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Commonwealth of Perspective on Restitutionary Disgorgement for Breach of Contract

Caprice L. Roberts

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A Commonwealth of Perspective on Restitutionary Disgorgement for Breach of Contract

Caprice L. Roberts*

Table of Contents

I. Introduction: Contractual Disgorgement Remedy as Watershed	946
II. Section 39 of the Pending American Restatement of Restitution	950
III. Comparative Roots & Flaws of Section 39's Proposed Disgorgement Remedy	953
A. <i>Blake's</i> Resonance and Other Signposts of Commonwealth Support	954
B. Section 39's Adoption of <i>Blake's</i> Remedial Theory but with Narrow Application	961
C. Lessons of <i>Blake</i> & Practical Flaws of Section 39.....	965
1. Section 39's Potential May Be Lost for Its Cumbersome Nature.....	965
2. Section 39 Asserts Its Narrowness, but to What End?	966
IV. Intellectual Godparents to Section 39	967

* Professor of Law, West Virginia University. The author is indebted to Andrew Kull for graciously accepting criticism of the pending American Restatement provision on disgorgement, providing substantive feedback, and provoking my continued interest in assisting with the artful navigation of drafting this important contractual remedy provision. This Article benefited significantly from its presentation at the "Roundtable on Restitution and Unjust Enrichment in North America," sponsored by the Frances Lewis Law Center, Washington and Lee University School of Law, December 14, 2007. The author further thanks the following individuals for their thoughtful review and comments: Eoin O'Dell and Andrew M. Wright. For consultations throughout the author's study of this topic, the author expresses gratitude to Caroline Brown, Joshua Fairfield, Adam Feibelman, and Doug Rendleman. This Article also benefited from the research assistance provided by Nicole Bright.

- A. Broadly Supporting Disgorgement. 968
- B. Supporting Disgorgement, but in a Narrow Form 978
- C. Opposing Disgorgement Relief..... 986
- V. Conclusion: Proposed Path—Follow the Commonwealth
and Go Further..... 990

Promises made.
 Promises not kept.
 Breach to seize a more profitable deal.
 Default—Pay expectancy damages.
 Why not—Disgorge defendant’s gain through breach?

...

If, and when, the law permits disgorgement for contractual breach
 will say much about the nature of contract law and the role of
 moral judgment within it.¹

I. Introduction: Contractual Disgorgement Remedy as Watershed

The muse of restitution enraptures the rest of the world’s legal scholars. Yet, America, the nineteenth-century birthplace of restitution theory, resists her lure.² This Article contributes to what I hope will become an American

1. Justice Oliver Wendell Holmes provides a complex departure point for the relationship of morality to the law. His famous choice model—"The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else."—supports the expectancy default in contract law, which many extend to enable a party to choose breach as long as he or she is prepared to pay plaintiff the benefit of the bargain. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897), reprinted in 78 B.U. L. REV. 699, 702 (1998). Holmes’s logic thus further provides foundation for efficient breach theory—encouraging contractual breach where achieving Pareto optimality is possible. Interestingly, Justice Holmes also noted: "The law is the witness and external deposit of our moral life." *Id.* at 700. This quote may secure a position of morality as a historical matter, but not as a shaping force of the law.

2. For a provocative discussion on why the United States resists, and will continue to resist, restitution’s magnetism due to its global foundations in pre-realist notions rather than governing American jurisprudential principles, see generally Chaim Saiman, *Restitution in America: Why the U.S. Refuses to Join the Global Restitution Party*, 28 OXFORD J. LEGAL STUD. 99 (2008). Professor Saiman’s thoughtful treatment raises formidable challenges to my vision for an American *restitution revival*. I hope American scholars will engage in the debate despite the claimed pre-realist roots of restitutionary doctrine. Disagreement with foundational principles, working doctrine, or end results should not deter anyone interested in a rich field ripe for transnational dialogue and growth for American justice.

restitution revival.³ The instant comparative analysis focuses on an ongoing American blackletter-law endeavor to follow the Commonwealth's lead on restitutionary disgorgement as a remedy for contractual breach.

Ultimately, the American effort is a step in the right direction, but it may not go far enough. American legal scholars should embrace the complexity and attraction of restitution's riddles. We should call it to our imagination. The "new" American proposal for restitutionary contractual disgorgement is worthy of serious scholarly attention, praise, and critique. It will admirably enhance the stable of alternative remedies for contract plaintiffs. But we should explore its potential shortcomings, as drafted, as well as its moral underpinnings. Only then can we glean the deeper lessons from the Commonwealth's lead and embrace the consequences of our new path.

Disgorgement of defendant's gain is not traditionally available as a common-law remedy for breach of contract.⁴ At least two legal events telegraph a restitutionary sea change for the Commonwealth and the United States. The first is the House of Lords' decision in *Attorney General v. Blake*,⁵ permitting a gain-based remedy for breach of contract.⁶ The *Blake* decision "marked a watershed . . . for the award of gain-based remedies for breach of contract."⁷ Accordingly, for England, *Blake* demonstrates that "[i]t is now clear that breach of contract is capable of supporting gain-based relief."⁸

The second pivotal legal event is Section 39 of the pending American *Restatement (Third) of Restitution and Unjust Enrichment*.⁹ Section 39 extends

3. See Caprice L. Roberts, *Restitutionary Disgorgement as a Moral Compass for Breach of Contract*, 77 U. CINN. L. REV. (forthcoming 2009) (manuscript at 1, on file with the Washington and Lee Law Review) (noting that Section 39 of the current draft of *Restatement (Third) of Restitution and Unjust Enrichment* heralds a restitutionary revolution).

4. See John D. McCamus, *Disgorgement for Breach of Contract: A Comparative Perspective*, 36 LOY. L.A. L. REV. 943, 948 (2003) ("The traditional common law approach is that relief in the disgorgement measure is not available in a claim for damages for breach of contract.").

5. See *Attorney Gen. v. Blake*, [2001] 1 A.C. 268, 269 (H.L. 2000) (appeal taken from Eng.) (holding that "the court could, if justice demanded it, grant the discretionary remedy of requiring the defendant to account to the plaintiff for the benefits received from the breach of contract").

6. *Id.*

7. JAMES EDELMAN, GAIN-BASED DAMAGES: CONTRACT, TORT, EQUITY AND INTELLECTUAL PROPERTY 149 (2002); see also Mitchell McInnes, *Disgorgement for Breach of Contract: The Search for a Principled Relationship*, in UNJUST ENRICHMENT & THE LAW OF CONTRACT 241 (E.J.H. Schrage ed., 2001) ("*Attorney General v. Blake* represents a seminal development.").

8. McInnes, *supra* note 7, at 241.

9. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 (Tentative Draft No. 4, 2005).

a warm welcome to contractual disgorgement for the United States,¹⁰ while careful to answer the post-*Blake* task of "defining the various situations in which disgorgement actually will be available."¹¹ This section introduces limited authorization for a restitutionary remedy of disgorgement where one profits from an "opportunistic breach" of contract.¹²

Section 39, although likely narrow in its application, represents a significant theoretical challenge to the popular United States conception of Holmesian-based contract law.¹³ Justice Holmes is the intellectual godparent of an entire canon of contract law scholarship in the United States. His theories undermine core notions regarding contract law's non-interest in morally judging the defendant's mental state, and thus its rejection of efforts to punish defendants for breaching contracts.¹⁴ Instead, as classically conceived, contract defendants prepare to pay expectancy damages if they *choose* to breach the ordinary—not unique—contract.¹⁵ Justice Holmes's influence extends to the law and economics movement and may lend, in the minds of many, a historical platform upon which efficient breach theory rests.¹⁶ Efficient breach theory advances a Holmesian vision "because of the dominance that it gives to the expectation measure of damages in cases of contract breach: the promisor is allowed to breach at will so long as he leaves the promisee as well off after breach as he would have been had the promise been performed, while any

10. *Id.* § 39.

11. McInnes, *supra* note 7, at 241.

12. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, § 39 (Tentative Draft No. 4, 2005).

13. See generally Holmes, *supra* note 1. For a thoughtful critique of the Holmesian stance, see Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 1 (1989) (arguing that Holmes's "seminal" statement of contractual consequences, although "widely discussed, is not acceptable as a normative [or a positive] account of the question of contract remedies").

14. See Holmes, *supra* note 1, at 702–15 (discussing the intersection of contract law and morality).

15. See David H. Vernon, *Expectancy Damages for Breach of Contract: A Primer and Critique*, 1976 WASH. U. L.Q. 179, 180 (1976) ("When a contract is breached, the traditional remedy available to the aggrieved party is an award of money damages. Courts attempt to place the aggrieved party in the financial position that party would have occupied had the contract been performed—by awarding expectancy damages."). In rare instances, a defendant must specifically perform because the contract is sufficiently unique and monetary damages prove inadequate to remedy plaintiff's loss. See Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 357–58 (1978) ("If the 'subject matter of [a] contract is unique in character and cannot be duplicated' . . . , a court will be more apt to compel specific performance.").

16. See, e.g., Friedmann, *supra* note 13, at 1–2 ("The modern theory of 'efficient breach' is a variation and systematic extension of Holmes's outlook on contractual remedy.").

additional gain is retained by the contract breaker."¹⁷ Section 39's intersection with the classical conception, as well as with efficient breach theory, should give serious pause to American contract, restitution, and remedies scholars. Further, this section is critically important because it may augur the coming of a restitution revival in the United States.

Commonwealth scholars, internationally, have devoted substantial treatment to the concept of restitutionary remedies for contractual breach. This provocative body of scholarship is richer than parallel scholarship in the United States.¹⁸ Commonwealth legal precedents are also somewhat ahead of Section 39 in terms of restitutionary momentum. As we consider the implications and propriety of adopting Section 39 as drafted or otherwise, we would be well served by examining Commonwealth precedent and scholarship.

To this end, this Article will explore Commonwealth perspectives on the restitutionary disgorgement remedy for breach of contract through the lens of comparative law. It will focus on the changes to American contract law that will likely come from the pending *Restatement of Restitution*. This author's other scholarship casts the *Restatement of Restitution's* recognition of a restitutionary disgorgement remedy for *opportunistic* breach of contract as somewhat revolutionary in the context of the American approach to contract law. A well-developed canon of scholarship and precedent on restitutionary disgorgement exists in foreign common-law jurisdictions. For comparison, this Article will explore parallel movements in Commonwealth countries, such as Australia, Canada, Great Britain, Ireland, and New Zealand. This Article seeks to bring these rich resources to bear on the American debate.

More specifically, Part II of this Article will provide the context of the current controversy in America, namely the full text and accompanying commentary on the parameters of Section 39, "Profit Derived from Opportunistic Breach." Next, Part III will examine relevant Commonwealth cases. This part will focus on the import of *Blake* as a potential watershed, but will also chart other Commonwealth precedential contributions. Part IV will explore the ancestral roots of Section 39, including its intellectual godparents among Commonwealth scholars. Part IV will also examine Commonwealth scholarship that ranges from advocacy for a full-throated version of

17. *Id.* at 2.

18. Of course, this fact in no way undervalues the seminal contributions of American scholars. See, e.g., John P. Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175, 175 (1959) (discussing the major types of restitution remedies and their interaction with damage remedies in cases of substantial breach); E. Allen Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1341 (1985) (examining the disgorgement remedy and concluding that it should enjoy limited application); Andrew Kull, *Disgorgement for Breach, the "Restitution Interest," and the Restatement of Contracts*, 79 TEX. L. REV. 2021, 2028 (2001) (examining the interrelation among traditional contract remedies, unjust enrichment, and disgorgement).

contractual disgorgement to a wholesale rejection of it. This Article will conclude that the lessons of the Commonwealth should serve as a guiding light for America's embrace of restitutionary disgorgement for contractual breach. Further, the rich comparative caselaw and scholarly discourse suggests that the foundation of contract law could withstand this seemingly new remedy in American law. Lastly, the Commonwealth perspective should foster further refinement of the contours of this important contractual disgorgement remedy.

II. Section 39 of the Pending American Restatement of Restitution

Section 39 represents a controversial, cutting-edge Restatement proposal that would break ground in American contract law. The restitutionary disgorgement remedy penned in Section 39, along with its underlying rationale, would alter traditional American contract law conceptions. Although the American Law Institute Restatement projects aim to *restate* the law, Section 39 boldly proposes an "essentially new" rule.¹⁹ In the traditional American formulation, "one who merely breaches a contract is not required to restore collateral profits or gains facilitated by the breach."²⁰ This new rule authorizes a disgorgement remedy that keys to defendant's gain and is available even in the absence of loss to the plaintiff.²¹ As this Article will discuss, however, this remedy has antecedents in the occasional American case,²² and more grounded support in the Commonwealth.²³

19. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT xv, Reporter's Introductory Memorandum (Tentative Draft No. 4, 2005). "Section 39 has no counterpart in either the first or the second *Restatement of Contracts*." *Id.* § 39, Reporter's Note a; *see also* Farnsworth, *supra* note 18, at 1341 (acknowledging that there is not a rule permitting plaintiff's restitutionary recovery of defendant's profit from breach); Dawson, *supra* note 18, at 187 ("[T]he prevention of profit through mere breach of contract is not yet an approved aim of our legal order.").

20. DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 12.7(4), at 171 (2d ed. 1993).

21. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 (Tentative Draft No. 4, 2005).

22. *See, e.g.,* Laurin v. DeCarolus Constr. Co., 363 N.E.2d 675, 691-93 (Mass. 1977) (approving an award of the fair market value of gravel that defendant, in a "deliberate and willful breach of contract," wrongfully removed). In *Laurin*, plaintiffs did not forward a claim for "the net proceeds of wrongful sales of gravel made by the defendant." *Id.* at 692. The court does not utilize the terminology of disgorgement or restitution; rather, it analogizes tortious conversion of property. *Id.* Regarding a contractual remedy keyed to a form of defendant's gain rather than plaintiff's loss, however, the court notably maintained: "Nor is it punitive; it merely deprives the defendant of a profit wrongfully made, a profit which the plaintiff was entitled to make." *Id.* at 693. *But see* Burger King Corp. v. Mason, 710 F.2d 1480, 1494 (11th Cir. 1983) (emphasizing that "disgorgement of profits earned is not the remedy for breach of contract").

23. *See infra* Parts III-IV (exploring Commonwealth precedents and scholarly treatments

The remedy that Section 39 provides—restitutionary disgorgement for certain contractual breaches—challenges all sorts of theoretical underpinnings that are taken for granted in American contract law. As discussed in this author's related article on this topic, Section 39 departs from contract law's emphasis on compensation rather than punishment, the Holmesian-choice model, and to some extent, the efficient breach mode.²⁴ As such, Section 39 warrants a thorough treatment of all of its interactions with core contract doctrines, such as *Hadley* foreseeability²⁵ and mitigation,²⁶ which the author addresses in a companion article on this topic.²⁷ The fundamental departure from the compensatory principle is clear. In particular, Section 39's disgorgement remedy is admittedly not compensatory.²⁸ Rather, it focuses on defendant's gain rather than plaintiff's loss. As Professor Kull acknowledges, this feature of Section 39 and its emphasis on the breaching party's mental state represent departures from traditional American contract conceptions.²⁹ He specifically acknowledges that:

Standard contract remedies afford specific or compensatory relief, and a breach of contract—*whatever the actor's state of mind*—is not usually treated in law as a wrong to the injured party, comparable to a tort or breach of equitable duty.³⁰

of restitutionary disgorgement for contractual breach, respectively).

24. Roberts, *supra* note 3, at 5–6.

25. See *Hadley v. Baxendale*, (1854) 156 Eng. Rep. 145, 147–48 (Exch. Div.) (establishing the foreseeability doctrine for contract law that requires defendant reasonably foresee damages from the time of contract, and thus indicating that defendant must have actual notice of the quantum of harm for consequential damages to flow).

26. See, e.g., *Rockingham County v. Luten Bridge Co.*, 35 F.2d 301, 307–08 (4th Cir. 1929) (holding that where plaintiff receives notice of breach, plaintiff has a duty to mitigate defendant's damages); *Parker v. Twentieth Century Fox*, 474 P.2d 689, 694 (Cal. 1970) (excusing actress from the duty to mitigate in the employment setting where substitute employment was not substantially similar to the promised employment). Generally, scholars have raised the apparent incompatibility of disgorgement relief and the mitigation doctrine. See, e.g., McCamus, *supra* note 4, at 951 (noting that "the general availability of disgorgement relief would undermine the principle that the victim of a breach of contract has a duty to mitigate loss").

27. See Caprice L. Roberts, *Restitutionary Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages*, 42 LOY. L.A. L. REV. (forthcoming 2008) (manuscript at 15, on file with the Washington and Lee Law Review) (proposing specific amendments to Section 39 in order to reconcile mitigation goals with the disgorgement remedy).

28. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. a (Tentative Draft No. 4, 2005) ("Judged by the usual presumptions of contract law, a recovery for breach that exceeds plaintiff's damages is anomalous on its face.").

29. *Id.*

30. *Id.* (emphasis added).

Professor Kull reassures, however, by emphasizing the intended limited application of Section 39.³¹ In that vein, the draft of Section 39 includes extensive, albeit clunky, efforts to ensure that the disgorgement remedy would rarely be available to contractual plaintiffs. The underlying rationale remains expansive, but the requirements of Section 39, as drafted, would apply narrowly. Section 39 generates a slight tremor in its application, but could be seismic in its theoretical import to traditional American views of contract law.

The proposed new *Restatement* includes Chapter 4, "Restitution and Contract." This chapter includes Topic 3, "Restitution in Case of Profitable Breach," and Section 39, which provides in full:

Section 39. Profit Derived from Opportunistic Breach

(1) If a breach of contract is both material and opportunistic, the injured promisee has a claim in restitution to the profit realized by the defaulting promisor as a result of the breach. Liability in restitution with disgorgement of profit is an alternative to liability for contract damages measured by injury to the promisee.

(2) A breach is "opportunistic" if

(a) the breach is deliberate;

(b) the breach is profitable by the test of subsection (3); and

(c) the promisee's right to recover damages for the breach affords inadequate protection to the promisee's contractual entitlement. In determining the adequacy of damages for this purpose,

(i) damages are ordinarily an adequate remedy if they can be used to acquire a full equivalent to the promised performance in a substitute transaction; and

(ii) damages are ordinarily an inadequate remedy if they cannot be used to acquire a full equivalent to the promised performance in a substitute transaction.

(3) A breach is "profitable" when it results in gains to the defaulting promisor (net of potential liability in damages) greater than the promisor would have realized from performance of the contract. Profits from breach include saved expenditure and consequential gains that the defaulting

31. *See id.* ("The restitution claim here described is infrequently available, because a breach of contract that satisfies the cumulative tests of § 39 is distinctly rare.")

promisor would not have realized but for the breach. The amount of such profits must be proved with reasonable certainty.

(4) Disgorgement by the rule of this Section will be denied

(a) if the parties' agreement authorizes the promisor to choose between performance of the contract and a remedial alternative such as payment of liquidated damages; or

(b) to the extent that disgorgement would result in an inappropriate windfall to the promisee, or would otherwise be inequitable in a particular case.³²

As is apparent from the text, despite a careful effort to narrow the application of this rule, its rationale represents a fundamental shift away from focus on the plaintiff's diminished position to the defendant's wrongdoing. Yet, this shift is not without significant precursors from the international scene.

III. Comparative Roots & Flaws of Section 39's Proposed Disgorgement Remedy

In order to appreciate fully the potential benefits and ramifications of restitutionary disgorgement for contractual breach, we need to view the issues through as many lenses as possible. We all benefit from using our eyesight, but we need to use both the microscope and the telescope. First, Part III.A will address significant Commonwealth cases and, in the following Part, the Commonwealth's scholarly debate on this remedial device. Such exploration should enhance the American discussion about the proposal for Section 39 restitutionary disgorgement in the case of certain contractual breaches.

What is at first blush revolutionary within the context of American jurisprudence enjoys meaningful support from the perspective of comparative law. Such a transnational comparison may show that a new remedy derived from unjust enrichment will not unmoor American contract law.³³

While America may well have initiated restitution theory, its vibrant intellectual life now exists most fully beyond America's shores. It resides

32. *Id.* § 39.

33. The roots of disgorgement relief and its consequences demonstrate the potential tension with traditional contract law principles: "Avoidance of unjust enrichment explains why we award these profits to plaintiff. But we are not restoring anything that plaintiff once had or ever would have had." Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1281 (1989).

primarily in the Commonwealth jurisdictions. The antecedent roots of Section 39 exist in the Commonwealth line of cases that follow, beginning with *Blake* and then bolstered by other cases.

A. *Blake's Resonance and Other Signposts of Commonwealth Support*

The House of Lords in *Blake* reasoned that the defendant, "a notorious, self-confessed traitor" and former intelligence officer, breached his contractual duty to the Crown and must account for the anticipated profits from his autobiography, although a fiduciary duty claim had already failed.³⁴ The fiduciary label gives cover, but *Blake* rendered a gain-based remedy despite the dead fiduciary claim.³⁵ Lord Nicholls of Birkenhead significantly emphasized:

The Court of Appeal expressed the view, necessarily tentative in the circumstances, that the law of contract would be seriously defective if the court were unable to award restitutionary damages for breach of contract. The law is now sufficiently mature to recognize a restitutionary claim for profits made from a breach of contract in appropriate situations. These include cases of "skimped" performance, and cases where the defendant obtained his profit by doing "the very thing" he contracted not to do. The present case fell into the latter category: Blake earned his profit by doing the very thing he had promised not to do.³⁶

He continued to set forth a string of precedent "often analyzed as damages for loss of a bargaining opportunity or . . . the price payable for the compulsory acquisition of a right."³⁷ According to Lord Nicholls, such cases demonstrate that, notwithstanding an absence of loss to the plaintiff, "in a suitable case, [the court] will assess the damages by reference to the defendant's profit obtained"—in fact, "courts habitually do that very thing."³⁸ The phrase, "in a suitable case," understates the complexity of determining the appropriate triggers for authorizing disgorgement relief for a breach of contract.

With the stage set, Lord Nicholls turned to the breach of contract theory. He cited, with approval, *Wrotham Park Estate Co. v. Parkside Homes*,³⁹ a case in which the judge analogized to property rights in order to award damages

34. Attorney Gen. v. Blake, [2001] 1 A.C. 268, 275–77 (H.L. 2000) (appeal taken from Eng.).

35. *Id.* at 277.

36. *Id.*

37. *Id.* at 281.

38. *Id.*

39. See *Wrotham Park Estate Co. v. Parkside Homes Ltd.*, [1974] 1 W.L.R. 798, 799 (Ch. 1974) (holding covenant prohibiting development of land enforceable).

totaling five percent of defendant's anticipated profits—an amount representing "money which could reasonably have been demanded for a relaxation of [a restrictive] covenant."⁴⁰ Lord Nicholls remarked, "it is not easy to see why, as between the parties to a contract, a violation of a party's contractual rights should attract a lesser degree of remedy than a violation of his property rights."⁴¹ Viewing *Wrotham Park* as "a solitary beacon" for giving contract damages beyond plaintiff's financial loss, he then extended the underlying principles to support a "modest" extension to the equitable remedy of an account of profits.⁴² He noted: "[C]ircumstances do arise when the just response to a breach of contract is that the wrongdoer should not be permitted to retain any profit from the breach."⁴³ With a deterrence goal at the fore, Lord Nicholls endorsed *Snepp v. United States*,⁴⁴ in which the United States Supreme Court ordered a former CIA agent to surrender the profits of a book published in violation of his contractual promise to obtain pre-publication clearance.⁴⁵ Notably, Lord Nicholls analogized to *Snepp*'s reasoning for its constructive trust remedy in order to reach the account of profits remedy:

The court considered that a remedy which required Snepp "to disgorge the benefits of his faithlessness", was swift and sure, tailored to deter those who would place sensitive information at risk and, since the remedy reached only funds attributable to the breach, it could not saddle the former agent with exemplary damages out of all proportion to his gain. In order to achieve this result the court "imposed" a constructive trust on Snepp's profits. In this country, affording the plaintiff the remedy of an account of profits is a different means to the same end.⁴⁶

Accordingly, the majority of the House of Lords endorses a remedy keyed to defendant's gain rather than plaintiff's loss.⁴⁷

40. *Attorney General v. Blake*, [2001] 1 A.C. 268, 283 (H.L. 2000) (appeal taken from Eng.).

41. *Id.*

42. *Id.* at 283–84.

43. *Id.* at 284.

44. See *Snepp v. United States*, 444 U.S. 507, 515–16 (1980) (imposing a constructive trust on profits derived from a book published in violation of ex-CIA agent's obligation to obtain prepublication authorization).

45. *Id.*

46. *Attorney General v. Blake*, [2001] 1 A.C. 268, 288 (H.L. 2000) (appeal taken from Eng.).

47. *Id.* at 269. For a provocative comparison and critique of *Blake* and *Snepp* for their failure to weigh private restitutionary relief against applicable free speech concerns, see generally Eoin O'Dell, *Justice Powell, Frank Snepp and George Blake: Freedom of Speech and Restitutionary Remedies* (Nov. 9, 2007) (on file with the Washington and Lee Law Review).

In concurrence, Lord Steyn criticized the slippery taxonomy used in reaching an equitable remedy before ruling the legal remedy inadequate for the private law claim of breach of contract seeking restitutionary disgorgement.⁴⁸ Ultimately, he supports the ruling because it is the Court's "prime duty to do practical justice whenever possible."⁴⁹ More specifically, he emphasized: "For my part practical justice strongly militates in favour of granting an order for disgorgement of profits against Blake."⁵⁰

The *Blake* Court did not fear the confines of contract's compensatory principle. To wit: "[T]he law does not adhere slavishly to the concept of compensation for financially measurable loss. When the circumstances require, damages are measured by reference to the benefit obtained by the wrongdoer."⁵¹ According to Professor McCamus, *Blake* "suggests that the disgorgement remedy is likely to play a peripheral role in contract law, largely at the margins of more clearly recognized forms of disgorgement liability."⁵²

Fiduciary duty often provides cover for the introduction of a disgorgement remedy into a contractual setting.⁵³ In the fiduciary setting, we are more

48. See *Attorney General v. Blake*, [2001] 1 A.C. 268, 290 (H.L. 2000) (appeal taken from Eng.) (Steyn, L., concurring) (questioning whether granting the equitable injunctive remedy was proper in light of potential legal remedies).

49. *Id.* at 292 (Steyn, L., concurring).

50. *Id.* (Steyn, L., concurring).

51. *Id.* at 285.

52. McCamus, *supra* note 4, at 1.

53. In a similar case to *Blake*, *Snepp v. United States*, 444 U.S. 507 (1980), the United States Supreme Court approved a disgorgement remedy, via a constructive trust, for breach of contract. *Id.* at 515–16. The Court's *per curiam* opinion incorporates an unconvincing fiduciary-styled linchpin. A former CIA agent, Snepp, published a book pertaining to CIA activities in South Vietnam without seeking the contractually required prepublication clearance. *Id.* at 507–08. The Court authorized the "trust remedy simply requir[ing] him to disgorge the benefits of his faithlessness." *Id.* at 515. According to the Court, Snepp "deliberately and surreptitiously violated his obligation to submit all material for prepublication review." *Id.* at 511. The Court emphasized the "extremely high degree of trust" present in Snepp's CIA employment. *Id.* at 510. Ultimately, the Court reversed a court of appeals judgment, and endorsed a constructive trust over Snepp's book profits. *Id.* at 515–16. It proclaimed that the "remedy is the natural and customary consequence of a breach of trust." *Id.* at 515. The Court further justified this "swift and sure remedy" for its deterrence value. *Id.* at 515–16. In general limitation, the Court noted that "the remedy reaches only funds attributable to the breach" and thus "cannot saddle the former agent with exemplary damages out of all proportion to his gain." *Id.* Three Justices vigorously dissented, asserting the extraordinary remedy would operate as an unlawful prior restraint on "a citizen's right to criticize his government." *Id.* at 526 (Stevens, J., dissenting). In fact, the published book did not contain classified material. *Id.* at 516 (Stevens, J., dissenting). The dissenters reasoned thus that "Snepp did not breach his duty to protect confidential information. Rather, he breached a contractual duty." *Id.* at 518 (Stevens, J., dissenting). They also chided the *per curiam* opinion for its focus on deterrence rather than unjust enrichment and its flawed implicit logic because in fact "Snepp has not gained any profits

comfortable assigning *blame* for a violation of this special duty and focusing on the defendant. We are, however, less comfortable attaching *blame* in the garden-variety breach of contract case because of Holmesian influences. Yet, the availability of the disgorgement remedy in the fiduciary context may build the bridge to its creep into contract law. Thus, with the foundation in place, later cases may provide the disgorgement remedy for a breach of contract without a fiduciary relationship.

In *Reading v. Attorney General*,⁵⁴ England in the early 1950s found the existence of a fiduciary duty and granted the disgorgement remedy for the breach.⁵⁵ Numerous cases that followed vacillated back and forth.⁵⁶ This groundwork created the fertile soil for *Blake* in 2000 to grant a disgorgement-styled remedy for contractual breach, despite the absence of a fiduciary duty.⁵⁷ The *Blake* Court diligently sought, and ultimately cobbled together, a viable avenue to strip the defendant's wrongful gain, assign blame, and deter.

Blake's endorsement of gain-based relief and disgorgement principles garnered one serious dissent on the Court, Lord Hobhouse of Woodborough.⁵⁸ He viewed *Blake* as worthy of punishment, but maintained that: "What the plaintiff has lost is the sum which he could have exacted from the defendant as the price of his consent . . ." ⁵⁹ In other words, the appropriate remedy is

as result of his breach; the Government, rather than Snapp, will be unjustly enriched if he is required to disgorge profits attributable entirely to his own legitimate activity." *Id.* at 521 (Stevens, J., dissenting). See also DOUG RENDLEMAN, *REMEDIES CASES & MATERIALS* 705 n.2 (7th ed. 2006) ("Since Snapp was not managing an asset in a beneficiary's best interest, his employment relationship was not, as the dissent points out, a core case for a fiduciary duty."). Professor Rendleman further poignantly questions whether it would "be more satisfactory if the Court had held that Snapp's breach of a fiduciary duty was not a prerequisite for disgorgement, but that his opportunistic breach of contract was enough to trigger restitution." *Id.* at 704 n.1. Section 39 would permit this argument assuming the Government could offer a more explicit showing of the inadequacy of legal damages, including punitive relief for tortious conduct. Would *Blake*? Yes.

54. See *Reading v. Attorney General*, [1951] A.C. 507, 507–08 (H.L.) (appeal taken from Eng.) (holding that the Crown, not Reading, was entitled to funds he obtained as a result of his smuggling operation).

55. See *id.* at 508 ("The soldier owed a fiduciary duty to the Crown and profits gained by him by the use or abuse of his military status were recoverable by it.").

56. For extensive treatment of disgorgement's remedial journey through various causes of action throughout the Commonwealth and beyond, see EDELMAN, *supra* note 7, at 113–242.

57. See *Attorney General v. Blake*, [2001] 1 A.C. 268, 285 (H.L. 2000) (appeal taken from Eng.) ("When the circumstances require, damages are measured by reference to the benefit obtained by the wrongdoer.").

58. *Id.* at 293–99 (Hobhouse, L., dissenting).

59. *Id.* at 298 (Hobhouse, L., dissenting).

perfectly compensatory rather than restitutionary.⁶⁰ According to Lord Hobhouse, the Court's remedy goes too far: "It does not award to the Crown damages for breach of contract assessed by reference to what would be the reasonable price to pay for permission to publish."⁶¹ Then, he asserts that the Court instead mistakenly follows "proprietary principles" by granting "the Crown damages which equal the whole amount owed by [the publisher] to Blake."⁶² Fearful of the possible extensions of *Blake's* rationale, Lord Hobhouse strongly cautioned: "[I]f some more extensive principle of awarding non-compensatory damages for breach of contract is to be introduced into our commercial law the consequences will be very far reaching and disruptive."⁶³ Although he did not believe such extensions to be the Court's intention, he feared that, "if others are tempted to try to extend the decision of the present exceptional case to commercial situations so as to introduce restitutionary rights beyond those presently recognized by the law of restitution, such a step will require very careful consideration before it is acceded to."⁶⁴ Will such fears be realized?

Canada could be fertile territory for disgorgement for contractual breach given Canada's recognition of punitive damages for contract law.⁶⁵ "Perhaps the most important consideration in support of our tentative view that Canadian courts are likely to adopt the approach to disgorgement taken in *Blake* . . . is the recognition of the availability of punitive or exemplary damages in claims for breach of contract under Canadian common law."⁶⁶ Professor McCamus and others suggest it is a matter of time before Canada follows suit and authorizes the disgorgement remedy for breach of contract.⁶⁷ Further, Canadian case law has essentially approved disgorgement in theory by effectively stating, *not here*,

60. *Id.* (Hobhouse, L., dissenting).

61. *Id.* (Hobhouse, L., dissenting).

62. *Id.* at 298–99 (Hobhouse, L., dissenting).

63. *Id.* at 299 (Hobhouse, L., dissenting).

64. *Id.* (Hobhouse, L., dissenting).

65. See *Whiten v. Pilot Ins. Co.*, [2002] 1 S.C.R. 595 (affirming jury's award of punitive damages against insurance company for breach of contract); Robert J. Sharpe, *Remedies for Bad Behaviour in Canadian Contract Law*, in *THE LAW OF REMEDIES: NEW DIRECTIONS IN THE COMMON LAW* (Jeff Berryman & Rick Bigwood eds.) (forthcoming 2008) (manuscript at 1–2, on file with the Washington and Lee Law Review) (exploring Canadian "courts' increasing tendency to make contract damage awards to sanction bad behaviour rather than compensate for the loss of the plaintiff's economic expectation interest").

66. McCamus, *supra* note 4, at 971.

67. See, e.g., *id.* at 969 ("[I]t is likely that Canadian courts will follow the lead of the House of Lords in *Blake* and explicitly recognize the availability of disgorgement relief for breach of contract in exceptional circumstances.").

but yes—the Supreme Court of Canada has already "recognized" and "intimated that such relief might be available."⁶⁸

Ireland, in principle, approved a restitutionary disgorgement remedy in *Hickey v. Roches Stores*,⁶⁹ a 1976 unpublished breach of contract case. In *Hickey*, a fabric company sued a department store regarding the store's breach of its promise not to sell fabrics by the yard for a specified period.⁷⁰ Thus, the contractual claim relied upon an exclusivity theory.⁷¹ Plaintiff Hickey sought to disgorge profit obtained by the wrongdoer, defendant Roches.⁷² Roches retorted that damages above compensation were "unknown" to contractual breach caselaw.⁷³ Further, Roches attempted to strike a body blow to Hickey's theory by pointing out to the High Court "that what the Hickeys are really contending for is the introduction into the assessment of damages in a breach of contract case of a principle of unjust enrichment which is unknown to the law of Ireland."⁷⁴ Despite this "novel" claim, the High Court decidedly made known a restitutionary disgorgement remedy in Ireland for contractual breach would be available under certain circumstances.⁷⁵

Significantly, the *Hickey* High Court, per Justice Finley, boldly reasoned that disgorgement may well be the appropriate remedy in a contractual setting as follows:

Thus where a wrongdoer *has calculated and intended* by his *wrongdoing* to *achieve a gain or profit* which he could not otherwise achieve and has in

68. See *id.* at 969 n.129 (citing *Bank of Am. Canada v. Mut. Trust Co.*, [2002] 2 S.C.R. 601 for this indication, but noting that the "controversial nature" of disgorgement relief may not have been "drawn to the court's attention"). But see Mitchell McInnes, *Restitutionary Damages for Breach of Contract: Bank of America Canada v. Mutual Trust Co.*, 37 CAN. BUS. L.J. 125, 131–33 (2002) (characterizing the remedy in *Bank of America Canada* as disgorgement relief). Further, *Strother v. 3469420 Canada Inc.*, [2007] 2 S.C.R. 177, a focal point in Professor Duggan's article, assumes it. See generally Anthony Duggan, *Gains-Based Remedies and the Role of Deterrence in Fiduciary Law*, in *THE GOALS OF PRIVATE LAW* (Andrew Robertson & Hang Wu Tan eds., forthcoming 2008) (manuscript on file with the Washington and Lee Law Review) (preferring the dissenting view regarding the relationship between a fiduciary and contract law because courts should not be able to redraft the parties' contract with an override of fiduciary law).

69. See *Hickey & Co. v. Roches Stores Ltd.*, [1975] H.Ct. No. 1007P, 1–2 (H.Ct., 14th July, 1976) (unreported) (Ir.) (holding disgorgement remedy appropriate in breach of contract case) (on file with the Washington and Lee Law Review).

70. *Id.* at 3–4.

71. *Id.* at 4. Of course Ireland's competition laws, which did not exist at the time of *Hickey*, would now strike down such an exclusivity agreement.

72. *Id.* at 5.

73. *Id.* at 6.

74. *Id.* at 7.

75. *Id.* at 12–13.

that way *acted mala fide* then *irrespective of whether the form of his wrongdoing constitutes a tort or a breach of contract* the Court should in assessing the damages look not only to the loss suffered by the injured party but also to the profit or gain unjustly or wrongly obtained by the wrongdoer.⁷⁶

Further, the High Court proclaimed: "If the assessment of damages confined to the loss of the injured party should still leave the wrongdoer profiting from his calculated breach of the law damages should be assessed so as to deprive him of that profit."⁷⁷ Ultimately, the High Court did not find bad faith and calculated damages via compensation for plaintiff's loss.⁷⁸ Hickey, the fabric company, did not assert "any lack of good faith" on Roches's part.⁷⁹ The disposition accordingly does not tell the full story of this precedent. Ireland's High Court, evidenced by the expanse of both quoted passages from *Hickey*, sanctions a restitutionary disgorgement as a remedy for contractual breach. Notably, the High Court would so hold, if bad faith existed, even without the wrong embodying contractual breach.⁸⁰ Accordingly, in contrast to *obiter dictum*, the High Court in *Hickey* establishes a legal rule for restitutionary disgorgement in either a contractual or tort setting, although the facts of *Hickey* represent one application where the plaintiff could not meet the requisite bad faith showing.

In Australia, a line of cases beginning with *Warman v. Dwyer*⁸¹ arguably creates a bridge to disgorgement in a purely contractual breach setting. *Warman*, an equity case, clarified that the account of profits remedy at issue is grounded in fiduciary duty, not unjust enrichment.⁸² As Professor Edelman explores, the *Warman* Court emphasized:

[I]t has been suggested that the liability of the fiduciary to account for a profit made in breach of the fiduciary duty should be determined by reference to the concept of unjust enrichment But the authorities in Australia and England deny that the liability of a fiduciary to account depends upon the detriment to the plaintiff.⁸³

76. *Id.* at 12 (emphasis added).

77. *Id.*

78. *Id.* at 13.

79. *Id.* at 6.

80. Whether bad faith ought to be an essential ingredient is a question not explored by this Article.

81. See *Warman Int'l Ltd. v. Dwyer*, (1995) 182 C.L.R. 544, 570 (Austl.) (holding an accounting of profits remedy appropriate for a breach of fiduciary duty claim).

82. *Id.* at 556.

83. EDELMAN, *supra* note 7, at 40 (citing *Warman*, 182 C.L.R. at 557).

Professor Edelman opines that the High Court of Australia thus "rejected any role for the principle of unjust enrichment in a case concerned with profit-stripping because the account of profits does not focus upon any transfer from (described as 'detriment to') the claimant."⁸⁴ Rejection should not be interpreted to mean a whole-cloth rejection. Rather, the unjust enrichment model should be limited to cases involving a "transfer from" or "detriment to" the plaintiff.⁸⁵ Accordingly, the *Warman* Court did not preclude the remedy of disgorgement for a contractual breach lacking a live fiduciary claim à la *Blake*. Thus, a liberal reading of the unanswered questions coupled with the dicta leave room for Australia to support a restitutionary disgorgement remedy for contractual breach in the future. So, no news yet is good news, unless you are a pessimist.

B. Section 39's Adoption of Blake's Remedial Theory but with Narrow Application

Blake opens the door to the disgorgement remedy, and proposed Section 39 steps through the door. It does so with much timidity despite its bold title "Profit Derived from Opportunistic Breach."⁸⁶ Further, restitution and unjust enrichment doctrines drive Section 39's disgorgement remedy for opportunistic contractual breaches,⁸⁷ given Section 39's placement in the *Restatement of Restitution and Unjust Enrichment* rather than the *Restatement of Contracts*.⁸⁸ Section 39 of the *Restatement of Restitution* grounds itself in the notion that defendant's "unjust enrichment at the expense of the other

84. *Id.*

85. *Id.*

86. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 (Tentative Draft No. 4, 2005).

87. Professor Edelman would not approve given Section 39's conceptual blending of restitution with contractual disgorgement. See EDELMAN, *supra* note 7, at 1 (holding a strict view on the line between disgorgement and restitutionary damages). In particular, Edelman insists that:

[T]he crucial difference is that in the case of restitutionary damages the gain in question is that objective gain received by the defendant which has been wrongfully transferred from the claimant, while in the case of disgorgement damages the gain to be disgorged is that which has accrued to the defendant as a result of the wrong irrespective of whether there has been any transfer of value and not limited by any possible value transferred.

Id.

88. See *supra* note 19 and accompanying text (discussing the disgorgement section as a new rule that has no counterpart in the *Restatement of Contracts*).

contracting party" warrants disgorgement of defendant's wrongful gain in certain cases.⁸⁹ If the defendant has wrongfully obtained benefits, then a restitutionary disgorgement remedy should flow from defendant's deliberate and profitable breach of contract.⁹⁰

Thus, propelled by powerful doctrines, Section 39 ushers in a test and extensive reporter commentary regarding its intended limited applicability. Professor Kull, the reporter, admits that Section 39 creates a "new" rule, although not unprecedented in caselaw.⁹¹ He then uses narrowing devices and language of limitation to convince readers that *'there is nothing to see here.'*⁹² Watch closely, because in fact, there is much to see.

According to Professor Kull, we should not fear Section 39's disgorgement relief because it is shrouded in language of limitation.⁹³ Accordingly, the restrictions "will exclude the vast majority of contractual defaults."⁹⁴ It poses narrow walls by defining "opportunistic"—an otherwise loaded and debatable term—to require that the breach be "deliberate," "profitable," and yielding "inadequate protection" in damages.⁹⁵ Each of these has strengths and weakness as limiting principles.

The requirement that the breach be deliberate would appear to apply in a broad swath of cases or at least be asserted widely by plaintiffs on the other end of contractual breaches. Also, examining the breaching party's *culpability* is a path fraught with peril that we have traditionally avoided in contract law.⁹⁶ Yet, the Court in *Blake* goes there. Of course, the factual background of *Blake* involved a previously criminally convicted defendant; thus, the Court did not have to engage in serious line-drawing regarding intent to breach.⁹⁷ The *Blake*

89. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. a (Tentative Draft No. 4, 2005).

90. *Id.*

91. *Id.* at xv, Reporter's Introductory Memorandum. American caselaw support is less than inspiring. Professor McCamus describes the landscape as providing "some judicial support" for the disgorgement remedy for breach of contract, but not yet "well-established." McCamus, *supra* note 4, at 943 & 943 n.1 (citing *Earthinfo, Inc. v. Hydrosphere Res. Consultants, Inc.*, 900 P.2d 113 (Colo. 1995)).

92. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 Reporter's Notes a-j (Tentative Draft No. 4, 2005).

93. *See id.* § 39 cmt. g (describing Section 39's limiting factors).

94. *Id.*

95. *Id.* § 39(2).

96. *See* John P. Dawson, *Restitution Without Enrichment*, 61 B.U. L. REV. 563, 614 (1981) (arguing that culpability should not play a role in restitutionary analysis for its danger of morality-laden judgments and potential for inconsistent justice).

97. *Supra* note 35 and accompanying text.

Court found defendant's conduct worthy of deterrence and rebuke in the form of a gain-based remedy of all of his forthcoming profits.⁹⁸ The disgorgement remedy in Section 39 follows this logic and seeks to make conscious wrongdoing not a profitable choice.⁹⁹ It seeks to deter and to *condemn* opportunism.¹⁰⁰ Such goals may be desirable, even with the necessary departure from contract law orthodoxy, but it is unclear how requiring the breach to be deliberate serves as a significant limitation on access to the remedy. Notably, Section 39 does not clarify whether greater degrees of culpability ought to yield disgorgement of all, rather than some, of defendant's wrongfully obtained profits.

The requirement that the breach be "profitable," however, raises a formidable hurdle to disgorgement relief. In Professor Kull's estimation, truly profitable breaches are rare.¹⁰¹ To cabin it explicitly, Section 39 defines "profitable" as occurring when the breach "results in gains to the defaulting promisor (net of potential liability in damages) greater than the promisor would have realized from performance of the contract."¹⁰² This section also demonstrates potential tension with efficient breach doctrine. Professor Kull maintains that truly efficient breaches exist more in academic theory than in the real world.¹⁰³ Relatively few cases may exist in the published universe and in light of transaction costs. Yet, his point, *if true*, raises corollary questions. If it is true that profitable breaches are so rare, and merely academic, then why cabin the disgorgement doctrine at all? What incentives would a plaintiff have to seek disgorgement in a case in which it was not a profitable breach? What incentives would a party have to breach in the first place? Also, how could you be a wrongdoer if there were not some sort of personal profit incentive to breach?

Importantly, Professor Kull sees daylight between this provision and the continued viability of some efficient breaches that may occur such as the non-conforming tender widget problem.¹⁰⁴ At a minimum, Section 39 is in tension

98. *Supra* notes 35–37 and accompanying text.

99. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39(2) (Tentative Draft No. 4, 2005).

100. *See id.* § 39 cmt. b ("By condemning this form of opportunism, the rule of § 39 reinforces the contractual position of the vulnerable party and condemns a form of conscious advantage-taking that is the equivalent, in the contractual context, of an intentional and profitable tort.").

101. *Id.* § 39 cmt. a.

102. *Id.* § 39(3).

103. *Id.* § 39 cmt. i.

104. *Id.* § 39, illus. 13.

with efficient breach theory, and the "profitable" requirement may intensify it.¹⁰⁵ Yet, regardless of whether the two can coexist, it seems that the "profitable" requirement will serve a restrictive purpose. For cases that have permitted disgorgement relief, profitability is present or at least not seriously debated.¹⁰⁶

Given that *Blake*, with some scholarly support, provided a gain-based remedy in an account of profits, foundation exists to limit the availability of disgorgement to instances in which the plaintiff demonstrates the inadequacy of legal relief. Section 39 awkwardly travels down this road. Specifically, it provides that access to disgorgement relief is available only where "the breach affords inadequate protection to the promisee's contractual entitlement."¹⁰⁷ Then, two cumbersome attempts to clarify provide: (i) If plaintiff can use the traditional legal damages remedy as "full equivalent to the promised performance in a substitute transaction," then "damages are ordinarily adequate; and (ii) If plaintiff cannot, then "damages are ordinarily inadequate."¹⁰⁸

The inadequacy hurdle, although poorly drafted, is a significant hurdle to a plaintiff's obtaining (*not seeking*) disgorgement relief. In essence, if plaintiff could establish a right to specific performance by meeting the standard irreparable injury test, then plaintiff should have the option of seeking disgorgement. Yet, Section 39 does not state this principle as such. Presumably, this provision represents a drafting compromise designed to avoid extended academic debates about the flaws of the irreparable injury rule and the anachronistic perpetuation of the law and equity divide.¹⁰⁹ One way to avoid it entirely would be to eliminate the inadequacy limitation. Yes, this avenue would broaden disgorgement's availability. If the breach is deliberate and profitable, however, the interest in deterring the wrongfulness and stripping the

105. The author explores these potential ramifications in related articles on disgorgement and Section 39. See generally Roberts, *supra* note 3; Roberts, *supra* note 27.

106. See, e.g., *Attorney Gen. v. Blake*, [2001] 1 A.C. 268, 275 (H.L. 2000) (appeal taken from Eng.) (noting that Blake earned significant profits from his autobiography); *Snepp v. United States*, 444 U.S. 507, 515–16 (1980) (imposing a constructive trust on profits derived from a book published in violation of an ex-CIA agent's obligation to obtain prepublication authorization).

107. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39(2)(c) (Tentative Draft No. 4, 2005).

108. *Id.* § 39(2)(c)(i)–(ii).

109. See generally DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* (1991) (examining the rule and maintaining it is in decline). Professor Laycock provides: "Injury is irreparable if plaintiff cannot use damages to replace the specific thing he has lost." *Id.* at 37; see also RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 Reporter's Note c (Tentative Draft No. 4, 2005) (citing and adopting this principle in Section 39).

gains wrongfully obtained—if chosen as worthy goals—remains intact irrespective of whether plaintiff is able to obtain substitute performance with traditional compensatory damages.

C. Lessons of Blake and Practical Flaws of Section 39

Blake leaves an opening for scholars and courts to craft the exact parameters of a disgorgement remedy for breach of contract actions. Section 39 attempts to navigate these treacherous waters. Through labor-intensive efforts to chart the right course, the resulting compromise in the text of the proposed section is clunky and unappealing. In sum, it is aesthetically displeasing. All of this unwieldiness seems calculated to avoid unnecessary association with the specific performance doctrine and to reassure those who are apprehensive that this section will be a slippery slope towards the perceived unbounded nature of tort remedies.

1. Section 39's Potential May Be Lost for Its Cumbersome Nature

For all that Section 39 may accomplish, literary clarity is not a selling point. To some extent, the *Blake* opinion suffers from this ailment also. This stems from the tortured procedural history of *Blake's* case, the need for a creative way to remedy what so clearly screamed out as a wrong, and the incredibly complex nature of the topic of disgorgement for contractual breaches. Section 39 follows *Blake* and supportive academic treatments, but then the section must grapple with the difficulty of drawing the proper lines.

In order to allay fears, Section 39 imposes the varied limitations discussed, but in so doing, creates non-user friendly text. It may ultimately rein in the approval of disgorgement relief in the breach of contract setting. It will, however, likely result in extensive litigation battles over its meaning and applicability. Accordingly, streamlining revision would aid in its effectiveness. Plaintiffs need to be able to understand it and make wise decisions about when to utilize it. Meanwhile, defendants need to be able to minimize protracted litigation fights over it. Of course, the parties can avoid any perils in advance by agreeing to an enforceable liquidated damage provision, in which case Section 39, by definition, is not applicable.¹¹⁰ A tighter draft would also help fill a gap in contract law and support a restitution revival.

110. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39(4)(a) (Tentative Draft No. 4, 2005).

2. Section 39 Asserts Its Narrowness, but to What End?

When, in 2001, Professor Kull asked whether an American disgorgement remedy existed for breach of contract, did he envision or hope it would be broader than Section 39?¹¹¹ He is the reporter after all. There are a number of possible reasons for its strained limitations: (i) to compromise as commanded by the inner workings of a decade-long drafting process, (ii) to allay fears of a slippery slope, and/or (iii) to build a safe inroad as a savvy placeholder for later expansion (or, put another way, to start sliding down the slippery slope).¹¹² My money is on the third option. In the footsteps of Lord Mansfield, "I am a great friend of the action for money had and received, and therefore, I am not for expanding it."¹¹³ Accordingly, in spite of the language of limitation shrouding Section 39, greater theoretical currents generate a torrential undertow beneath the placid calm.

With all good-faith inferences in favor of the cabining of Section 39, does the narrowing service a worthy goal? The narrow circumscription regarding the availability of the Restatement's contractual disgorgement remedy may create what Professor Beatson described as effectively "a monetized form of specific performance."¹¹⁴ Professor McInnes, however, finds "problematic" the notion that "[d]isgorgement would constitute a principled proxy for the actual performance to which the plaintiff was entitled."¹¹⁵ He argues that this purported "principled proxy" in fact collapses "the distinction between disgorgement and expectation damages" and more critically "artificially

111. See Kull, *supra* note 18, at 201 ("Is there a disgorgement remedy for breach of contract?"). Professor Kull answers the question in the affirmative. He justifies permitting a disgorgement remedy for breach of contract for limited cases: "Disgorgement awarding the plaintiff more than he lost is justified in a narrow class of cases in which the defendant's election to breach imposes harms that a potential liability for provable damages will not adequately deter." *Id.* at 2052. In order to limit access to this bold remedy, he suggests "by way of hypothesis, that the necessary breach of contract be both profitable and opportunistic." *Id.* Not surprisingly, the draft RESTATEMENT adopts these limitations, although wrapped in the overly technical language that often results via drafting compromises.

112. See Roberts, *supra* note 3, at 20, 41 (suggesting that Section 39 is the "proverbial nose in the camel's tent" or perhaps a "Trojan horse," but not necessarily one we should fear unless "you want the Greeks to lose").

113. *Weston v. Downes*, (1778) 99 Eng. Rep. 19, 20 (K.B.); see also David Ibbetson, *Implied Contracts & Restitution: History in the High Court of Australia*, 8 OXFORD J. LEGAL STUD. 312, 317 (1988) (noting that Lord Mansfield professed himself a great friend to the action for money had and received).

114. JACK BEATSON, *What Can Restitution Do For You?*, in THE USE & ABUSE OF UNJUST ENRICHMENT 1, 17 (1991).

115. McInnes, *supra* note 7, at 237.

assumes that the defendant's enrichment coincides with the benefit that the plaintiff would have derived from performance."¹¹⁶

Further, if plaintiffs had the choice of specific performance would they not choose it? Perhaps not. Plaintiffs may be more comfortable with substitutionary remedies—contract to an end, get the money, and get on with it. Challenging Holmes's conception that specific performance was so rare as to not affect general theory, Professor Laycock poses this question: "Isn't it more accurate to say that a contract entitles a promisee to the thing she was promised, and that she has to accept damages only when she can use the money to replace the thing."¹¹⁷ On this logic, plaintiff should be entitled to, and may prefer, specific performance where damages cannot replace that which the breaching party promised. Under Section 39, by definition, if plaintiff is entitled to disgorgement she necessarily could not use traditional damages to purchase the substitute performance. So, she also would be entitled to specific performance, which would provide her exactly the promised performance. Disgorgement then may be desirable as leverage to force specific performance in settlement or when specific performance is impossible or practically too distant. Professor Laycock advises that in practice "the risk of mootness is great" that specific performance will not be "an option because courts move too slowly; the parties must go about their business and then litigate over damages."¹¹⁸ Then, if expectancy damages cannot attain the equivalent of substitute performance, plaintiff may well choose disgorgement relief if the option is available.

IV. Intellectual Godparents to Section 39

Before *Blake* and its progeny in the Commonwealth caselaw, scholarly debate created fertile ground for *Blake* to take hold. Caselaw authorizing restitutionary disgorgement for contractual breach would not have been possible without robust legal scholarship among Commonwealth academics. Led by the late Professor Peter Birks and his seminal contribution to the law of restitution and unjust enrichment,¹¹⁹ many joined the dialogue and focused

116. *Id.*

117. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES & MATERIALS* 387 (3d ed. 2002).

118. *Id.* at 385.

119. For examples of Professor Birk's scholarship, see generally PETER BIRKS, *UNJUST ENRICHMENT* (2d ed. 2003); PETER BIRKS, *AN INTRODUCTION TO THE LAW OF RESTITUTION* (1989); Peter Birks, *The Role of Fault in the Law of Unjust Enrichment*, in *THE SEARCH FOR PRINCIPLE: ESSAYS IN HONOUR OF LORD GOFT OF CHIEVELEY* 235 (William Swadling & Gareth Jones eds., 1999).

considerable efforts on whether restitutionary disgorgement should ever be available for breaches of contract.

A. Broadly Supporting Disgorgement

The broadest support possible would be to allow plaintiff's election of disgorgement as an alternative remedy for breach of contract. Some have argued that disgorgement should be widely available as long as culpable intent exists.¹²⁰ Other scholars leave the question of drawing lines to later articles or to the "anvil of concrete cases."¹²¹ Such scholars focus on building momentum for contract law's need for disgorgement relief.

For example, Professor Lionel Smith, McGill Professor of Law, speaks forcefully in favor of disgorgement for breach of contract in *Disgorgement of the Profits of Breach of Contract: Property, Contract and "Efficient Breach"*.¹²² He plainly submits that for disgorgement, "plaintiff's loss is irrelevant."¹²³ He reminds us that "disgorgement is widely available" across an array of private law causes of action whether legal or equitable.¹²⁴ Why, then, deny disgorgement relief to contractual plaintiffs? Professor Smith contends that we should not. With refreshing frankness, he acknowledges that with the disgorgement remedy, "plaintiff can end up better off than if the transaction had never taken place."¹²⁵ To justify this result, he forcefully argues that disgorgement relief "is the only way to enforce a rule that rights must be respected and cannot be expropriated."¹²⁶

According to Professor Smith, expropriation exists if the court permits defendant to keep his gain.¹²⁷ Further, it is insufficient to condone defendant's

120. See, e.g., THE LAW COMMISSION NO. 247, AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES, Report, 1997, H.C. 346 (endorsing a disgorgement remedy for any civil wrong as long as defendant's conduct demonstrates "a deliberate and outrageous disregard of plaintiff's rights").

121. Attorney Gen. v. Blake, [2001] A.C. 268, 291 (H.L. 2000) ("Exceptions to the general principle that there is no remedy for disgorgement of profits against a contract breaker are best hammered out on the anvil of concrete cases.").

122. See Lionel D. Smith, *Disgorgement of the Profits of Breach of Contract: Property, Contract and "Efficient Breach"*, 24 CAN. BUS. L.J. 121, 121-40 (1994) (arguing in favor of the availability of the disgorgement remedy for breach of contract).

123. *Id.* at 122.

124. See *id.* (noting, for example, breach of fiduciary duty, breach of confidence, and torts).

125. *Id.*

126. *Id.* at 123.

127. *Id.* at 122-23.

violation of plaintiff's right "subject only to paying compensation."¹²⁸ Yet, compensation is the law's default for contract law.¹²⁹ If this logic cabins the reach of disgorgement relief, Professor Smith contends that the law of contracts is trapped in "Zeno's paradoxes"¹³⁰ and the "false monopoly of compensation."¹³¹ He insists: "So long as we remain convinced that compensation is the only response available for breach of contract, intractable problems arise."¹³² These problems include the wrongful defendant *getting away with it*. In his words, the unacceptable consequence is: "Scofflaws appear to be able to breach their obligations with impunity, pocketing ill-gotten gains which the law is powerless to confiscate."¹³³ If courts find a road to allow disgorgement, the judges inevitably engage in "the deployment of fictions and other contortions of reasoning" to "achieve rational results."¹³⁴ Even with these cases, Professor Smith is not satiated because such judicial maneuvering compromises "the internal consistency of private law" and compels us to "accept asymmetries which have no basis in reason."¹³⁵ His solution: "[A]dmit that disgorgement is a natural response to breach of contract, [then] these problems vanish like the paradoxes of Zeno."¹³⁶

Importantly, Professor Smith has no difficulty finding that we should allow disgorgement for breach of contract. He acknowledges that complex issues regarding the determination of scope will arise, but he points out that this task is "familiar because we have already resolved analogous issues in the

128. *Id.* at 123.

129. *See id.* ("The orthodox view is that the only response available for breach of contract is compensation.") (citing [1979] *Asamera Oil Corp. v. Sea Oil & General Corp.*, 1 S.C.R. 633 and *Surrey County Council v. Bredero Homes Ltd.*, [1993] 1 W.L.R. 1361 (A.C.)).

130. *Id.* at 125–29. Professor Smith points to the flaws of logic via a recital of Zeno's paradoxes:

Achilles runs 10 times as fast as the tortoise. If he gives it a head start of 100 metres, can he ever catch it? Once he has run 100 metres to where the tortoise was, it has gone another 10 metres; once he covers those 10 metres, it has gone another metre; when he gets there, it has gone another 10 centimetres; and so on. It seems he will never catch up; but of course he will.

Id. at 125. The complexity of this riddle, according to Professor Smith, is that "the puzzle is worded in such a way that it asks us to consider ever shorter periods of time." *Id.* Yet, if "we break out of that, the paradox disappears." *Id.* He answers the puzzle: "After running 111.111111 . . . (111 1/9) metres." *Id.* at 125 n.16.

131. *Id.* at 125.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

context of the response of compensation."¹³⁷ He utilizes the English case of *Surrey County Council v. Bredero Homes Ltd.*,¹³⁸ in which the court denied all but a nominal remedy to a plaintiff without actual loss who sought disgorgement for the contractual wrong.¹³⁹ In Professor Smith's opinion, the *Surrey* decision demonstrates the constraints of the compensation orthodoxy.¹⁴⁰ Specifically, it trapped the judges in an illogical box—deny disgorgement relief (which the court did) or artfully (artificially) stretch the compensation principle "to encompass defendant's gain."¹⁴¹ The expansion of the compensation formulation could flow from the following reasoning: "[S]ince the defendant expropriated the plaintiff's right instead of buying it, the plaintiff's compensation must include what she would have received had the right been bought."¹⁴² Thus, the law should jettison the artificial box.

This expanded compensation model finds support in the lost opportunity to bargain theory supported by Judge Sharpe and Professor Waddams.¹⁴³ Specifically, they maintain that "defendant's gain does reflect something the plaintiff has lost" in that "defendant's wrongful conduct has deprived the plaintiff of the opportunity to bargain with the defendant, and . . . damages should be awarded to compensate the plaintiff for this lost opportunity."¹⁴⁴ They opine that a gain-based remedy finds support in compensatory principles without the need to reach for restitution.¹⁴⁵

And, if the compensatory principle is the problem, why not expand our conception? Professor Smith and the *Surrey* Court, however, find this

137. *Id.*

138. *See Surrey County Council v. Bredero Homes Ltd.*, [1993] 1 W.L.R. 1361, 1361 (A.C.) (holding that plaintiff was entitled only to nominal damages for breach of contract claim).

139. *Id.*

140. Smith, *supra* note 122, at 126.

141. *Id.*

142. *Id.*

143. *See generally* Robert J. Sharpe & S. M. Waddams, *Damages for Lost Opportunity to Bargain*, 2 OXFORD J. LEGAL STUD. 290 (1982).

144. *Id.* at 290.

145. *Id.* at 297. Notably, Judge Sharpe and Professor Waddams acknowledge that a skeptic might view the results as a "restitutionary measure" given that the lost opportunity theory fictitiously "allows the plaintiff the benefit of a presumption that he would have demanded the greatest sum that the defendant would rationally have paid." *Id.* They retort, however, that their goal "is not to displace restitution, but rather to offer a new explanation and justification of the results, widely agreed to be just, that formerly had been thought only to be defensible on restitutionary and other exceptional grounds." *Id.* Accordingly, they contend that the same results may be founded on a "compensatory basis." *Id.*

reasoning wholly unpersuasive. In *Surrey*, Steyn L.J. dismissed this fiction.¹⁴⁶ Professor Smith similarly rejects this "shoehorning" as "ultimately doomed, since it cannot cope with the case in which the plaintiff would never have bargained away the right."¹⁴⁷ As a matter of consequence, he offers the further injustice that such an instance "is arguably when the case for disgorgement is strongest."¹⁴⁸ Professor Smith maintains that the use of any fictions is unpersuasive and unnecessary.¹⁴⁹ Instead, "the availability of the response of disgorgement for breach of contract would obviate the need to use fictions and to apply legal concepts to inappropriate situations."¹⁵⁰ Then the law, laudably in Professor Smith's opinion, would ensure that defendant not "keep his ill-gotten gain," require defendant to purchase the expropriation, and avoid a legal inconsistency.¹⁵¹

Professor Smith urges that a world without contractual disgorgement would regrettably benefit wrongdoers and would create intolerable inconsistencies in the law. He analyzes, and ultimately rejects, two classical justifications for why the law would abide these consequences. The first is the distinction between property rights, which are *in rem* (proprietary rights held against everyone) or proprietary, and thus arguably more worthy of a disgorgement protection because the right is held against all, and contract rights, which are *in personam* (rights held only as between the parties) or personal, and the right is held against one.¹⁵² Professor Smith finds that this distinction is insufficient to justify allowing the disgorgement remedy in one category while denying it in the other.¹⁵³ Although he does not forward much of an affirmative case, he simply offers: "It is not clear why it should be any more permissible to expropriate personal rights than it is to expropriate proprietary rights."¹⁵⁴ Yet, oft times, the status quo remains powerful. It is for this reason that others search for ways to reconceptualize through the law's brittle traps.

146. Smith, *supra* note 122, at 126 (citing *Surrey County Council v. Bredero Homes Ltd.*, [1993] 1 W.L.R. 1361, 1369 (A.C.)),

147. *Id.* Professor Smith also rejects the alternative tack of turning the contractual promise into a fiduciary obligation. *Id.* at 127.

148. *Id.* at 126.

149. *Id.* at 129.

150. *Id.*

151. *Id.*

152. *Id.* at 129–32.

153. *Id.* at 129.

154. *Id.* at 132.

The second classical justification for denying disgorgement is the interest in protecting efficient breach theory.¹⁵⁵ Professor Smith acknowledges that he does not "wish to be taken as an adherent of that approach," but offers a straightforward representation of how the model ostensibly works.¹⁵⁶ He notes that the Coase Theorem assumes the absence of transaction costs.¹⁵⁷ Then, he points to a potential argument that disgorgement would cause a "double monopoly" by necessitating negotiations between the two parties in order to release one from the contractual obligation.¹⁵⁸ In the "double monopoly," then, "there is only one buyer and one seller, which implies potentially prohibitive transaction costs."¹⁵⁹ This reality causes Professor Smith to retort: "Other things being equal, then, surely even on an economic analysis we can choose the rule which requires rights to be purchased, rather than the one which allows them to be expropriated."¹⁶⁰ It is less than clear that this logic would persuade an efficient breach proponent, especially where the going price for the "right" is compensatory harm, i.e., expectancy damages. For those to whom disgorgement may be most compelling, the appeal of the remedy likely rests on policy grounds such as the interest in deterring the wrongdoer from the expropriation without negotiating for the right. It is less likely that a law-and-economics adherent would find this compelling, but such an adherent might say if the law chooses that course on redistribution of wealth grounds, the contractual parties will adjust to the new reality, e.g., they will bargain more heavily at the front of the bargain for liquidated damages.

Regarding the thornier questions of disgorgement's scope, Professor Smith examines and rejects almost all limits to the availability of disgorgement for breach of contract.¹⁶¹ Interestingly, the *Surrey* plaintiffs attempted an unsuccessful litigation strategy to convince the court that it could award a narrowly cabined disgorgement remedy.¹⁶² In so doing, the plaintiffs offered the following limitations on the remedy, which the Court rejected: (a) It should be available only if specific performance would have been, (b) It should be

155. *Id.* at 133–35.

156. *Id.* at 133.

157. *Id.* at 134.

158. *Id.*

159. *Id.* (describing "another double monopoly"—settlement negotiations—as the paradigmatic example).

160. *Id.* at 134–35. As his final argument, Professor Smith offers that even if a breach would increase social wealth, the law does not abide "efficient tort" or "efficient theft." *Id.* at 135.

161. *Id.* at 135–39.

162. *Id.* at 136–37.

unavailable if the gain occurred by defendant's saving an expense (thereby limiting disgorgement through a mitigation principle), and (c) It should be only permitted if defendant's breach was deliberate.¹⁶³ Professor Smith roundly rejects all of these limitations.¹⁶⁴ Ordering a defendant to do that which she promised is compensatory, unlike disgorgement that takes away defendant's gains.¹⁶⁵ Accordingly, he maintains that the problem of whether to allow disgorgement in the contractual setting "cannot be solved by reference to the principles governing specific performance."¹⁶⁶ As for importing a mitigation principle, Professor Smith finds this likewise flawed because mitigation ties to plaintiff's compensatory harm and is thus not transferable to a remedy like disgorgement that strips defendant's gain.¹⁶⁷

Professor Smith gives some credence to the potential relevancy of defendant's intent, but not as a bar—rather only as possibly relevant to the gain measurement such as whether to disgorge the total profit versus "the expense saved by failing to negotiate with plaintiff" and thus setting the award at the market price defendant should have paid plaintiff.¹⁶⁸ The limitations that Professor Smith sees as essential are well stated, but not controversial. They are: (i) The causal connection between defendant's gain and the obligation owed to the plaintiff and (ii) a remoteness limitation.¹⁶⁹ As Professor James Edelman of the University of Oxford explains in detail in his seminal book regarding gain-based damages, causation and remoteness are creeping into the development of gain-based damages.¹⁷⁰ He notes that these traditional limitations on compensatory damages are "still relatively unexplored" in the disgorgement realm.¹⁷¹ Professor Edelman clarifies the difficulties posed by the doctrines of causation and remoteness in the context of gain-based damages: (i) For causation, "[t]o what extent should the transaction be revered," "in a situation where a transfer is procured as a result of a wrong but *some part of* the transfer was not a result of the wrong, and would have occurred in any event[;]"¹⁷² and (ii) for remoteness, "[c]an a claimant argue that the value transferred is not the value of the initial transfer but that in reversing the

163. *Id.* at 137–38.

164. *Id.* at 137–39.

165. *Id.* at 137–38.

166. *Id.* at 137.

167. *Id.*

168. *Id.* at 138.

169. *Id.* at 136.

170. EDELMAN, *supra* note 7, at 103.

171. *Id.*

172. *Id.*

transfer the subsequent transfer (sale) must also be taken into account" "in a situation where a transfer is procured as a result of a wrong but where the property is then sold at a price higher than the market value."¹⁷³ Professor Smith does not elaborate on the details of how causation and remoteness should cut on these difficult questions. Instead, he simply cautions that the doctrine should require plaintiff to "have some connection to the gain" and that in addition to "but for" causation, there must be "a remoteness limitation" to bound plaintiff's recovery of defendant's gain.¹⁷⁴

Overall, perhaps Professor Smith suffers from too much intellectual honesty. He warns against judicial trickery in the face of the law's conundrums. Instead, he urges that we should open the gates to a much-needed remedy that will serve the valiant purpose of reining in wrongdoers. Professor Smith proclaims that courts should not fear the perceived "revolutionary" nature of the disgorgement remedy for breach of contract because, "where logic and principle demand a development of the law, an absence of precedent should not deter."¹⁷⁵ Moreover, precedent exists and is on the rise.¹⁷⁶ In closing, Professor Smith commands: "A mature system of law cannot allow rights to be expropriated unilaterally."¹⁷⁷ And, surely we should not miss the rising tide based upon the perceived prisons of faulty logic embedded in contract law's orthodoxy.

Another prominent scholar argues passionately on behalf of disgorgement with potentially wide applicability. Hanoch Dagan, Dean and Professor of Law at Tel Aviv University in Israel, contributes an extensive critical treatment of the possible normative foundations and "desirability of enabling a promisee to pursue profits derived by the promisor through a breach of contract as an alternative pecuniary remedy of wide applicability."¹⁷⁸ He aptly describes the issue of disgorgement for contractual breach as "[s]ituated at the frontier of both contractual and restitutionary liability."¹⁷⁹

To focus his inquiry, he examines normative principles for their ability to ground two key cases with opposite results: (i) The English Court of Appeal, in

173. *Id.* at 106.

174. Smith, *supra* note 122, at 136.

175. *Id.* at 139.

176. *See id.* at 139 nn.82–83 (citing *Moses v. Macferlan*, (1760) 97 Eng. Rep. 676 (K.B.); *Groves v. John Wunder Co.*, 286 N.W. 235 (Minn. 1939); *Wrotham Park Estate Co. v. Parkside Homes Ltd.*, [1974] (W.L.R. 798 (Ch.1974)).

177. *Id.* at 140.

178. Hanoch Dagan, *Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory*, 1 THEORETICAL INQUIRIES L. 115, 115 (2000).

179. *Id.*

line with traditional resistance, denied disgorgement for contractual breach in *Surrey County Council v. Bredero Homes*, and (ii) In *Adras Building Material v. Harlow & Jones GmbH*,¹⁸⁰ the Israeli Supreme Court authorized for the first time a gain-based remedy for contractual breach.¹⁸¹ Professor Dagan then methodically explores five potential normative groundings: "enforcement of promise-keeping; prevention of unjust enrichment; protection of proprietary rights; enhancement of efficiency; and performance of contractual obligations in good faith."¹⁸² He rejects the relevance of promise-keeping and unjust enrichment because he maintains that both are neutral as to the results of the two key cases.¹⁸³ Next, he expresses real doubt as to the distinction between contractual and proprietary rights as the distinction serves only to support the *Surrey* anti-disgorgement ruling, but not the *Adras* allowance of disgorgement.¹⁸⁴ He similarly notes that efficiency only supports *Surrey*.¹⁸⁵ Unsatisfied, Professor Dagan analyzes one additional normative value: "[G]ood faith."¹⁸⁶

Although both propriety and efficiency principles may justify a *Surrey* anti-disgorgement stance, Professor Dagan plumbs the last model, good faith considerations, but interestingly finds that "good faith supports neither *Adras* nor *Surrey*."¹⁸⁷ Instead, good faith doctrines support a third possible alternative to *Surrey* and *Adras*—dividing the unexpected benefits of profits between the contractual parties.¹⁸⁸ Viewing good faith as a cooperative construct of contract law, he articulates that good faith considerations include "a zone of mutual cooperation and confidence" and duties of "loyalty," "protection," "solidarity," and to "share with each other."¹⁸⁹ Professor Dagan proposes a "cooperative

180. See CA 20/82 *Adras Bldg. Material v. Harlow & Jones GmbH* [1989] 42(1) P 221 translated in English at 3 RESTITUTION L. REV. 235, 235 (1995) (granting the buyer "the difference between the contract price and the price obtained on the wrongful resale" of steel).

181. Dagan, *supra* note 178, at 116.

182. *Id.* at 117.

183. *Id.* at 117–18, 125–26.

184. *Id.* at 118, 132, 139.

185. *Id.* at 118, 140, 146. Notably, Professor Dagan cautions that even if efficiency may explain a *Surrey* rule, "[e]fficiency . . . should not be the exclusive consideration in shaping contract rules." *Id.* at 145. He forcefully maintains: "The law is not merely a set of incentives. Rather, it also provides standards for conduct and for judgment of behavior. Furthermore, as one of the most important social institutions, the law also influences the preferences of those subject to it." *Id.*

186. *Id.* at 146.

187. *Id.* at 147.

188. *Id.* at 118, 147.

189. *Id.* at 147–48.

countervision" with "apparent affinity" to *Adras's* favoring of restitutionary disgorgement.¹⁹⁰ Specifically, he offers: "[W]hen the opportunity to sell at a better price materializes, the proper thing for the promisor to do is to contact the promisee, make sure her expected profits are greater than the promisee's expected loss and—if indeed it turns out that the alternative transaction is more efficient—share these profits with the promisee."¹⁹¹ Accordingly, if a contractual party stands to benefit unexpectedly, that party should "share" the benefits with the other party.¹⁹²

This good-faith cooperative social vision, if preferred over an instrumental one, would "repudiate the traditional rule, as restated in *Surrey*, that implicitly sanctions the promisor's unilateral pursuit of her own interests, irrespective of the existing relationship she has already established with her contractual partner."¹⁹³ Accordingly, then "the law should adopt the *Adras* rule, which solicits the appropriate contractual behavior: discouraging any unilateral repudiation by the promisor and requiring her to consult with the promisee and negotiate with him an agreed release that will supposedly satisfy both."¹⁹⁴ Yet, Professor Dagan then posits that a cooperative vision may in fact support the rejection of *Adras* as it "may be seen not to foster cooperation" but instead, like specific performance, "compelling parties to work together when their relationship is no longer mutually beneficial is bound to create a loss of confidence and even hostility between the parties."¹⁹⁵ A rule following *Adras* disgorgement yields the promisee "a position of threatening leverage that enables him to demand the promisor purchase her release at a prohibitively high price" and on occasion "even impede efficient reallocation of the promissory resources altogether."¹⁹⁶ Having framed such contradictory postures, Professor Dagan queries: "Is a rule that enables people to prevent others from improving their situation without detrimental effect on anyone else really required by the values of trust, solidarity and sharing?"¹⁹⁷

The solution to this "deadlock" of an "all or nothing" approach, according to Professor Dagan, is to opt for a measure that requires the promisor to share "the unexpected benefits that arise over the course of their contractual

190. *Id.* at 149.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 149–50.

196. *Id.* at 150.

197. *Id.*

relationship."¹⁹⁸ Regarding whether to create a rule of equal division or a standard of judicial discretion, Professor Dagan supports a "more precise rule" over seemingly attractive "ad hoc judicial determinations" because the "rule mitigates the parties' conflict of interests when the beneficial opportunity arises and stabilizes their relationship at that delicate point in time."¹⁹⁹

In the end, Professor Dagan offers the cooperative conception and the "third legal regime" of sharing the profits for our examination and potential adoption *if* "the law seeks to endorse a more cooperative conception of contract" over competing social visions such as instrumentalism.²⁰⁰ He offers the cooperative "counter-vision of modern contract law" with its "zone of trust, solidarity and sharing" as relevant under "the assumption that private law has some value-shaping effect."²⁰¹ Accordingly, we must make the tough choice regarding what social vision of contract law we want.²⁰² If we want to promote good faith over the instrumentalism, then "neither *Surrey* nor *Adras* points to the correct doctrine. Rather, a third legal regime—one which divides the reallocation profits amongst the parties—is called for."²⁰³

Professor Dagan has no qualms that it is our task to choose among competing conceptions of the law and then tailor the law accordingly to service those ends. Professor Dagan makes a compelling case for a good-faith cooperative conception of contract law and its potential ability to ground gain-based relief. The fact that an *Adras* rule favoring disgorgement may foster over-enhanced bargaining power is worthy of collective pause. Whether this practical consequence in some cases should lead to a third alternative of *splitting the baby* is less clear. It resonates in fairness and may well best fit a cooperative conception—the social vision this author would choose over instrumentalism in a zero-sum equation. A blend of good faith and promotion of economy, however, is relevant to well-rounded, optimally functioning contract theory. Yet, a rule calling for a share of the profits raises Professor Weinrib's critique that the doctrinal substantive foundations of the cause of action do not correlate to this form of relief. Rather, a sharing-of-profits remedy for breach of contract allows the remedy to shape the substantive right. Presumably, Professor Dagan would say, yes as it does and should.

198. *Id.* at 150–51.

199. *Id.* at 151–52.

200. *Id.* at 152.

201. *Id.* at 154.

202. *Id.*

203. *Id.*

B. Supporting Disgorgement, but in a Narrow Form

Professor Kull and Section 39 fall in line with numerous scholars who support disgorgement for breach of contract cases, but only in certain cases. As *Blake* instructed, the hard question is then which cases. How do we draw the lines? Here are some prominent theories of limitation from international scholars.

One avenue is to allow disgorgement when plaintiff has an interest in defendant's performance warranting specific performance. This reasoning is present in Section 39 and seen repeatedly in the scholarship. Notably, scholars that explore this mechanism of line drawing sometimes express an openness to additional avenues.

A provocative theoretical analysis comes from Professor Peter Benson of the University of Toronto. In the book, *Understanding Unjust Enrichment*, Professor Benson contributes, *Disgorgement for Breach of Contract and Corrective Justice: An Analysis in Outline*.²⁰⁴ In this chapter, Professor Benson importantly asks the same question this author has posed elsewhere in the American jurisprudential context: "[W]hether gain-based damages for breach of contract can ever be compatible with the fundamental character of the contractual relation."²⁰⁵ Notably, he sharpens this query: "[C]an disgorgement of gain ever be the measure of damages for breach of contract, consistent with a conception of corrective justice?"²⁰⁶ Ultimately, Professor Benson concludes that a disgorgement remedy can cohere "within the larger framework of the theory of contract law and of private law itself."²⁰⁷

In particular, Professor Benson describes that the "emerging view in the case law and in legal scholarship" maintains "that disgorgement may be appropriate in cases where specific performance is in principle available."²⁰⁸

204. Peter Benson, *Disgorgement for Breach of Contract and Corrective Justice: An Analysis in Outline*, in UNDERSTANDING UNJUST ENRICHMENT 310–30 (Jason W. Neyers, Mitchell McInnes, & Stephen G.A. Pitel eds., 2004).

205. *Id.* at 311.

206. *Id.* at 312.

207. *Id.* at 330.

208. *Id.* at 311, 330; see also *id.* at 311 n.1 (citing a "substantial and growing body of academic literature" that supports gain-based damages for breach of contract, including the Supreme Court of Israel in *Adras Building Material v. Harlow & Jones* [1995] IsrSC 42(1) 221 and *Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L. 2000)). Professor Benson also quotes *Attorney General v. Blake*, [2001] 1 A.C. 268, 285 (H.L. 2000):

In the same way as a plaintiff's interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract.

He describes this route as the "central case" for disgorgement for breach of contract.²⁰⁹ Under this rubric, disgorgement would be available if the seller of a unique object breaches and sells the item to another or uses it for profit—regardless of whether the seller breaches deliberately.²¹⁰ Significantly, Professor Benson leaves open the possibility for broadening the availability of the disgorgement remedy in the contract setting. He notes that the specific performance model "may provide important guidance in determining whether there are other instances where 'the plaintiff [has] a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit.'"²¹¹

Before reaching his ultimate conclusion, Professor Benson methodically overcomes what he views as the two primary hurdles to disgorgement existing within the confines of a corrective justice contractual framework: (i) The potential that disgorgement of defendant's gain might not constitute a compensation measure, and (ii) The potential chasm between contract rights and proprietary rights permitting a disgorgement remedy for the latter but not the former.²¹² He maintains that private law remedies "entail . . . correlative gain and loss."²¹³ In the "less contentious" case of disgorgement for property—rather than contract—right violations, "the owner's legally protected interest is his or her *exclusive authority to determine the purposes* to which the object is put."²¹⁴ Professor Benson then posits:

One might think of an award of damages calculated on the wrongdoer's profit as representing what in fairness the plaintiff was entitled to exact from the wrongdoer as the price of his or her consent or, alternatively, as treating the wrongdoer's profit *as made for the benefit of the owner*.²¹⁵

With this groundwork in place, he reasons that the disgorgement measure could logically be compensatory. In particular, he argues:

[P]laintiff's (actual) loss and defendant's (actual) gain *just* represent alternative measures of the single idea of injury: they are identical in terms of their normative significance. They stand in the very same relations to the

Id. at 330 n.29.

209. *Id.* at 311, 330.

210. *Id.* at 311–12.

211. *Id.* at 330 (brackets in original) (quoting *Attorney Gen. v. Blake*, [2001] 1 A.C. 268 (H.L. 2000) (appeal taken from Eng.)).

212. *Id.* at 312.

213. *Id.* at 317.

214. *Id.* at 312, 318.

215. *Id.* at 320.

principle of reparation of civil injury under corrective justice, which is non-punitive and, in this sense, compensatory in character.²¹⁶

Regarding the second challenge, Professor Benson notes the premise that contract rights lie *in personam* rather than *in rem*, but contends "that while contract is distinct from property as a different mode of acquiring ownership, it shares at a fundamental level with property the very same idea of ownership."²¹⁷ Provocatively, he queries: "[I]n what way does the failure to keep one's promise deprive the promisee of what is already his or her own?"²¹⁸ He attempts to persuade with this logical leap—contractual default remedies of expectation damages and specific performance are compensatory "on one condition *only*: at, and indeed through, contract formation, and therefore prior to and independently of the moment of performance, the plaintiff acquires an exclusive ownership right as against the defendant with respect to the latter's promised performance."²¹⁹ Professor Benson acknowledges that such a contractual right is "*not* proprietary" and thus "must be *in personam*," but he asserts that under a model of "contract as a transfer of right," contract law possesses the same idea of ownership as property.²²⁰ Accordingly, for contractual acquisition, "performance or delivery *merely* represents a physical event that exhibits the promisor's respect for the promisee's already and fully established right."²²¹

Then, Professor Benson, invoking Kantian ethics, completes the picture regarding the existence of both an *in personam* and *in rem* classifications for contract law.²²² He argues that contractual performance "alter[s] . . . the rightful relation vis-à-vis non-contracting parties by giving a party the kind of physical possession essential to establish a right in property against others."²²³ Therefore, according to Professor Benson, "while contract formation gives rise to rights personal as between the parties, performance gives a party a real right as against the world."²²⁴ Then, he returns to the hypothetical breacher modeled

216. *Id.*

217. *Id.* at 321.

218. *Id.* at 322.

219. *Id.*

220. *Id.*

221. *Id.* at 324.

222. *Id.* (extending Kant's distinction between ownership and acquisition from IMMANUEL KANT, *THE METAPHYSICS OF MORALS*, reprinted in *THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT—PRACTICAL PHILOSOPHY* 353 (Mary J. Gregor ed. & trans., Cambridge University Press 1996)).

223. Benson, *supra* note 204, at 324.

224. *Id.*

to contract law.²²⁵ If defendant seller promises to sell unique²²⁶ goods to plaintiff buyer but breaches by selling unique goods to another for profit, "defendant interferes with the plaintiff's exclusive authority to dispose of them."²²⁷ Between only the initial two parties "there is a misappropriation by the defendant of what belongs to the plaintiff,"²²⁸ and similar to a property right, "the profit can in principle represent the value of the injury to the plaintiff's exclusive right."²²⁹ Thus, Professor Benson concludes there is no reason to deny the contractual plaintiff disgorgement or gain-based damages.²³⁰

Other scholars present limited support for disgorgement. The reasoning often lies in concerns about proper taxonomy. Further, scholars may fear the judicial temptation to authorize disgorgement without a coherent doctrine supporting it. In particular, there is a real fear that courts will conduct ends-based analysis or award relief in the name of justice. This style of reasoning also raises real concerns about abuses of discretion and palm-tree justice.

The import of hinging a contractual disgorgement remedy on principle rather than practical justice is thoughtfully explored by Professor Mitchell McInnes of the University of Alberta in Edmonton, Canada.²³¹ Professor McInnes contributes a chapter entitled, *Disgorgement for Breach of Contract: The Search for a Principled Relationship*, in *Unjust Enrichment and the Law of Contract*. He fears that although Lord Steyn, in permitting a disgorgement remedy in *Blake*, acknowledged the need to articulate "'a principled basis'" for a disgorgement remedy in contract law, Lord Steyn "was willing to '[s]ubordinat[e] conceptual difficulties to the needs of practical justice' in order to achieve a desired result."²³² Thus, Professor McInnes focuses much of his effort on taxonomy to ensure that causative events (causes of action) correlate to the legal responses (forms of relief) within the private law.²³³ Pursuant to his

225. *Id.* at 326–29.

226. Professor Benson distinguishes the promise to sell a non-unique item such that "the defendant's disposal of it does not, and indeed cannot, directly implicate his or her duty to perform" and thus "disgorgement should not be available as a remedy." *Id.* at 329.

227. *Id.* at 328.

228. *Id.* Professor Benson emphasizes: "[B]y selling the specific goods to a third party, the defendant has done the very thing which is now under the rights of the plaintiff." *Id.* at 329.

229. *Id.*

230. *Id.*

231. McInnes, *supra* note 7, at 225–42.

232. *Id.* at 225 (quoting *Attorney Gen. v. Blake*, [2001] 1 A.C. 268, 292 (H.L. 2000) (appeal taken from Eng.)).

233. *Id.* at 227–34; see also Mitchell McInnes, *Disgorgement for Wrongdoing: An Experiment in Alignment*, 8 RESTITUTION L. REV. 516 (2000) (providing extensive treatment of his thesis regarding the necessary alignment between causative events and legal responses).

"alignment thesis," he posits that "remedial options are limited in any given case to the extent that the operative cause of action is defined by a particular factual event."²³⁴ For example, then, the cause of action for unjust enrichment premises upon defendant obtaining from plaintiff a benefit that would be unjust for the defendant to retain without restoring the benefit (or value of the benefit) to plaintiff; therefore, "the only principled response is restitution."²³⁵ Notably, he provides a salient contrast between restitutionary relief and disgorgement relief:

"Restitution" should be defined narrowly to include only those responses that are intended to require the defendant to *give back* to the plaintiff an enrichment that he received from her. "Disgorgement" should be used to refer to those responses that are designed to require the defendant to *give up* to the plaintiff an enrichment that he received from someone (perhaps, but not necessarily, her).²³⁶

According to Professor McInnes, the alignment between contract law's causative events and its legal responses show that "breach of contract facilitates—but does not require—the availability of disgorgement."²³⁷

The logical follow-up then is if Professor McInnes is correct, when should disgorgement be available in breach of contract actions? He notes the complexity of "defining the various situation in which disgorgement actually will be available," and maintains that this formidable task "still lies ahead."²³⁸ He suggests the House of Lords "perhaps wisely refrained from speculating on the proper approach to facts that were not immediately before it."²³⁹ Ultimately, Professor McInnes opts to follow the line of scholars supporting disgorgement for contractual breaches where plaintiff would have a right to specific performance.²⁴⁰ He maintains that pursuant to his alignment thesis,

234. McInnes, *supra* note 7, at 231.

235. *Id.*

236. *Id.* at 229.

237. *Id.* at 226. Professor McInnes further expresses disdain for the clouding of categories by both scholars and judges. *Id.* at 230. For example, he cites to *Blake* as involving an instance in which the majority opinion, looking for precedential support for a disgorgement remedy in contract law, manipulated precedent. *Id.* Specifically, the House of Lords stretched *Wrotham Park Estate Co. v. Parkside Homes Ltd.*, (1951) 2 Eng. Rep. 641 (Ch.) to provide a "solitary beacon" for contractual disgorgement when in fact, according to Professor McInnes, *Wrotham* rests more naturally on a "compensatory purpose" in providing a substitutionary relief for plaintiff's "lost opportunity to bargain." McInnes, *supra* note 7, at 230 (citing *Wrotham*, 1 W.L.R. 798, 815 (1974) (internal quotations omitted)).

238. *Id.* at 241.

239. *Id.*

240. *Id.* at 242. Professor McInnes's nuanced support of disgorgement clarifies:

specific performance ordering a defendant to "honour his word" "is the most coherent response possible" for breach of an enforceable promise.²⁴¹ Then, he extends the alignment thesis to find that "there is nothing inherent in [the breach of contract] action that precludes a gain-based response."²⁴² His finding is tempered, however, because he likewise emphasizes that "there is nothing inherent in that type of claim that invariably demands such relief."²⁴³ This point is fair enough given that existing contract theory is grounded in numerous principles that may be in tension with disgorgement relief. Professor McInnes recognizes as much: "[I]t also is true that the general availability of gain-based relief would necessitate a fundamental re-conceptualisation of the nature of contract."²⁴⁴ He thus wisely acknowledges the reality that the issue of whether to permit disgorgement, stripping a defendant "of wrongfully acquired benefits," for certain contractual breaches "therefore may turn on policy considerations" such as deterrence.²⁴⁵

In terms of specific performance as the guiding principle for contractual disgorgement, Professor McInnes analyzes three primary strains of academic argument: (i) "Disgorgement as Monetized Specific Performance," as advanced by Professor Beatson; (ii) "Disgorgement and Bargaining Power Under Specific Performance," as suggested by Professor Waddams; and (iii) "Disgorgement and the Proprietary Effect of Specific Performance," as

Without denying the potential for such relief, [the alignment thesis] has suggested that there is nothing inherent in a contract that is not amenable to an order for specific performance that compels the availability of disgorgement. In contrast, the equitable consequences of a contract of sale that is subject to such an order do positively indicate that the defendant should be required to disgorge to the plaintiff any profit that he earns as a result of exploiting the property in question.

Id.

241. *Id.* at 234.

242. *Id.*

243. *Id.*

244. *Id.* at 236 (citing R. Nolan, *Remedies for Breach of Contract: Specific Performance and Restitution*, in FAILURE OF CONTRACTS: CONTRACTUAL, RESTITUTIONARY AND PROPRIETARY CONSEQUENCES 34, 37 (F. Rose ed., 1997)).

245. *Id.* at 234. McInnes cites *Attorney General v. Blake*, [2001] 1 A.C. 268, 285 (H.L. 2000) (appeal taken from Eng.) for "suggesting rather broadly that gain-based relief should be available if 'the plaintiff had a legitimate interest in preventing the defendant's profit-making activity'" and then awarding disgorgement "largely on the ground that the integrity of the secret service would be enhanced if agents were so dissuaded from breaking contractual obligations of non-disclosure." *Id.* 234–35 n.32. The *Blake* quote evidences both a goal of specific and general deterrence. See also *id.* at 236 ("As evidenced in *Attorney General v. Blake*, there at least occasionally are compelling policy reasons for that result (e.g., the desire to strongly deter breach).").

forwarded by a number of scholars including Professor Nolan.²⁴⁶ Under the first theory, gain-based recovery "would constitute a principled proxy for the actual performance to which plaintiff was entitled."²⁴⁷ Professor McInnes finds this argument "problematic" for its "collapse" of the divide between disgorgement and expectation damages in that "it artificially assumes that the defendant's enrichment coincides with the benefit that the plaintiff would have derived from performance."²⁴⁸ He also critiques the second formulation advanced by Professor Waddams, who argues that "specifically enforceable contracts support gain-based relief in so far as the plaintiff's enhanced bargaining position properly allows her to insist that the defendant give up at least part of his profit in exchange for permission to breach his undertaking."²⁴⁹ Professor McInnes sees the remedial classification, in essence compensatory, as flawed; further, even if it has "intuitive appeal," it may prove too much because its underlying rationale would support punitive damages.²⁵⁰ The third specific performance theory grounded in the proprietary effect, however, Professor McInnes views as "the most compelling."²⁵¹ According to this proprietary formulation, "[f]rom the moment of creation, a contract of sale [such as the sale of land] that is subject to specific performance raises a constructive trust between the parties."²⁵² Then, according to Professor McInnes, disgorgement would flow "as a logical implication of the propriety consequences of equity's treatment of specifically performable contracts."²⁵³

Overall, Professor McInnes offers cautious and tempered support for an opening for disgorgement for breach of contract. He notes that the breach of contract cause of action logically permits such a remedy, although does not mandate its availability. His narrow interpretation is accurate as far as it goes. Much, however, depends upon whether the desire to allow the disgorgement remedy is strong enough to propel reconceptualization of contract law to encompass disgorgement theory and consequences. In the end, Professor McInnes wisely acknowledges that any serious attempt to allow the remedy

246. *Id.* at 237–41.

247. *Id.* at 237.

248. *Id.*

249. *Id.* at 237–38.

250. *Id.* at 238. Professor McInnes acknowledges that Professor Waddams would partially concede that "on such reasoning, the gist of the remedy is compensatory" such that "defendant deprives the plaintiff of the opportunity to bargain for a share of the resulting enrichment; relief therefore is granted to restore the value of that opportunity to her." *Id.*

251. *Id.*

252. *Id.* at 238–39.

253. *Id.* at 240.

would need to find public policy, such as deterrence, as a compelling reason to disgorge benefits defendant wrongfully attained.²⁵⁴ His ultimate position that disgorgement is only required for equitably rooted proprietary contract cases where plaintiff has a right to specific performance may be more limited than necessary or desirable given the positive prospects of reconceptualization projects and public policy support for broader uses.

But, could there be more, and, if so, how would one craft a principled rule to cover the intended circumstances for a disgorgement remedy in contract law? Professor McInnes points out that the tone of Lord Nicholls's majority opinion in *Blake* "quite strongly suggests that it will not be possible to formulate a single rationale to explain all of the circumstances that eventually will be recognised as supporting disgorgement."²⁵⁵

Still yet, other scholars debate the descriptive categories regarding when courts have granted disgorgement or when they should. Professor Howard O. Hunter, President of Singapore Management University, comments favorably on attempts by Professor S.M. Waddams²⁵⁶ of the University of Toronto, to classify cases where restitution relief lies.²⁵⁷ Ultimately, Professor Hunter argues that Professor Waddams's classifications supporting restitution for breach of contract—(i) lost opportunity to bargain, (ii) equity-protected interests,²⁵⁸ and (iii) proprietary interests—"may be both too broad and too narrow."²⁵⁹ Professor Hunter maintains that certain cases do not fit these categories such as the "losing construction contract cases" because they "do not involve restitution of profits derived from a breach, but they do result in the denial of any savings expected by the breaching party and the allocation of risks of loss (those of both parties) to the breaching party."²⁶⁰ Notably, Professor Hunter concludes that, although Professor Waddams provides "some rough guides" for a descriptive understanding the few cases where restitution rather than compensation flow, Professor Hunter opines that perhaps "it may be just as well to treat these cases

254. *Id.* at 241.

255. *Id.*

256. See generally S.M. Waddams, *Profits Derived from Breach of Contract: Damages or Restitution*, 11 J. CONTRACT LAW 115 (1997).

257. See Howard O. Hunter, *Commentary on 'Profits Derived from Breach of Contract: Damages or Restitution'*, 11 J. CONTRACT LAW 127, 127–29 (1997) (discussing Professor Waddams's article entitled *Profits Derived from Breach of Contract: Damages or Restitution*).

258. *Id.* at 128 (discussing a hypothetical breach of contract by a famous athlete where gain-based damages might serve "useful as a post hoc substitute for injunctive relief" because equity would not force specific performance given the involuntary servitude concerns).

259. *Id.*

260. *Id.* at 129.

as anomalies—though not without justification—in the general scheme of compensatory damages" for contractual breaches.²⁶¹

C. *Opposing Disgorgement Relief*

Restitutionary disgorgement has not possessed universal acclaim, even in the Commonwealth. The opposition, however, has not carried the day. To the extent that international scholars raise serious doubts about this form of relief, their doubts generally do not stem from concerns about tension with efficient breach doctrine. The efficient breach theory as a driving influence in contract doctrine is fairly unique to American law.²⁶² In fact, most countries reject its lure and support doctrines that are either incompatible, or at least in tension with, efficient breach notions.²⁶³ The following primary opposition hinges not on economic concerns, but rather from abiding concern about the law's coherence and temptations to be flexible despite the inability to create proper doctrinal links.

Notably, Professor Ernest J. Weinrib of the University of Toronto, who thoughtfully examines the aptness of disgorgement as a contractual remedy,²⁶⁴

261. *Id.*

262. See, e.g., Ronald J. Scalise Jr., *Why No "Efficient Breach" in the Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract*, 55 AM. J. COMP. L. 721, 763 (2007) (noting that the "difference" in posture towards efficient breach theory "is one between American common law and the law of the rest of the world").

263. *Id.* at 763–65. In particular, Professor Scalise notes that in the most similar cultural and structural analogue, England, "the reception to the idea of efficient breach has been cold." *Id.* at 763–64. Regarding the comparison of the United States to civil law jurisdictions, Professor Scalise concludes: "The doctrine of efficient breach of contract has not been endorsed by civil law scholars and judges and is unlikely to be at any time in the near future." *Id.* at 763. Notably, he views the doctrine of disgorgement and its acceptance in other countries as a significant hurdle to the acceptance of an efficient breach theory. *Id.* at 734–35 ("In a system in which disgorgement of profits by the breacher is the standard rule (or even a generally available remedy), the doctrine of efficient breach would not exist, as '[a] principle that stripped the seller of profits made on the second sale would discourage efficient [breach] behavior.'" (brackets in original)); see also Daniel Friedmann, *Restitution of Profits Gained by Party in Breach of Contract*, 104 L.Q. REV. 383, 385 (1988) (emphasizing that Israel "rejected the idea of 'efficient breach,' under which a breach should be allowed or even encouraged, if the benefit to the party in breach exceeds the loss to the other party" and instead endorsed a "prima facie" entitlement to specific performance because "[t]here is no reason to treat a breach lightly"); McCamus, *supra* note 4, at 950 (noting that the efficient breach theory has garnered much criticism); Smith, *supra* note 122, at 133 (observing that the efficient breach theory supporting the disgorgement remedy does not withstand scrutiny). Whether room remains for efficient breach to exist in a world with Section 39 disgorgement remains to be seen. For an exploration, see Roberts, *supra* note 3.

264. See Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-

recognizes its "superficial attractiveness of preventing wrongdoers from profiting from their wrongs,"²⁶⁵ but ultimately reasons that disgorgement is inconsistent with the internal coherence of contract law within a corrective justice frame.²⁶⁶ Professor Weinrib centers the analysis on this driving principle: "The role of remedy in corrective justice is simply to undo injustice between the parties."²⁶⁷ In fact, he clarifies that under a corrective justice model this is the only task.²⁶⁸ This corrective justice mission works within the confines of law's practical limits, but is not driven by the instrumental goals of particular social policies.²⁶⁹

As a preliminary matter, Professor Weinrib queries whether contract law's default of expectancy damages fits within corrective justice.²⁷⁰ He then tracks Professors Fuller and Perdue's analysis and negative conclusion based upon their reasoning that expectancy damages "protect a future expectancy—'something [the plaintiff] never had'—rather than a loss already suffered."²⁷¹ Professor Weinrib reminds that Fuller and Perdue found that the expectancy measure is a curious form of compensation by surpassing the change in position recovery and thus leaves the corrective justice realm for the distributive justice dominion.²⁷² Searching for alternative justifications, Fuller and Perdue rest upon policy rationales of "protecting the reliance interest" such as lost opportunity to enter other contracts and promoting economic activity.²⁷³ Professor Weinrib reasons that this logic is flawed under a corrective justice lens.²⁷⁴ Specifically, he highlights the paradox: "By requiring that the promisor make good the value withheld through the breach of the contract, the law treats the promisee as entitled to the object's present value though it does not yet regard the promisee as owner of the object itself."²⁷⁵ Such a result,

KENT L. REV. 55, 55 (2003) (examining punitive damages and the disgorgement remedy in the breach of contract context).

265. *Id.* at 58.

266. *Id.* at 58, 83–84, 103.

267. *Id.* at 60.

268. *See id.* at 61 ("[C]orrective justice requires only that one ask what remedy would undo the injustice to the extent that the law can.").

269. *Id.*

270. *Id.* at 62.

271. *Id.* (exploring L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936)).

272. *Id.*

273. *Id.* at 62–63.

274. *Id.* at 64.

275. *Id.*

moreover, finds rationale only in independent social goals, but instrumental goals are not the function of corrective justice's aim.²⁷⁶

In Professor Weinrib's opinion, Immanuel Kant better resolves the compensation conundrum embedded in contract law's standard of expectancy.²⁷⁷ Importantly for Professor Weinrib, "Kant's treatment of contract law suggests why contractual performance can be seen as an entitlement, for the loss of which the promisee can demand compensation."²⁷⁸ Under Kant's model, Professor Weinrib emphasizes that "contractual performance" is an "external object of choice" for the "self-determining agents" involved in the agreement.²⁷⁹ Per this rubric, one does not gain a "right to the subject matter of the contract," but instead "a right merely to the performance of that act."²⁸⁰ Importantly, this view of contractual right extends "one's entitlement to the external object even when one is not using or possessing it."²⁸¹ This right exists "against the specific person obligated to perform the requisite act."²⁸² According to Professor Weinrib, this "Kantian account of contractual entitlement provides a basis for the expectation measure of damages" and conforms to the "tradition of corrective justice" by the law undoing the "injustice by restoring to the plaintiff either the specific performance that has been lost or the value of that performance."²⁸³ More specifically, under a Kantian posture the expectancy measure services correlative ends as required by corrective justice when the law awards promisees "the value of what the contract would have given" in exchange for what "the breach deprives from them."²⁸⁴

Having laid a proper foundation for contract's expectancy default, Professor Weinrib then addresses whether contract law can permit an extension to disgorgement.²⁸⁵ He echoes others regarding the "devilishly difficult" nature of the topic and its underlying allure from the "strong ethical intuitions that promises should be kept and that those who breach their contracts should not

276. *Id.* at 65.

277. *Id.* (analyzing IMMANUEL KANT, *THE METAPHYSICS OF MORALS*, reprinted in *THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT—PRACTICAL PHILOSOPHY* 353 (Mary J. Gregor ed. & trans., 1996)).

278. *Id.*

279. *Id.* at 65–66.

280. *Id.* at 67.

281. *Id.* at 66.

282. *Id.* at 67.

283. *Id.* at 68–69.

284. *Id.* at 70.

285. *Id.* at 70–84.

profit from their wrongs."²⁸⁶ He notes the international "miscellaneous instances" of disgorgement for contractual breach and queries whether such cases, grounded in a variety of theories, represent "scattered embers of a general conception . . . to be collected and fanned into a new and explicit principle of disgorgement for breach of contract."²⁸⁷ Similar to Professor Smith and *Blake*, Professor Weinrib queries "why should profiting from another's contractual right be treated less severely than profiting from another's proprietary right?"²⁸⁸ After analyzing two of the key cases—*Adras* and *Blake*—that "have provided the most extensive discussions favoring the disgorgement of gains from contract breach,"²⁸⁹ Professor Weinrib finds that disgorgement, despite its "obvious moral resonance,"²⁹⁰ cannot comport with the requirements of corrective justice.²⁹¹ Specifically, disgorgement support cannot cure the one-sided corrective justice difficulty: "[T]hat the promisor has profited from committing a wrong appears to supply an intuitively plausible reason for requiring the promisor to surrender the gain, but not for transferring that gain to the promisee."²⁹² Professor Weinrib also views the temptation to view disgorgement through a punitive lens as flawed and further unable to resolve the incoherence with corrective justice.²⁹³ The Kantian account does not cure the difficulty either because Kant's theory only demonstrates that the breach of contract is a remediable wrong to the promisee, but not that defendant's gain is the proper "measure of that wrong."²⁹⁴ Professor Weinrib continues that neither the "instrumentalist" reasoning of *Adras* or *Blake* cure this problem.²⁹⁵ Rather, in his assessment, the rationale of both cases "is incompatible with the correlative structure of corrective justice."²⁹⁶ Short of

286. *Id.* 70–71.

287. *Id.* at 72.

288. *Id.*

289. *Id.* (analyzing *Adras Bldg. Material v. Harlow & Jones* [1988] IsrSC 42(1) 221 and *Attorney Gen. v. Blake*, [2001] 1 A.C. 268 (H.L. 2000) (appeal taken from Eng.)). For a concise exploration of *Adras* within the Israeli legal context, see generally Friedmann, *supra* note 263.

290. Weinrib, *supra* note 264, at 73.

291. *Id.* at 74–75.

292. *Id.* at 74.

293. *Id.* at 84–102.

294. *Id.* at 75.

295. *Id.* at 76 (explaining that *Adras* "leaves unexplained why the promisee is entitled to recover for what was a wrong against society as a whole" and that *Blake* fails to show that plaintiff's "legitimate interest in preventing defendant's profit-making activity" warrants plaintiff's entitlement to those profits (quoting *Attorney General v. Blake*, [2001] 1 A.C. 268, 285 (H.L. 2000) (appeal taken from Eng.))).

296. *Id.* at 77.

establishing a propriety entitlement, which Professor Weinrib finds untenable, a disgorgement remedy cannot logically lie within a corrective justice frame of contract law.²⁹⁷

Even if the plaintiff possesses an entitlement to specific performance, thereby arguably transforming the right into a proprietary one, Professor Weinrib maintains that corrective justice cannot abide letting the nature of the remedy "determine the nature of the underlying right" and thus specific performance "cannot transform into a proprietary right that which is not already one before the remedy is fixed."²⁹⁸ Thus, the remedy may not shape the substantive right in his opinion. Whether this happens as a matter of practical reality, Professor Weinrib does not address. Instead, he clearly views such a maneuver as incompatible with a faithful view of corrective justice. Ultimately, Professor Weinrib pleads that contract law should maintain its "internal coherence" through its adherence to corrective justice and any attempt to award disgorgement via flawed conceptions or policy rationales will only demonstrate that the law has "become more flexible but less just."²⁹⁹

In the end, Professor Weinrib raises relevant cautionary concerns. These challenges should not reign the day, however. Such critiques should help guide the careful crafting of the parameters of restitutionary disgorgement relief for breach of contract. Overall, the great weight of comparative authority from judges and scholars expresses openness and support for the availability of disgorgement relief for contractual breach. The United States should follow the Commonwealth, while remaining cognizant of the pitfalls. Now, American scholars must continue our efforts to draft the most effective form of disgorgement relief for contractual breach possible.

V. Conclusion: Proposed Path—Follow the Commonwealth and Go Further

As we progress, the United States legal community must decide whether to adopt, reject, or modify Section 39. We need to continue to immerse ourselves in the rich body of Commonwealth commentary and law on this topic. The Commonwealth's experiences with restitutionary disgorgement present readily

297. *Id.* at 77–81. He concludes, forcefully, that "a breach of contract is not tantamount to the alienation of a proprietary right" and that this distinction matters. *Id.* at 80. He also criticizes Lord Nicholls's insistence in *Blake* that there is no justification for treating contractual rights as less worthy than property rights. *Id.* at 80–81.

298. *Id.* at 82.

299. *Id.* at 103.

available test cases for the United States. This Article seeks to provide an appreciation of the full context of, and projected consequences to, the legal system of the United States.

The lessons of the Commonwealth show that restitutionary disgorgement for breach of contract is not as scary as it might seem at first blush. Despite the American contract law's jurisprudential focus on flow of commerce and choice, availability of a Section 39 remedy will not unravel United States contract law or its economy. Section 39 as drafted is imperfect, but it is narrowly crafted to avoid overly disturbing classical contract formulations. There is still time before the Restatement comes to fruition. The ink is not yet dry. Much opportunity remains to glean the lessons of the Commonwealth to craft a more artful statement that will have practical effect and import in pushing the law of contracts into its next logical sphere. Ultimately, I will offer my recommendations for modifying the proposed Section 39 in light of theoretical underpinnings of contract law in the United States, the Commonwealth's perspectives, the interplay with efficient breach theory, and the interaction with other significant traditional contract doctrines such as foreseeability and mitigation. Accordingly, the instant study aims to further the dialogue and refinement of Section 39, its implications for contract law, and its role in the restitution revival in the United States.

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