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Spinning Restitution: From Cauliflower to Coconut

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Restitution needs some public relations work. The advent of the sexy class phenomenon in American law schools is bad news for a subject like Restitution. How can a student be expected to find fulfillment in a class whose very name suggests dusty books?[1] Consider the rising upper-class law student who is pre-registering for next semester's classes and contemplating the choices. How can Restitution, or even the broader subject of Remedies, compete against more inviting courses like Sports Law? When I started teaching in 1975, my class in Restitution competed against courses like Conflicts and Admiralty and assorted Uniform Commercial Code (U.C.C.) courses with dull names. The only courses with exciting names were seminars. Now, however, students are lured into a vast array of classes with names like Law of the Sea, Law in the Age of Technology, and Law and Literature, in addition to the wonderful offerings of seminars. The old standby courses are still there, but flourishing only if they are on the bar exam or if they are staffed by the "Teacher of the Year."

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1. The dust is literal. Among the leading "modern" texts are some old gems. *See* ZECHARIAH CHAFFEE, JR., SOME PROBLEMS OF EQUITY (1950); JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS (1951); WILLIAM Q. DE FUNIAK, HANDBOOK OF MODERN EQUITY (2d ed. 1956). The *Restatement* for this subject is a yellowing text from 1937. *See* RESTATEMENT OF THE LAW OF RESTITUTION (1937). Indeed, poking around the library in the FK 1244 area is not recommended for those who sneeze easily. There are, of course, many current scholars of the subject doing wonderful work, including the current project to draft a new Restatement. That project itself admits, however, that there was a dearth of scholarship in the area during the latter half of the last century. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Tentative Draft No. 2, 2002). Hence the dust.

Long ago my Restitution course was expanded into Remedies[2] for greater student appeal. The expansion drew larger crowds, but now even the broader course has trouble luring students away from the other subjects. It is simply not as self-evident to law students as it is to me that they need to learn this subject. There is comfort that I am not alone. The other old stalwart courses have the same problem: Who would want to take Conflict of Laws when they could take Comparative Law of Conflict?

Upperclass law students usually receive only very general advice about what to select at the "course buffet," so to speak. Schools typically offer course counseling that directs students toward combinations of courses for different types of legal practice and advises them on which subjects are covered by the bar exam in various states. The danger thus remains that students fill their plates too high with the palate-pleasers at the course buffet and they forget the vegetables—those courses that provide the basic fiber of the legal profession.[3] Restitution, of course, is a vegetable. And a tough one at that. Rather like cauliflower.[4] The allure of those delectable other dishes like Cyberspace and the Law is just too much to resist next to an ugly bowl filled with mistakenly bestowed benefits and other such topics of Restitution.

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2. In most law schools, the old course on Restitution has been subsumed in the more general course on Remedies. The tentative draft of the new *Restatement* laments that law school courses devoted to restitution departed from the curriculum in the 1960s. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Tentative Draft No. 2, 2002). Notably, the famous casebooks for Restitution have not survived to this century. *See* JOHN P. DAWSON & GEORGE E. PALMER, CASES ON RESTITUTION (2d ed. 1969); JOHN W. WADE, CASES AND MATERIALS ON RESTITUTION (2d ed. 1966).

3. Judge Harry Edwards drew national attention to this distinction when he criticized law professors for being "ivory tower dilettantes, pursuing whatever subject piques their interest." Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 36 (1992); *see also* Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921 (1993) (addressing the distinction posed by Judge Edwards).

4. I hasten to add that I personally love cauliflower and I urge everyone to visit the National Cancer Institute's 5 a Day for Better Health Program Web site to learn about its many virtues. *See* National Cancer Institute, Eat 5 A Day For Better Health Program, *at* http://www.5aday.gov (last visited Jan. 10, 2003).

The problem could be solved with more rigorous course counseling. Students come to the school for faculty wisdom in the first place, so professors can overcome glitzy course appeal by telling students what they should take in order to become respectably educated lawyers. If students know that they must eat ugly vegetables in order to become good lawyers, most of them will. Therefore, the faculty simply needs to get its collective act together and tell students that Restitution is one of those necessary vegetables in the curriculum. The problem is that faculties inevitably fight over which courses are the most important beyond the first year.[5] Faculties fight in part because professors have genuine differences about what future lawyers should study and in part because some faculty members are motivated by turf protection. After all, glitzy courses might be canceled if enrollment is low, so battles often lead to inaction with the polite exiting justification that the students have "enough sophistication" to figure out course selection without more help.

The current environment is clear: It is now every course for itself. If other professors will not send students to Restitution, then we who profess the subject ourselves must find ways to lure them there. It is time to engage in some unmitigated advertising. Restitution must shake the cauliflower image and look more like ambrosia salad at the course buffet. We need to show students that Restitution is like the coconut in this wonderful fruit salad—a hard nut to crack but the benefits gained are large. There are a couple of possible strategies for achieving this result.

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5. Faculties are famous for debating about the first-year curriculum as well, but that is obviously another topic. It is noteworthy that Remedies has sometimes appeared as a first-year required course. At my own institution, Remedies was taught in the 1950s as a first-year required course by John E. Cribbet, who went on to fame as the "big picture" property man and ultimately as dean of our law school and chancellor of our university. Professor Cribbet even authored a casebook for this first-year required course in Remedies. *See* JOHN E. CRIBBET, CASES AND MATERIALS ON JUDICIAL REMEDIES (1954). The Remedies casebook tradition at the University of Illinois has been carried forward by three individuals connected to that law school with a casebook that I humbly cite as ELAINE W. SHOBEN, WILLIAM MURRAY TABB & RACHEL M. JANUTIS, CASES AND PROBLEMS IN REMEDIES (3d ed. 2002).

I. STRATEGY ONE: "RESTITUTION IS RESCUE"

The first strategy is to advertise Restitution as a device to rescue the lawyer from dire trouble. The coconut image fits nicely into this strategy. An excerpt from the Tom Hanks movie *Cast Away*[6] can present coconuts as a source of rescue to prevent starvation on a deserted island. The metaphor is obvious: Restitution can also be the salvation of lawyers in a tough spot. After the scene of Tom Hanks devouring his first coconuts on the island where he landed after the plane crash, students should next see a young lawyer in the library who is working late with the thorny problem of the client whose contract is unenforceable, or whose key employee disappeared after embezzling company funds. Then they may understand the thirst for the sweet milk of Restitution.

The problem with this approach to advertising Restitution is that it may be too brutal; scenes depicting young lawyers suffering late at night in a law firm library may be too large a dose of reality. After all, the goal is not to drive students out of law school. So rather than pitching Restitution as salvation in a tight spot, another possibility is to spin Restitution as fun and clever.

II. STRATEGY TWO: "RESTITUTION IS ZANY"

This alternative strategy is to present Restitution as fun. Convincing students that Restitution is entertaining may not be as hard as it sounds. The subject is inherently zany because many of the famous cases in the subject involve bizarre and amusing fact situations. Consider these colorful individuals from Restitution classics: a gold miner in Alaska,[7] an owner of a large and noisy egg-washing machine,[8] a bribed Chicago politico,[9] the unsuccessful inventor of a 3D movie device[10] and the owner of a haunted house.[11]

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6. (Twentieth Century Fox 2000).

7. *See* Felder v. Reeth, 34 F.2d 744, 745 (9th Cir. 1929).

8. *See* Olwell v. Nye & Nissen Co., 173 P.2d 652 (Wash. 1946).

9. *See* County of Cook v. Barrett, 344 N.E.2d 540, 543 (Ill. App. Ct. 1975).

10. *See* Alder v. Drudis, 30 Cal. 2d 372, 182 P.2d 195 (1947). The plaintiffs in this case had a device called a "polyscope," which was believed to be on the cutting edge of technology in 1947 because it was thought capable of producing three dimensional motion pictures. The device was entrusted to the defendants as part of a contract, but the parties subsequently had a dispute and terminated the contract. The case was one for rescission and restitution so that

There are dramatic characters too, suitable for soap opera portrayal, such as the divorced law student who broke his promise to support his wife through graduate school after getting his juris doctorate.[12] To further this theme, one should carefully avoid mentioning litigants who fail to embody the spirit of either fun or drama. One such case to avoid mentioning for this reason is *Campbell v. Tennessee Valley Authority*,[13] which involves a librarian who ordered tech reports in microfilm without following appropriate bidding procedures for the Tennessee Valley Authority Technical Library at Muscle Shoals, Alabama.[14] Although this case is famous, such facts do not add any luster to the subject.

To persuade prospective students of the liveliness of this study, one might distribute the following flyers:

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the plaintiffs could reclaim the polyscope. Needless to say, history did not vindicate the faith of the parties concerning the value of this invention. *Id.* at 374–77.

11. *See* Stambovsky v. Ackley, 572 N.Y.S.2d 672, 674 (N.Y. App. Div. 1991).

12. *See* Pyeatte v. Pyeatte, 661 P.2d 196, 198 (Ariz. Ct. App. 1982).

13. 421 F.2d 293 (5th Cir. 1969).

14. *See id.* at 294. The plaintiff Raymond Campbell believed he had a valid contract to convert 336 technical journals into thirteen sets of microfilm for the Tennessee Valley Authority ("TVA") Technical Library. He sued the TVA for quantum meruit when his contract proved unenforceable. The director of the library who improperly ordered the microfilm was Earl Daniel, whom his employer, TVA, first fired and then sued for indemnity. Apparently, the technical reports were as boring as the story because after they were converted into microfilm and the hard copy destroyed, they lived virtually unused in the library until the error was discovered. This fact was noted by the dissenting judge who questioned whether there had been any unjust enrichment following the jury verdict that awarded the exact contract price under the guise of restitution. *See id.* at 298–300. Perhaps the only way to "spin" this case would be as follows: High tech drama when this guy destroys the hard copies and tries to get the stodgy librarians to go modern. Like Julia Roberts, he skips the red tape to get the job done, but in the end he is in hot water. *See infra* note 18 and accompanying text for similar spins in the suggested review quiz.

For the main hallway:

WILD and CRAZY

ZANY

"Couldn't stop laughing"

That's what just a few students thought about

RESTITUTION

Why?

You'll never meet a funnier cast of characters

than those who end up with Restitution claims

Come and see for yourself

Remedies M-W-F at 2:00

Fall Semester

For the wall next to the television, a different flyer can join the postings for "roommate wanted" and "book for sale—never opened."

Resti - one - shun

Resti - tu - tion

Resti - three - shun

Take my Restitution.....please!

A class full of laughs with a fascinating cast of characters

Remedies M-W-F at 2:00

Fall Semester

And for the offices of the law reviews in the school:

Here's the secret not revealed in
the Course Selection packet:

The smartest lawyers take Restitution

Learn how to "enforce" unenforceable contracts
Learn how clients can sue strangers without prior dealings/contact
Learn how to waive Torts and other exotica

Here's a class showing little known tricks that are hard to find with traditional research

Come learn them all while you're still in school

Remedies M-W-F at 2:00
Fall Semester

Are you worried that with such heavy-handed advertising students will have to "unlearn" some things once you get them in the classroom? Are you concerned that these messages are portraying Restitution as you hate to see it portrayed? Years of professional dedication to a subject can make professors protective of the dignity of that subject, but be realistic—dust and dignity just do not cut it in today's world. The practicing bar learned long ago that advertising works. We all have to stoop to a little dirty reality sooner or later.[15]

Worst of all, the dirty reality is not finished even if you resort to advertising Restitution in flyers. Getting students into the classroom is not enough. Your need to sell the subject as fun extends well beyond recruiting them to the course. You will need to be a dynamic and interesting teacher, of course, but with a subject like Restitution, only an occasional tap dance will keep the class lively. Therefore, you have an even bigger problem once you have filled the seats.

15. The dirty reality to which we stoop must be ethical dirty reality, of course. *See* RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY (Am. Bar Ass'n ed., 2002).

The bigger problem is that you have to make them like Restitution enough to fill out good reports at the end. Otherwise, when students pass along wisdom about course selection to each other, they will reveal you as an advertising fraud. One solution, previously mentioned, is afforded by the fact that Restitution is buried in the larger class on Remedies. If the professor can make Damages and Injunctions interesting enough, students may forgive the Restitution. This strategy only works, however, if the professor keeps Restitution as a very small segment of the overall course. If Restitution is a large portion of the course, then the professor has a serious problem at evaluation time.

The solution is to convince the students how much fun they had with Restitution. Regardless of the number of soporific sessions during the semester, people are most influenced by recency.[16] Therefore, right before the evaluation/report time, the professor should convince the students that, with hindsight, the course was fun. To do so, you might give them the following "review" questions. Of course, this quiz cannot be graded; the students hate that. Rather, the purpose is to convince them how much fun they had learning about the zany characters in Restitution. And, truth be told, there ARE some pretty weird characters who populate the famous cases.[17] So

16. *See* DOUGLAS L. MEDIN ET AL., COGNITIVE PSYCHOLOGY (3d ed. 2001).

17. *See infra* note 18.

here's the self-review quiz to give them right before evaluations:

Restitution Review Self-Quiz

Instructions: Match the facts in the left column to the appropriate case in the right column. Note that some cases may be used twice.

(a) The case is reminiscent of Charlie Chaplin's *Gold Rush*. Alaska gold miner, struggling with the elements, leaves equipment stranded on a river bank. Camp store seizes it to satisfy supply debt. Plaintiff does dance of the rolls and sort of wins.	(1) *Snepp v. United States*
(b) Those crazy chickens! Dirty eggs drive this World War II story of intrigue.	(2) *Pyeatte v. Pyeatte*
(c) High intrigue with international spy flavor when CIA agent tries to "tell it all" and the government stops him dead in his tracks, figuratively speaking.	(3) *Felder v. Reeth*
(d) Doctor, doctor—Is there a philanthropic doctor in the house? Doctor invents a device to help patients then gets touched by greed.	(4) *Olwell v. Nye & Nissen*
(e) Law & Order in Cook County. Voter fraud isn't enough for these wacky politicos. They take bribes for the voting machines too.	(5) *Jako v. Pilling*
(f) Amber waives of torts.	(6) *Stambovsky v. Ackley*
(g) Double-Crossing Law Student. Future lawyer husband has his nude toes crossed when he promises his hard-working wife that he'll support her future education. She puts him through school and then—bam!—divorce.	(7) *County of Cook v. Barrett*
(h) S**t happens. Who you gonna call? The courts are also Ghostbusters.	

The goal of this "review" is to convince the students that they had fun studying Restitution even if they did not know it at the time.[18] Then give out the evaluations.

One last thought—those bluebooks. If you have been too successful in getting students to take your course, you'll have too many bluebooks. Now here is where your timing has to be very delicate. AFTER you have lured students into the class with the advertising flyers, and AFTER you have given them the Self-Review Quiz, and AFTER they have filled out the evaluation of the class, THAT is the time to really teach the tough parts of Restitution. If you hit them for days and days with equitable liens, reformation, and tracing rules, I guarantee that you will drive large numbers to drop the course—just in time to reduce those bluebooks.

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18. Answers: A is Felder v. Reeth, 34 F.2d 744 (9th Cir. 1929). B is Olwell v. Nye & Nissen Co., 173 P.2d 652 (Wash. 1946). C is Snepp v. United States, 444 U.S. 507 (1980). D is Jako v. Pilling Co., 848 F.2d 318 (1st Cir. 1988). E is County of Cook v. Barrett, 344 N.E.2d 540 (Ill. App. Ct. 1975). F applies to both (3) and (4) because in each of those cases the tort was waived in favor of the suit in assumpsit. G is Pyeatte v. Pyeatte, 661 P.2d 196 (Ariz. Ct. App. 1982). H is Stambovsky v. Ackley, 572 N.Y.S.2d 672 (N.Y. App. Div. 1991).