

RESTORING RESTITUTION TO THE CANON

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INTRODUCTION

The *Restatement (Third) of Restitution and Unjust Enrichment* brings clarity and light to an area of law long shrouded in fogs that linger from an earlier era of the legal system. It makes an important body of law once again accessible to lawyers and judges. This new *Restatement* should be on every litigator's bookshelf, and a broad set of transactional lawyers and legal academics would also do well to become familiar with it.

Credit for this *Restatement* goes to its Reporter, Professor Andrew Kull.¹ Of course his work benefited from the elaborate processes of the American Law Institute, with every draft reviewed by a Members' Consultative Group, a committee of Advisers, the Council, and the Membership.² I was an active part of that consultative process; I know this project well.³ But Professor Kull controlled the word processor and did the work, and only he had the breadth and depth of understanding to complete this project. No one else in the American legal academy could have done it since John Dawson and George Palmer, the two great Michigan restitution scholars of the mid-twentieth century.⁴ And at least for contemporary legal audiences, Dawson

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2. See Doug Rendleman, *Restating Restitution: The Restatement Process and Its Critics*, 65 WASH. & LEE L. REV. 933 (2008) (describing the process in detail).

3. This footnote is both a disclosure of a possible source of bias and a statement of relevant experience and expertise. I currently serve as the Second Vice President of the American Law Institute. I served as a very active Adviser to the *Restatement (Third) of Restitution and Unjust Enrichment*, and I participated in the meetings of the Council and of the Membership where the drafts were discussed and approved. I had an advisory hand in the decision to initiate the project in the first place. See Andrew Kull, *Three Restatements of Restitution*, 68 WASH. & LEE L. REV. 867, 876-79 (2011) (describing the deliberations that led to the project and the role of my report to the ALI); Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277 (1989) (an article derived from my report to the ALI).

4. See, e.g., JOHN P. DAWSON & GEORGE E. PALMER, *CASES ON RESTITUTION* (2d ed. 1969); JOHN P. DAWSON, *UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS* (1951); EDGAR N. DURFEE & JOHN P. DAWSON, *CASES ON REMEDIES II: RESTITUTION AT LAW AND IN*

and Palmer would not have done it nearly as well. They were too much a part of the earlier era that American lawyers no longer understand.

I. ACADEMIC NEGLECT

By the later stages of Dawson's and Palmer's careers, restitution and unjust enrichment was becoming a neglected field. But restitution's importance to the law is greatly disproportionate to the amount of systematic attention it has received over the last generation. The law of restitution and unjust enrichment creates distinctive causes of action with many and diverse applications—to mistake, to joint owners and joint obligors, to unenforceable contracts, to disrupted transactions of all kinds. And it creates distinctive remedies with applications to all sorts of causes of action—to claims in contract, tort, and unjust enrichment, and to claims for equitable wrongs and for violation of statutes. The cases continue to arise, as attested by the many recent citations in the Reporter's Notes in the new *Restatement*. But few lawyers or judges come to these cases with any systematic understanding of the field, and until now, most of them have found the available reference books difficult to use.

The restitutionary causes of action dropped out of the curriculum of American law schools in the third quarter of the twentieth century, largely by accident. Innovative law teachers created the modern remedies course by combining separate courses in damages, equity, and restitution, and the idea spread rapidly after about 1960.⁵ This change led to a great improvement in the teaching of remedies, including restitutionary remedies. But combining three courses into one left many things on the cutting room floor, including the restitutionary causes of action. And no one picked them up.

The result is that hardly anyone who graduated from law school in the last forty years has taken a restitution course, and at least by 1989 (probably a good bit earlier), there was no restitution casebook in print.⁶ When a lawyer or judge encounters a restitution problem today, there is a substantial risk that she will view it as an isolated problem, only dimly aware that there is a large body of law on restitution and unjust enrichment and that arguments about her particular problem can be tested and refined in light of larger principles.

Before this new *Restatement*, she might also have found it hard to investigate either that larger body of law or her particular problem within it. Contemporary lawyers do not find the other available reference books very user friendly. The first *Restatement of the Law of Restitution*,⁷ and Palmer's

EQUITY (1939); GEORGE E. PALMER, *THE LAW OF RESTITUTION* (1978) [hereinafter PALMER, *LAW OF RESTITUTION*]; GEORGE E. PALMER, *MISTAKE AND UNJUST ENRICHMENT* (1962); John P. Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175 (1959); John P. Dawson, *Restitution Without Enrichment*, 61 B.U. L. REV. 563 (1981).

5. For an account of how this course developed and spread, see Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161 (2008).

6. Laycock, *supra* note 3, at 1277 (reporting my search at that time).

7. RESTATEMENT OF THE LAW OF RESTITUTION (1937).

four-volume treatise,⁸ each give substantial weight to the historic division between law and equity and to the historic scope of quasi-contract. Quasi-contract, the nineteenth-century name for the common law's response to cases of what we would now call unjust enrichment, was rooted in fictional pleadings and the forms of action.⁹ The first *Restatement* speaks as of 1937; Palmer's treatise was published in 1978, but it feels much older. Both suffer from rather weak intermediate levels of organization, so it can be hard for new users to find what they are looking for.

Treatises on remedies give modern and accessible treatment of restitutionary remedies,¹⁰ but they are little help on restitutionary causes of action. And the treatment of restitutionary remedies in the *Restatement (Third)* is clearer, more systematic, and more precise than in any of the remedies treatises.

II. ACCESSIBILITY AND FUNCTIONAL EXPLANATIONS

The *Restatement (Third)* is written in plain English for lawyers in the twenty-first century. None of its rules are stated in terms of quasi-contract or the forms of action, and almost none are stated in terms of common law or equity. There is a clear explanation of restitution's separate roots both at law and in equity, correcting the common misconception that restitution is necessarily equitable, and explicitly stating that no remedy for unjust enrichment requires a showing that legal remedies are inadequate (§ 4). There is an overview of laches and the relevant statutes of limitation, which necessarily says that the applicable time limit in some jurisdictions may depend on the court's view of whether the claim arose at law or in equity (§ 70). More problematic, the Reporter could not find a way to restate the rights of bona fide purchasers for value without referring to "legal interest[s]" and "equitable interests" (§ 66). This distinction is mystifying to most contemporary lawyers, but the Reporter understands that it "may be unfamiliar" (§ 66 cmt. a), and he makes its meaning reasonably clear in the comments (§ 66 cmts. a, e). Apart from those three sections, the few references to common law or equity are brief and historical, and no legal rule is made to depend on distinctions between the two.

Finding what you're looking for is considerably easier than in the first *Restatement*. The *Restatement (Third)* is divided into four parts: general principles, liability in restitution, remedies, and defenses. "Liability in Restitution" means the substantive grounds for liability, subject to defenses and to further specification of the remedy. As with all the more recent restatements, the number of sections has been greatly reduced, and the explanatory

8. PALMER, LAW OF RESTITUTION, *supra* note 4.

9. See generally WILLIAM A. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS (1893); FREDERIC CAMPBELL WOODWARD, THE LAW OF QUASI-CONTRACTS (1913).

10. See 1 DAN B. DOBBS, LAW OF REMEDIES 550–706 (2d ed. 1993); JAMES M. FISCHER, UNDERSTANDING REMEDIES 329–436 (2d ed. 2006). Each of these sources has additional treatment of restitutionary remedies dispersed through later chapters.

comments, and the collection of cases and authorities in the Reporter's Notes, have been greatly expanded. Consequently, the *Restatement (Third)* functions not just as a summary of the law but also as a powerful research tool.

There are forty-four sections on restitutionary causes of action (§§ 5–48), so if necessary, it is quite manageable to simply read through the list in the table of contents. But it is not often necessary. These forty-four sections are subdivided into five chapters and ten topics, providing the intermediate levels of organization that were weak or missing in Palmer and the first *Restatement*. Most of these chapters, topics, and sections have common-sense titles that make for easy finding. If lawyers discover that the *Restatement (Third)* exists, they will be able to find what they need and understand what they find.

The *Restatement (Third)* states its rules in functional terms. This is clear from the very beginning, in its introductory explanation of “unjust enrichment” (§ 1 cmt. b). Section 1, closely tracking section 1 of the first *Restatement*, states the broad general principle that “[a] person who is unjustly enriched at the expense of another is subject to liability in restitution.” But what makes an enrichment “unjust”?

The comment makes clear that this question is not a free-floating moral inquiry, but a matter of legal rules. The phrase “unjust enrichment” is established by long usage, but comment b explains that the concept “might more appropriately be called *unjustified enrichment*.”

Compared to the open-ended implications of the term “unjust enrichment,” instances of unjustified enrichment are both predictable and objectively determined, because the justification in question is not moral but legal. Unjustified enrichment is enrichment that lacks an adequate legal basis; it results from a transaction that the law treats as ineffective to work a conclusive alteration in ownership rights. (§ 1 cmt. b)

The grounds for treating a transfer of property as reversible—as “ineffective to work a conclusive alteration in ownership rights”—are set out in the sections that follow. They are mostly a function of impaired consent by the transferor, wrongdoing by the transferee, failure of communication between the two, or some wholly unexpected development that disrupts the transaction. But no such generalization can substitute for the specific rules that follow. Those rules are emphatically *not* a matter of what the jury thinks is fair or “unjust.” But they necessarily give judges some discretion to take account of new ways in which unjustified enrichment may arise.¹¹

The benefits of functional rules are clearly apparent in a comparison of section 2 to its predecessor. Section 2 of the first *Restatement*, entitled “Officious Conferring of a Benefit,” says that “[a] person who officiously confers a benefit upon another is not entitled to restitution therefor.”¹² Comment a explains that “[o]fficiousness means interference in the affairs

11. *E.g.*, § 1 cmt. a, § 44(1).

12. RESTATEMENT OF THE LAW OF RESTITUTION § 2.

of another not justified by the circumstances under which the interference takes place.”¹³ What circumstances are those? Readers have to find out inductively, by examining which benefits are treated as “officious” and which are not. The cases sometimes describe an officious conferrer of benefits as an “officious intermeddler,”¹⁴ which sounds worse, and as a “volunteer” (§ 2 cmt. d), which may not sound so bad. But she is equally unable to recover under any of these labels.

Section 2 of the *Restatement (Third)* is much longer and more informative. Section 2, entitled “Limiting Principles,” offers broad principles that help make sense of the more detailed rules that follow. These principles are in the black letter, and they state what section 2 of the first *Restatement* meant, but never quite explicitly said, even in a comment. “This section states the same rule [as its predecessor], substituting a functional explanation for the familiar epithets” (§ 2 cmt. d).

So: “Liability in restitution may not subject an innocent recipient to a forced exchange: in other words, an obligation to pay for a benefit that the recipient should have been free to refuse” (§ 2(4)). If someone delivers a new car to my door, that is objectively a benefit, but it is not a benefit that I can be required to pay for. I might not want a new car at all, and if I do, I might want a different make, model, color, or options package. I might value the new car at much less than the market price, or I might be unable or unwilling to pay that price.

Similarly, “[t]here is no liability in restitution for an unrequested benefit voluntarily conferred, unless the circumstances of the transaction justify the claimant’s intervention in the absence of contract” (§ 2(3)). This focuses attention on a recurring question: Would it have been feasible to make a contract to cover this transaction before either side took action? And if not, was there sufficient reason to proceed in the absence of contract?

If the parties did make a contract, the contract controls. “A valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment” (§ 2(2)).

There is nothing very surprising in these principles. But in teaching a seminar on restitution, I have found that they have enormous explanatory power. The principle of “no forced exchanges,” so obvious in the case of a mysteriously delivered new car, can resolve more difficult cases where a recipient receives a benefit he can’t return but never agreed to pay for, as when a property owner builds a road or a fence that benefits his neighbor as much as it benefits the one who built it (§ 30 cmt. b, illus. 2, 6). And when, as inevitably happens, there are exceptions to these principles in the rules that come later, these principles focus attention on the reasons for the exceptions.

The law has recognized a limited exception to the duty to make contracts in cases of unmarried cohabitants, who obviously could have sorted out their property rights by contract, but where it is contrary to all human

13. *Id.* § 2 cmt. a.

14. *See, e.g.,* Teton Peaks Inv. Co. v. Ohme, 195 P.3d 1207, 1211–12 (Idaho 2008).

experience to expect them to have done so (§ 28). It has recognized a limited exception to the rule against forced exchanges in cases of persons who build by mistake on the property of others, where a free building to defendant and a total loss to plaintiff have seemed, to many judges and legislators, too large to ignore (§ 10). An exception permitting forced exchanges in one application of the law of attorneys' fees, more conceptually troublesome in my view, is discussed in Section IV.B.

The "familiar epithets" of earlier formulations did more to conceal than to illuminate the actual rules and their underlying policies. Nothing in the word "volunteer" will tell you what the better reasoned cases actually mean by that word, and there are many troublesome cases where the lawyers or judges focused more on the word than on the underlying concept. A recurring bad example is the argument, and the occasional holding, that a company that reimburses its victimized customer is a volunteer who cannot recover from the third party supplier, installer, or subcontractor actually at fault.¹⁵ The *Restatement (Third)* emphatically approves the cases that allow recovery on such facts (§ 24 cmt. d).

A special source of trouble has been the voluntary payment rule—that money voluntarily paid cannot be recovered (§ 6 cmt. e). All money paid by mistake is paid voluntarily in one sense; the question is what kinds of mistake are sufficient to justify reversing the payment. And when a court holds that payments coerced by a judgment and the threat of execution or garnishment were "voluntary,"¹⁶ or that payments of erroneously assessed taxes were "voluntary,"¹⁷ the word is being used in a Pickwickian or perhaps Orwellian sense to accomplish some purpose that might or might not make sense if openly stated and examined. What does the voluntary payment rule mean in functional terms?

The new *Restatement's* more helpful explanation is that "money voluntarily paid *in the face of a recognized uncertainty as to the existence or extent of the payor's obligation to the recipient* may not be recovered, on the ground of 'mistake,' merely because the payment is subsequently revealed to have exceeded the true amount of the underlying obligation" (§ 6 cmt. e). This formulation is closely related to a key element of the *Restatement's* definition of "mistake": a claimant has not made a mistake of the sort that invalidates a transaction if she has decided "to act in the face of a recognized uncertainty" (§ 5(3)(b)). If you pay money in total ignorance of some critical fact, or in the unquestioning belief in a "fact" that turns out not to be true, you have paid by mistake. But if you are aware that the critical fact is

15. See, e.g., *Armco, Inc. v. S. Rock, Inc.*, 696 F.2d 410, 412–13 (5th Cir. 1983) (holding that the manufacturer of a leaking sewer pipe who paid for repairs could not recover from a contractor whose defective installation allegedly caused the problem); *Inland Real Estate Corp. v. Tower Constr. Co.*, 528 N.E.2d 421, 428 (Ill. App. Ct. 1988) (holding that a syndicator of real estate partnerships that made its investors whole could not recover from the architects allegedly at fault).

16. See, e.g., *Ken Lawler Builders, Inc. v. Delaney*, 892 So. 2d 778, 780 (La. Ct. App. 2005).

17. See, e.g., *Sorce v. Armstrong*, 929 N.E.2d 1156, 1159–60 (Ill. App. Ct. 2010).

in doubt or the subject of disagreement, and you pay anyway, you have not made a mistake. You have decided to pay despite the uncertainty.

Most commonly, a party who pays in this situation is settling a disputed claim. Settlements are always made in the face of uncertainty about which party a court would think is right. A party to a settlement cannot undo the settlement later by claiming that she has discovered new evidence or that she mistakenly underestimated her odds of prevailing in litigation. This is usually obvious in routine cases. It is also the rule in more dramatic cases, such as those in which an insurer pays on a life insurance policy and the insured later turns up alive (§ 5 cmt. b, illus. 4). These cases never involve a mistaken death certificate and a public funeral; they typically arise from a long disappearance. The insurer decides to pay despite the known uncertainty about the presumed death of the insured. The insurer could resist payment and litigate if necessary; it could further investigate the claim; it could try to settle the claim for less than the full amount of the policy or with an agreement to repay the policy proceeds if the insured turns up alive. If it decides to pay despite the uncertainty, it has not paid by mistake, and it cannot recover its payment when the uncertainty is resolved. But it can recover in fraud if either the insured or the beneficiary has misrepresented the known facts (§ 6 cmt. e, illus. 19).

“Unjustified enrichment,” the limiting principles in section 2, and the voluntary payment rule are simply examples. Functional explanations pervade the *Restatement (Third)*. Traditional formulations are explained, defined, and clarified in functional terms.

III. THE SCOPE OF COVERAGE

A. Restitutionary Causes of Action

Why should lawyers care about clear explanations of restitution and unjust enrichment? If it's been gone from the curriculum for forty years or more, is it really all that important? Yes it is, as a brief survey of the *Restatement (Third)* illustrates. Each of the topics briefly mentioned below is summarized, explained in functional terms, and supported by a large body of cases and other authorities in the Reporter's Notes.

Part II, on “Liability in Restitution,” opens with eight sections on mistake (§§ 5–12). To err is human,¹⁸ but it is also corporate, because humans do the actual work of corporations. So we find one clerk paying the fax copy of an invoice for \$304,000, and a different clerk paying the hard copy.¹⁹ We find a bank paying \$725,000 on a check for \$7,250,²⁰ and another bank wiring the same \$2 million twice to two different recipients.²¹ The *Restatement (Third)* addresses recovery of such mistaken payments (§§ 5–8)

18. ALEXANDER POPE, AN ESSAY ON CRITICISM 30 (Scholar Press 1970) (1711).

19. *In re Dow Corning Corp.*, 192 B.R. 428, 429 (Bankr. E.D. Mich. 1996).

20. *In re JD Servs., Inc.*, 284 B.R. 292, 294 (Bankr. D. Utah 2002).

21. *Banque Worms v. BankAmerica Int'l*, 570 N.E.2d 189, 190–91 (N.Y. 1991).

and what happens to that claim when the recipient of the mistaken payment has gone bankrupt in the interim (§§ 55–61). It also addresses other kinds of mistakes: building on the wrong lot or over the property line (§§ 9–10); mistaken gifts, which usually arise in estate planning situations (§ 11); and the law of reformation, which provides a remedy for mistakes in drafting the documents that implement transactions (§ 12).

“Defective Consent or Authority” addresses a miscellany of recurring situations: fraud and misrepresentation (§ 13), duress (§ 14), undue influence (§ 15), lack of legal capacity (§ 16), and lack of authority on the part of an agent or fiduciary (§ 17).

“Transfers Under Legal Compulsion” addresses payment of judgments later reversed (§ 18) and erroneous payment of taxes (§ 19). Such payments may or may not be made by mistake, but they are always made under legal compulsion. Settlements pending appeal and settlements of disputed tax liabilities are of course binding. But when a judgment debtor pays a judgment while continuing to prosecute his appeal, the payment has been coerced by the judgment and its potential consequences, and the payment can be recovered if the judgment is ultimately reversed or reduced. Tax payments are equally made under the threat of coercive collection measures. If an erroneous tax payment cannot be recovered, it is not because the payment was voluntary, but because of statutory requirements of protest and the like, or because of special considerations of government finance that such statutory requirements are designed to serve.

“Emergency Intervention” (§§ 20–22) may seem like a small-stakes curiosity, but it is important to the medical industry. Don’t think of the law school example of a surgeon summoned to treat a patient by the side of the street, although that’s a real case (§ 20 cmt. a, illus. 1). Think instead of the unconscious or suicidal patient delivered to the emergency room by others (§ 20 cmt. b, illus. 5). He never agreed to pay, nor did he do anything that manifests the tacit consent needed to support an implied contract. But he is liable in restitution, because the emergency excuses the hospital’s failure to make a contract before beginning treatment.

“Performance Rendered to a Third Person” (§§ 23–25) is one of the less informative topic titles. But here we find the basis for the whole law of indemnity and contribution (§ 23) and much of the law of equitable subrogation (§ 24). And we find cases where a contractor contracts with a tenant or an adult resident and then looks to the owner of the property for payment (§ 25).

Under “Self-Interested Intervention” (§§ 26–30), we find restitutionary claims between joint owners of property (§ 26) and between unmarried cohabitants (§ 28). We find the claims of persons who improved property that they reasonably expected to own, only to have that expectation dashed (§ 27). And we find the conceptual basis of the whole law of attorneys’ fees in common fund cases, most notably including class actions (§ 29). Finally, there is a residual rule, tightly limiting restitution in other cases of unrequested benefits to those in which the benefit is received in cash or can be

returned in kind, so that there is no hint of forced exchange—no risk of making a defendant pay for something she might not have wanted (§ 30).

“Restitution and Contract” (Chapter Four) addresses two sets of problems of considerable commercial importance and conceptual confusion. The first is “Restitution to a Performing Party with no Claim on the Contract” (§§ 31–36). When one side partly or wholly performs a contract later discovered to be unenforceable for whatever reason—statute of frauds or indefiniteness (§ 31), illegality (§ 32), lack of legal capacity (§ 33), mistake, impossibility, or frustration of purpose (§ 34)—the party who performed may have a claim in restitution for the benefit conferred. Here is the whole law of *quantum meruit*—a phrase that survives from the days of quasi-contract and can be translated into plain English as “reasonable value” (§ 31 cmt. e)—explained and rationalized. It is not just amateurs who sometimes perform without an enforceable contract; it is also business people and professionals in a hurry. These issues often arise in real estate contracts²² and in contracts for services, including cases where an attorney does valuable work without an enforceable fee agreement (§ 31 cmt. h, illus. 18–19). They can arise in unexpected contexts, as when a divorce agreement divides a \$5 million account with Bernie Madoff and that balance turns out to be a fiction (§ 34 cmt. e, illus. 19). Similar issues arise when a party to a contract is coerced or manipulated into doing more than the contract requires (§ 35), or when he performs valuable services and then breaches, forfeiting his claim on the contract but not necessarily his claim in restitution (§ 36).

Topic 2 of Chapter Four, “Alternative Remedies for Breach of an Enforceable Contract,” includes the settled law of rescission (§ 37), the more confused law of reliance and restitutionary damages, much clarified here and relabeled “Performance-Based Damages” (§ 38), and a remedy newly stated but with support in the cases for disgorgement of profits from opportunistic breach (§ 39). I return to these issues in Section IV.A.

“Restitution for Wrongs” (Chapter Five) addresses a whole series of commercially significant torts: trespass and conversion (§ 40), misappropriation of financial assets (§ 41), infringement of intellectual property (§ 42), breach of fiduciary duty or confidential relation (§ 43), and other intentional interference with legally protected interests (§ 44). This catchall provision includes established torts such as fraud (§ 44 cmt. c, illus. 12–13) and intentional interference with contract (§ 44 cmt. b, illus. 4–6). It includes emerging problems such as identity theft (§ 44 cmt. b, illus. 2), and profitable wrongdoing too unusual to easily classify, such as the unauthorized redistribution of satellite signals (§ 44 cmt. b, illus. 1). The payoff is that addressing these torts through restitution can lead to restitutionary remedies, including disgorgement of profits (§ 51) and a constructive trust over identifiable proceeds of the wrong (§ 55) as alternatives to compensatory damages. Fraud is confined to the catchall here because it is more fully

22. *E.g.*, *Farash v. Sykes Datatronics, Inc.*, 452 N.E.2d 1245, 1251 (N.Y. 1983) (Jasen, J., dissenting) (oral agreement to lease from a “prominent and successful” real estate developer).

addressed in section 13, where the remedy is rescission of the affected transaction.

“Restitution for Wrongs” also includes some spectacular personal wrongs that are not so commercially significant but are surprisingly complex when they arise. These include homicide by an heir, an insurance beneficiary, or a joint owner with survivorship rights (§ 45), and a remarkable variety of other forms of interference with attempts to make a gift or a will (§ 46).

Finally, there is a miscellaneous set of three-party cases in which *A* makes a payment to *B* that should have been made to *C* (§§ 47–48). Often these cases are based on mistake or some other ground also addressed elsewhere in the *Restatement*. But the three-party variations raise enough distinct issues to justify separate treatment.

B. Restitutionary Remedies

Restitutionary remedies were never as academically neglected as restitutionary causes of action, but they were often fuzzily defined and only partially understood. Restitutionary remedies necessarily involve a measure of discretion, but this *Restatement* brings clear and mostly precise formulations to guide that discretion.

The measure of recovery in restitution varies with context to a much greater extent than the measure of compensatory damages. The fundamental question in damages, subject to many limits and exceptions, is how much a plaintiff lost, comparing what actually happened to what would have happened but for the wrong.²³ But in restitution, the question is not even presumptively as simple as how much defendant was enriched as compared to what would have happened but for the events giving rise to the claim in restitution. The question is how much defendant was *unjustly* enriched. How much of his enrichment is unjust may depend on all the facts and circumstances.

Topic 1 of Chapter Seven (“Remedies”) lays out the remedies that end in an ordinary money judgment (§§ 49–53). Central to this topic is a distinction between innocent recipients (§ 50) and conscious wrongdoers (§ 51). An innocent recipient most commonly received money or property by mistake (§§ 5–12), but there are many other possibilities. He may have received emergency medical services (§ 20) or some other form of unrequested benefit sufficiently exceptional that he has to pay for it (§§ 21–30). He may have received partial performance on an unenforceable contract (§§ 31–36).

The basic remedial principle is that an innocent recipient is required only to give back what he received. And if it is not possible to give back what he received, because it has been consumed or is permanently attached to his property, he has to pay only a very conservative measure of its value, designed to protect the innocent recipient from the risk that he might have to pay more for something than it is worth to him personally (§ 50). He may

23. See DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 11–15 (4th ed. 2010).

have to pay nothing if he did not request the benefit and cannot convert it into cash, and if it has no demonstrable value to him. If Improver mistakenly erects a new building on Owner's lot, and if Owner has other plans for that lot, there may be nothing to do but tear down the new building (§ 10 cmt. g, illus. 17). It is an encumbrance rather than a benefit.

As a first approximation, conscious wrongdoers are defendants who took someone else's property without asking. But section 51 offers a considerably more precise definition. A conscious wrongdoer is one who knowingly violated plaintiff's rights, or who acted despite a known risk that he was violating plaintiff's rights, under sections 13–15 or 39–46 of this *Restatement*. These sections include all the important commercial torts and all the forms of intentional wrongdoing, commercial or otherwise, that can enrich the wrongdoer.

A wrongdoer, conscious or not, is liable for at least the market value of what she received (§ 51(2)). This rule covers those who unknowingly commit strict liability torts, such as conversion. It also covers the reasonable royalty owed by an infringer of intellectual property even if there is no other evidence of profits to the infringer or damages to the victim (§§ 42 cmt. f, 51 cmt. d).

A conscious wrongdoer must surrender all his profits from the wrong, including any consequential gains he earned by using the property after he took it (§ 51(4)). Consequential gains are analogous to consequential damages, but the phrase does not appear in the cases. It should. It is very helpfully deployed in the *Restatement (Third)* to sort out measures of recovery and match them with assessments of culpability.²⁴

Section 52 addresses the intermediate case of a person who committed no actionable wrong but is partly or wholly responsible for his own enrichment. The most dramatic example is the property owner who watches the mistaken improver building on the wrong lot and says nothing (§ 52 cmt. c, illus. 3). The more common example is one who receives a mistaken payment, recognizes the mistake, and refuses to return the money (§ 52 cmt. e, illus. 10).

All of this is somewhat complicated to summarize. But it is set out in sections 49–53 with a clarity far exceeding anything previously available in the literature. These sections are generally consistent with the results in the cases, but they are clearer and more precise than any explanation in the cases.

Topic 2 of Chapter 7 restates the remedies that sometimes enable a plaintiff to claim specific property in preference to other creditors—rescission (§ 54), constructive trust (§ 55), equitable lien (§ 56), subrogation to a lien or other property interest (§ 57), and the rules for identifying and tracing the property subject to these remedies (§§ 58–59). These remedies treat the restitution plaintiff as the true owner of her property, or as a lien holder on property improved at her expense, so long as that property remains identifiable. She can retrieve her property or enforce her lien ahead of

24. See §§ 39(3), 49(5), 50(5), 51(5)(a), 53(2), 53(3), 58(3)(a), 43 cmt. h, 53 cmt. d.

the claims of ordinary creditors (§ 60). That priority is limited to the amount of plaintiff's actual losses if the wrongdoer has unpaid creditors or innocent dependents (§ 61). These sections offer a clear explanation of when and why these remedies work, what their limits are, and when the restitution plaintiff is overreaching.

C. Defenses

Claims in restitution are subject to characteristic defenses (Chapter Eight). Some are broadly applicable defenses that raise distinct issues when applied to restitution claims: equitable disqualification or unclean hands (§ 63), and laches and statutes of limitation (§ 70). Others are obscure: cases of apparent enrichment that turn out not to be (§ 62), and passing on, which arises almost exclusively in cases of sales taxes unlawfully collected from merchants who passed the tax on to their customers (§ 64).

Other defenses are both important and uniquely or principally applicable to restitution claims. The restitution plaintiff is generally in the position of trying to undo an apparently completed transaction. But innocent defendants—either the innocent original recipient of the unjust enrichment, or innocent third parties who dealt with either an innocent or wrongdoing recipient—may have relied on the apparent transaction. That reliance is generally protected by the defenses of change of position (§ 65) and bona fide purchaser (§ 66). There are separate definitions of “value” (§ 68), which is an essential element of the defense of bona fide purchaser, and of “notice” (§ 69), which is essential here and in many other places as well.

Considerably more dubious is the defense of bona fide payee (§ 67), which entirely dispenses with any requirement of reliance. When a person receives money not his own, whether by mistake, or misappropriation, or even armed robbery (§ 67 cmt. d, illus. 2), and uses that money to pay one of his creditors, the creditor can keep the money—even if it is still identifiable as the property of a restitution plaintiff and even if the creditor has done absolutely nothing in reliance on the payment. There is no justification for this rule intrinsic to the law of restitution. It is not even clear why the financial industry thinks the rule is in its interest, because banks appear in these cases both as the senders and recipients of mistaken payments.²⁵ But it is the dominant rule. And because most of these payments are made by check or wire transfer, changing the rule would require a change to the law of negotiable instruments as well as to the law of restitution. The American Law Institute had little choice but to restate the existing rule, even though it is at odds with the principles that inform all the rest of the *Restatement (Third)*. There is a minority rule, much more sensible in my view, in which the creditor is protected only after he does something that relies on the payment.²⁶

25. See, e.g., *Banque Worms v. BankAmerica Int'l*, 570 N.E.2d 189 (N.Y. 1991).

26. See, e.g., *Wilson v. Newman*, 617 N.W.2d 318 (Mich. 2000).

IV. SOME SPECIAL CHEERS, FURTHER ELABORATIONS, AND MODEST RESERVATIONS

Few book reviews are complete without some criticisms or disagreements, and in a project of this magnitude, nearly every reader will find something to disagree with. I emphatically disagree with the defense of bona fide payee, as already noted. There are other places where I question the explanation, or where I would further elaborate the explanation. And some of these issues arise in sections that also deserve special praise for their clarification of the law.

A. *Restitution and Contract*

Some of the most important and creative work in the *Restatement (Third)* is in its treatment of “Alternative Remedies for Breach of an Enforceable Contract” (§§ 37–39). Two of these sections clear up substantial confusion originating in the forms of action and augmented by the two restatements of contracts. The word “restitution,” as originally used in the law of contracts, had little or nothing to do with unjust enrichment, but after the word became established as referring to the body of law addressed to unjust enrichment, the earlier meaning was mostly lost.²⁷ Trying to merge the two uses of the word led to conceptual confusion and distorted all the rules in which contract law talked about “restitution” (Chapter Four, Topic Two, Introductory Note, note 1).

The new *Restatement* once again separates the two usages. It takes the position that the claims in sections 37 to 39 are alternative remedies for breach of contract, and that those in sections 37 and 38 do not depend on unjust enrichment (Chapter Four, Topic Two, Introductory Note, note 2). A defendant who breaches his contract and escapes liability may indeed be unjustly enriched, but that is not inevitable, and it is not an element of the claim in sections 37 and 38. The claim in section 39, for restitution of the profits from opportunistic breach of contract, can be thought of as either in contract or in unjust enrichment, just as the claims for the profits of other conscious wrongdoing (§§ 13–15, 40–46) can be thought of as either in tort or in unjust enrichment.

1. Rescission

Section 37 restates the right to rescission for material breach. As I tell my students, this is the only remedy they learned about as a child: if the merchant doesn’t deliver what he promised, your mother will demand her money back. When defendant fails to perform, plaintiff can get all her money back even if she would have lost that money had the contract been

27. Chapter 4, Topic 2, Introductory Note, note 1. For a more fully elaborated account of this history, see Andrew Kull, *Disgorgement for Breach, the “Restitution Interest,” and the Restatement of Contracts*, 79 TEX. L. REV. 2021 (2001), and Andrew Kull, *Rescission and Restitution*, 61 BUS. LAW. 569 (2006).

performed. The Reporter is somewhat apologetic about this feature of rescission,²⁸ but he should not be. One has to be too deeply immersed in contract theory, and too separated from common sense, before it seems even remotely plausible that the party who failed to perform should be paid for doing nothing—on the ground that even *if he had performed*, his performance would not have been worth as much as plaintiff had agreed to pay for it.

Plaintiff may choose rescission because it is often very simple (no need to prove the expected profit from the contract), because of personal preferences not reflected in market values, because she has lost confidence in defendant and the transaction, or because she would have lost money on the contract and her expectancy damages would be negative. The reasons for her choice and the expected value of the contract are both irrelevant. If the breach is sufficiently material, plaintiff has the option of rescission. The law is straightforward and well settled, although the issues arising in implementation of this remedy can be surprisingly complex (§ 54).

Apart from its copious research, the new *Restatement's* principal contributions with respect to rescission are to vocabulary. It restores the word “rescission” to the restatements of the law. The two restatements of contracts attempted to restate the law of rescission without using the word.²⁹ This mysterious change of vocabulary had no effect on lawyers or judges, who overwhelmingly continued to refer to rescission as “rescission.”³⁰

The *Restatement (Third)* also abandons the unfortunate phrase “total breach” to describe the prerequisite to rescission (§ 37 cmt. c). By “total breach,” the *Restatement (Second) of Contracts* means only a breach that “so substantially impairs the value of the contract to the injured party at the time of the breach that it is just in the circumstances to allow him to recover damages based on all his remaining rights to performance.”³¹ The problem is that “total breach” in ordinary English seems to imply that defendant did absolutely nothing to perform the contract. The new *Restatement* avoids the phrase and explains why; it substitutes the phrase “material breach” (§ 37(1)) and explains what that term means (§ 37 cmt. c). This is a considerable improvement in clarity, but it leaves a problem beyond the power of this new *Restatement* to resolve. The phrase “total breach” still plays a significant role with respect to other issues in the *Restatement (Second) of*

28. See § 37 cmt. b (stating that “[s]uch outcomes are rare” and “are the fortuitous consequence of the law’s adherence to a simple rule rather than a complex one”).

29. See RESTATEMENT (SECOND) OF CONTRACTS § 373(1) (1981) (“The injured party is entitled to restitution for any benefit that he has conferred on the other party”); RESTATEMENT OF CONTRACTS § 354 (1932) (authorizing “specific restitution and retransfer of the property”); see also U.C.C. § 2-608 (2011) (“Revocation of Acceptance”).

30. In the Westlaw database for the two restatements of contracts (*REST-CONTR*), the words “rescind,” “rescinds,” or “rescission” appear 426 times (as of September 2011). Nearly all of these appearances are in the annotations of cases citing one of the restatements. Only a handful are in the restatements themselves.

31. RESTATEMENT (SECOND) OF CONTRACTS § 243(4).

Contracts.³² That *Restatement's* treatment of rescission is now displaced, but these other provisions are not. So the ALI is in the position of using two phrases—"total breach" and "material breach"—to mean substantially the same thing in different contexts.

2. Reliance and Restitution Damages

Section 38, on "Performance-Based Damages," is far more creative. This section follows the *Restatement (Second) of Contracts* in defining reliance damages (§ 38(2)(a)). Both restatements provide that reliance damages must be reduced by the amount of any loss that defendant proves plaintiff would have suffered if performance had been completed.³³ The result is that a reliance recovery cannot exceed a provable expectancy. If plaintiff's expectancy was to lose \$10,000, and if he recovers all his reliance costs less \$10,000, he winds up with the \$10,000 loss that was his expectancy. Because plaintiff will prove a positive expectancy if he can and defendant will prove a negative expectancy if he can, reliance damages are for cases where the expectancy cannot be proved.

The *Restatement (Third)* next provides that plaintiff may recover as damages "the market value of plaintiff's uncompensated contractual performance, not exceeding the price of such performance as determined by reference to the parties' agreement" (§ 38(2)(b)). This is a departure from the *Restatement (Second) of Contracts*, which conceived this remedy as restitution for unjust enrichment³⁴ and which did not impose a limit based on the contract price unless the contract had been fully performed.³⁵ But it leads to the same result in all cases except those in which the contract is only partially performed and plaintiff would have lost money if it had been fully performed (§ 38 cmt. a).

Like reliance damages, damages based on the value of performance matter principally in cases where the expectancy is difficult or impossible to prove. And because cash expenditures in reliance are generally easier to prove than the market value of part performance, damages based on the value of performance are scarcer than reliance damages. Their principal attraction under the *Restatement (Second) of Contracts* was that they sometimes allowed plaintiff to escape a losing contract. If the cost of performance turned out to be more than the contract price, and if any other contractor would have faced the same increased cost, plaintiff could show that the market value of performance was more than the contract price and recover the value of his

32. See *id.* § 236 (defining damages for total and partial breach); § 243 (explaining when nonperformance is a total breach); § 253 (stating that repudiation is a total breach).

33. § 38(2)(a); RESTATEMENT (SECOND) OF CONTRACTS § 349.

34. RESTATEMENT (SECOND) OF CONTRACTS § 373 cmt. a.

35. *Id.* cmts. b, d.

performance based on that higher market value without regard to the contract price.³⁶

It is this narrow set of cases (and only a subset of these) in which the new *Restatement* proposes to change the result. Between the parties to the contract, the value of plaintiff's performance is established by the contract price, and if that price is known, plaintiff cannot argue for a different value. The principal relevance of this remedy under the new formulation is for cases where the contract price is unknown because it depends on some future contingency that, because of the breach, will never come to pass. So if a real estate agent works through the development phase for a nominal salary plus the expectation of future sales commissions, and the project is abandoned before any units are ready for sale, the agent can recover the market value of her services (§ 38 cmt. b, illus. 4). But if the contract price is stated in cash, the value of plaintiff's partial performance will be the appropriate fraction of that price, and plaintiff will not be permitted to argue for a higher value.

With the notable exception of George Palmer, every scholar to address the issue, including this reviewer, has argued for holding plaintiff to the contract price (§ 38 reporter's note d(3)). The inquiring reader may wonder why I think it is only common sense that a plaintiff seeking rescission under section 37 can get out of a losing contract but that a plaintiff seeking performance-based damages under section 38 cannot. There are two reasons, compelling in my view, but they do not appear in the *Restatement (Third)*.

First, when the contract is rescinded, the contractual exchange is reversed. To the extent physically possible, each side returns to the other all that he has received under the contract. That doesn't happen in cases of damages based on reliance or the value of performance. Defendant keeps as much of plaintiff's performance as has been delivered, and he pays for it. The amount he pays should be based on the contract price.

Second, and more fundamental, sections 37 and 38 both treat the contract price as binding. There is no distinction to be explained. When plaintiff rescinds a losing contract, it is defendant who wants to override the contract price and revalue his promised performance. When plaintiff with a losing contract seeks damages based on the value of performance, it is plaintiff who wants to override the contract price and revalue her performance. Neither side is allowed to do that.

To flesh this out a bit, suppose plaintiff pays \$10,000 in advance for goods to be delivered in 90 days. When the time for performance arrives, the market price has dropped to \$8,000, but defendant fails to deliver. Plaintiff can sue for rescission and get her money back (§ 37 cmt. b, illus. 2). It is defendant in this case who wants to say the goods were not really worth \$10,000 but rather only \$8,000, so he should be allowed to keep \$2,000 for

36. See, e.g., *United States ex rel. C.J.C., Inc. v. W. States Mech. Contractors, Inc.*, 834 F.2d 1533, 1537-41 (10th Cir. 1987); *Boomer v. Muir*, 24 P.2d 570 (Cal. Dist. Ct. App. 1933).

doing nothing. Defendant wants to override the contract price, and he is not permitted to do so.

The rule is the same if plaintiff agrees to build a special-purpose machine for \$8,000, and it soon becomes apparent that the project will cost \$10,000. If defendant repudiates the contract and plaintiff sues for the value of his performance, it is plaintiff who wants to override the contract price and claim that completed performance would have been worth \$10,000. She should not be permitted to do so either, and that is what the new *Restatement* says (§ 38(2)(b)).

Of course it remains to be seen if the courts accept this analysis. I hope they do, but it is important that they accept all of it and not just part of it. There are many reasons why performance may turn out to be more expensive than expected. Maybe the cost of labor or materials took an unexpected jump; maybe plaintiff found rock where she expected soil. These are risks of the contract, and a fixed-price contract implicitly assigns these risks to the party that faces them. The other side's breach of contract is not a reason to shift these risks.

But in some of these cases, the source of plaintiff's increased costs is defendant's breach. The parties had to cooperate to perform the contract, and defendant underperformed or misperformed in ways that drove up plaintiff's costs. Professor Gergen reports his impression that this was the situation in a majority of the cases allowing plaintiff to value his performance at more than the contract price.³⁷ In this scenario, all or much of plaintiff's excess costs were really consequential damages caused by defendant's breach. Allowing plaintiff to recover "restitution" in excess of the contract price allowed plaintiff to recover those damages without having to prove causation and without being subject to common limitation-of-remedy clauses in the contract. This was the right result, but overriding the contract price to achieve that result came at the cost of considerable conceptual confusion and gross overinclusiveness. Because the value-of-performance theory has been available without proof of causation, it has been equally available when plaintiff simply underbid the job and defendant's breach had nothing to do with plaintiff's excess costs.

The *Restatement (Third)* addresses both kinds of cases. It says that damages based on the value of performance cannot exceed the applicable portion of the contract price (§ 38(2)(b)). But it also urges courts to address the damages caused by defendant's breach with realistic standards of proof (§ 38 cmt. e). A court should not abandon the rule of overriding the contract price and also demand an unattainable precision in proof of plaintiff's consequential damages. And it should not let defendant deliberately or persistently breach, run up plaintiff's costs, and then hide behind a contract clause that disclaims consequential damages or damages for delay. Courts have ample authority to deprive defendants of the benefit of such clauses

37. Mark P. Gergen, *Restitution as a Bridge over Troubled Contractual Waters*, 71 *FORDHAM L. REV.* 709, 712–13 (2002).

when they are abused.³⁸ The *Restatement (Third)* attends to the proof issue (§ 38 cmt. e) but not to the limitation-of-remedy issue. Courts that adopt its position on performance-based damages should attend to both of these issues. Excess costs caused by defendant's breach should be borne by defendant; excess costs with other causes should not be.

3. Opportunistic Breach

Finally, the *Restatement (Third)* provides that plaintiff can recover defendant's profits from an opportunistic breach of contract (§ 39). In the simplest example, a seller of real estate breaches its contract and sells to a third party for \$10,000 more than the contract price. Plaintiff can recover the seller's \$10,000 of profit from the breach without having to litigate the market value of the property on the day of the scheduled closing (§ 39 cmt. d, illus. 1). There are examples of this disgorgement remedy in the cases, many of them relatively uncontroversial, but the results have been undertheorized, both in the cases and in the academic literature (§ 39 reporter's note a).

The *Restatement (Third)* gives this remedy clear definition, proposing that it be available on three conditions: that the breach is deliberate; that the breach is profitable to the breaching party; and that contract damages would afford "inadequate protection to the promisee's contractual entitlement" (§ 39(1)). A breach is profitable when the gains from breach, less the payment of contract damages, exceed the gains from performance (§ 39(3)).

The Reporter is at pains to emphasize that "[t]he restitution claim described in this section is infrequently available, because a breach of contract that satisfies the cumulative tests of § 39 is rare" (§ 39 cmt. a). That statement is undoubtedly true; it is also somewhat misleading. What principally makes this claim rare is the rarity of profitable breaches. Contract-market damages mean that defendant's opportunity for market-based gain is typically matched by plaintiff's market-based loss. The additional risk of "liability for incidental and consequential damages, over and above the cost of a substitute performance, limits the occurrence of profitable breaches almost to the vanishing point" (§ 39 cmt. f).

It follows that recoveries of the profits of opportunistic breach will be rare, as the Reporter emphasizes. It also follows that the occasions even to consider the question of permitting recovery of profits will also be rare. But in the tiny set of cases in which defendants profit from breach, recovery of those profits under the rule in section 39 would not be rare.

Within this set of profitable breaches, there is no disgorgement of profits unless the breach is deliberate (§ 39(1)). This eliminates inadvertent or negligent breaches that turn out to be profitable, but that is likely a small subset.

38. See, e.g., Carl S. Beattie, Note, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause*, 46 WM. & MARY L. REV. 1857, 1860-68 (2005) (collecting multiple recognized grounds for refusing to enforce no-damages-for-delay clauses).

A much larger set of cases is eliminated in the comment rather than the black letter. If the cost of performance to defendant would be so greatly disproportionate to the benefit to plaintiff that the court would not order specific performance,³⁹ then neither should it award the profits from the breach (§ 39 cmt. i). Breach in such circumstances is often deliberate, but the profits from breach are just the savings from not performing. When the hardship of performing would be great enough, the law accepts these savings as legitimate.⁴⁰

The third requirement in the black letter—that damages afford “inadequate protection to the promisee’s contractual entitlement” (§ 39(1))—is unfortunate. The rule that equity will not act if there is an adequate remedy at law has been used and abused for so many disparate purposes over the years that introducing a limited version of it here will inevitably be a source of confusion and mischief. The Reporter went to great lengths to reject such misinterpretations (§ 39(2) cmt. c), but history suggests that they are unavoidable.⁴¹

The black letter says that “[a] case in which damages afford inadequate protection to the promisee’s contractual entitlement is ordinarily one in which damages will not permit a party to acquire a full equivalent to the promised performance in a substitute transaction” (§ 39(2)). This is the definition reflected in the cases when adequacy of legal remedy is the only issue and there is not some other reason to withhold specific performance or an injunction.⁴² And the Reporter carefully distinguishes those other reasons. Specific performance may be denied because it is burdensome, impractical, or difficult to supervise, or because plaintiff has to obtain whatever substitute performance he can far more quickly than the case can be litigated (§ 39 cmt. c). Courts in such cases may also say that damages are adequate under the circumstances, but the real reason for decision is the difficulty of specific performance. These constraints on specific performance are essentially irrelevant to disgorgement of profits, which is an after-the-fact monetary remedy (§ 39 cmt. c).

Even with all these clarifications and limitations, this provision would seem to be an exception to the general principle that restitution plaintiffs “need not demonstrate the inadequacy of available remedies at law” (§ 4(2)). But the Reporter says that “properly interpreted, there is no conflict between the requirements of § 39 and the general proposition of § 4(2)” (§ 39 cmt. c). This too may reflect the triumph of hope over experience, but it is one more indication that this *Restatement* rejects the many misuses of the adequate-remedy rule.

39. See RESTATEMENT (SECOND) OF CONTRACTS § 364(1)(b).

40. See generally Douglas Laycock, *The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in Boomer v. Atlantic Cement)*, 4 J. TORT L. (forthcoming 2011).

41. See DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 99–244, 265–86 (1991) (documenting the many purposes for which adequate remedy and irreparable injury have been invoked, and identifying the functional rules that underlie the rhetoric).

42. See *id.* at 37–72 (collecting cases).

Defined and explained in this way, the requirement that damages inadequately protect the contractual entitlement will screen out very few cases. Damages enable a plaintiff to obtain “a full equivalent . . . in a substitute transaction” (§ 39(2)) only in cases of contracts for fungible goods or routine services in orderly markets. Opportunities to profitably breach such contracts, for any reason other than idiosyncratic inability to perform at reasonable cost, are essentially zero. When breach is profitable and deliberate, and not motivated by disproportionate hardship in performing, it should be extremely rare that disgorgement of profits is displaced by an adequate remedy in damages. The only illustrations of the adequate-remedy requirement are two hypothetical cases in which all or most of the analytic work is being done by the unexpected hardship of performance on defendant (§ 39 cmt. i, illus. 16) or by the settled rule against specific performance of contracts to provide personal services (§ 39 cmt. i, illus. 17). Neither of those defenses to specific performance has anything to do with the adequacy of plaintiff’s damage remedy.⁴³ In one of these illustrations, plaintiff gets a substitute performance that is imperfect but acceptable for plaintiff’s purposes (§ 39 cmt. i, illus. 16); in the other, plaintiff gets a substitute performance of unknown quality (§ 39 cmt. i, illus. 17).

What seems to have attracted the Reporter to this adequate-protection formulation is that, very often, the source of an opportunity for profitable breach is a striking inadequacy in the damage remedy. Where plaintiff bargains for a specific contractual entitlement that he values more highly than the market would, damages based on market value fail to protect his bargain (§ 39 cmt. d). Cynically taking advantage of this mismatch between the actual bargain and conventional measures of damage is one way in which opportunistic breach is wrongful (§ 39 cmt. e). But such mismatches are not the only source of opportunities for profitable breaches, as the example of breaching a real estate contract to sell at more than the market price illustrates (§ 39 cmt. d, illus. 1). The damage remedy may be modestly inadequate or egregiously inadequate, but where the breach is profitable, it will be quite rare that the damage remedy provides “a full equivalent to the promised performance” (§ 39(2)).

B. *Common Funds and Common Benefits*

A lawyer who represents a class and recovers a cash fund, whether by judgment or settlement, benefits the whole class. She is entitled to be paid for her professional services out of the fund before the remainder of the fund is distributed (§ 29). This is such a familiar part of class action practice that many class action lawyers may not even know that its underlying rationale and historical origins are in restitution. The class would be unjustly enriched if it received the fund without paying for the legal services required to obtain the fund. Class action lawyers who may care little about

43. See *id.* at 160–64, 168–74 (analyzing these two defenses in the context of the adequate-remedy rule).

restitution can still use the thirty-seven pages of research collected here on the implementation of that proposition, especially in unusual cases raising variations on the basic issue.

There is little controversy about the underlying rule. There is greater room for controversy when the rule is extended to recoveries of intangible benefits not reducible to a cash fund. I explore that extension here, not to challenge the rule on attorneys' fees but rather to explore the principle against forced exchanges (§ 2(4)).

The most common example is suits alleging inadequate disclosures in proxy statements. The case typically settles with the corporate defendant sending out an amended proxy statement with improved disclosures. Then the plaintiffs' lawyers recover fees from defendant. Defendant does *not* pay fees because it is a wrongdoer or a losing litigant. Instead, the rationale is that the cost of the fees is borne pro rata by the shareholders, that these shareholders (or their predecessors in interest) benefited pro rata from the improved disclosures, and that they would be unjustly enriched if not required to pay the cost of producing that benefit (§ 29 cmt. e, illus. 15). The leading case is *Mills v. Electric Auto-Lite Co.*⁴⁴

In *Hall v. Cole*,⁴⁵ the Supreme Court applied the same reasoning to a lawsuit by a union member against his union to enforce his free-speech rights with respect to controversies within the union. The Court said that all the union members benefited from the vindication of members' free-speech rights, and the members would share the cost of vindicating those rights if the union paid the plaintiffs' attorneys' fees.

The Court found a limit to the theory in *Alyeska Pipeline Service Co. v. Wilderness Society*,⁴⁶ where the owners of the Alaska pipeline were not required to pay the fees incurred in environmental challenges that vindicated the relevant governmental processes and arguably led to improvements in the pipeline.⁴⁷ The Court offered little explanation for rejecting the common-benefit theory, but it seems clear that it could not identify any class of beneficiaries—citizens of the United States, persons who cared about the environment, persons who hiked or hunted or fished in the Alaska backcountry near the pipeline—who corresponded even approximately to the 20 percent of the population that were customers of the oil companies who owned the pipeline.⁴⁸

The *Restatement (Third)* endorses the principle of these cases (§ 29 cmt. e), including the limiting principles in *Alyeska* (§ 29 reporter's note e). It endorses *Mills* and the proxy cases in particular (§ 29 cmt. e, illus. 15). It does not mention *Hall*, the union free-speech case. And it does not adequately address the forced-exchange problem inherent in these cases.

44. 396 U.S. 375, 389–97 (1970).

45. 412 U.S. 1 (1973).

46. 421 U.S. 240 (1975).

47. *Alyeska*, 421 U.S. at 264 n.39.

48. *Cf. id.* at 288 (Marshall, J., dissenting) (arguing that those 20 percent could represent the whole public).

It seems to me very doubtful that most members of the class in these cases value the benefit enough to be willing to help pay for it. Many corporate shareholders toss (or delete) their proxy statements unread. Probably they still benefit from full disclosures, because they are relying on bigger shareholders with larger stakes to read the proxy statement and make a sensible decision. But how much would they pay for that benefit? And very often, by the time the attorneys' fees are assessed and paid, the principal or only shareholder is the acquiring corporation that stood to benefit from any inadequacies in the original proxy statement's description of the acquisition then being proposed.

If individual shareholders were asked to pay these fees out of their own pockets, there would be vigorous resistance. They would say they never asked for a lawsuit to obtain improved proxy statements and they should not have to pay. The lawsuit was a benefit they "should have been free to refuse" (§ 2(4)). The reason we do not hear those objections is that the shareholders do not pay anything out of their individual pockets. The corporation pays on their behalf.

The problems in *Hall* may be even more severe. Many union members would no doubt rather have seen the dissenter silenced than see his free-speech rights vindicated. If the dissenter had not been unpopular, the union leadership would probably not have punished his speech in the first place. And many members probably assess as rather small the odds that someday they will be the dissenter in need of free-speech rights.

The real justification for these fee awards is that the proxy rules and the union free-speech rules would be unenforceable without a provision for attorneys' fees, and that the Burger Court in its early years was willing to supply the fee provisions that Congress had neglected to enact. That is a powerful justification. But it is not a justification the Supreme Court can easily invoke, given its general commitment to the rule that losing litigants pay the winners' attorneys' fees only when Congress says so.⁴⁹ The Court appears to be stuck with its common-benefit rationale.

The *Restatement (Third)* accommodates the Court by endorsing that rationale. It not only restates the existing law; it also omits mention of any objection based on forced exchange. It says that "the claim is justified, in theory, so long as the court is satisfied that a benefit has been conferred that exceeds in value the cost being assessed" (§ 29 cmt. e).

But that determination—a decision by the court about how much the recipient of an unrequested benefit ought to value the benefit—is precisely the determination that the principle against forced exchanges is designed to avoid. The *Restatement (Third)* would let the court make that determination in a handful of special circumstances, such as mistaken improvements, where forced exchanges are sometimes permitted if "qualified or limited to avoid undue prejudice" (§ 10), and emergency medical services, which may be the only place where the *Restatement* presumes that the recipient would have wanted the services performed and would have valued them at the

49. *Id.* at 247–71 (opinion of the Court).

market price (§ 20). In each of these cases, the *Restatement* offers a rationale for exceptional treatment (§§ 10 cmt. a, 20 cmt. c).

But the strong general tendency of this *Restatement* is to avoid such inquiries:

Most restitution claims in respect of nonreturnable benefits are limited as may be necessary to protect an innocent recipient from *any possibility* of an involuntary exchange. The innocent defendant is protected, in other words, from *any risk* of having to pay money for a benefit the defendant would not willingly have purchased. (§ 10 cmt. a; emphasis added)

“Proof that a forced exchange is in the recipient’s interest . . . does not justify the claimant’s failure to obtain the recipient’s agreement to pay” (§ 2 cmt. e). These principles are implemented in the black letter in sections on general principles (§ 2(4)), in sections on liability for unrequested benefits (§§ 9, 30), and in sections on remedies (§§ 49(3), 50(2)(a)).

If these principles were applied to attorneys’ fees, there could be no liability for legal services that confer only a noncash benefit. The benefit cannot be reduced to cash, and whatever value it may have to the class as a whole or to individual members of the class, there is no way to demonstrate its value to any individual recipient. Section 29 would very much benefit from a stated rationale for why intangible benefits in class litigation are an exception to the usual principle against forced exchanges. But the apparent rationale—the need to make certain statutes effectively enforceable—would come from wholly outside the law of restitution. And because it is a rationale the Supreme Court has formally rejected, spelling it out so prominently might undermine the rule. So the Reporter, perhaps prudently, elided the issue (§ 29 cmt. e).

CONCLUSION: THE NEXT STEP

These modest disagreements and augmented explanations are quibbles in the context of a 1400-page project. The important news is that the *Restatement (Third) of Restitution and Unjust Enrichment* makes this entire body of law accessible once again. It makes it possible for restitution and unjust enrichment to once again become familiar to the bench and bar. But by itself, it does not make that result inevitable. It may not even make that result likely.

For restitution and unjust enrichment to be once again firmly planted in the legal consciousness, it has to be restored to the curriculum. Some students would take the course, more would hear about the course from friends, and nearly all would at least see its title on the list of courses. They would know that restitution and unjust enrichment is a body of law.

For that to happen on more than a scattered or occasional basis, someone must produce a casebook. The obvious candidate has just completed the *Restatement (Third)*. He has the breadth and depth of knowledge; he has just reviewed all the cases; he has just been freed up from an enormous obligation. If he builds it, they will come. I would adopt such a

casebook, and I know others who would adopt it. Only then would restitution be fully restored to the canon.