Commonwealth of Perspective on Restitutionary Disgorgement for Breach of Contract

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A Commonwealth of Perspective on Restitutionary Disgorgement for Breach of Contract

Caprice L. Roberts*

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* 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.
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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

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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. 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. 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, permitting a gain-based remedy for breach of contract. The Blake decision "marked a watershed . . . for the award of gain-based remedies for breach of contract." Accordingly, for England, Blake demonstrates that "[i]t is now clear that breach of contract is capable of supporting gain-based relief."

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

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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.


8. McInnes, supra note 7, at 241.

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

Section 39, although likely narrow in its application, represents a significant theoretical challenge to the popular United States conception of Holmesian-based contract law. 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. Instead, as classically conceived, contract defendants prepare to pay expectancy damages if they choose to breach the ordinary—not unique—contract. 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. 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.
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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{17} Id. at 2.

\textsuperscript{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. In the traditional American formulation, "one who merely breaches a contract is not required to restore collateral profits or gains facilitated by the breach." 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. As this Article will discuss, however, this remedy has antecedents in the occasional American case, and more grounded support in the Commonwealth.


22. See, e.g., Laurin v. DeCarolis 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.\(^2\) As such, Section 39 warrants a thorough treatment of all of its interactions with core contract doctrines, such as *Hadley* foreseeability\(^2\) and mitigation,\(^2\) which the author addresses in a companion article on this topic.\(^2\) The fundamental departure from the compensatory principle is clear. In particular, Section 39’s disgorgement remedy is admittedly not compensatory.\(^2\) 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.\(^2\) 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.\(^2\)


\(^2\) 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).

\(^2\) 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").


\(^2\) 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.").

\(^2\) Id.

\(^2\) Id. (emphasis added).
Professor Kull reassures, however, by emphasizing the intended limited application of Section 39. 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. The fiduciary label gives cover, but Blake rendered a gain-based remedy despite the dead fiduciary claim. 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.

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." 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." 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, a case in which the judge analogized to property rights in order to award damages

35. Id. at 277.
36. Id.
37. Id. at 281.
38. Id.
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."\textsuperscript{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."\textsuperscript{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.\textsuperscript{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."\textsuperscript{43} With a deterrence goal at the fore, Lord Nicholls endorsed \textit{Snepp v. United States},\textsuperscript{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.\textsuperscript{45} Notably, Lord Nicholls analogized to \textit{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.\textsuperscript{46}

Accordingly, the majority of the House of Lords endorses a remedy keyed to defendant’s gain rather than plaintiff’s loss.\textsuperscript{47}

\begin{itemize}
  \item 41. \textit{Id.}
  \item 42. \textit{Id.} at 283–84.
  \item 43. \textit{Id.} at 284.
  \item 45. \textit{Id.}
  \item 47. \textit{Id.} at 269. For a provocative comparison and critique of \textit{Blake} and \textit{Snepp} for their failure to weigh private restitutionary relief against applicable free speech concerns, see generally Eoin O'Dell, \textit{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).
\end{itemize}
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. Ultimately, he supports the ruling because it is the Court's "prime duty to do practical justice whenever possible." More specifically, he emphasized: "For my part practical justice strongly militates in favour of granting an order for disgorgement of profits against Blake."

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." 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."

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

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 requiring 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
generated 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 Snepp, 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 Snepp 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 Snepp'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.

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 restitutary. 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." 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." 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.

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." 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. "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." Professor McCamus and others suggest it is a matter of time before Canada follows suit and authorizes the disgorgement remedy for breach of contract. 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."

Ireland, in principle, approved a restitutionary disgorgement remedy in *Hickey v. Roches Stores*, 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. Thus, the contractual claim relied upon an exclusivity theory. Plaintiff Hickey sought to disgorge profit obtained by the wrongdoer, defendant Roches. Roches retorted that damages above compensation were "unknown" to contractual breach caselaw. 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." 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.

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

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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:

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

\(^{76}\) 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.


\(^{82}\) 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 profitstripping because the account of profits does not focus upon any transfer from (described as 'detriment to') the claimant." 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. 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." Further, restitution and unjust enrichment doctrines drive Section 39's disgorgement remedy for opportunistic contractual breaches, given Section 39's placement in the Restatement of Restitution and Unjust Enrichment rather than the Restatement of Contracts. 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.\textsuperscript{89} If the defendant has wrongfully obtained benefits, then a restitutionary disgorgement remedy should flow from defendant's deliberate and profitable breach of contract.\textsuperscript{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.\textsuperscript{91} He then uses narrowing devices and language of limitation to convince readers that 'there is nothing to see here.'\textsuperscript{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.\textsuperscript{93} Accordingly, the restrictions "will exclude the vast majority of contractual defaults."\textsuperscript{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.\textsuperscript{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.\textsuperscript{96} Yet, the Court in \textit{Blake} goes there. Of course, the factual background of \textit{Blake} involved a previously criminally convicted defendant; thus, the Court did not have to engage in serious line-drawing regarding intent to breach.\textsuperscript{97} The \textit{Blake}
Court found defendant's conduct worthy of deterrence and rebuke in the form of a gain-based remedy of all of his forthcoming profits. The disgorgement remedy in Section 39 follows this logic and seeks to make conscious wrongdoing not a profitable choice. It seeks to deter and to condemn opportunism. 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. 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." 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. 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. At a minimum, Section 39 is in tension

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

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.


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. A tighter draft would also help fill a gap in contract law and support a restitution revival.

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? 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). 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." 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." Professor McLinnes, however, finds "problematic" the notion that "[d]isgorgement would constitute a principled proxy for the actual performance to which the plaintiff was entitled." 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 2021 ("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").


115. McLinnes, supra note 7, at 237.
assumes that the defendant’s enrichment coincides with the benefit that the plaintiff would have derived from performance."\textsuperscript{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?"\textsuperscript{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."\textsuperscript{118} Then, if expectancy damages cannot attain the equivalent of substitute performance, plaintiff may well choose disgorgement relief if the option is available.

\textit{IV. Intellectual Godparents to Section 39}

Before \textit{Blake} and its progeny in the Commonwealth caselaw, scholarly debate created fertile ground for \textit{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,\textsuperscript{119} many joined the dialogue and focused

\textsuperscript{116} Id.

\textsuperscript{117} DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES & MATERIALS 387 (3d ed. 2002).

\textsuperscript{118} Id. at 385.

\textsuperscript{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 Goff 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. Other scholars leave the question of drawing lines to later articles or to the "anvil of concrete cases." 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." He plainly submits that for disgorgement, "plaintiff's loss is irrelevant." He reminds us that "disgorgement is widely available" across an array of private law causes of action whether legal or equitable. 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." 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."

According to Professor Smith, expropriation exists if the court permits defendant to keep his gain. Further, it is insufficient to condone defendant’s
violation of plaintiff’s right "subject only to paying compensation." Yet, compensation is the law’s default for contract law. If this logic cabins the reach of disgorgement relief, Professor Smith contends that the law of contracts is trapped in "Zeno’s paradoxes" and the "false monopoly of compensation." He insists: "So long as we remain convinced that compensation is the only response available for breach of contract, intractable problems arise." 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." 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." 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." His solution: "[A]dmit that disgorgement is a natural response to breach of contract, [then] these problems vanish like the paradoxes of Zeno.

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." He utilizes the English case of *Surrey County Council v. Bredero Homes Ltd.*, in which the court denied all but a nominal remedy to a plaintiff without actual loss who sought disgorgement for the contractual wrong. In Professor Smith's opinion, the *Surrey* decision demonstrates the constraints of the compensation orthodoxy. 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." 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." 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. 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." They opine that a gain-based remedy finds support in compensatory principles without the need to reach for restitution.

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.*


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. 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." As a matter of consequence, he offers the further injustice that such an instance "is arguably when the case for disgorgement is strongest." Professor Smith maintains that the use of any fictions is unpersuasive and unnecessary. 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." 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.

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. Professor Smith finds that this distinction is insufficient to justify allowing the disgorgement remedy in one category while denying it in the other. 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." 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.

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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. 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. He notes that the Coase Theorem assumes the absence of transaction costs. 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. In the "double monopoly," then, "there is only one buyer and one seller, which implies potentially prohibitive transaction costs." 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." 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. Interestingly, the Surrey plaintiffs attempted an unsuccessful litigation strategy to convince the court that it could award a narrowly cabined disgorgement remedy. 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. Professor Smith roundly rejects all of these limitations. Ordering a defendant to do that which she promised is compensatory, unlike disgorgement that takes away defendant’s gains. 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." 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.

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. 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. 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. He notes that these traditional limitations on compensatory damages are "still relatively unexplored" in the disgorgement realm. 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," 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.
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.”

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.

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." Moreover, precedent exists and is on the rise. In closing, Professor Smith commands: "A mature system of law cannot allow rights to be expropriated unilaterally.” 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.” He aptly describes the issue of disgorgement for contractual breach as "[s]ituated at the frontier of both contractual and restitutionary liability.”

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.
177. Id. at 140.
179. Id.
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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*, the Israeli Supreme Court authorized for the first time a gain-based remedy for contractual breach. 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." 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. 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. He similarly notes that efficiency only supports *Surrey*. Unsatisfied, Professor Dagan analyzes one additional normative value: "[G]ood faith." 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*." Instead, good faith doctrines support a third possible alternative to *Surrey* and *Adras*—dividing the unexpected benefits of profits between the contractual parties. 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." Professor Dagan proposes a "cooperative

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. 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." Accordingly, if a contractual party stands to benefit unexpectedly, that party should "share" the benefits with the other party.

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." 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." 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." 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." 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?"

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

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190. Id. at 149.
191. Id.
192. Id.
193. Id.
194. Id.
195. Id. at 149–50.
196. Id. at 150.
197. Id.
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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. 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." 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?" 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."

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."

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205. Id. at 311.
206. Id. at 312.
207. Id. at 330.

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. 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. 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.'

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. He maintains that private law remedies "entail... correlative gain and loss." 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." 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.

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

[Plaintiff’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

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Id. at 330 n.29.
209. Id. at 311, 330.
210. Id. at 311-12.
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.\textsuperscript{216}

Regarding the second challenge, Professor Benson notes the premise that contract rights lie \textit{in personam} rather than \textit{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."\textsuperscript{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?"\textsuperscript{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."\textsuperscript{219} Professor Benson acknowledges that such a contractual right is "not proprietary" and thus "must be \textit{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.\textsuperscript{220} Accordingly, for contractual acquisition, "performance or delivery \textit{merely} represents a physical event that exhibits the promisor's respect for the promisee's already and fully established right."\textsuperscript{221}

Then, Professor Benson, invoking Kantian ethics, completes the picture regarding the existence of both an \textit{in personam} and \textit{in rem} classifications for contract law.\textsuperscript{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."\textsuperscript{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."\textsuperscript{224} Then, he returns to the hypothetical breacher modeled

\begin{itemize}
\item \textsuperscript{216} \textit{Id.}
\item \textsuperscript{217} \textit{Id.} at 321.
\item \textsuperscript{218} \textit{Id.} at 322.
\item \textsuperscript{219} \textit{Id.}
\item \textsuperscript{220} \textit{Id.}
\item \textsuperscript{221} \textit{Id.} at 324.
\item \textsuperscript{222} \textit{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)).
\item \textsuperscript{223} Benson, \textit{supra} note 204, at 324.
\item \textsuperscript{224} \textit{Id.}
\end{itemize}
to contract law. If defendant seller promises to sell unique 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." Between only the initial two parties "there is a misappropriation by the defendant of what belongs to the plaintiff," and similar to a property right, "the profit can in principle represent the value of the injury to the plaintiff's exclusive right." Thus, Professor Benson concludes there is no reason to deny the contractual plaintiff disgorgement or gain-based damages.

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. 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." 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. 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.
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 Mclnnes, 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 Mclnnes 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 Mclnnes 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. Mclnnes, supra note 7, at 231.
235. Id.
236. Id. at 229.
237. Id. at 226. Professor Mclnnes 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 Mclnnes, Wrotham rests more naturally on a "compensatory purpose" in providing a substitutionary relief for plaintiff's "lost opportunity to bargain." Mclnnes, 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 Mclnnes'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.\textsuperscript{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."\textsuperscript{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."\textsuperscript{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."\textsuperscript{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.\textsuperscript{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

\begin{quote}
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.
\end{quote}

\textit{Id.}

\textsuperscript{241.} \textit{Id.} at 234.

\textsuperscript{242.} \textit{Id.}

\textsuperscript{243.} \textit{Id.}

\textsuperscript{244.} \textit{Id.} at 236 (citing R. Nolan, \textit{Remedies for Breach of Contract: Specific Performance and Restitution, in Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences 34, 37} (F. Rose ed., 1997)).

\textsuperscript{245.} \textit{Id.} at 234. McInnes cites \textit{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." \textit{Id.} 234–35 n.32. The Blake quote evidences both a goal of specific and general deterrence. \textit{See also id.} at 236 ("As evidenced in \textit{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.\textsuperscript{246} Under the first theory, gain-based recovery "would constitute a principled proxy for the actual performance to which plaintiff was entitled."\textsuperscript{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."\textsuperscript{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."\textsuperscript{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.\textsuperscript{250} The third specific performance theory grounded in the proprietary effect, however, Professor McInnes views as "the most compelling."\textsuperscript{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."\textsuperscript{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."\textsuperscript{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

\textsuperscript{246} Id. at 237-41.
\textsuperscript{247} Id. at 237.
\textsuperscript{248} Id.
\textsuperscript{249} Id. at 237-38.
\textsuperscript{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.
\textsuperscript{251} Id.
\textsuperscript{252} Id. at 238-39.
\textsuperscript{253} Id. at 240.
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would need to find public policy, such as deterrence, as a compelling reason to disgorge benefits defendant wrongfully attained. 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. Ultimately, Professor Hunter argues that Professor Waddams's classifications supporting restitution for breach of contract—(i) lost opportunity to bargain, (ii) equity-protected interests, 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

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254. *Id.* at 241.

255. *Id.*


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.


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.""); 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," but ultimately reasons that disgorgement is inconsistent with the internal coherence of contract law within a corrective justice frame. Professor Weinrib centers the analysis on this driving principle: "The role of remedy in corrective justice is simply to undo injustice between the parties." In fact, he clarifies that under a corrective justice model this is the only task. 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. As a preliminary matter, Professor Weinrib queries whether contract law's default of expectancy damages fits within corrective justice. 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." 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. 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. 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." Such a result,


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.
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.\textsuperscript{276}

In Professor Weinrib's opinion, Immanuel Kant better resolves the compensation conundrum embedded in contract law's standard of expectancy.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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."\textsuperscript{280} Importantly, this view of contractual right extends "one's entitlement to the external object even when one is not using or possessing it."\textsuperscript{281} This right exists "against the specific person obligated to perform the requisite act."\textsuperscript{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."\textsuperscript{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."\textsuperscript{284}

Having laid a proper foundation for contract's expectancy default, Professor Weinrib then addresses whether contract law can permit an extension to disgorgement.\textsuperscript{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

\textsuperscript{276} Id. at 65.
\textsuperscript{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)).
\textsuperscript{278} Id.
\textsuperscript{279} Id. at 65--66.
\textsuperscript{280} Id. at 67.
\textsuperscript{281} Id. at 66.
\textsuperscript{282} Id. at 67.
\textsuperscript{283} Id. at 68--69.
\textsuperscript{284} Id. at 70.
\textsuperscript{285} Id. at 70--84.
profit from their wrongs." 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." 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?" 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," Professor Weinrib finds that disgorgement, despite its "obvious moral resonance," cannot comport with the requirements of corrective justice. 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." 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. 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." Professor Weinrib continues that neither the "instrumentalist" reasoning of Adras or Blake cure this problem. Rather, in his assessment, the rationale of both cases "is incompatible with the correlative structure of corrective justice." Short of

286. Id. 70-71.
287. Id. at 72.
288. Id.
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.\textsuperscript{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."\textsuperscript{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."\textsuperscript{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.

\textit{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

\textsuperscript{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 \textit{Blake} that there is no justification for treating contractual
rights as less worthy than property rights. Id. at 80–81.

\textsuperscript{298} Id. at 82.

\textsuperscript{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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