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Wednesday Morning Session
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The Wednesday morning session of The American Law Institute convened in the Grand Ballroom of the Sheraton Society Hill, Philadelphia, Pennsylvania, and was called to order at 9:00 a.m. by President Michael Traynor.

President Traynor: We are ready to commence with Restitution and Unjust Enrichment, with our marvelous Reporter, Andrew Kull, and this great project, a building block of the common law.

We thought this morning that it might be helpful, especially to our newer members, if Andrew, in addition to a brief introduction of the Sections before us, would also accompany that with a brief statement about where we are, a little capsule about where we have been and where we are going with this project to try to place it in some perspective for you as we start.

And now I will ask our Reporter, Andrew Kull, to begin that discussion, and then we will begin with the Section-by-Section discussion.

Professor Andrew Kull (Mass.): Good morning. I am happy to try to give that kind of an introduction for the benefit of anyone who has just arrived in this process.

What is going to be called Restatement Third, Restitution and Unjust Enrichment, is a complete reworking, rather than an updating, of the original Restatement of Restitution that was published in 1937. We got started on the project at the Annual Meeting in 2000 with the presentation and consideration of something called a Discussion Draft. It is now 2005. People are asking me with increasing frequency how long I think the project is actually likely to take. I think there may be four more Tentative Drafts after today's, and I'm sure it will take a year to go over everything to be sure we make proper changes and improvements.

The idea of the subject, in thumbnail version, is that unjust enrichment represents a substantive cause of action, comparable for purposes of classification, if not comparable in frequency, to tort or contracts. The proper way to present the subject, as it would be with those others, is by analyzing first the instances of liability, then the available remedies, and finally the available defenses.

The quickest way to see where we are, and how the project is organized, is to look at the Projected Overall Table of Contents, which appears in the front of every Tentative Draft. Each time, there are a few subtle changes, but the overall structure has not changed.

Chapter 1, General Principles, presents very broad propositions about the law of restitution and unjust enrichment, which we discussed in

2000 and agreed we would not mention again until the specific Sections had all been written.

Part II, Liability in Restitution, presents a listing grouped under thematic headings of the different kinds of cases in which a plaintiff can plausibly base a claim on the allegation that the defendant, in one way or another, has been unjustly enriched at his expense. I won't go into the subdivision of the different categories, except to say we are about to come to what many people consider the most interesting, which is the one we call "Chapter 5, Restitution for Wrongs."

We have worked through these Sections in numerical order. The present draft covers the last of the restitution and contract propositions, § 39, and then the first and most important part of what is commonly called Restitution for Wrongs, the cases in which a plaintiff seeks the defendant's ill-gotten gains instead of the plaintiff's own damages.

With next year's Tentative Draft, we will finish Part II on liability for restitution and begin the topic of the restitutionary remedies in Chapter 7. That will probably take two more Tentative Drafts to get through, and then we have defenses. That's the project.

President Traynor: Thank you. Are there any questions about where we're going or where we're headed, generally speaking? If not, then let's start with § 39, on page 3.

Professor Kull: I was hoping I might make a further introductory observation about the draft as a whole rather than launching into § 39.

President Traynor: Please do. That would be fine.

Professor Kull: Section 39, which concludes Chapter 4 on Restitution and Contract, could be classified in Chapter 5 on Restitution for Wrongs. We have done it the other way because it seemed more important to keep the contract Sections together.

What all of these Sections have in common is that we have finally come to the individualized instances of that very broad, familiar proposition that no one should be allowed to profit from his or her own wrong. That has a sort of ring to it. It's been very commonly said for millennia. We have a more formal statement of that general idea in § 3 in the Discussion Draft that we talked about five years ago. Here are the particular examples.

The Sections describe the instances of restitution in which the remedy is typically a disgorgement of profits by the defendant. These are cases in which, often enough, the plaintiff recovers more than he lost, which is to say his restitutionary recovery is greater than his provable damages. For obvious reasons, this feature makes this part of restitution extremely interesting to lawyers involved in cases where it might possibly have any application, and I think it is fair to say that the material here in Tentative Draft No. 4 is of more immediate interest and appeal to most lawyers than perhaps everything we have done heretofore.

Recovering more than you lost is not the only significant feature of restitution. Some of these Sections bring us much closer than we have been before to the techniques of specific restitution, characteristic restitution remedies basically derived from equity. Our predecessors not that long ago would simply have said, "Now you're talking about equitable remedies." We are.

These are instances in which a restitution claimant can establish an ownership or security interest in identifiable property — that's what we call "specific restitution" — and by doing so prevail in a contest with other creditors. The result can be just as significant as the interesting possibility of recovering more than you lost. These equitable remedies are frequently implicated in the Sections we are going to talk about.

Returning to the draft, § 39 on restitution for opportunistic breach of contract is something of an innovation. The innovation consists in the attempt to state a general rule; it is not an attempt to dictate outcomes that have never been thought of before. The Illustrations are all based on real cases; they are not recommendations for how we think life ought to be organized. The general rule has not been stated either this way or any other way, to my knowledge. It does not appear in the Second Restatement of Contracts, and it is not easy to decide how to write it. For these reasons and others, § 39 was the most difficult to prepare and is perhaps the most open to criticism of all the material in the draft.

Sections 40 to 44 cover more traditional restitution cases in which the claimant is able to prove that the defendant has committed either a tort or a breach of some other duty, such as a fiduciary duty. In the language of the older cases, he says, "I waive the tort." Some people still recognize and use that expression. Not using the expression, he says, "Nevertheless, I'm not interested in damages; I want to discuss your profits, and I want to recover them."

Sections 40 to 44 could be summed up in a single statement. It would be something like the first sentence of the Introductory Note to Topic 1 of Chapter 5 on page 37, where we say, "Gains realized in violation of another's legally protected rights must be given up to the person whose rights have been violated." That is true. You could state a rule like that, but it would be too general to be of much use. Sections 40 to 44 are an attempt to subdivide that overall proposition according to different types of cases involving characteristic difficulties that we will talk about when we reach them.

Reverting to § 39 on restitution for opportunistic breach of contract, as I have just said, it is to some extent novel. It is ambitious in that we try to state a rule that was not stated for us in the Restatements of Contracts. We do not feel, however, that we are making up or imposing results in these cases. The way to state the rule for the first time is not obvious, and

what we have here in § 39 is lengthy and complex. We hope at least it is not confusing.

The idea, in general terms, is that there are certain circumstances in which a breach of contract has the effect of upsetting the balance of the bargain. The breaching party manages either to take more or to give less than the terms of the intended exchange, and he does this in circumstances where the ordinary liability for damages does not adequately protect the plaintiff's entitlement.

The breaching party in these cases is in some way taking advantage of shortcomings in the remedial regime of contract law. It is this characteristic of the breach that most distinctly identifies it as what we call "opportunistic."

A good concrete example would be a contract in which the defendant has sold a business as a going concern. He has sold the assets with a covenant not to compete within a reasonable area and for a reasonable time. Let's stipulate that the noncompete covenant is valid and enforceable. It is then deliberately breached. The proposition of Illustration 6 and the law in this area is that, in such a case, the disappointed buyer need not prove damages in terms of lost sales. If possible, he can prove the amount of the defendant's profits realized in breach of the covenant and recover those. We say this is a recovery in restitution rather than contract damages.

At some point, the contract breach begins to look analogous to cases involving deliberate, profitable torts in which the defendant — seeing something of the plaintiff's that he wants or would like to make use of — simply goes ahead and helps himself, rather than negotiating with the owner about a sale or license of the rights in question. He takes something that is in some sense the legally protected interest of the other party, then sits back and says, "If you can prove your damages, you're welcome to them."

At some point in the contract context, a deliberate breach seems to assume this character. It is condemned by the law of restitution for the same reason that this kind of help-yourself/litigate-afterwards behavior is condemned if we're talking about a trespass to real property or an embezzlement of somebody's money.

Section 39 is our attempt to state this proposition in a sufficiently concrete way. It is complex, but I hope it is not confusing.

In subsection (1), we say the breach has to be "material and opportunistic." "Opportunistic" is very much a defined term here. Most of the rest of the Section defines it.

We chose the term because the natural sense of the word carries with it something of the flavor of what's wrong with this kind of a breach of contract, the calculating advantage-taking in the face of an inadequate damage remedy.

The word is then defined in subsection (2). The breach has to be deliberate [§ 39(2)(a)], which means that simple inadvertence or unsuccessful attempt that could produce a material breach of contract does not get you into this category. It has to be profitable [§ 39(2)(b)]. Most breaches of contract are not profitable. In subsection (3), we are very careful to define "profitable" and explain that it means profitable net of one's exposure to damages.

Perhaps most important, it has to be a breach that is committed in a situation where the nonbreaching party is vulnerable. The plaintiff is vulnerable because the ordinary remedy in damages does not afford adequate protection [See § 39(2)(c)].

We had a lengthy discussion about how to express this vulnerability idea. An earlier draft said something like, "promisee's right to recover damages affords inadequate protection to his contractual entitlement," period, leaving the rest of it for the court to fill in.

It would also be possible to gloss this idea by saying, "under circumstances in which the promisee's legal remedies are inadequate," thereby invoking a century of judicial opinions about the adequacy of legal remedies in other contexts, notably injunction and specific performance. We thought the traditional formula brought too much learning that would get in the way. So we have tried to take the idea one step further back — avoiding the formula and trying to invite more direct thinking about whether damages would protect the promisee's entitlement in one situation or another.

The balance of subsection (2)(c) is intended as a gloss on "inadequate protection," based on the modern American law of this issue, typically in the context of injunction or specific performance.

Subsection (3) defines "profitable," as already mentioned.

Subsection (4) serves as a sort of safety valve, to be sure that the claim would not be recognized either when it contradicts in some important way the parties' contractual understanding [§ 39(4)(a)] or when it would produce inequitable results [§ 39(4)(b)]. A claim that is supposed to do equity could sometimes frustrate equity, and subsection (4) is intended to alert the court to those possibilities.

President Traynor: Thank you very much, Andrew.

Are there comments on § 39?

Professor Mark P. Gergen (Tex.): I really had two comments, Andy, and they are both on rather general points. I think in § 39 you have to address the issue of what we mean by deliberate breach, and you talk about, in the Introductory Note to Topic 1 of Chapter 5 before § 40 and then even in the black letter of § 40, how you want to handle the case where the infringing act is purposeful but whether it is actually in breach of a contract

is in dispute. And in the Introductory Note to Topic 1, you take the position that that's within my concept of deliberate, and maybe you mean to say that here, maybe you don't mean to say that here. I think we could have a bully argument about whether you should say that, but I don't think it should be left hanging. So that's the first comment, just define what we mean by deliberate breach, and in particular what if, again, the act is purposeful but whether it violates a right is reasonably debatable.

The second point, and this is something that didn't come up in the earlier drafts because you've added it, is I think you overshot the mark on subsection (2)(c) by requiring that damages be "a full equivalent" [§ 39(2)-(c)(i) and (ii)], and I like the vaguer language, and let me just give you a hypothetical.

A contractor is renovating my kitchen. He pulls off the job to go take a job where he's going to make more money. Damages are not an adequate remedy there, because they are not going to compensate me for my wife's emotional distress and the inconvenience. (*Laughter*) So if I read your black letter, I am entitled to disgorgement of whatever profits he made on that second job. I am confident the answer in that case is live with it, that we just simply don't try to compensate that sort of emotional harm in contract. So I like the vaguer language of whether damages were an adequate remedy or whether we give an injunction, because it really did incorporate all of that learning. So I would suggest you go back to the vaguer language, because I think you are going to overshoot it here and sweep in some things you don't want to sweep in.

Professor Kull: Thank you. I take both of those points and very seriously.

President Traynor: After each comment, the Chair will pause just for a moment in case the Reporter wishes to respond. The Reporter may elect not to respond or to take a point, so he doesn't have to comment on every question, but we will leave a chance for him.

Justice Martin Evans (N.Y.): I am concerned with Illustration 7 of § 39, the situation in which a firefighters' association agrees to furnish a certain number of people and services in exchange for money received, and it saves $100,000 by not furnishing that number. On the other hand, it looks to me as if what they have done is assume the risk of great damages in the event there is a fire and they are unable to handle it. It seems to me that $100,000 amounts to payment of insurance, and I am troubled by that, because people can take a risk in that nature, and, in the event that they lose the risk, under your doctrine they would also lose $100,000, plus the payment of damages. It seems to me that's a little bit too much.

Professor Kull: I would like to respond to that, because it's one of my favorite Illustrations, and this is the sort of conceptual issue that is at the heart of the interest of the Section. You say that the firefighters assumed a

risk: they have been paid as insurers, and now they are being made to return the premium. I think that would be a splendid argument to make on their behalf, but I would have said it doesn't really characterize the situation. They are not an insurance company, they are a fire brigade. I think it is important that the terms of the contract — how many men, how many wagons, how many horses, how many feet of hose pipe and so forth — are all negotiated and priced on a line-by-line basis, so many horses at so much per day.

If I were the city, I would say, when I get fire insurance I get it from an insurance company; they are capitalized in a very different way. Here we have a firefighters' association, no assets, for all we know they rent their horses. This is not where I get my fire insurance.

I think, frankly, the city has the better of the argument. The case seems to me an especially good example of the way a rule limiting the plaintiff to provable damages would subject the plaintiff to a risk for which he's not compensated, and would make it impossible for him to obtain the contract performance for which he has paid.

President Traynor: Thank you.

Mr. Michael Marks Cohen (N.Y.): Mr. Reporter, I have two comments, one on § 39(1) and one on § 39(4), and, because I don't want to run out of time, let me give you both of them at the same time, and then you can deal with them as you will.

The first is you say in § 39(1) that disgorgement "is an alternative to liability for contract damages," and I think you're almost right. I think it is an alternative to liability for expectation damages for breach of contract and that, if there are other damages from the breach of contract, the victim does not have to surrender that in order also to obtain disgorgement.

I know that there are cases — I know you know that there are cases, too — in which damages have been awarded in addition to disgorgement, and, if you are not going to buy my suggestion, then I would ask that you at least cite those cases and indicate that this Restatement does not follow those cases.

The second point is that, on § 39(4)(a), you refer to liquidated damages and say, in effect, that disgorgement will be denied if the contract contains a liquidated-damage clause. The Comment is directly contrary to what you say in the black letter, because you say presence of a liquidated-damage clause will not be a bar to recovering disgorgement [See § 39, Comment *j*], and I just want to point out that liquidated damages in many instances, particularly where time is of the essence, is intended to be an *in terrorem* inducement of prompt performance, it's not a license for delay. The way that you have phrased § 39(4)(a), you make it into almost a license. I think that's wrong and would urge that you just simply drop "such as payment of liqui-

dated damages" from the black letter and let the issue of liquidated damages be treated as you have properly treated it in both the Comment and in the Reporter's Note.

Professor Kull: Yes, thank you. As Mr. Cohen suggests, he and I have discussed whether there are persuasive cases that allow a disgorgement remedy in addition to some form of damages. I think we disagree on how seriously to take the authorities that Mr. Cohen has brought to my attention, but I may not have given them sufficient consideration and I undertake to rethink. You will help me remember which ones they are if I don't have them at hand.

As to the second point, it may be that § 39(4)(a) is unclear. The intended meaning of saying, "if the parties' agreement authorizes" a choice between performance and payment, is if the parties' agreement, correctly interpreted, authorizes the performing party to choose between performance and payment. This is glossed in the Reporter's Notes in the way that you approve, but I'm sure the language can be improved here.

President Traynor: Thank you.

Professor Douglas Laycock (Tex.): Andrew, you were becomingly modest as you explained this, and undoubtedly this Section can be tweaked and further improved, but this Section is an enormous accomplishment.

People have known about these cases for a long time. The first Reporter's Note has a long list of distinguished scholars who have struggled with them. Twenty some years ago, I organized a session at the American Association of Law Schools on this problem, and we did no better than the articles.

People have identified recurring fact patterns where this remedy makes sense. Nobody has identified a principle that makes sense of these cases. Judge Posner, who is the guru of efficient breach, I think coined the term, certainly popularized the term, "opportunistic," and said in opportunistic breaches there ought to be restitution of profits, but his conception of opportunistic was wholly intuitional and incoherent, with all the respect due to a great scholar and an Article III judge. This puts real content on it and, you know, the Institute should be very proud of this Section when we get it finished and get it in the shape we want it to.

Briefly one specific point. I do think you need the further specification in subsection (2)(c), and we may want to clarify in the Comment, what you mean by "a full equivalent to the promised performance" [§ 39(2)(c)(i) and (ii)], and the promised performance may be getting Professor Gergen's kitchen finished, and emotional stress, which is never recoverable in contract, may just be outside the scope of what we're talking about here. But to go back to the generality of, is the contractual entitlement adequately protected, not only brings in a mass of learning, it also brings in an enormous

mass of confusion of phrases that are used to mean 12 different things in 12 different contexts, and we simply cannot leave it at that.

Justice Rudolph Kass (Mass.): I thought the black-letter text and Comment were admirable. Some of the Illustrations, given the contemporaneous quality of the main text, I thought were needlessly quaint, albeit based on the cases, I'm sure. Horses and wagons [§ 39, Illustration 7]? I mean to say, one could substitute trucks. (*Laughter*)

In Illustration 8, "Landlord is entitled to recover $10,000 from [the] Tenant"? Only if he wants to go pro se. Just add a zero. (*Laughter*)

In Illustration 10, "Dealer sells Customer a new automobile for $5000"? (*Laughter*)

You take the point.

Professor Thomas D. Rowe, Jr. (N.C.): I have two quick wording suggestions in the text of the black letter on page 3. First, in § 39(2)(c)(i) and (c)(ii), near the bottom of the page, you refer to damages acquiring "a full equivalent to the promised performance." I would suggest something instead like "provide." Damages don't acquire; I think they provide or furnish.

And then up in § 39(1), in the fourth line, you refer to a "defaulting promisor" after having referred to "breach of contract." I wonder if just plain "breach" would be better. The firefighters, whether they are dealing with trucks or horses, are still performing to a considerable extent. It may be a little bit awkward to refer to them as defaulting, but they are breaching.

President Traynor: Thank you.

Judge A. James Robertson, II (Cal.): I am still troubled by the interaction with this Section and the notion that you should be able to breach contracts when it is efficient, and often the whole idea, it makes a lot of sense to breach a contract when you can make more money breaching it than you can performing it. So that's kind of the traditional view; it makes a lot of sense economically to do that.

I think the problem is that this Section says, "full equivalent to the promised performance" [§ 39(2)(c)(i) and (ii)], but there is no further kind of guidance as to when that starts to take effect, and the normal rule about efficient breaching takes over, so by putting all these cases together in one Section I wonder if you don't run smack into the efficient-breach doctrine, and there is no mention of it in here. I wonder if that could be looked at in some way.

Professor Kull: Well, the efficient-breach doctrine is discussed in Comment *i*; it starts at page 25, with a couple of Illustrations.

Your comment is a very interesting one because of what seem to be your starting assumptions. Referring to "efficient breach doctrine" is fairly

common among Contracts professors, but referring to the "normal rule of efficient breach" does not sound to me like contract orthodoxy.

If we had to take a position in the abstract debate over "efficient breach," I think it is fair to recognize that the law of restitution tends to be on the other side of the issue. The law of restitution is very unsympathetic to the party who takes without asking, the party who leaves a transaction to be resolved after the fact, in litigation as a defendant, putting the innocent party to the expense of the dispute resolution. These are circumstances in which the proper course is to negotiate a price for the rights that are at issue. "It turns out that it is unexpectedly expensive for me to perform my obligation. What amount of money would you accept to release me from it?" Restitution, insofar as it has a view on the question, prefers a negotiated resolution.

In the Comment, I try to suggest that much without making a big point of it. Real-life cases (as opposed to cases on the blackboard) in which this efficient-breach proposition can be tested are extremely unusual.

I do include a standard Illustration of the sort of "efficient breach" that the law does not condemn, even though it involves a deliberate breach of contract. That is Illustration 13, in which a seller confronts sudden cost increases and supplies a nonconforming but a commercially reasonable substitute. I say for good measure that the seller's conduct is in conformity to ordinary commercial standards of fair dealing. This is, I think we would all agree, a situation in which the position of contract law is that damages are an adequate remedy.

So that much space for the deliberate breach of contract we certainly want to recognize. Beyond that, I think it is not an approach that is congenial to the presumptions of this part of the law.

President Traynor: Thank you.

Director Emeritus Hazard: Could I comment? I think it would be well, Andrew, to elaborate your Comment to express the essence of what you just said.

Mr. Pieter M. Schenkkan (Tex.): Andrew, I want to thank you very much for the enormous progress made in this difficult Section since our meeting in Nashville of the Members Consultative Group, from the perspective of a practicing lawyer. This § 39, as now drafted, is a far clearer and more useful aid to those of us who are going to have to try to apply these Sections in cases.

I do want to ask one question about the black-letter law as you have proposed it here in comparison to the Reporter's Note. It is § 39(4), with its introduction and then as applied to subsection (4)(b), in comparison with the bottom of page 36 [§ 39, Reporter's Note to Comment *j*], the very end of the Reporter's Note.

In subsection (4), you say, "Disgorgement by the rule of this Section will be denied," and then you have two circumstances under which it will be denied. The first is "if the parties' agreement authorizes the promisor to choose between performance" and some liquidated damages or other remedy [§ 39(4)(a)], but then subsection (4)(b) is "to the extent that disgorgement would result in an inappropriate windfall."

This makes it sound like it is going to be denied if it's possible that it will result in a windfall, and that seems an all-or-nothing concept, whereas at page 36 in the Reporter's Note, citing Professor Laycock, you invite not an all-or-nothing concept. You say, "In contrast to the all-or-nothing remedy of specific performance, a claim to disgorgement . . . inherently invites some shaping of the remedy to accord with the equities between the parties." And I am wondering which you intend here, and, if you intend the shaping, if it could be accommodated by some rewording of subsection (4).

Professor Kull: I think, in other drafts and probably in other Sections, we have said "qualified or denied." Here I think I was hoping that the words "to the extent that" would do that work. I think somebody must have objected to "qualified or denied," although I can't recall why, but let me revisit that question because I sympathize with your thought.

Mr. Schenkkan: Thank you.

President Traynor: Thank you.

Professor Candace Saari Kovacic-Fleischer (D.C.): Andrew, I would also like to second the other speakers who have complimented you on this Section, and I would like to speak in defense of it against some of the criticisms. In full disclosure, I must note that my kitchen renovation is still not done, (*laughter*) but I do not plan to use litigation as a method of hopefully getting to having a working kitchen.

I do think, however, were I to seek litigation, it would not be to look for whatever profits they may have made in moving on and coming back but would have been in the cost to bring in a contractor who at short notice could step in at those times, and, given the demand for contractors all around town, that's probably a very high amount, subtracting out what we would have paid. I think that is an actual contract damage that would work, and emotional distress would not ever come into that, so I think it is covered by this and that this works as written.

Also in terms of the efficient-breach comment, when I teach Contracts I always say efficient breach is fully understood as someone can breach so long as they can pay damages to put the nonbreaching party in the same position had the contract been performed. I think it is that second part of efficient breach that people forget about and make efficient breach sound as if it ought to be that the contract is not so good, I'm going to go do something else.

So I think this is perfectly appropriate with everything, and that, if you took out any of your carefully worded qualifications to inadequate breach, you would bring in all the confusion that Professor Laycock mentions would come into the inadequacy discussion, so I compliment you.

Professor D. Michael Risinger (N.J.): I refer to this project as the Holmes "bad man" versus the Horton the Elephant school-of-thought project. The Horton the Elephant school of thought takes the position that people ought to keep their contracts as the sort of starting position, while the Holmes bad-man school thinks that people ought to be free to breach as long as they can get away with paying only such damages as the law recognizes.

It seems to me that this Section is incredibly important in trying to fill in the gap between what is truly an efficient breach and what is an inefficient breach that is trading on the inadequacy of damage remedy, a point that I think you made earlier.

The problem that I have with the way it is drafted now — and I am very much in favor of this effort and most of the way it's drafted — is a problem in regard to a point that was raised earlier: the failure to fill out what is meant by a full equivalent of the promised performance, specifically no reference to *Hadley* limitations on contract damages [Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854)].

Hadley limitations on contract damages create a situation in which contract damages are, even more so than in the tort law, but as a matter of policy, only partial compensation in a large percentage of cases, and in regard to that limitation, it seems to me, and this goes back to the kitchen, unfortunately, in regard to that situation a full equivalent has to take into account the fact that you are only entitled to such damages as you would get by *Hadley* to begin with. One of the Illustrations you used earlier didn't deal with *Hadley* limitations, it dealt with failure-of-proof problems. In those situations, trading on the fact that you could have lost profits if you could prove them, you just often are in situations where you can't prove them. Those are the easy situations in which this situation should apply to say there is an opportunistic breach and that you should be able to disgorge the profits.

But dealing with the interconnection of the *Hadley* limitations to what constitutes a full equivalent of the promised performance and what constitutes an opportunistic breach, which in what one might call a moral sense is clearly an opportunistic breach because, to use everyday language, the breacher knows that they are going to screw the person that they are breaching against when they do it, on the other hand, *Hadley* sort of seems to say that they are entitled to do it to that degree. I'm not sure I'm comfortable with the *Hadley* limitations working that way, but I think they do,

and I think something has to be said in this Section about that interconnection in regard to the full equivalent of promised performance.

Professor Kull: I take the point that the reference to "a full equivalent to the promised performance" [§ 39(2)(c)(i) and (ii)] invites a lot of work by the judge, and it may well be appropriate to try to say more about what is meant, assuming we keep this language in subsection (2)(c). I think that is essentially the point that was being made by Professor Gergen earlier, and I take it very seriously.

President Traynor: Professor Risinger, there is an old California case [Overstreet v. Merritt, 200 P. 11 (Cal. 1921)] that's rarely cited, but it stands for the proposition that, when there is a so-called bad-faith breach of contract, the Hadley v. Baxendale limitation does not apply. Do you think that is relevant in this context?

Professor Risinger: I not only think it's relevant, I believe that it would be appropriate policy to move to that kind of situation. I think those were in the insurance context.

The problem with bad faith, as opposed to opportunistic, has to do with this gap between efficient breach, and I believe there is such a thing as efficient breach, and I don't think that we should have a situation in which the law of restitution eliminates economic efficiency from the consideration. On the other hand, damage theory creates this gap between efficient breaches and what are essentially transaction-cost chisel, inefficient breaches that people get away with because of the invocation of the notional efficient-breach theory in relation to damage theory, as it currently exists.

I don't know that you can actually simply invoke the California thing about bad faith, but there has to be some approach to allow disgorgement, in my opinion, in those situations where the breach is only notionally efficient because of the deficiencies of the damage regime of *Hadley*, and so something like that, it seems to me, ought to be recognized in this Section.

President Traynor: Thank you.

Judge David Paul Yaffe (Cal.): I want to echo the sentiments about how wonderful I think this formulation is, basically, and also my unease about the vagueness of the term "deliberate" [§ 39(2)(a)]. I stand up only because I wonder if the problem cannot be solved by just taking out that element. What is there in "deliberate" that is not covered by "opportunistic"?

A breach is opportunistic. It seems to me that what's implied here is the matter of choice by the breaching party. If he has a choice and he takes the opportunity to make a better deal, then what else is necessary? How can that be inadvertent or negligent?

In your Illustration 1, about the seller who agrees to sell A Blackacre for $100,000 and then sells it to B for $110,000, well, that's what the amateur

breacher does. The sophisticated breacher borrows $110,000 from B and gives B a mortgage on Blackacre and then doesn't pay it back.

What's difficult here is the factual question of what is opportunistic. I don't think it is a legal concept, and I don't really think you're adding anything by the "deliberate" element that isn't already in "opportunistic."

Professor Kull: Well, I –

Judge Yaffe: I know cases using –

Professor Kull: I think the reference to "deliberate" serves two functions. One is that, on rare occasions, there may be a profitable breach as the result of an accident. There is a case mentioned in the Reporter's Note to Comment *g*, on pages 34 to 35, from the Court of Appeals in Louisiana where a brokerage firm makes an inadvertent mistake that ends up producing a windfall profit. So there is a breach of contract with no injury to the plaintiff, quite profitable for the defendant, but it's just an accident, and I say this is not within the rule of this Section because it's not a deliberate breach. It's not the kind of thing we are trying to deter.

More generally, the idea of a conscious choice to take an advantage for oneself at the expense of the other contracting party is part of what I mean to convey by "deliberate," and it's definitely part of the definition of "opportunistic."

We considered many synonyms. I will be happy to consider them further. We talked about "intentional," "conscious," "willful." These are words that appear in the cases.

Judge Yaffe: My question really is, does it say anything that isn't already said by "opportunistic."

Professor Kull: Well, it's part of the definition of opportunistic as drafted here, but let me consider it.

Professor Neil B. Cohen (N.Y.): My question is not about the substance of the Section, which is well deserving of all the praise that's been thrown your way, but about its scope. You have 17 Illustrations in here, and, in at least five of them, the underlying transaction would not be governed by the common law of contracts but rather by a statute that's been enacted in 49 states and of which this institution is the cosponsor, and that, of course, is the Uniform Commercial Code. Those are sales of goods. You could also have leases of goods and other transactions.

My question has to do with the fact that Article 2 and other parts of the UCC have fairly detailed statements about the consequences that follow when one party fails to fulfill its legal obligations, and the implicit assumption of these Illustrations is that the restitution principles stated in this Section apply in those contexts as well as they would in cases governed by the common law of contracts.

Perhaps you have dealt with this elsewhere, in which case I have forgotten and missed it and I apologize, but, if we are taking the position — and I'm not arguing against it — that these restitutionary principles apply even when the consequences are stated in that fairly detailed statute, that might be something worth making clear and explaining how we get there.

The remedies provisions in the UCC have been sometimes described as the cutting edge of 1950s theory, so it may well be that this is better. On the other hand, we also do have, in that statute that we cosponsored, a fairly definitive, although hard-to-understand, rule that says when we get to look at the law outside that statute. Section 1-103, which this Institute recently strengthened just five years ago, talks about how you can go out to the wonderful world of law and equity to the extent not displaced by the provisions of the UCC [§ 1-103(b)]. If you could perhaps, in a Comment, explain why that works here, why that is justifiable, or, if there are limits on when it's justifiable and perhaps even in the Reporter's Note cite a well-reasoned case or two, if there are some, explaining why this works, I think that would be a helpful proposition for courts that are applying it in that statutory context.

Professor Kull: The comment is very pertinent, and Professor Cohen anticipates my answer, which is that, in the list of topics mentioned by § 1-103 of the Uniform Commercial Code, at least half of them are things that would ordinarily be classified as part of the law of restitution.

Yes, I do think every one of the Illustrations we have in here is justifiable on the basis of that Section, if not the specific remedial Sections within the UCC. Where a restitution claim is displaced by a UCC provision, as sometimes happens, we acknowledge that specifically. In any Illustration where the proposed restitution claim would strike a UCC lawyer as surprising, paradoxical, or unexpected, I entirely agree we ought to be prepared to justify it. I would appreciate it if you would call to my attention any examples that strike you that way. If you think the problem is really more pervasive, then perhaps we should have a general Comment on it somewhere; I'm not quite sure where.

Professor Cohen: Andrew, I think it is not so much that the problem is pervasive as the question is pervasive. If what you are saying is the statutory remedies aren't well thought out, they don't do a good job, and we need the help of this brilliant Restatement to get it right, that's something different than saying the UCC doesn't deal with this area, and therefore it does not displace this area of the law, and I think it needs a reasoned discussion to make it clear that this is something within that statutory license.

Director Emeritus Hazard: Could I make just a comment?

President Traynor: Sure.

Director Emeritus Hazard: I wonder whether the point that has just been made could also apply to certain kinds of statutory remedies. I am thinking in terms of consumer-protection statutes, and so, Andrew, what you might say is that the concepts here are common-law concepts that are, in varying ways, provided for in statutory remedies, of which the UCC is an illustration. But there are others, because I am reminded of complaints, I'm thinking of civil complaints where you have nine causes of action in which the plaintiff has tried legitimately to bring to the court's attention a variety of remedial possibilities that should not be cumulative but have to be all taken into account.

President Traynor: Thank you.

Mr. Marvin L. Gray, Jr. (Wash.): Let me suggest that the problem of efficient breach is a lot greater in cases of expenses avoided than it is where the contracting party decides willfully to leave the promisee in the lurch to go make a greater opportunity somewhere else. It is one thing to talk about disgorgement of profits in the latter situation. It is another thing to say we're going to inflict on you the losses that you would have had if you had performed in excess of the damages by some measure or the injury by some measure suffered by the promisee.

Related to that, in one of your Illustrations, Illustration 5, which is the restoration of the strip-mining where the cost of restoration is $25,000, according to the hypothetical, there is no corresponding benefit, and the market value of the plan is inept. The reason I think it is inept is it seems to me that the measure of damages in that case is the cost to the landowner of procuring substitute performance, just as if I hire a painter to paint my house in some ghastly color scheme that annoys all my neighbors and diminishes the value of my property, it's my house, it's my choice, and if the painter promises to do that I am entitled to that performance or the cost of that performance. So I think this is inept, and I would suggest that you focus particularly on the problem of losses avoided, most particularly I think where there is some idiosyncratic reason why the contractor's expenses of performance would be much greater than the cost of substitute performance, and that becomes a problem because of your formulation of damages being inadequate. I mean, damages are always inadequate because of the Hadley v. Baxendale problem, because of the unrecoverability of emotional distress and hassle factor, because of cost of litigation, because of timing.

I think the real crux of this issue is your fire Illustration [§ 39, Illustration 7] — whether we are talking about horses and wagons or trucks I defer to you — but I think that is a good focus in which, after the fact, there was no harm, no foul, or at least no harm in an observable way. There was a risk created, unjustifiably, that was not realized. I think that is the hardest case and the most interesting case, frankly, and I note from the Reporter's Note to Comment *e* that the court in that case came out the other way than

you suggest is appropriate. So I think all of these somehow are related factors that need to be considered, and particularly the problem of cost avoided perhaps has to be considered more fully than it has presently been done.

Professor Kull: Let me respond by saying I welcome this comment, like the one about the firefighters, because it is such a wonderful case, one that many people will remember from Contracts class in law school. I could change the facts to make it perfect, so that there was no measure of contract damages that would give any recovery to the plaintiff here. We could assume the plaintiff sells the property after the mining is done and that the price is unaffected by the breach. The Reporter's Notes talk about a case in New Zealand where exactly that kind of thing happened [§ 39, Reporter's Note to Comment *h*].

Now I didn't do that because I wanted to retain recognizable facts from the *Peevyhouse* case [Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1962), cert. denied, 375 U.S. 906 (1963)], as many people will remember it's called. You are quite right, one can justify the recovery by saying that the plaintiff is entitled to the cost of completion, and that's the amount of money we're talking about. But as you remember, in that case and in some others there are judges who hesitate, saying why should we award a cost-of-completion measure when the work will add no value whatsoever to the property, and they worry about economically wasteful damage remedies.

"Economic waste" is a problem so long as you are worried about contract damages. The problem disappears if you recognize that, in this situation, the plaintiff's claim could perhaps more appropriately be structured as one that is directed to the defendant's unjust enrichment — saved expenditure of a particularly cynical kind. So I like the Illustration. It is not a case in which restitution provides the only possible solution, as you point out, but it seems to me it provides a solution that is in some ways more attractive than the ones that are often debated, when the case is regarded purely as a contract problem.

Mr. Sheldon Raah (N.Y.): I have two brief comments. I will state them both. The first one is that there is nothing in the black letter that reflects where in the hierarchy of preferences specific performance comes. That is, one of your rationales here for the Section is that it is often true when damages, traditional contract damages, are thought to be inadequate, for one reason or another, specific performance can't be granted; it may be too difficult to supervise or something similar. That part's right, but what you don't then do in the black letter of § 39 is say not only should damages be inadequate for us to reach this restitution remedy, but in addition specific performance should be unavailable or should be insufficient to make the plaintiff whole, and I think you should. That's my first comment.

My second comment goes back to the discussion earlier about the liquidation-damages clause. You say, correctly, in the Reporter's Notes that

mostly people don't regard liquidated damages as a kind of contractual choice. That is, there is a moral opprobrium to breaching even though there is a liquidated-damages clause, and I think that's probably right.

Nonetheless, your Section says that it is only where the parties really have this option, they remove the moral opprobrium, that the liquidated-damages clause is going to not trump. That is to say, if you just have a liquidated-damages clause of the ordinary kind, your formulation is you can go ahead and give restitution. I really disagree with that. We have freedom of contract. If parties agree on the liquidation, on the liquidated-damages clause — this is kind of a trap for the unwary — surely they believe that that's going to be the end of it. They intend to limit their liability. I don't see why it is necessary to override that.

Professor Kull: The second point is the one that Mr. Cohen was addressing earlier. I think that the intention behind subsection (4)(a) should not be controversial or objectionable to either of you. Apparently, I have not made the meaning as clear as it needs to be, so I will address that.

As to the first point, let me think about it. I think that characteristically the claim to profits that would be asserted under § 39 arises after it is too late to be asking for an injunction or specific performance, it just comes at a different sequence, a different point in the transactional sequence. We would not like a situation in which the nonbreaching party himself became the opportunist by sitting back, watching a breach take place, and then suing for restitution because it provided more recovery than damages. On the other hand, I wonder if that is a sufficiently realistic threat to require any direct comment here. I have assumed it was not.

President Traynor: We are going to need to move on in a little bit here. Is there anyone not standing at the mikes who wishes to comment on this Section? If not, then we will limit the remaining debate to those presently standing at the mikes. The Chair may have a question at the end of that, before we proceed to the next Section.

Professor William F. Young (N.Y.): Like some others who spoke, I am a warm admirer of this Section. Andy, I do not think it is obligatory to speak in a Restatement of Restitution to the question whether or not specific performance is available, but the new formulation does in fact suggest the question whether the prospect of this kind of recovery might restrict access to specific relief for contract, and there will be debate about that I predict, which you can forestall if you want to.

I do make this request, that you consider qualifying your definition of "opportunistic." I like the restriction to "deliberate," but I would like to have you consider a further restriction such that the breach is not opportunistic unless the promisor commits it either impelled by a prospect of private gain or at least with a view to private gain.

Now I believe that further qualification in the black letter would not change any of your Illustrations and would in fact reflect something I heard you say a few minutes ago. You may ask me what sort of situation it could be in which the contract breaker would not have a private gain. I shall not give an illustration at the moment, but I can privately. In fact, I can tell you now that there is a contract of my own that I wish I had broken in the public interest, one highly degrading to the environment. If I had broken it, I'll tell myself, but no one will believe me, that it would not have been with a view to private gain, so I ask for you to consider that further restriction.

Professor Kull: Thank you.

Mr. R. Nicholas Gimbel (Pa.): Andrew, I want to go back to the issue about what "deliberate" means [§ 39(2)(a)]. Don't you mean that the breaching party knows that what they are doing violates the contract? Because if you are saying anything other than that, there are a whole lot of air pockets in the concept. And if that is what you mean, I think it is better to say it just like that, because otherwise if you mean something different from knowing that it violates the contract, if you are importing "should have known" or if, for example, there are some concepts of substitution that the breaching party thinks are sufficient, then you have a concept that is somewhat ungovernable and also, I think, is at war with one of the basic purposes of the Section, which is that somebody sits back, they know there is a breach, and instead of going to the other side and bargaining about what they are doing, just sort of split the unmeasurable difference, they go ahead and act unilaterally. So I think it may be more concrete to say it that way.

Second, on Illustration 7, I do think there is more of a problem there. Take an insurance context where you buy an insurance policy, and to make it more vivid than perhaps is real, the insurance company has an undisclosed policy of not providing coverage for a certain type of loss, so you don't have the security just the way the firehouse didn't. Does that mean that the policyholder gets the investment income that the insurance company gathered by virtue of their undisclosed policy of not providing all the security, even though nobody knew about it at the time? So I think that there is a problem cabining Illustration 7 as it is now stated.

Professor Kull: As to your first point, I recognize this, I recognize your remarks as an aspect of the point that Professor Gergen made earlier in our discussion, and I will give that very careful thought.

I don't think I entirely follow your hypothetical about Illustration 7, but I look forward to pursuing it with you.

Mr. James C. McKay, Jr. (D.C.): You should, somewhere in this Section in the Comments, discuss the typical case, which happens every day, in which a government contract officer terminates a contract for the convenience of the government to get a better deal for the government, and it's deliberate, it's opportunistic. The cases say, though, it's perfectly okay as

long as it's not in bad faith, and the contractor is entitled to costs and the profits he has incurred but not anticipated profits. Basically, reading this, without knowing that there is this whole body of law out there on government contracts, you would come to a different conclusion, but, I mean, these are hundreds of millions of dollars every day, and you should deal with this, I think.

Professor Kull: Let me interrupt you just to say —

Mr. McKay: Sure.

Professor Kull: — I think it is an excellent example. I would have thought this was precisely the kind of thing, perhaps the most important example of the kind of thing that is intended to be covered within subsection (4)(a). You're saying it is a principle of government contracting that the government is free to walk away, subject to some indemnification obligation. In that case, that's part of the deal, and I think it is one of the reasons that we need this provision. Perhaps it would be a good idea to include an express reference to some of these government contracting cases.

Mr. McKay: I think it would be. I mean, there is a lot more than renovating the kitchen when you're talking about a recycling contract for $50 million or something like that. There are so many cases and there's so much money involved, I think that you ought to have some sort of discussion of these cases, and if they fit into this category that's fine, but you ought to say so. Thank you.

Mr. Guy Miller Struve (N.Y.): I would like to come back to very nearly the same point that Mr. Gimbel made about the word "deliberate" [§ 39(2)(a)] used to describe the breach that is opportunistic. I do hope that by "deliberate" you mean more than that the breaching party intentionally did the act that then later turns out to be a breach. That is to say, I hope you meant at least knowing that it was a breach, and I have been standing here thinking maybe you're worried about that importing a subjective quality to the definition, and if you are worried about that one possible surrogate, "for he must have known that it was a breach," does he come up with any good-faith argument in the litigation that it was not a breach? If he does, particularly if it is a reasonable argument and the court spends some time on it, then it is hard to see it fitting within the concept of opportunistic, which is what you're trying to capture. So to sum up, I not only hope you will keep this element of deliberateness, but I hope it will turn out that it embodies some kind of mental element beyond just knowingly doing the act that turns out to be a breach.

Professor Kull: Thank you.

Professor Peter Linzer (Tex.): I would like to say a couple of things. First of all, let me say I strongly support this provision. I have been fighting with Andrew since this started, and I am very happy to support this provision, even if that seems like a rare thing here.

I think this is really important in a number of different senses. From the beginning we've got the point that restitution, I say, has a different moral basis than at least the view of contract associated with Holmes, that you have a choice between performing or breaching. That has been controversial since Holmes said it. It is not a completely accepted view, and the efficient-breach approach that comes from that is also, of course, not only highly controversial, in fact it virtually doesn't exist. I defy people to give me a list of cases in which anybody successfully did an efficient breach. As Ian McNeil showed years ago, they also involve fact situations that are simply counterintuitive, some enormous break in the market and nobody arbitraging to take advantage of it and things like that.

But if contract says we don't care whether you perform or not, restitution is concerned with right or wrong, it is concerned with unjust enrichment, and it seems to me this is a situation like that. Our colleague, Dan Friedmann, wrote several important articles on this interaction here.

One of the thoughts I have is that, in some ways, this also reminds us of something that's very out of fashion right now, the tort of bad-faith breach of contract in noninsurance situations, but in the most famous of those cases, the *Seaman's Direct* case from California [Seaman's Direct Buying Service, Inc. v. Standard Oil Co. of California, 686 P.2d 1158 (Cal. 1984)], then Chief Justice Rose Bird concurred, beginning by defending the notion of efficient breach and saying, however, that this is a different situation, this is somebody taking advantage here and efficient breach should be allowed. I might not agree with her on that, but she said efficient breach should be allowed in the ordinary commercial situation but not when someone is stonewalling, is acting in bad faith in this situation. It seems to me this is covering that situation, from a different point of view, and for that reason belongs in the Restatement of Restitution and functions as an additional remedy, in the largely contractual area, but on a different theory that is completely justifiable. Thank you.

My friend, Professor Risinger, asked what about "no restitution" clauses, do they trigger these exceptions, an exception to your basic principle here?

Professor Kull: I'd be interested to see one. (*Laughter*)

Mr. Sheldon H. Elsen (N.Y.): I want to preface what I am about to say by pointing to the enormous importance of this Section for contemporary complex business litigation. You said that at the beginning, and I can assure you that this is the case.

I want to give you an example, however, that departs from Justice Kass's horses and wagons and $5000 automobiles, and it is in the field of what is in the newspapers today, late trading, and it involves such a contemporary problem that I must disclose a client interest in the illustration I am about to give, but it also points to something that I think would be very

useful here, if you could articulate situations in which both tort and opportunistic contract remedies come into play.

Let me give you the example. Most people have read about the situation of BankAmerica and the Canary people. Bank of America set up this trading platform, and they mistimed the market trading so that there was market trading after 4:00 o'clock. The traders made an enormous profit because they knew it after it was — the market had closed. They made a profit at the expense of the mutual funds of other stockholders whose equity was diluted, all right, so there is a tort by the traders against the funds.

But in the middle was a contract, and the contract was between the investment adviser, who doesn't have equity being diluted, and the broker-dealer. In that case, it would be somebody like Bank of America, who typically signed a contract in which it agreed that it would place orders before the close of business, so you have a breach of contract.

Now putting aside the fact that there may be restitutionary tort remedies on behalf of the fund as against the traders, the Bank of America people were out making a fortune by selling this scheme to a lot of people. They are coming in, these traders, they are selling, they are paying them big commissions. The investment adviser is not losing dollars. They are losing reputation, they are being subjected to investigations by states and the SEC and so on, but they are not losing out of pocket.

My question for you, sir, is: putting aside all the tort remedies, or should we consider this as an Illustration, should the investment adviser be able to go after the broker-dealers who are placing these trades, often with false information about the time that it actually was traded, for all the commissions that they made from these customers they sucked in? I'm not saying you necessarily have an immediate answer, but maybe you want to consider that as an Illustration for the interplay.

Professor Kull: To the extent that any of the participants in this transaction occupy a fiduciary position towards any of the others, I think the discussion of restitution comes quite naturally somewhere in § 43, where we have old-fashioned, relatively tame examples of unfaithful agents for purchase and sale. I would assume that part of what you're describing is in fact treated by analogy there.

Mr. Elsen: Yes, I think that's fair.

Professor Kull: To the extent that there might be other liabilities based on a breach of contract, I would want to understand the facts you are describing much better than I do before saying anything, but it does sound like an interesting case to look at.

I dare say that, by the time we see any of this material in final form in hardcover, there will be many stimulating examples that can be added as

Illustrations and to the Reporter's Notes, and perhaps this will be one of them.

Mr. Elsen: Well, I guess I would just leave you with the thought I think you're right that there may be fiduciary concepts that shadow the contract, pure contract questions, but the interplay between the tort and the contract situations might deserve some fuller treatment somewhere.

Professor Kull: Thank you.

Professor Ray D. Madoff (Mass.): Andrew, I'm wondering if it might not be helpful to add somewhere something that discusses consumer cases. One can imagine a situation where this could be used with a vengeance against the consumer — the consumer leaves Verizon for Sprint or some such thing, they have a tremendous saved expenditure by breaching the contract — and do we really want to bring those types of cases into this type of provision?

Professor Kull: My immediate answer is I don't think so, but I am also wondering if there is really a realistic case here. I mean, thinking about my own experience with telecommunications cases, companies of the kind you are suggesting, I think that my contracts with them provide for staggering liquidated damages if I ever make the slightest false move. (*Laughter*)

And I think the service provider is usually very adequately covered by contract. He does not need fancy restitution theories to reach the paltry savings that I might — (*Laughter*) I would welcome suggestions of realistic hypotheticals, or, even better, real consumer litigation that I could consider including.

Professor Madoff: I mean, I do think that the cell phone, they were very good at providing those types of protections, but one can easily remember the days of the MCI wars with the phone companies, switch here, switch here, and one could see where you could be giving tremendous advantage to the writers of all of these contracts, in addition to the liquidated damages, to also go after to say that no, we are locking you in for big periods, and I just don't know whether we want to really be doing that.

President Traynor: Thank you.

The Chair would like to join in the many compliments to Andrew for bringing reason and order to a very difficult and confused area of the law, and my question is really just one of clarification, Andy. If you look at the Projected Overall Table of Contents on Roman xx and xxi, you see that this Section falls into Part II on the basis for liability, as distinguished from remedies [Part III], and it is in the Chapter on restitution and contract [Chapter 4], but in between restitutionary remedies for breach of a contract [Chapter 4, Topic 2], it is a separate topic, and before torts [Chapter 5, Topic 1]. On page 5, it says, "the present Section recognizes an alternative claim ... by an injured party who might instead assert a claim to enforce the con-

tract," and then at the bottom paragraph, "recovery for breach that exceeds the plaintiff's damages is anomalous on its face," and then the justification for it. Then, in the carryover paragraph on pages 4 and 5, you say, "It is identical in principle to the claims described in" the following Sections, which are tort claims. I know you don't want to get into a lot of subjects that are tangential to this, but take, for example, punitive damages, where in many states the remedy of punitive damages is available for an obligation other than a breach of contract, so the question really is, what do you feel is a precise characterization of the underlying liability?

Professor Kull: Well, the question is a controversial one, but the controversy is one that I have come to regard as arid and uninteresting. (*Laughter*) Not meaning this personally at all. (*Laughter*)

President Traynor: I take that as a unique form of compliment. I've never heard that before. (*Laughter*)

Professor Kull: It is discussed directly, though perhaps too discreetly, in the Reporter's Note on page 45 [Chapter 5, Topic 1, Reporter's Note to Introductory Note]. This is hidden in a Reporter's Note to the Introductory Note, and few people will want to pursue the thought that far. The answer to your question, as directly as I can put it, is that the uniform basis of liability underlying §§ 39 to 44 is a liability for unjust enrichment.

You refer to some of our Illustrations as tort cases. I would not characterize them that way for the purposes of this Restatement. The position we take here, essentially for convenience, is that there are overlapping grounds of liability, leading to situations in which a claimant may have a choice of legal theories.

In § 39, a claimant has a choice between an action for breach of contract with contract remedies, typically damages, and an action based on unjust enrichment with a restitution remedy. In §§ 40 and 41, there is a choice between an action in tort, with tort damages, and an action based on unjust enrichment, with disgorgement of profits. In § 42, there is the familiar choice between damages and profits in the intellectual-property context. In § 43, there is a choice between damages and perhaps other miscellaneous remedies for breach of a fiduciary obligation, and, what we have here, unjust enrichment with disgorgement of profits against faithless fiduciaries. Section 44 is a residual Section describing essentially the same choice.

The long-standing and, as I say, arid dispute, although one in which distinguished people have participated, is whether it is appropriate to describe these cases as instances of overlapping theories of liability — so that I have a choice between a tort action and an unjust-enrichment claim — or to say instead that, in § 39, you are simply talking about a choice between different contract remedies; or that, in § 40, you are adding disgorgement of profits to the list of tort remedies.

I recognize your question as being another form of this long-standing issue. My own view is that ultimately it depends how you look at it, and it really doesn't matter because we're just arguing about how to write the Table of Contents for some book, in this case the Restatement. Personally, I am satisfied that it is simpler to describe overlapping liabilities than to say that part of the law of restitution confers a substantive cause of action, while another part of this curious subject is simply an additional remedy to be brought out where you have a tort or a contract claim.

President Traynor: Well, I can't help but say this. One speaker who wishes to enter this desert. At microphone 4.

Judge Helen I. Bendix (Cal.): I am a new member, and I haven't had the benefit of being able to read these new Sections in the context of some of the ones that aren't in front of us today, but I don't think it is so arid. As a practical matter, this does have implications in terms of who is the trier of fact, and I'm familiar with this only because of the overlapping remedies that Professor Hazard mentioned. We have § 17200 [of the California Business and Professions Code], which is the granddaddy statute regarding restitution, and it creates very interesting issues for the judge in terms of managing a trial when you have overlapping causes of action but have different remedies that come from that. I always ask the lawyers have you thought about the order-of-proof issues if we ever have to try this case because, in California, equitable claims, unlike federal law, go first, so in effect the judge tries the liability issues, and I wondered if you'd given some thought to that, given the discussion you have just had with our President.

Director Emeritus Hazard: Yes, he's given it thought, but without consequence. (*Laughter*) Andy, I wonder whether you ought to take account of the problem just mentioned by Judge Bendix about law, equity, and the trier and the problem that the President raised about whether the characterization is a suitable predicate for a claim of punitive damages. If I were doing it, I would say "and other," how shall we say, "subordinate classification problems or consequential are beyond the scope of this Restatement." Because I can tell you that, speaking of the problem of proof, of trier of fact, how this would be characterized in California is not necessarily the way it would be characterized in Massachusetts or Pennsylvania or New Jersey or Delaware, and the same for the punitive-damages predicate. I don't think you want to get into that, so you say salute the problem, there it is, it is a separate local question of law in any particular jurisdiction or forum to make such a classification.

Professor Kull: I appreciate that suggestion. The reason I was dumbstruck in response to Judge Bendix's question is not that it's not a good one. As Professor Hazard says, it is one that I have thought about, as yet without any visible result. (*Laughter*)

One of the most difficult questions, asked at almost every meeting, is whether some issue is a question for the court or for the jury. We will discuss in some detail, probably in a Comment to § 1 (Discussion Draft, 2000), the fact that a claim in restitution or unjust enrichment may be, by a historical test at least, either legal or equitable, or in some cases legitimately both. The further consequences of that determination I am very much inclined to disclaim along the lines that you suggest.

Director Emeritus Hazard: Well, I think it is important to realize that the characterization for those and other purposes varies a great deal jurisdiction to jurisdiction. There is no unified American tradition of classification, and I think that is a perfectly legitimate ground for you to refrain from trying to resolve a problem that, as you suggest, you will recognize.

President Traynor: I think we are ready to go to § 40, on page 46.

Professor Kull: When we began some time ago, I made the general observation that the whole of this topic, §§ 40 to 44, presents specific applications of a broad general rule. As we say on page 37 [Chapter 5, Topic 1, Introductory Note], "Gains realized in violation of another's legally protected rights must be given up to the person whose rights have been violated." That is one of the aspirations and organizing principles of restitution law.

The Sections that follow are merely an attempt to apply that general principle in a series of contexts that are distinguished by the nature of the transaction more than any difference in legal principle. I have tried to create Sections that will allow the best grouping of like cases in order to make the instances recognizable.

Section 40 talks about trespass and conversion because torts to tangible property make such a grouping. Section 41 covers misappropriation of financial assets, whatever name we might give it; § 42, intellectual property and similar interests; § 43, fiduciary cases. Section 44 is a residual category intended to include not just the torts that don't quite fit in the other Sections but also — and with somewhat more hesitation — a general rule of restitution for ill-gotten gains from violation of other legal prohibitions. We also proceed approximately from the simpler to the more complex going through these Sections, so we start with physical trespasses.

Professor Colleen P. Murphy (R.I.): I am troubled by your use of the term "specific restitution" starting in § 40 [§ 40, Illustration 19] and going throughout the remainder of the draft. You seem to be using this term to mean restitution via devices developed in equities, the constructive trust and tracing, and you are using it to mean the ability to reach identifiable property, but this usage sweeps within it the idea that the plaintiff can get something other than what was taken from the plaintiff, indeed a substitute. I think that this usage of "specific restitution" is at odds with the conventional understanding of what specific relief is, which is giving the plaintiff