise (see Comment a to § 232), regard must be had to the entire exchange . . . .

Id. § 241 comment b. Section 232 provides that when consideration “consists in whole or in part of promises, all the performances to be rendered by each party taken collectively are treated as performances to be exchanged . . . .” Id. § 232. Comment a to that section states:

The rules applicable to performances to be exchanged under an exchange of promises are designed to give the parties maximum protection, consistent with freedom of contract, against a disappointment of their expectation of a subsequent exchange of those performances. When the parties have exchanged promises, there is ordinarily every reason to suppose that they contracted on the basis of such an expectation since the exchange of promises would otherwise have little purpose.

Id. § 232 comment a.

The Second Restatement of Contracts provides an illustration in which a seller agrees to sell goods and advertising materials and also promises not to sell advertising materials to any other buyer. A breach of the promise not to sell advertising to a competitor can be material and justify the buyer’s refusal to take and pay for the goods. See id. § 232 comment a, illus. 1; see also E.H. Boly & Son, Inc. v. Schneider, 525 F.2d 20 (9th Cir. 1975). On the sale of an apartment building to the defendant, the broker reduced the commission from $34,125 to $4,125 in exchange for the defendant’s promise that the broker would be the exclusive selling agent for the apartment when it was converted to condominiums and would share in the profits. When the defendant did not convert the apartments to condominiums, the defendant totally breached the contract with the broker who was entitled to restitution of $30,000. Id. at 25.

Professor Palmer said that “[i]n deciding whether the breach is essential enough to justify restitution, a court should be concerned primarily with the objective of the plaintiff in seeking the performance promised by the defendant.” 1 G. Palmer, supra note 64, § 4.5, at 410. Palmer discusses with approval Buffalo Builders’ Supply Co. v. Reeb, 247 N.Y. 170, 159 N.E. 899 (1928), in which plaintiff bought defendant’s business for an agreed price and a promise that the defendant would not compete. The defendant later breached. The court granted restitution stating that “the defendant’s agreement not to do business was the dominant purpose of the contract and not merely a collateral part.” Id. at 175, 159 N.E. at 901. Professor Palmer added that the “decision is just, but any implication that restitution should be limited to instances in which the dominant purpose of the plaintiff has been defeated through the defendant’s breach should be rejected.” 1 G. Palmer, supra note 64, § 4.5, at 412. Professor Palmer criticized Rosenwasser v. Blyn Shoes, Inc., 246 N.Y. 340, 159 N.E. 84 (1927), in which the defendant had sold its stock to the plaintiff for $100,000, and the officers of the defendant had promised that their company would do business with the plaintiff’s company. That promise was breached and the court viewed it as “incidental to the main purpose of the contract.” Id. at 348, 159 N.E. at 86. Professor Palmer criticized this analysis as having focused on defendant’s main purpose, rather than on plaintiff’s: “The plaintiff did not receive an important part of the consideration for which he paid the money, and this is all that is meant when the breach is described as essential.” 1 G. Palmer, supra note 64, § 4.5, at 411.}
For associates interested in partnership, the facts accord with the presumption. The promise of eligibility for partnership is a material, indivisible, and essential part of the contract between the associate and the partners. An associate interested in partnership does not view her job as one for which a salary is sufficient compensation, but rather as one in which she is working to establish a permanent career and in which the promise of eligibility for partnership is an integral part of the compensation.\textsuperscript{177} If an associate had known she was not eligible for partnership she might not have joined the firm or, if she had joined the firm as a permanent associate, she might have a professionally excellent but less than all-consuming career. The promise of eligibility motivates an associate to work diligently and for many hours, perhaps foregoing personal activities in order to work extra hours. The promise induces extra effort.\textsuperscript{178} In fact, the less the prospect of partnership is guaranteed, the harder some associates may work. Failure to work long hours or to forego vacations may be reasons for denying partnership.

Cynthia Fuchs Epstein, in her book \textit{Women in Law}, discussed “Wall Street-type firms, those with a hundred or more... lawyers” throughout the nation,\textsuperscript{179} and stated:

Because the stakes are high (partnerships provide lifelong tenure and average incomes of over $200,000), young lawyers typically invest a large amount of time and energy at work . . . .

Full-time work is not enough for a lawyer, especially for an ambitious younger lawyer. The norms of the legal profession equate excellence with hard work, measured in part by long hours. Smigel’s study of Wall Street firms indicates that overtime work is not only common but expected, and that “going home is the wrong choice if an associate wants to stay with a law firm or to get ahead in one.”\textsuperscript{180}

\textsuperscript{177} Of course, not all associates are interested in partnership. They make their choices as to their work style based on other motivations. The firm may also benefit financially from their work, but so long as the firm does not discriminate against them, the firm has not breached its contract and is entitled to retain the benefits.

\textsuperscript{178} The Eleventh Circuit in \textit{Hishon} stated: “We are well aware of the significance given a firm’s partnership policy by a prospective associate in determining the proper career choice.” Hishon v. King & Spalding, 678 F.2d at 1029; see also Note, \textit{Selection of a Law Partner}, supra note 24, at 293 (possibility of partnership induces associates to join the firm and work diligently). \textit{See generally} White, \textit{supra} note 24, at 1106 (partnership prospects diminish drawbacks of job such as low beginning pay and undesirable working conditions).

\textsuperscript{179} C. Epstein, \textit{supra} note 131, at 175.

\textsuperscript{180} \textit{Id.} at 205 (citing E. Smigel, \textit{The Wall Street Lawyer Reconsidered}, \textit{New York},
Ms. Epstein also stated that "there is no doubt that the ambitious lawyer will put in long hours." Furthermore, partners are aware that competition for partnership motivates hard work. Many of them were associates before they became partners.

Most, if not all, of the hours worked by an associate presumably would not be spent at the defendant firm if she knew that her gender would disqualify her from a partnership position. In an analogous example, the court in Palmer v. Central Board of Education of Pittsburg recognized that a chance of winning a competition that would select an architect for a city school was "the chief inducement" for the architect contestants' labors. In that competition, architects were to submit plans and specifications. The losing architects were to be compensated $750. The court held that "[u]nder any fair and reasonable method of selection by competition, the chief inducement for anyone to take upon himself the labor and expense incident to the submission of plans would be the chance that upon a fair and impartial examination his plan might win acceptance." For an associate seeking partnership, eligibility to compete for it is a "chief inducement" to join a particular firm and work diligently.

In restitution, when the defendant has partially performed but the breach is material, the plaintiff must return the defendant's performance. When the defendant's partial performance is the payment of money, a plaintiff need not tender the money prior to suit, but the court or jury can deduct that amount from the defendant's benefit in determining the amount of the judgment.

Aug. 18, 1969, at 75).

181. C. Epstein, supra note 131, at 208.

182. "In many high prestige firms, the senior partners (whose own apprenticeships were served in an era of total involvement in the law) still expect that promising young lawyers will be prepared to work late into the night, for weeks or even months, if necessary." Id. at 576, 70 A. at 436; see also Hertz v. Montgomery Journal Publishing Co., 9 Ala. App. 178, 62 So. 564 (1913) (plaintiff expended services in hopes of winning a prize for the most newspaper subscriptions).

183. 220 Pa. 568, 70 A. 433 (1908).

184. Id. at 576, 70 A. at 436; see also Hertz v. Montgomery Journal Publishing Co., 9 Ala. App. 178, 62 So. 564 (1913) (plaintiff expended services in hopes of winning a prize for the most newspaper subscriptions).

185. See supra note 132. Professor Palmer stated: "The plaintiff may have received a part of the [defendant's] performance or he may have received nothing. In the former case, he will be entitled to restitution only on returning or in some way accounting for the value of the performance he received." 1 G. Palmer, supra note 64, § 4.5, at 410.

186. See Restatement (Second) of Restitution § 19 comment d (Tent. Draft No. 1, 1983). That comment provides: "If the court has the power to assure the required return in connection with the relief it grants, it is not necessary that there have been a prior return or offer to return." Id. The Second Restatement of Contracts states that "[i]f all that is to be
law firm's partial performance is payment of compensation and other benefits, which is deducted from the total benefit.\textsuperscript{187}

c. The Breach

When a partnership discriminates because of sex or claims to have a right to discriminate because of sex\textsuperscript{188} against an associate who was hired with a promise that she would be eligible to compete for partnership, the partnership has breached its contract with the associate. If an associate is not made a partner because of sex discrimination, then sex was the only factor or at least one factor used in the partnership decision. If sex was the only factor considered, then the associate was ineligible for partnership and her work, which was motivated by the promise of eligibility, was ignored.\textsuperscript{189} Thus, the partners breached their promise that the associate would be eligible to compete for partnership.\textsuperscript{190}

If sex was one factor in the adverse partnership decision, then the associate's work was considered, but not equally with that of the men. The female associate's work had to be better than that considered acceptable for a male associate.\textsuperscript{191} This dual standard is

\begin{itemize}
\item [\textsuperscript{187}] See supra text at Tables 1-3 & note 132.
\item [\textsuperscript{188}] See supra note 62.
\item [\textsuperscript{189}] See generally Frontiero v. Richardson, 411 U.S. 677 (1973). "The sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result . . . distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." \textit{Id.} at 686 (Brennan, J.).
In return for Titan's [a design and construction company] services, the School District was to afford Titan the opportunity to bid on three school building projects. That agreement was breached when the School District withdrew the three projects from public bidding. For the breach of that agreement, Titan is entitled to recover the reasonable value of the services it rendered to the School District. \textit{Id.} at 1293.
\item [\textsuperscript{191}] See Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106, 114 (1st
also a breach of a promise of eligibility since a promise that one is on the "partnership track" implies that there is one track, not a separate, steeper track for women. In Palmer, where the city planned to choose an architect by competition and then abandoned the competition without reviewing the architects' plans, the court held that "a fair and impartial examination" is the "chief inducement" and therefore a requirement of "any fair and reasonable method of selection by competition."192 A steeper "track," which is an undisclosed handicap to eligibility, is not a fair and impartial examination.193

An associate does not have to prove that she would have been made a partner but for the discrimination in order to prove that discrimination is a breach of the promise of eligibility. There are at least two reasons why this is so. First, the partnership's promise was a promise that the associate was eligible to compete for partnership, not a guarantee that she would be made a partner. Therefore, the breach occurs either when the associate is not considered or when she is separately considered for partnership because of her sex.194 The fact that partnership decisions may be highly subjective may make it difficult, but not impossible, for a plaintiff to prove that the firm breached its promise that she was eligible.195 Diffi-

Cir. 1979), cert. denied, 444 U.S. 1045 (1980) (sex discrimination includes the practice of subjecting women to higher standards of evaluation than are applied to males). "Given the wide discretion that interviewers and supervisors have to measure the 'total person' and to waive some criteria if other criteria are satisfied, it is possible that, at least in some cases, the criteria have been applied more stringently with respect to women." Leisner v. New York Telephone Co., 358 F. Supp. 359, 369 (S.D.N.Y. 1973).


193. Because discrimination breaches a promise of eligibility to compete, the promise made when the associate is hired could be viewed as a promise not to discriminate. Cf. Wald, supra note 21, at 48-50. Ms. Wald would imply a promise not to discriminate in employment contracts on the ground that such contracts incorporate federal law. Here the promise not to discriminate is based on the nature of the promise of eligibility to compete for partnership and is independent of federal law.

194. See supra note 191.

195. Discrimination is not always easy to prove, see, e.g., Note, Selection of a Law Partner, supra note 24, at 282, especially when advancement criteria are subjective. When subjective criteria are used in an employment selection process, however, the danger of discrimination is great. "A supervisor judging a subordinate for promotion potential tends to look for traits which the supervisor feels he himself has." Stacy, Subjective Criteria in Employment Decisions Under Title VII, 10 Ga. L. Rev. 737, 739 (1976). "An evaluation of an applicant's subjective qualities, as opposed to an assessment of objective qualifications, depends upon the personal biases and experiences of the interviewer." Note, Subjective Employment Criteria, supra note 84, at 167. "Such high-level subjectivity subjects the ultimate
promising decision to the intolerable occurrence of conscious or unconscious prejudice.” Robinson v. Union Carbide Corp., 538 F.2d 652, 662 (5th Cir. 1976). The object of Title VII, however, “is the elimination of employment discrimination, whether practiced knowingly or unconsciously and in relation to employment or advancement criteria which, although neutral on its face, is in fact discriminatory in its application.” EEOC v. University of New Mexico, 504 F.2d 1286, 1302 (10th Cir. 1974).

The danger of using subjective standards in high level employment evaluations is thus great. As Professor Bartholet noted: “Upper level subjective systems typically invest decision-makers with broad discretion, allowing the expression of personal bias and inviting selection of candidates who resemble those doing the selecting.” Bartholet, supra note 24, at 996. She added:

Although . . . subjective measures may appear far more sensible than a purely objective approach for most upper level jobs, the use of subjective measures poses serious problems of fairness and accuracy. Those who subjectively assess an employee’s job performance will ordinarily be higher level employees of the same employer. A subjective criterion measure for evaluating job performance may strongly resemble the selection procedures that kept many minorities from being hired in the first place.

Id. at 1020. See generally Stacy, supra; Note, Subjective Employment Criteria, supra note 84; cf. Waintroob, supra note 24, at 45 (subjective criteria permissible if procedural fairness is ensured).

In cases involving discrimination, at least in lower levels of employment, courts recognize the dangers involved when employers use subjective selection criteria. Professor Bartholet noted: “At the lower level, subjective processes that have an adverse racial impact have almost uniformly been condemned. The courts have generally relied at least in part on the theory that subjective processes lend themselves to the expression of conscious or unconscious bias.” Bartholet, supra note 24, at 973-74; see also id. at 1020 n.221 (discussing cases that reject subjective evaluations as validation for tests).

The fact that a promotion system is highly subjective does not mean that it insulates discrimination. In a Title VII case involving allegations that a law firm discriminated in hiring women, the court said that “although a law firm is undoubtedly free to make complex, subjective judgments as to how impressive an applicant is, it is not free to inject into the selection process the a priori assumption that, as a whole, women are less acceptable professionally than men.” Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 521 (S.D.N.Y. 1973). Another court has said:

[U]se of subjective criteria is open to attack where the criteria are vague and unrelated to the qualities necessary for successful on-the-job performance . . . . A distinction must be made between such vague, subjective criteria, and criteria which, although subjective, are job-related, clearly defined in terms of the competences to be measured, and capable of being applied in a nondiscriminatory manner.

Nath v. General Electric Co., 438 F. Supp. 213, 220 (E.D. Pa. 1977). If use of vague criteria such as “we know it when we see it” or “we look for an unspecified package of attributes” or an “unspecified extra dimension” result in a disproportionately adverse impact on women, that impact may permit an inference of discrimination, conscious or unconscious, on the basis of sex. See Fitzgerald v. Sirloin Stockade Inc., 624 F.2d 945, 950 (10th Cir. 1980) (company’s subjective decisions on promotion had a discriminatory impact on females; plaintiff’s failure to advance was the result of the discriminatory policies and practices); cf. Albemarle Paper Co. v. Moody, 422 U.S. 405, 438 (1975) (validation of test by subjective supervisory rankings that were “extremely vague and fatally open to divergent interpreta-
for a proven breach.

Even if a firm were to choose its partners arbitrarily, which is unlikely, the firm would not be immunized from liability for breaching its agreement that the plaintiff was eligible to compete for partnership. Eliminating an associate from eligibility on the basis of sex is not arbitrary; it is deliberate. The associate’s name is removed from the pool being considered for partnership before arbitrary factors are used to choose partners. For example, if the partners put all the names in a hat and chose two, that would be arbitrary. If an associate were discriminatorily excluded, however, her name would not be in the hat. She was never considered and never had an opportunity to be selected. She had worked for the past years, however, believing that she was eligible for partnership.

See generally Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106, 114 (1st Cir. 1979) (promotion of one woman with outstanding credentials does not preclude finding of sex discrimination as to others), cert. denied, 444 U.S. 1045 (1980).

Sometimes, however, discrimination may be blatant and perhaps easy to prove. See generally Davis v. Passman, 442 U.S. 228 (1979) (letter from Congressman stated that his administrative assistant’s understudy must be a man); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) (job abolished in retaliation for plaintiff’s refusal to grant sexual favors). An in depth discussion of how to prove discrimination is, however, outside the scope of this article.

Many partnerships choose partners based on their legal abilities, their abilities to generate business or some other factor or factors that were demonstrated by the associate while working at the firm. See Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). “We are willing to presume [an inference of discrimination] largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.” Id. at 577.

197. The Second Circuit, in a Title VII suit for damages without injunctive relief, held that failure to consider an applicant for a promotion solely because she was a woman was discrimination even though the man hired for the contested position was better qualified than she. Gillin v. Federal Paper Bd. Co., Inc., 479 F.2d 97 (2d Cir. 1973). The court stated that “while the ultimate prize was won by the male who had superior qualifications, this in our view does not purge [the defendant] of its prior discriminatory act of refusing to consider her at all not solely because of lack of qualification but because she was a woman.” Id. at 102. The court then said that “it is difficult to determine the basis for compensatory damages here” but remanded the case to give the plaintiff an opportunity “to establish her theory of damages.” Id. at 103.

As the Gillin court suggested, it is difficult to determine compensatory damages for back pay unless the plaintiff could prove she would have obtained the contested position. Where the recovery is the defendant’s unjust enrichment from having breached the promise of eligibility for consideration for partnership, however, there is no need for the plaintiff to prove that she would have been made a partner, only that she was not considered for partnership because she was a woman, or was considered more stringently because she was a woman, in breach of the promise of eligibility.
In addition, her work benefitted the partnership.

The fact that other associates were considered for partnership but not selected does not defeat an associate’s claim. As to the associates considered, the firm kept its promise that they were eligible to compete for partnership. These associates had an opportunity to “win” the competition.

Second, certainty of making partner goes to the issue whether damage to a plaintiff for breach of contract can be measured once a breach of a material promise has been proven, not to the issue whether there was a breach of a promise of eligibility. For example, in Palmer, the court held that the city had breached its contract by abandoning the competition and refusing to review the plans that the architects submitted pursuant to the terms of the competition.198 The court also held, however, that the plaintiffs, three of the contestant architects, could not recover damages for breach of contract:

What the plaintiffs lost was the chance of having some one of the plans submitted win the prize, and this was the inducement to the expenditure of labor involved in the preparation and the submission of plans . . . . To recover anything more than nominal damages in a common-law action, actual, substantial injury would have to be shown, and in the very nature of the case that would be impossible here. To show actual loss, plaintiffs would be required to show affirmatively at least a reasonable probability that some one of the plans submitted would, had they been examined, have received the approval of the board. Since the acceptance of any of the plans rested ultimately in the discretion of the board, this would be impossible.199

The court also denied recovery in restitution because the city had not obtained a benefit at the plaintiffs’ expense. The city did not

199. Id.; see also Hertz v. Montgomery Journal Publishing Co., 9 Ala. App. 178, 62 So. 564 (1913). In Hertz, a newspaper held a contest pursuant to which the person who gathered the most subscriptions would win a prize. The newspaper changed the rules after some of the contestants had begun soliciting subscriptions. The new rules would give greater value to later solicited subscriptions. The court said that this change of rules was a breach of contract but “the measure of . . . damages would not have been the value of the prize offered, since it was a pure speculation as to whether or not [the plaintiff] would get it.” Id. at 186, 62 So. at 567. The court also said that the plaintiff could have “sued [the] defendant on the common count for work and labor done and recovered under an implied contract on a quantum meruit for the value of the services she had actually performed in securing subscriptions for defendant's paper and otherwise. . . .” Id. This is a restitutionary theory.
use the plans and the contestants did not part with them.\textsuperscript{200} Since the legal remedies were therefore inadequate, the court ordered the city to consider the plans in good faith as the contest provided. Unlike the situation in Palmer, a law firm does benefit from the time and work that an associate puts in, at the associate’s expense; therefore, when an associate is discriminatorily denied a partnership position, an action in restitution provides an appropriate remedy.

2. The Injustice of Discrimination

In addition, although it is not necessary, a new area of restitution could be created. Professor Dawson stated that “nothing . . . prevents an appropriate unjust enrichment remedy from being used in any field.”\textsuperscript{201} He added that “restitution remedies . . . have implications that reach in every direction . . . .”\textsuperscript{202} It follows from Professor Dawson’s statements, and from the fact that society has begun prohibiting employment discrimination as a form of injustice,\textsuperscript{203} that the common law can and should do likewise. Employment discrimination is unjust and is therefore one of the fields into which restitution should be extended.\textsuperscript{204}

3. Inadequacy of Damages

Although restitution is not limited to situations in which damages are inadequate, inadequacy of the damage remedy is an additional reason for permitting recovery in restitution.\textsuperscript{205} Restitution

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\textsuperscript{200} Palmer, 220 Pa. at 577, 70 A. at 436. The court said that “[p]laintiffs have not lost their plans and specifications. They are still theirs as much as ever.” Id. Where a design and construction company had given services to a school district in exchange for the “opportunity to bid” on a project, the company was awarded the reasonable value of those services upon defendant’s breach of the agreement. See Titan Envtl. Constr. Sys., Inc. v. School Dist. of Philadelphia, 421 F. Supp. 1289, 1295 (E.D Pa. 1976), aff’d, 564 F.2d 90 (3d Cir. 1977). The refusal of American courts to quantify a lost opportunity except in narrow circumstances has been criticized and is not the rule in England. See J. Calamari & J. Perillo, The Law of Contracts § 10-14, at 533-34 (2d ed. 1977).

\textsuperscript{201} J. Dawson, supra note 89, at 113.

\textsuperscript{202} Id. at 117; see supra text accompanying notes 123-24.

\textsuperscript{203} See supra note 10 for an example of a federal anti-discrimination law; Wald, supra note 21 for a discussion of state anti-discrimination laws.

\textsuperscript{204} In order for a plaintiff to recover in restitution for a discriminatory denial of partnership, it is not necessary that she argue that discrimination is a new category of restitution. Application of long existing categories of unjust enrichment, such as a material breach of contract, will produce the same result. See supra text accompanying notes 159-200.

\textsuperscript{205} 1 G. Palmer, supra note 64, § 4.7, at 427-28; see also id. § 1.6, at 33; G.
is particularly appropriate when damages from a breach of contract cannot be ascertained with certainty.
A discriminatory denial of partnership is a total breach of contract by the defendant for which restitution is appropriate. Contract damages would be difficult, if not impossible, to determine for such a breach. It would be difficult to measure the value of the lost partnership, or the harm from not having been considered for partnership after having worked for six years on the assumption of eligibility to compete for partnership.\textsuperscript{207} Recovery in restitution, however, is easy to measure. The recovery is the amount of the law firm's benefit gained from the associate's work after deduction of the salary and other benefits the firm has given to the associate.\textsuperscript{208}

\section*{VI. Conclusion}

Restitution, or liability in unjust enrichment, provides an associate the opportunity to prove that she was discriminated against in the partnership decision. Upon proof of discrimination, restitution remedies the discrimination by requiring the law firm to disgorge its benefit received from the associate. While a money judgment may not fully compensate someone who has been discriminated against, it is far better than no remedy at all. Since the amount of recovery in restitution is potentially substantial, application of the theory should have a deterrent effect upon discrimination by law firms. Nor would the deterrent effect require any onerous activity on the part of firms. They need only choose not to discriminate in the selection of partners, or choose to return the benefit they received from those whom they excluded from partnership because of sex, race, color, religion or national origin.

To do justice, courts should also apply Title VII not only to prevent discrimination at entry level career positions, but also to prevent discrimination at the higher level positions that represent power, money, and prestige. Justice is not done when Title VII enables women to obtain jobs only to be forced out of them six years later because of their sex. Until courts recognize this, however, and even after they do, discrimination against high level professionals can be remedied to some extent by depriving those who discrimi-

\textsuperscript{207} See supra text accompanying notes 54-55, 199.

\textsuperscript{208} See supra notes 126-55 and accompanying text. Although statutes of limitation are specified by each state, the statute of limitations for restitution is typically six years. Thus, for restitution based upon breach of contract, the cause of action would accrue upon the occurrence of the breach, the discriminatory denial of partnership. See 1 G. Palmer, supra note 64, \S 2.3, at 89.
nate of their unjust enrichment. In this situation, restitution prevents the injustice of a wrong without a remedy.