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## The Restitution Revival and the Ghosts of Equity

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# The Restitution Revival and the Ghosts of Equity

Caprice L. Roberts\*

## *Abstract*

*A restitution revival is underway. Restitution and unjust enrichment theory, born in the United States, fell out of favor here while surging in Commonwealth countries and beyond. The American Law Institute's (ALI) Restatement (Third) of Restitution & Unjust Enrichment streamlines the law of unjust enrichment in a language the modern American lawyer can understand, but it may encounter unintended problems from the law-equity distinction.*

*Restitution is often misinterpreted as always equitable given its focus on fairness. This blurs decision making on the constitutional right to a jury trial, which "preserves" the right to a jury in federal and state cases for "suits at common law" satisfying specified dollar amounts. Restitution originated in law, equity, and sometimes both. The Restatement notably attempts to untangle restitution from the law-equity labels, as well as natural justice roots. It explicitly eschews equity's irreparable injury prerequisite, which historically commanded that no equitable remedy would lie if an adequate legal remedy existed.*

*Can restitution law resist hearing equity's call from the grave? Will it avoid the pitfalls of the Supreme Court's recent injunction cases that return to historical, equitable principles and reanimate equity's irreparable injury rule? Losing anachronistic, procedural remedy barriers is welcome, but*

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*the Restatement must be careful to maintain the soul of unjust enrichment, which includes flexibility, creativity, justice and morality underpinnings, and discretion. The project's success depends on streamlining the language, unhinging from equity's arcane procedures, and providing guidance for bounded discretion.*

*I argue that the ALI's groundbreaking restitution project will suffer because it adopts language of inadequacy and affirms the hierarchy of remedies, which prefers legal to equitable remedies. The Restatement notably liberates all restitutionary remedies, including those emanating from equity (e.g., constructive trusts), from demonstrating the inadequacy of available remedies at law. This shift moves in the right direction, but ultimately the project falls short in a provocative section that authorizes disgorgement of profits for opportunistic breaches of contract.*

*The disgorgement remedy reallocates the breacher's wrongful profit to the plaintiff if the breach is deliberate and profitable and the contractual entitlement inadequately protected. Disgorgement is an alternate remedy to traditional contract damages and, notably, would apply without the contractual breach rising to the level of a tort or breach of fiduciary duty.*

*The inadequacy requirement may purposefully narrow a bold, and perhaps feared, disgorgement remedy, but it creates unnecessary confusion by taking the focus away from the breacher's opportunism and redirecting the focus to the adequacy of plaintiff's compensation. Even as the restitution revival garners traction, inadequacy haunts this important restitutionary remedy with equity's ghosts.*

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*I. Restitution, the Elusive Merger of Law and Equity & Irreparable Injury*

A restitution revival is underway in the United States.<sup>1</sup> Scholarly interest and cases involving the law of restitution and unjust enrichment are increasing in the United States. International scholars, long intrigued by restitution doctrine, are watching American developments with renewed interest. The primary catalyst for the revival is the ALI's restitution project, The Restatement (Third) of Restitution & Unjust Enrichment.<sup>2</sup> The Restatement's Reporter, Professor Andrew Kull, the ALI Restitution Advisers, and the ALI Members Consultative Group have dedicated fifteen years to the project.<sup>3</sup> In May 2010, the ALI voted to approve the Restatement, which was recently published in July 2011.

This Article addresses the extent to which equity's ghosts will haunt the revival. The focus will be on two particular threats: (i) Will fear of all things equity cause total abandonment of unjust enrichment's roots in justice and fairness, and (ii) will equity's nettlesome procedures undermine the launch of an exciting new rule that provides for restitutionary disgorgement for opportunistic breach of contract? I answer yes to both questions,<sup>4</sup> but offer normative approaches for retaining restitution's historical justice roots, while exorcizing the restitutionary disgorgement remedy from burdensome equitable prerequisites, including the irreparable injury rule and other alternative formulations.<sup>5</sup>

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1. *See infra* Part III (providing a full discussion of America's restitution revival).

2. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT (2011) [hereinafter RESTATEMENT (THIRD)].

3. In full disclosure, my initial interest in and critique of the Restatement (Third) project began when I was an outsider to the process. In 2008, I became an elected member of the ALI and had the good fortune to participate in the final waves of restitution revisions as a member of the Consultative Group.

4. *See infra* Parts III & IV.

5. *See infra* Part IV.

Why does the law-equity divide remain relevant? The complete merger of law and equity remains elusive. Court systems are no longer separated. The Federal Rules of Civil Procedure merged in 1938.<sup>6</sup> Almost all states have merged law and equity courts.<sup>7</sup> Students often fail to understand the contemporary relevance of studying equity. Good-faith efforts to teach it are inherently anachronistic. Many of the core law school courses that traditionally covered equity have faded from the curriculum.

Value remains in appreciating America's law and equity origins for historical reasons alone. The import of the law-equity distinction, however, extends beyond its historical context. Comprehension is imperative because both federal and state constitutions hinge the right to a jury trial on the distinction. The Seventh Amendment of the United States Constitution guarantees the right to trial by jury in certain civil cases: "*In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*"<sup>8</sup> The Court has not incorporated the Seventh Amendment jury trial right to the states by means of the Fourteenth Amendment. Nevertheless, state constitutions have analogous guarantees.<sup>9</sup> The Supreme Court has interpreted the Seventh Amendment's introductory clause, "In Suits at common law," to provide a right to trial by jury if the right to trial by jury existed at common law.<sup>10</sup> If, instead, a judge sitting in equity historically handled the matter, then there was no right to a jury trial. The judge-jury issue turns on "whether the case before [the court] is one that would have been brought at law or in equity in 1791."<sup>11</sup> Thus, the law-equity distinction is dispositive.

Unfortunately, determining whether the remedy is legal or equitable is no simple task. Many urge the adoption of a functional test that would

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6. FED. R. CIV. P. 2 advisory committee's note.

7. For example, Virginia held out until 2006. *See* VA. SUP. CT. R. 3:1. Delaware continues to retain its separate Chancery court system.

8. U.S. CONST. amend. VII (emphasis added).

9. *See, e.g.*, CAL. CONST. art. 1, § 16; VA. CONST. art. 1, § 11; N.J. CONST. art. 1, § 9. State constitutional language usually differs from the federal Seventh Amendment's, but the law-equity distinction remains for states' constitutional jury trial rights.

10. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998) (finding a right to jury trial in federal copyright actions based on historical English practice).

11. RESTATEMENT (THIRD) § 4 cmt. a.

examine the nature and purpose of the remedy.<sup>12</sup> Accordingly, if plaintiff, for example, seeks compensatory damages, her remedy is legal and triggers a jury trial right on seeking the requisite constitutional monetary amount. In contrast, if plaintiff seeks injunctive relief, the remedy is equitable and determined by a judge. Modern Supreme Court jurisprudence follows a more cumbersome, less predictable path.<sup>13</sup> In an opinion authored by Justice Clarence Thomas, the Court applied a history-plus-remedy test: the nature of the cause of action and the remedy sought.<sup>14</sup> In *Feltner v. Columbia Pictures*,<sup>15</sup> Justice Thomas decided that the Court could not avoid the constitutional jury trial right issue via statutory interpretation of the Copyright Act<sup>16</sup> and ultimately found that a constitutional right to a jury trial existed based on the history of copyright actions and their corresponding remedies.<sup>17</sup> Thus, students and lawyers have to study and

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12. See, e.g., DOUG RENDLEMAN & CAPRICE L. ROBERTS, REMEDIES—CASES & MATERIALS 346 (8th ed., 2011) ("There is constant pressure to utilize the remedies test for the parties' right to a jury trial. That test is more practical and easier to apply."); *Chauffeurs v. Terry*, 494 U.S. 558, 572–80 (1990) (Brennan, J., concurring) (advocating a remedies test); see also *Wooddell v. Int'l Bhd. of Elec. Workers, Local 71*, 502 U.S. 93, 97 (1991) (maintaining that the legal or equitable nature of the remedy sought is the "more important" part of the analysis); *Pereira v. Farace*, 413 F.3d 330, 337 (2d Cir. 2005) (giving more weight to the remedies test); *C & K Eng'g Contractors v. Amber Steel Co.*, 587 P.2d 1136, 1143 (Cal. 1978) (Newman, J., dissenting) ("[T]he basic rule should be that no jury is required when plaintiff seeks equitable relief rather than 'legal' damages. That approach requires no complex, historical research regarding when and by whom certain rights were created. It also requires less reliance on the anomalies of England's unique juridical history.").

13. See RENDLEMAN & ROBERTS, *supra* note 12, at 345 (explaining the shift in the Supreme Court's jurisprudence on the jury trial issue from "a more practical and simpler criterion of whether the plaintiff's demand seeks money" in *Dairy Queen v. Wood*, 369 U.S. 469, 476–79 (1962), to a three-part test in *Ross v. Bernhard*, 396 U.S. 531 (1970)). The three relevant considerations, according to the Court in *Ross*, were (1) the particular cause of action's history before law and equity merged, (2) the type of relief sought, and (3) the jury's practical ability to resolve the issues. *Id.* at 538 n.10. Later, the Court seemingly abandoned *Ross*'s third factor—the jury's practical ability—and moved to a two-part analysis of the "nature of the issues involved and the remedy sought." See *Wooddell*, 502 U.S. at 97 ("First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature."); see also *Feltner*, 523 U.S. at 355 (claiming to "examine both the nature of the statutory action and the remedy sought," but devoting the bulk of analysis to the history of the action).

14. *Feltner*, 523 U.S. at 355.

15. *Id.* at 340.

16. *Id.* at 345, 352.

17. Ironically, the defendant had requested the jury trial, but would have been better

research the law-equity distinction as it directly affects a pivotal matter in lawsuits—whether the parties will have a right to a jury trial.<sup>18</sup>

Merger remains elusive in part because of the jury trial right issue, but also due to the remnants of equitable tests that continue to operate as prerequisites for access to certain remedies. The irreparable injury test commands that no equitable remedy will flow if adequate legal remedy exists.<sup>19</sup> This test is oft repeated but rarely understood or applied consistently.<sup>20</sup> The intractable hold of the irreparable injury rule and the rhetoric of inadequacy may muddy the waters for the rollout of the new Restatement.

## *II. The Irreparable Injury Rule Is Dead. Long Live the Irreparable Injury Rule.*

Two decades ago, Professor Laycock provocatively declared the death of the irreparable injury rule.<sup>21</sup> This conclusion rested on his realist evaluation of vast remedies caselaw.<sup>22</sup> Professor Laycock diligently compiled and dissected the cases in a law review article,<sup>23</sup> which he

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off with the trial judge's statutory award of damages (\$8.8 million, at \$20,000 per 440 episode violations), *id.* at 344, rather than what the jury ultimately awarded (\$31.68 million, at \$70,000 multiplied by 440 acts of infringement). See *Columbia Pictures Television v. Krypton Broad., Inc.*, 259 F.3d 1186, 1190–91 (9th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002).

18. For a useful critique of the law-equity reasoning, see Tomás Gómez-Arostegui, *The Untold Story of the First Copyright Suit Under the Statute of Anne in 1710*, 25 BERKELEY TECH. L.J. 1247 (2010).

19. See *The Changing Limits of Injunctive Relief*, 78 HARV. L. REV. 997, 997 (1965) ("Few legal rubrics can vie in frequency of use with the maxim that equity will not grant specific relief—injunction or specific performance of contracts—when there exists any adequate remedy at law."); see also RENDLEMAN & ROBERTS, *supra* note 12, at 266–69 (describing the history and persistence of the traditional maxim, "the plaintiff's inadequate legal remedy, irreparable injury").

20. See Doug Rendleman, *Irreparability Irreparably Damaged*, 90 MICH. L. REV. 1642, 1649 (1992) ("The words *irreparable*, *injury*, and *inadequate* became transmogrified into idiom and lost their ordinary meaning in the vernacular.").

21. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 692 (1990).

22. *Id.* at 701.

23. *Id.*

subsequently expanded into a now-seminal book, *The Death of the Irreparable Injury Rule*.<sup>24</sup>

He meticulously analyzed hundreds of cases to establish that the irreparable injury rule "does not describe what cases do, and it cannot account for the results."<sup>25</sup> Professor Laycock asserted that the rule "highlights the obsolete distinction between law and equity, and subordinates more functional schemes for classifying remedies."<sup>26</sup> He further explained that the rule does not operate as a genuine prerequisite. Rather, according to Professor Laycock, "Injunctions are routine, and damages are never adequate unless the court wants them to be."<sup>27</sup> His evidence demonstrated that other reasons and rules actually motivate the court decisions. He admitted, however, that "when courts invoke these rules, they often go on to invoke the irreparable injury rule as well."<sup>28</sup>

Accordingly, Professor Laycock advised that "[a]nalysis would be both simpler and clearer if we abandoned the rhetoric of irreparable injury and spoke solely and directly of the real reasons for choosing remedies."<sup>29</sup> I agree with that prescription, which is no less needed today than it was twenty years ago. Further, Professor Laycock rightly sought "to complete the assimilation of equity, and to eliminate the last remnant of the conception that equity is subordinate, extraordinary, or unusual." Not all scholars agree with the goal of equalizing the remedial playing field to include non-preferential treatment for legal versus equitable remedies.<sup>30</sup> The complete assimilation goal should garner broad support. Ultimately, Professor Laycock urged switching from the law-equity framing to a functional analysis: "[I]s the remedy specific or substitutionary, is it a personal command or an impersonal judgment, is it preliminary or

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24. DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* (1991).

25. Laycock, *supra* note 21, at 692.

26. *Id.* at 769.

27. *Id.* at 692.

28. *Id.* at 693.

29. *Id.*

30. See, e.g., Rendleman, *supra* note 20, at 1642 (reviewing Professor Laycock's book). For two other thoughtful pieces on the meaning of inadequacy and the irreparable injury rule before and after Professor Laycock's obituary of the rule, see Doug Rendleman, *Irreparability Resurrected? Does a Recalibrated Irreparable Injury Rule Threaten the Warren Court's Establishment Clause Legacy?*, 59 WASH. & LEE L. REV. 1343 (2002) and Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346 (1981); see also JAMES M. FISCHER, *UNDERSTANDING REMEDIES* § 21 (2006) (maintaining that Professor Laycock called time of death too early).



permanent? On the facts of each case, does plaintiff's preferred remedy impose unnecessary costs, or undermine substantive or procedural policies?"<sup>31</sup>

Overall, Professor Laycock's proof of the rule's lack of descriptive or predictive value is compelling. But the irreparable injury rule, along with its inadequacy prerequisite, is not dead. In my opinion, the rule is not alive and well but, rather, rattles about like the undead. Lip service and rhetoric persist. Confusion continues. Even the Supreme Court is part of the problem. The ALI seeks to be part of the assimilation solution,<sup>32</sup> but the Restatement (Third) of Restitution & Unjust Enrichment runs the risk of exacerbating the confusion by utilizing an inadequacy inquiry in its new rule permitting disgorgement for opportunistic breaches of contract.<sup>33</sup> This temptation for confusion is heightened by the Supreme Court's resurrection of the irreparable injury rule and the inadequacy-of-legal-remedies test.

Despite progress on the merger of law and equity, the Supreme Court's recent foray into the law of injunctions represents a move backwards.<sup>34</sup> In *eBay Inc. v. MercExchange, L.L.C.*,<sup>35</sup> and its progeny,<sup>36</sup> the Supreme Court reanimated irreparability and inadequacy as hurdles—two separate hurdles in fact—to the equitable remedy of injunction.<sup>37</sup> In

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31. Laycock, *supra* note 21, at 693.

32. RESTATEMENT (THIRD) § 4.

33. *Id.* § 39.

34. Unfortunately, the Supreme Court's remedies analysis all too often falls short on its doctrinal purity. *See, e.g.,* *Snepp v. United States*, 444 U.S. 507, 515–16 (1980) (approving restitutionary disgorgement via a constructive trust remedy without a proper doctrinal foundation—operating as if the former CIA agent had breached his fiduciary duty when he, in fact, breached only the prepublication clearance clause of his contract); *see also* Caprice L. Roberts, *A Commonwealth of Perspective on Restitutionary Disgorgement for Breach of Contract*, 65 WASH. & LEE L. REV. 945, 956 n.53 (2008) (criticizing the Court's doctrine-to-remedy analysis in *Snepp*). The author will analyze the Court's remedies failures in a forthcoming manuscript.

35. *See eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391–92 (2006) (finding courts must apply the "traditional four-part test" in deciding whether to grant permanent injunctions in patent cases).

36. *See Monsanto v. Geerston Seed Farms*, 130 S. Ct. 2743, 2759 (2010) (finding that the lower courts failed to properly apply a four-part test in granting permanent injunction against manufacturer of genetically engineered alfalfa during course of federal agency's environmental impact study); *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 32–33 (2008) (overturning preliminary injunction against Navy sonar testing after finding NRDC had failed to prove likelihood of irreparable harm to marine mammals).

37. *See eBay*, 547 U.S. at 391 (identifying "irreparable injury" and "inadequacy" as

*eBay*, the Court considered what level of discretion would be appropriate for a court to exercise in granting or denying permanent injunctive relief for a proven patent violation.<sup>38</sup> The district court had denied the injunction on the basis of failure to demonstrate irreparable injury: "[I]t concluded that a 'plaintiff's willingness to license its patents' and 'its lack of commercial activity in practicing the patents' would be sufficient to establish that the patent holder would not suffer irreparable harm if an injunction did not issue."<sup>39</sup> The federal appellate court granted the permanent injunction as a matter of automatic entitlement based on the proven patent violation: "The court articulated a 'general rule,' unique to patent disputes, 'that a permanent injunction will issue once infringement and validity have been adjudged.'"<sup>40</sup>

Ultimately, the *eBay* Court found that both the federal district and appellate courts erred in failing to "fairly" apply the "four-factor test historically employed by courts of equity"—the same test "[o]rdinarily" applied by "a federal court considering whether to award permanent relief to a prevailing plaintiff."<sup>41</sup> In rigid fashion, the Court reset the equitable table by cementing the required analysis:

According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) *that it has suffered an irreparable injury*; (2) *that remedies at law, such as monetary damages, are inadequate to compensate for that injury*; (3) *that, considering the balance of hardships between plaintiff and defendant, a remedy in equity is warranted*; and (4) *that the public interest would not be disserved by a permanent injunction*.<sup>42</sup>

Without explicating the quantum of proof required for the four factors, the Court simply ruled that both lower courts did not fairly apply the factors due to their categorical leanings in opposite directions. The Court reasoned that both lower courts faltered by rigidly conducting the equitable analysis: "Just as the District Court erred in its categorical

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two of the salient factors for consideration).

38. *Id.* at 390.

39. *Id.* at 393 (quoting *MercExchange, L.L.C., v. eBay*, 275 F. Supp. 2d 695, 711 (E.D. Va. 2003)), *vacated*, 401 F.3d 1323, 1338–39 (Fed. Cir. 2005).

40. *Id.* at 393–94 (quoting *MercExchange, L.L.C. v. eBay*, 401 F.3d 1323, 1338–39 (Fed. Cir. 2005)).

41. *Id.* at 390.

42. *Id.* at 391 (emphasis added).

denial of injunctive relief, the Court of Appeals erred in its categorical grant of such relief."<sup>43</sup> Ultimately, the Supreme Court vacated the court of appeals' judgment and remanded to the district court so that the district court could conduct the four-factor analysis and determine whether a permanent injunction should issue in the particular case.<sup>44</sup> The Court explicitly declined to indicate whether injunctive relief should be granted.<sup>45</sup>

Most notably, the Court failed to provide any meaningful guidance on the interpretation of the irreparable injury factor and the (strangely) separate inadequate-legal-remedies factor. The Court did state the classic inadequacy question for the second factor: "Whether monetary damages are inadequate to compensate for that injury."<sup>46</sup> It is no wonder that, on remand, the federal district court reached its original conclusion, to deny injunctive relief on the basis of lack of irreparable injury.<sup>47</sup> The district court lamented the lack of guidance on the quantum of proof required for satisfying the irreparable injury factor.<sup>48</sup>

The Supreme Court echoed and extended the remedial lockstep hurdles in *Winter v. Natural Resources Defense Council*<sup>49</sup> and *Monsanto v. Geertson Seed Farms*.<sup>50</sup> In *Winter*, the Court extended the *eBay* framework to a preliminary injunction beyond the intellectual property context. The *Winter* plaintiffs alleged irreparable environmental harm from Navy sonar

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43. *Id.* at 394.

44. *Id.* As it turns out, on remand, the district court went through the motions of the four-factor test, but again declined to grant plaintiff an injunction. *MercExchange, L.L.C. v. eBay, Inc.*, 500 F. Supp. 2d 556, 590 (E.D. Va. 2007). The district court limited its injunction holding by stating that its "determination that MercExchange fails to establish irreparable harm is based upon facts specific to this case and not broad classifications or categorical exclusions of certain types of patent holders." *Id.* at 570. The court noted, "Although the 'quantum of evidence' required to prove irreparable harm remains unclear, the *potential* for loss of market share is insufficient to establish the same; otherwise a scenario would never arise where an injunction would not issue." *Id.* at 577.

45. *eBay, Inc. v. MercExchange*, 547 U.S. 388, 394 (2006).

46. *Id.* at 391.

47. *MercExchange*, 500 F. Supp. 2d at 570.

48. *Id.* at 577.

49. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 32 (2008) (assessing propriety of injunctive relief to protect marine wildlife from sonar damage).

50. *See Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010) (applying the "traditional" four-factor test in overturning trial court's grant of a permanent injunction to remedy a proven National Environmental Policy Act violation) (quoting *eBay*).

testing.<sup>51</sup> The Supreme Court found the lower court's irreparability standard in error because the court awarded an injunction based on a "possibility," rather than a "likelihood," of irreparable harm.<sup>52</sup> Ultimately, the Court found the grant of a preliminary injunction in error because of the incorrectly applied lower standard for risk of harm, the tip of the balance of the equities in the Navy's favor, and the disservice of the public interest if the injunction issued.<sup>53</sup>

It was news to remedies and injunctions scholars that the four-factor test was the required "traditional," "ordinarily" applied, familiar test; scholars "consider the Court's four-point test to be new."<sup>54</sup> Courts have historically utilized many balancing techniques in evaluating whether to grant equitable relief, including sliding scale tests.<sup>55</sup> Scholars and courts may now follow the Court's edict and apply the four-factor test for intellectual property injunctions and beyond. Analyses and criticisms abound,<sup>56</sup> however, and at least one scholar argues that the four factors

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51. *Winter*, 129 U.S. at 371.

52. *Id.* at 375.

53. *Id.* at 381.

54. RENDLEMAN & ROBERTS, *supra* note 12, at 273.

55. *See, e.g.*, *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 976 (10th Cir. 2004) (en banc) (declaring that a movant seeking a disfavored injunction "must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms, and may not rely on our modified likelihood-of-success-on-the-merits standard"). This modified standard requires a movant who makes a weaker showing of likelihood of success on the merits to make a strong showing that the balance of irreparable injury favors her. *See Winter*, 555 U.S. at 33 ("[C]ourts have evaluated claims for equitable relief on a 'sliding scale,' sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high") (Ginsburg, J., dissenting). It is unclear whether sliding scale tests will survive after *eBay* and *Winter*. *See id.* ("This Court has never rejected [a sliding scale] formulation, and I do not believe it does so today.") (Ginsburg, J., dissenting). Other courts continue to use a balancing test for the success-on-the-merits factor. *See, e.g.*, *Salinger v. Colting*, 607 F.3d 68, 79 (2d Cir. 2010) ("[P]laintiff [must] demonstrate[] 'either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of the hardships tipping decidedly in the [plaintiff]'s favor.'" (emphasis added).

56. *See generally* James M. Fischer, *What Hath eBay v. MercExchange Wrought*, 14 LEWIS & CLARK L. REV. 555 (2010); Rachel M. Janutis, *The Supreme Court's Unremarkable Decision in eBay Inc. v. MercExchange, L.L.C.*, 14 LEWIS & CLARK L. REV. 597 (2010); J. Scott Larson, *The Unsettled Aftereffects of eBay and Survey of Its Continued US Litigation Impact*, 22 INTELL. PROP. & TECH. L.J. 5 (2010); Stacy Streur, *The eBay Effect: Tougher Standards but Courts Return to the Prior Practice of Granting Injunctions for Patent Infringement*, 8 NW. J. TECH. & INTELL. PROP. 67 (2009); Tracy Thomas, *eBay Rx*, 2 AKRON INTELL. PROP. J. 187 (2008).

should be affirmative defenses, with the burden on the defendant to plead and prove them.<sup>57</sup>

It remains to be seen whether the Court's reanimation of the irreparable injury and inadequacy prerequisites will filter through decisionmaking regarding all equitable remedies. The disgorgement remedy for breach of contract runs a peculiar risk because, although the Restatement declares the remedy legal, its incorporation of inadequacy rhetoric may result in the remedy being hoisted by its own p  tard.

### *III. Restitution Revival and the Shackles of Equity*

#### *A. Restitution in a Global Context*

According to lore, the United States gave birth to the law of unjust enrichment. Credit for this title is owed, at least in part, to the ALI's first restatement project on restitution released in 1937.<sup>58</sup> The philosophical roots of restitution, however, predate the first restatement contribution. Long before the ALI put pen to paper, the law recognized the maxim that you cannot reap what another sows.<sup>59</sup> Still, the first restatement offered a blackletter, compiled bedrock for the development of restitution jurisprudence. With the inaugural restitution work, combined with Palmer's treatise,<sup>60</sup> the law of restitution seemed set to blossom. In the decades following 1937, however, the law of restitution and unjust enrichment thrived internationally, especially in Commonwealth countries, but waned in the United States.<sup>61</sup>

Interest in and understanding of restitution has faded in the United States. Commonwealth scholars are engaged in vigorous debate about the contours of restitution's doctrinal scope.<sup>62</sup> They are leading the charge for

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57. Doug Rendleman, *The Trial Judge's Equitable Discretion Following eBay v. MercExchange*, 27 REV. LIT. 63 (2008).

58. RESTATEMENT (FIRST) OF RESTITUTION (1937) [hereinafter RESTATEMENT (FIRST)].

59. See *A.P. v I.N.S.*, 248 U.S. 215, 239–40 (1918) (characterizing defendant's unauthorized behavior as an unfair business practice where defendant "is endeavoring to reap where it has not sown").

60. See generally GEORGE E. PALMER, *THE LAW OF RESTITUTION* (1978).

61. See ANDREW BURROWS, *THE LAW OF RESTITUTION* (3d ed. 2011); Chaim Saiman, *Restitution in America: Why the U.S. Refuses to Join in the Global Restitution Party*, 28 OXFORD J. LEGAL STUD. 99, 100–02 (2008) [hereinafter Saiman, *Restitution in America*].

62. Roberts, *A Commonwealth of Perspective*, *supra* note 34, at 968–90.

the advancement of the modern law of restitution. Sadly, by comparison, the contemporary American lawyer, especially a recent graduate, may have little to no comprehension of restitution law. Modern American lawyers, if prompted, may have a dim recollection of their Contracts professor introducing the quasi-contract fiction of creating an exchange of promises in order to return the parties to the *status quo ante*<sup>63</sup>—for example, returning money paid for no return consideration<sup>64</sup>—or awarding quantum meruit<sup>65</sup> for services rendered under an unenforceable contract.<sup>66</sup> American courts have continued to issue restitutionary rulings but, all too often, the doctrinal logic is utterly absent,<sup>67</sup> the terminology misstated,<sup>68</sup> and the law misconstrued.<sup>69</sup> All hope is not lost, however, for American lawyers and scholars to revive their interest in restitution law.

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63. *Status quo ante* means "to return the parties to the positions they held prior to any exchange." Professor Perillo argues that if restitution has the goal of restoring the status quo, it would allow, when the contract is invalid, a restitution remedy for the cost of performing or preparing to perform. Joseph M. Perillo, *Restitution in a Contractual Context and the Restatement (Third) of Restitution & Unjust Enrichment*, 68 WASH. & LEE L. REV. 1007 (2011).

64. *See, e.g., Neri v. Retail Marine Corp.*, 285 N.E.2d 311, 314 (N.Y. 1972) (permitting boat seller to recover expected profit as a lost volume seller, offset by a return of plaintiff's down payment).

65. Quantum meruit means literally "as much as he deserves" or "the reasonable value of one's services."

66. *See, e.g., Britton v. Turner*, 6 N.H. 481, 1834 WL 1176, at \*9 (N.H. 1834).

67. *See, e.g., Snapp v. United States*, 444 U.S. 507 (1980).

68. *See* RENDLEMAN & ROBERTS, *supra* note 12, at 493–94 (outlining numerous restitution equitable fallacies uttered by courts).

69. *See, e.g., Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255–56 (1993) (describing restitution—incompletely—as "a remedy traditionally viewed as 'equitable'" and emphasizing—misleadingly—that "'equitable relief' can also refer to those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)"); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) (lamenting the Court's muddled ERISA jurisprudence regarding federal "equitable" remedies and calling for the Court or Congress to forge a fresh remedial structure in order to remedy the colossal misunderstanding and injustices that would otherwise flow to plaintiffs under existing caselaw). *But cf. Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212–17, 218 n.4 (2002) (Scalia, J.) (noting properly the difference between legal restitution and equitable restitution, but unfortunately utilizing the incorrect term of "damages" for Great-West's freestanding restitution claim for monetary relief); *Sereboff v. Mid Atlantic Med. Serv., Inc.*, 547 U.S. 356, 357 (2006) (describing accurately the fiduciary's claim for a constructive trust or equitable lien as "equitable" restitution). For a thoughtful analysis of Justice Antonin Scalia's contribution to restitution jurisprudence, see generally Tracy A. Thomas, *Justice Scalia Reinvents Restitution*, 36 LOY. L.A. L. REV. 1063 (2003). Although errors abound on both the federal and state level, there

Leading up to and coinciding with the recent Restatement project, American scholarly interest in restitution has been on the rise. Significant contributions include the seminal works of Professors Andrew Kull,<sup>70</sup> Allan Farnsworth,<sup>71</sup> Jack Dawson,<sup>72</sup> Doug Rendleman,<sup>73</sup> Jim Rogers,<sup>74</sup> Peter Linzer,<sup>75</sup> and Mel Eisenberg.<sup>76</sup> Other important contributions did not shy away from the intricate study that restitution law demands across disciplines, such as the work of Professor Candace Kovacic-Fleischer in family law,<sup>77</sup> Professor Emily Sherwin in varied areas,<sup>78</sup> and Professor Sid

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are numerous court opinions that correctly distinguish legal restitution from equitable restitution. See, e.g., *First Nat'l Bank of DeWitt v. Cruthis*, 203 S.W.3d 88 (Ark. 2005) (recognizing the distinction and finding a jury trial proper for the legal restitution at issue).

70. Andrew Kull, *Disgorgement for Breach, the "Restitution Interest," and the Restatement of Contracts*, 79 TEX. L. REV. 2021 (2001); Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191 (1995).

71. E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339 (1985). Although Professor Farnsworth disfavored a robust disgorgement remedy for contract law, his treatment remains seminal. The Restatement (Second) of Contracts lists the three remedial goals of contract law as the expectation, reliance, and restitution interests. RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981). It notably does not include any reference to a disgorgement interest. Professor Eisenberg maintains that this omission is "plainly deliberate" and tracks Reporter Professor Farnsworth's normative stance against recognition of the disgorgement interest in contract law. Melvin A. Eisenberg, *The Disgorgement Interest in Contract Law*, 105 MICH. L. REV. 559, 561 (2006).

72. John P. Dawson, *Restitution Without Enrichment*, 61 B.U. L. REV. 56 (1981).

73. Doug Rendleman, *Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages*, 68 WASH. & LEE L. REV. 973 (2011); Doug Rendleman, *Restating Restitution: The Restatement Process and Its Critics*, 65 WASH. & LEE L. REV. 933 (2008); Doug Rendleman, *When Is Enrichment Unjust? Restitution Visits an Onyx Bathroom*, 36 LOY. L.A. L. REV. 991 (2003); Doug Rendleman, *Quantum Meruit for the Subcontractor: Has Restitution Jumped off Dawson's Dock?*, 79 TEX. L. REV. 2055 (2001); Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 GA. L. REV. 847 (1999).

74. James Steven Rogers, *Restitution for Wrongs and the Restatement (Third) of the Law of Restitution and Unjust Enrichment*, 42 WAKE FOREST L. REV. 55 (2007).

75. Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695 (2001).

76. Eisenberg, *supra* note 71, at 561. Professor Eisenberg provides detailed case support for disgorgement, demonstrates disgorgement's ability to foster efficiency and promise-keeping goals, and compellingly argues "that contract law should and does protect the disgorgement interest." *Id.* at 562.

77. Candace S. Kovacic, *A Proposal to Simplify Quantum Meruit Litigation*, 35 AM. U. L. REV. 547 (1986); Candace S. Kovacic, *Applying Restitution to Remedy a Discriminatory Denial of Partnership*, 34 SYRACUSE L. REV. 743 (1983).

78. See generally Emily Sherwin, *Unjust Enrichment and Creditors*, 27 REV. LITIG. 141 (2008), reprinted in UNJUST ENRICHMENT (G. Radhika, ed. 2008); Emily Sherwin, *Love*,

DeLong regarding disgorgement's application in practice.<sup>79</sup> I have found the field fertile ground for scholarship,<sup>80</sup> and have also benefitted from recent thoughtful treatments by Professors Colleen Murphy,<sup>81</sup> Chaim Saiman,<sup>82</sup> and Eoin O'Dell.<sup>83</sup> These works show a resurgence of interest and appreciation for the import of restitution law, as well as significant disagreement about its interpretation and reach.

All of this scholarship and the rollout of the new Restatement will contribute to the restitution revival in the United States. As momentum continues, the American voice of restitution will regain a place in the global debate about the proper application and scope of the law of restitution and unjust enrichment.

### *B. The Restatement (Third) of Restitution & Unjust Enrichment*

The ALI approved the Restatement (Third) of Restitution & Unjust Enrichment in May of 2010<sup>84</sup> and published the work in July 2011. Law

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*Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711 (2006); Emily Sherwin, *Reparations and Unjust Enrichment*, 84 B.U. L. REV. 1443 (2004); Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083 (2001).

79. Sidney W. DeLong, *The Efficiency of a Disgorgement as a Remedy for Breach of Contract*, 22 IND. L. REV. 737 (1989).

80. Caprice L. Roberts, *The Case for Restitution and Unjust Enrichment Remedies in Patent Law*, 14 LEWIS & CLARK L. REV. 653 (2010); Caprice L. Roberts, *Restitutionary Disgorgement as a Moral Compass of Breach of Contract*, 77 U. CINN. L. REV. 991 (2009); Roberts, *A Commonwealth of Perspective*, *supra* note 34; Caprice L. Roberts, *Restitutionary Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages*, 42 LOY. L.A. L. REV. 131 (2008).

81. *See generally* Colleen P. Murphy, *What Is Specific about "Specific Restitution"?*, 60 HASTINGS L.J. 853 (2009); Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577 (2002).

82. *See generally* Chaim Saiman, *Restitution and the Production of Legal Doctrine*, 65 WASH. & LEE L. REV. 993 (2008); Chaim Saiman, *Restitution in America*, *supra* note 61; Chaim Saiman, *Restating Restitution: A Study in Contemporary Common Law Conceptualism*, 52 VILL. L. REV. 487 (2007).

83. *See generally* Eoin O'Dell, *Spies Like Us? Frank Snepp and George Blake: Freedom of Speech and Restitutionary Remedies* (Feb. 4, 2010) (unpublished manuscript), available at <http://www.scribd.com/doc/26638068/O-Dell-CLP-Paper>. Another interesting contribution is Steve Thel & Peter Siegelman, *You Do Have to Keep Your Promises: A Disgorgement Theory of Remedies*, 52 WILLIAM & MARY L. REV. 1181, 1221 (2011), but the authors' omission of the Restatement's Section 39 is difficult to understand.

84. *See* AMERICAN LAW INSTITUTE, *Current Projects: Restatement Third, Restitution and Unjust Enrichment*, [http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&project](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&project)



reform projects are not for the weary. This particular project occupied the unenviable position of updating a body of law not captured in restatement blackletter since the first restatement of restitution from 1937.<sup>85</sup> The second restatement effort never garnered approval. Now, after ten years of labor, critique, and refinement, the Restatement (Third) will make its official debut this year. The Restitution Rollout conference is part of a continued effort to introduce the new Restatement to the curiosity and candor of the professional world.<sup>86</sup>

This Restatement will help revive the American soul of restitution. It has already reengaged a dialogue among American scholars, Commonwealth scholars, and beyond.<sup>87</sup> The new Restatement will stir revival by streamlining a complex body of law into a language the modern lawyer can understand. Ideally, it will serve as a catalyst for a return of freestanding law school courses in restitution and unjust enrichment.<sup>88</sup>

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id=14 ("The final Tentative Draft of this project was approved at the 2010 Annual Meeting, subject to the discussion at the meeting and to editorial prerogative . . . . Approval cleared the way for publication of the official text of this project, which is expected in summer 2011.") (last visited Oct. 12, 2011) (on file with the Washington and Lee Law Review).

85. *See generally* RESTATEMENT (FIRST).

86. Doug Rendleman first applied this famous phrase to the Restatement as part of our Restitution Revival panel description at the Southeastern Association of Law Schools conference in 2010.

87. Numerous panels and conferences in the United States have recently focused on restitution and the Restatement (Third), including Washington and Lee University School of Law's Restitution Roundtable and Restitution Rollout Symposium, the American Association of Law Schools' Remedies Section, the Remedies Forum in Aix-en-Provence, France, the Southeastern Association of Law Schools, and the International Contracts Conference at the University of Nevada–Las Vegas and Stetson University.

88. Although the Restitution course is a staple in Commonwealth jurisdictions, the course lost favor in the American curriculum. Many of the lions in American academia once taught Restitution, but the course has all but vanished. Restitution remains a strong research interest of American scholars, but only a couple of law schools have current course offerings in restitution. For example, Professor Kull teaches Restitution at Boston University, and Professor Doug Laycock has offered a seminar in restitution at the University of Michigan and the University of Virginia. Many American law professors attempt to cover for the course's absence by teaching a healthy component of unjust enrichment law in the Remedies course. This solution is not ideal, however, for at least two reasons: (i) Remedies centers students' study on the various avenues to judicial relief rather than the underlying substantive law, while incorporating a segment on restitution requires teaching the free-standing unjust enrichment cause of action in addition to the variety of restitutionary remedies that may flow from doctrinal claims in unjust enrichment, contract, tort, intellectual property, fiduciary duty, and beyond; and (ii) the typical three-hour Remedies course has to do much heavy lifting in order to ensure students gain a capstone experience integrating review of vast bodies of underlying doctrine, learn new remedies and limits for

The complex history of restitution and its disappearance from the American legal landscape require the Restatement to do yeoman's work. The project, like all ALI efforts, must *restate* the law. But it also must do much more. The Restatement must reorganize, synthesize, translate, and redirect the future of restitution law towards its best aims and with appropriate limits.

First and foremost, the Restatement grounds American law onto one center stage. Simply put, "A person who is unjustly enriched at the expense of another is subject to liability in restitution."<sup>89</sup> Liability may stem from one or more underlying substantive causes of action, including, but not limited to, contract, tort, fiduciary duty, securities fraud, trademark infringement, and unjust enrichment. Restitution remedies include monies returned,<sup>90</sup> items returned,<sup>91</sup> quantum meruit, accounting for profits, disgorgement, and constructive trusts.

### C. *Equity's Ghosts Haunting Restitution*

The ghosts of equity loom over unjust enrichment and restitution law. Equitable ghosts may even threaten the success of the project. Restitution has a sordid past because it has existed remedially as legal, equitable, and sometimes both.<sup>92</sup> One should not mistakenly assume that restitution

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both public and private remedies, appreciate the continuing import of the law-equity divide, and prepare for practice as well as bar exams.

89. RESTATEMENT (THIRD) § 1. Even this simple statement is not without controversy. For example, the requirement that the enrichment be "at the expense of another" raises concerns because the phrase may confine unjust enrichment recovery to a narrower set of cases than courts have permitted. Doug Rendleman and I hypothetically explore this foreseeable, definitional problem:

Suppose the defendant diverted a benefit which would otherwise have gone to the plaintiff. The court may simply ignore the supposed requirement that the defendant's enrichment must be at the plaintiff's expense. Or the court may find the intercepting defendant unjustly enriched at the 'expense of' the plaintiff and order the defendant's 'restitution' of something the plaintiff never had.

RENDELMAN & ROBERTS, *supra* note 12, at 472–73.

90. Technically, money "had and received."

91. Technically, replevin or "specific restitution."

92. See RESTATEMENT (THIRD) § 4(1) ("Liabilities and remedies within the law of restitution and unjust enrichment may have originated in law, in equity, or in a combination of the two."); see also RENDELMAN & ROBERTS, *supra* note 12, at 473–95 (discussing the law-equity distinction at various points).

liability or remedies are inherently equitable.<sup>93</sup> Despite repeated clarification, the lure of such a misconception is strong. The very foundation of restitution—unjust enrichment—includes the word "unjust," which summons forth notions of equitable fairness, equitable discretion, and natural justness. Lord Mansfield famously characterized general assumpsit, now called restitution, in an equitable frame:

If the defendant be under an obligation, *from the ties of natural justice*, to refund; the law implies a debt, and gives this action, *founded in the equity* of the plaintiff's case, as it were upon a contract ("quasi ex contractu," as the Roman law expresses it) . . . .

In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity* to refund the money.<sup>94</sup>

These *unjust*—justice and equity—trappings simultaneously display beauty<sup>95</sup> while threatening an early demise of the American restitution revival.

Beauty exists in the ability of restitution doctrine to adapt and aid cases with unusual fact patterns and unforeseen circumstances.<sup>96</sup> The

93. See RESTATEMENT (THIRD) § 4 cmt. a (stating the purpose of § 4(1) "is to warn against the common misconception that liabilities or remedies described in terms of 'unjust enrichment' are necessarily equitable in origin").

94. *Moses v. MacFerlan*, (1760) 97 Eng. Rep. 676 (K.B.) 678, 681 (emphasis added); see also RESTATEMENT (THIRD) § 4 cmt. b (quoting and discussing Lord Mansfield's announcement in *Moses* of a restitution theory of liability in equitable terms). In a mistaken improvements case, Joseph Story similarly grounded restitution recovery on natural justice and equity: "[*Jure naturae aequum est, neminem cum alterius detrimento et injuria fieri locupletiolem*]' (It is a principle of natural justice and equity, that no one be enriched through loss and injury to another)." See RESTATEMENT (THIRD) § 4 cmt. b (describing Story's reliance on this Latin maxim from Roman law and noting that he "was evidently prepared to bypass the English authorities altogether" to attain relief through unjust enrichment) (quoting *Bright v. Boyd*, 4 F. Cas. 127 (C.C.D. Me. 1841); see also Andrew Kull, *James Barr Ames and the Early Modern History of Unjust Enrichment*, 25 OXFORD J. LEG. STUD. 297, 313–16 (2005) (exploring Story's influence in grounding the American law of unjust enrichment on Roman sources).

95. See RENDLEMAN & ROBERTS, *supra* note 12, at 474–77, (exploring the French decision, *Patureau-Miran C. Boudier*, *Cass. Req.*, 15 June 1892 [S.1893.1.28], as translated from the decision in JACK BEATSON & ELTJO SCHRANGE, UNJUSTIFIED ENRICHMENT 39–42); *id.* at 477 (describing the French version of unjust enrichment—the action of *de in rem verso*—as a "*supple and elastic doctrine*," which holds that "no-one should enrich himself at the expense of another without just cause; for equity does not permit it") (emphasis added and internal citations omitted).

96. Louis E. Wolcher, *Intent to Charge for Unsolicited Benefits Conferred in an Emergency: A Case Study in the Meaning of "Unjust" in the Restatement (Third) of*

doctrine is flexible and may constitute a fail-safe avenue for a remedy. For example, restitution survives statute of frauds problems that bar traditional breach of contract actions.<sup>97</sup> The law of unjust enrichment and restitution has foundational grounding in Aristotelian justice<sup>98</sup> and, thus, can achieve corrective justice results. Some scholars celebrate and embrace these traditions and features.<sup>99</sup> The new Restatement, in contrast, proceeds with extreme caution and an explicit voice of departure.

The Restatement offers at least two critical maneuvers to exorcize equity's ghosts. It situates the intended path for American restitution within the positivist, rather than the natural law, tradition. The drafters allay anticipated American fears: unjust enrichment and restitution law eschews open-ended natural law in favor of grounded, principled, positive law doctrinal boundaries.<sup>100</sup> Accordingly, the first maneuver notably occurs immediately out of the gates in Section 1 to set the proper framing. This explicit dismissal of justice and morality underpinnings garners criticism.<sup>101</sup>

I hope the Restatement will foster the restitution revival and specifically reignite the soul of restitution in American law. I fear that a complete abandonment of the historical roots of justice represents a sanitization of an essential, soulful component of restitution. Fortunately,

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*Restitution & Unjust Enrichment*, 68 WASH. & LEE L. REV. 911 (2011); see also RESTATEMENT (THIRD) § 4 cmt. a ("The chameleon-like qualities of the term "restitution" permits its invocation in a variety of circumstances where the legal or equitable nature of a given remedy may not be apparent.").

97. See *Boone v. Coe*, 154 S.W. 900, 902 (Ky. 1913) (barring plaintiffs relying heavily on an oral agreement and no improvements, but noting the restitution exception for other cases).

98. See L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 56 (1936) (stating that the "'restitution interest,' involving a combination of unjust impoverishment with unjust gain, presents the strongest case for relief" if the purpose is Aristotelian justice, in which the law's aim is to maintain "an equilibrium of goods among members of society").

99. See, e.g., Wolcher, *supra* note 96; Peter Linzer & Donna L. Huffman, *Unjust Impoverishment: Using Restitution Reasoning in Today's Mortgage Crisis*, 68 WASH. & LEE L. REV. 949 (2011) (arguing that scholars should view restitution law's ability to address a plaintiff's "unjust impoverishment" as a key characteristic distinguishing it from the other principal bodies of law).

100. See RESTATEMENT (THIRD) § 1 cmt. b ("The concern of restitution is not . . . with unjust enrichment in any broad sense, but with a narrower set of circumstances giving rise to what is more appropriately called unjustified enrichment. Compared to . . . 'unjust enrichment,' instances of unjustified enrichment are both predictable and objectively determined . . .").

101. See generally Linzer & Huffman, *supra* note 99; Wolcher, *supra* note 96.

these fears may go unrealized due to the gravitational pull of unjust enrichment's history and rhetoric. Notwithstanding the Restatement's immediate disavowal of unjust enrichment's historical and moral foundation, the strong roots cannot be so easily cut. Even the Restatement offers mixed signals elsewhere throughout its text, showing a visible attraction to unjust enrichment's moral underpinnings.

For example, the disgorgement of profits remedy for opportunistic breach of contract contains multiple moral undertones, speaking of "opportunistic" action,<sup>102</sup> "conscious wrongdoing,"<sup>103</sup> and "conscious taking without asking."<sup>104</sup> The disgorgement section elevates certain breaches of contract from the amoral, or even efficient, frame to the language of unjust enrichment, paralleling tort doctrine. Per the Restatement, the disgorgement remedy would operate to disgorge *wrongful* gains from a *blameworthy* breaching party because it would be *unjust* to retain such *opportunistic* benefits.<sup>105</sup> As I have written elsewhere, the Restatement's rhetorical flourish may have a broader reach than intended<sup>106</sup> but, on the whole, operationalizing the disgorgement remedy for opportunistic breach of contract is a positive development.<sup>107</sup> In order for the remedy to be successful, it will be critical to establish the appropriate doctrinal boundaries, which will include deciding which contractual breach behavior is worthy of deterrence via profit-stripping. With appropriate boundaries, keeping a lifeline open to unjust enrichment's roots will provide a useful method for encouraging promise-keeping and deterring opportunism. This path requires careful attention to reasoned discretion with permissible reliance on principles of *fairness*, without fairness automatically triggering the equity misconception for all restitution liability and remedies.

The new Restatement explicitly seeks to escape the shackles of equity in another section. This second maneuver jettisons the equitable irreparable injury rule and inadequacy prerequisite: "A claimant otherwise entitled to a remedy for unjust enrichment, including a remedy originating in equity, need not demonstrate the inadequacy of available remedies at law."<sup>108</sup> The

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102. RESTATEMENT (THIRD) § 39.

103. *Id.* § 39 cmt. b.

104. *See id.* (targeting a breaching party who "takes without asking").

105. *Id.* § 39 cmt. a.

106. Roberts, *Restitutionary Disgorgement*, *supra* note 80, at 1006.

107. *See id.* at 1026 ("But, in the end, a Trojan horse is a bad thing only if you want the Greeks to lose.").

108. RESTATEMENT (THIRD) § 4(2); *see also id.* § 4 cmt. a (justifying the explicit call for

Restatement's purpose is to correct the misconception that restitution and unjust enrichment are necessarily equitable.<sup>109</sup> It further seeks to rectify the faulty conclusion that leads courts to dismiss restitution claims because an adequate remedy exists at law.<sup>110</sup> Shedding the inadequacy ghosts may not prove to be easy. The inadequacy of remedies at law is a judicial "slogan" that persists despite the disappearance of its original justification.<sup>111</sup> Thus, the lure of rhetoric and old habits remains. And what if the restitutionary remedy is actually equitable?<sup>112</sup>

Accurate law-equity characterization is often elusive.<sup>113</sup> Disgorgement is no exception. As a remedy, disgorgement has equitable roots. Definitive, consistent categorization, however, is lacking. Most often, courts have designated the disgorgement remedy as equitable.<sup>114</sup> This determination may hinge on the history of the underlying cause of action, as well as the historical tie to the remedy of accounting for profits, a classic equitable remedy. The new Restatement offers a functional clarification for determining classification: "If restitution to the claimant is accomplished exclusively by a judgment for money, without resort to any of the ancillary

erasing the inadequacy prerequisite: "An argument to the contrary should appear antiquated today, but § 4(2) is included to remove any doubt."

109. *See id.* § 4 cmt. c ("The most widespread error is the assertion that a claim in restitution or unjust enrichment is by its nature equitable rather than legal.")

110. *See id.* ("From this false premise [that restitution is naturally equitable] a court may conclude . . . that the claim in question may be dismissed because the plaintiff has an adequate remedy at law. . . . [This] conclusion is simply wrong.")

111. *See id.* § 4 cmt. e. (acknowledging that courts continue to recite the inadequacy test even though the "old slogan no longer explains what judges do"). The Restatement notes the discrepancy between rhetoric and practice that Professor Laycock demonstrated in *The Death of the Irreparable Injury Rule*: courts denying specific performance in contracts cases "continue to recite that the test is the adequacy of legal remedies," but "a reason can usually be found in independent and identifiable (if unacknowledged) limits to the propriety of the remedy in a particular case." *Id.*

112. The Restatement shuns the inadequacy prerequisite even if the restitutionary remedy is unquestionably equitable like the constructive trust remedy. RESTATEMENT (THIRD) § 4 cmt. e. The final, published Restatement's comment on the inadequacy test declares that "the Restatement does not propose to revive it." *Id.*

113. *See Merex, A.G. v. Fairchild Weston Sys., Inc.*, 29 F.3d 821, 823–26 (2d Cir. 1994) (explaining that the contract doctrine of promissory estoppel, which postdates Seventh Amendment ratification, "eludes classification as either entirely legal or entirely equitable").

114. *See, e.g., Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998) (noting that defendants, who asserted that statutory damages for copyright infringement were "clearly equitable," failed to analogize to historical causes of action, "including those actions for monetary relief that we have characterized as equitable, such as actions for disgorgement of improper profits") (emphasis added).

remedial devices traditionally available in equity but not at law, the remedy is presumptively legal."<sup>115</sup>

Historically, disgorgement flowed as a result of an equitable "accounting to capture profits and force proof from the defendant."<sup>116</sup> In this vein, modern disgorgement commonly flows from a fiduciary breach, and the disgorgement remedy "forces the fiduciary defendant to disgorge gains received from improper use of the plaintiff's property or entitlements."<sup>117</sup> The implication of this equitable categorization for breach of contract cases without a fiduciary component—like opportunistic breach in the Restatement—is unclear. Disgorgement's roots in accounting (a remedy ancillary to injunctive relief) possess a clear equitable frame: "Equity traditionally took jurisdiction to enforce such an accounting because there was a substantive equitable duty to account on the part of the fiduciary."<sup>118</sup> As such, disgorgement arguably operates coercively as an order on the defendant like traditional equitable remedies that offer a basis for contempt upon disobedience.<sup>119</sup> Another rationale supporting an equitable classification is that disgorgement, regardless of the nature of the underlying cause of action, does not work like traditional contract damages that compensate the plaintiff for her loss.<sup>120</sup> Rather, disgorgement strips defendant's wrongful gain and, thus, may appear as an equitable personal order, commanding specific conduct of the defendant.<sup>121</sup> If equitable, disgorgement would notably be a matter of judicial discretion.

Case law also supports an equitable classification for disgorgement, but the cases have doctrinal causes of action distinct from breach of contract. A Supreme Court opinion dealing with remedies under the

115. RESTATEMENT (THIRD) § 4 cmt. d. This functional approach, although preferred by remedies scholars, is not the sole test under the "nature and purpose" framework the Supreme Court has adopted. *See Feltner*, 523 U.S. at 352 (recognizing the "general rule" that monetary relief is legal).

116. 1 DAN A. DOBBS, LAW OF REMEDIES, DAMAGES-EQUITY-RESTITUTION § 4.3(5), at 609–10 (2d ed. 1992).

117. *Id.*

118. *Id.* at 610–11.

119. *See id.* at 56, 65 ("Some equitable remedies are restitutionary, in money or otherwise. Most often, however, equitable remedies are coercive" and serve as a basis for contempt if not followed).

120. *See id.* at 280 (distinguishing disgorgement from traditional legal damages: "[A] recovery [of defendant's gains] would not be a recovery of *damages* because it would be measured by the defendant's gain, not the plaintiff's loss").

121. *Id.* at 65.

Emergency Price Control Act explains the equitable nature of disgorgement, which scores of cases have cited and applied in a broad array of underlying causes of action:

When the Administrator seeks restitution . . . he asks the Court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant. Such action is within the recognized power and within the highest tradition of a court of equity.<sup>122</sup>

The Supreme Court weighed in again in favor of an equitable label, due to disgorgement's basis in restitution and its incidental connection or intertwinement with injunctive relief.<sup>123</sup> Other examples of an equity classification include disgorgement as a statutory remedy for infringement of intellectual property rights<sup>124</sup> (although this remedy is unfortunately no longer available for patent law).<sup>125</sup> Also, a federal district court interpreted the Lanham Act to permit plaintiff's recovery of defendant's profits pursuant to equity principles and, accordingly, denied defendant's request for a jury trial.<sup>126</sup> The United States Court of Appeals for the Seventh Circuit has also plainly held that "[r]estitution for the disgorgement of unjust enrichment is an equitable remedy with no right to a trial by jury."<sup>127</sup>

122. *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946).

123. *See* *Chauffeurs v. Terry*, 494 U.S. 558, 568–71 (1990) (finding plaintiff union members entitled to a jury trial on their suit against union for breach of duty of fair representation, despite the many "equitable" traits of the remedy sought).

124. *See, e.g.,* *Castrol, Inc. v. Pennzoil Quaker State Co.*, 169 F. Supp. 2d 332 (D.N.J. 2001) (granting Castrol disgorgement of profits on its unfair competition and false advertising (Lanham Act) claims against Pennzoil); *see also* *United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1058 (10th Cir. 2006) ("Section 332 of the FDCA [granting enforcement powers to federal courts] invokes the equity jurisdiction of courts, using the same statutory language the Supreme Court construed in *Mitchell [v. Robert de Mario Jewelry, Inc.]*, 361 U.S. 288 (1960),] to authorize all traditional equitable remedies."). The *Rx Depot* court then declared that "[d]isgorgement is a traditional equitable remedy." *Id.*

125. *See generally* Roberts, *The Case for Restitution and Unjust Enrichment Remedies in Patent Law*, *supra* note 80 (demonstrating the faulty Supreme Court logic interpreting the elimination of disgorgement in the Patent Act Amendment and making the case for restitutionary disgorgement's reemergence as a valid, alternative remedy for patent violations).

126. *See* *Castrol*, 169 F. Supp. 2d at 344 ("Pennzoil's argument that it was deprived of its Seventh Amendment right to a jury trial is . . . legally erroneous. A plain reading of the Lanham Act remedy section unqualifiedly weighs against Pennzoil's interpretation that they are entitled to a jury trial on the disgorgement of profits issue. . . . Furthermore, the language of this section makes no mention of a trial by jury.").

127. *See* *Roberts v. Sears, Roebuck & Co.*, 617 F.2d 460, 465 (7th Cir. 1980) (denying



Given the likelihood that a plaintiff alleging breach of contract will plead alternatively for damages or disgorgement, a court may view the question of the law-equity classification (and, thus, the jury trial right) as blurred. One plaintiff in a trademark infringement action unsuccessfully attempted this argument, but the failure may have been due to the plaintiff's abandonment of the alternative claim for damages in its amended complaint.<sup>128</sup> The court's reasoning for the denial of the blurring theory (and thus the jury trial right) demonstrates the strong equitable pulls of disgorgement:

[A] claim for damages seeks, and should be recognized as seeking, relief different from a claim for unjust profits. It is quite possible a plaintiff seeking unjust enrichment from a defendant may not have been damaged at all by the defendant's wrongful actions. In a trademark infringement action, for example, a plaintiff may actually have benefitted from a defendant's advertising or promotion of a product similar to plaintiff's product because of increased consumer demand for the product. In such a case, the plaintiff may not have suffered any damages; yet the law still entitles him to recover the defendant's wrongful profits. Thus, *because a claim for profits seeks relief recognized by the Seventh Amendment as fundamentally different from a claim for damages, the cases relied upon by American Cyanamid—involving claims for both damages and unjust profits—cannot be interpreted as blurring the two claims and rendering legal an otherwise purely equitable claim for profits.*

*The distinction between American Cyanamid's claims for damages and profits is not simply semantic. What does American Cyanamid give up by abandoning its claim for damages—the right to prove an injury for which, if infringement is proved, the law allows recovery of damages[?] Although American Cyanamid seeks money, it does not seek money for its injury; rather, it seeks the amount by which Sterling Drug was enriched from infringing on American Cyanamid's trademark. In substance, American Cyanamid seeks a determination whether Sterling Drug was enriched because of an infringement and, if so, an order requiring restitution of such money from Sterling Drug to American Cyanamid. These demands are equitable in nature. Accordingly, the*

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plaintiff's request for disgorgement of profits because (1) plaintiff had elected damages at law by requesting a jury, (2) the district court submitted three claims—breach of a confidential relationship, fraudulent misrepresentation, and negligent misrepresentation—to the jury, and (3) the jury awarded damages for each).

128. See *Am. Cyanamid Co. v. Sterling Drug, Inc.*, 649 F. Supp. 784, 785, 789 (D.N.J. 1986) (considering a jury trial but ultimately denying the right given plaintiff's pursuit of restitutionary disgorgement).

*determination of whether there is a right to a jury trial in this case is not decided merely on the choice of the words or phrasing used in the pleadings.*<sup>129</sup>

Scholars have also recognized the difficulty of definitively labeling disgorgement as either legal or equitable.<sup>130</sup> Further, all too often, courts attach the equity label in a conclusory fashion, but not without scholarly criticism.<sup>131</sup> Unfortunately, the weight of such scholarly treatments is

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129. *Id.* at 789 (emphasis added). The court also explores the import of the Supreme Court's remarks in *Dairy Queen v. Wood*, 369 U.S. 469 (1962), about distinguishing between a bona fide prayer for relief and a semantic maneuver to gain or avoid a jury trial. *Sterling Drug*, 649 F. Supp. at 787. Notably, the Court in *Dairy Queen* reasoned that plaintiff's claim for an accounting of profits was, in essence, a legal claim for damages:

We find it unnecessary to resolve this ambiguity in the respondents' complaint because we think it plain that their claim for a money judgment is a claim wholly legal in its nature however the complaint is construed. The respondents' contention that this money claim is "purely equitable" is based primarily upon the fact that their complaint is cast in terms of an "accounting," rather than in terms of an action for "debt" or "damages." *But the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings.*

*Dairy Queen*, 369 U.S. at 477–78 (emphasis added). The Supreme Court has re-emphasized the import of the nature of the relief actually sought versus creative characterization to gain access to available remedies under ERISA. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 220 (2002) (affirming dismissal of suit under Section 502 of the ERISA upon finding that plaintiffs were, in reality, seeking legal damages rather than an equitable remedy authorized by the statute). For additional cases after *Great-West* that place emphasis on the real relief sought over cloaking and faux-garb on remedy claims, see *Coan v. Kaufman*, 333 F. Supp. 2d 14, 25 (D. Conn. 2004); *Scholastic Corp. v. Kassem*, 389 F. Supp. 2d 402, 408 (D. Conn. 2005); *Eichorn v. AT&T Corp.*, No. 96-3587, 2005 U.S. Dist. LEXIS 29261, at \*36 (D.N.J. Nov. 22, 2005).

130. *See, e.g.*, ROBERT M. LANGER, JOHN T. MORGAN & DAVID BELT, 12 CONN. PRAC., UNFAIR TRADE PRACTICES § 6.9 (1st ed. 2003) ("The question of whether the remedy of disgorgement is legal or equitable is complex. In general, restitution for unjust enrichment may be awarded in an action at law."). The treatise surveys a number of cases under the FTC Act (15 U.S.C. §§ 41 et seq.) and California's Unfair Competition Law, which it places in three conflicting categories: cases that (1) authorized disgorgement as an available legal remedy, (2) permitted disgorgement only as ancillary equitable relief, or (3) denied as unavailable the remedy of *nonrestitutionary* disgorgement. *Id.* (emphasis added).

131. *See* George P. Roach, *A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity for Federal Agencies*, 12 FORDHAM J. CORP. & FIN. L. 1, 48 (2007) (criticizing a lower court for "ignor[ing] the Seventh Circuit's implied conclusion that, like restitution, disgorgement can be either a remedy at law or in equity"). Roach notes, "In essence, the Northern District of Illinois identified three different types of remedies: restitution in equity, restitution at law and disgorgement. Rather than define the exact nature of disgorgement and identify the key characteristics of disgorgement that qualify it as a remedy in equity, the opinion attaches a label and effectively assumes away the issue." The

unclear given that the underlying cases involve statutory interpretation unlike a claim of disgorgement for opportunistic breach of contract.

Contracts case law exists in which disgorgement-like remedies are awarded,<sup>132</sup> but the cases shed little, if any, light on the proper treatment of the remedy. Contracts courts have consistently failed to either characterize the remedy as disgorgement,<sup>133</sup> rely on restitution and unjust enrichment doctrine, or consider the jury trial right issue. For example, courts speak in terms of expectancy, but when left without an appropriate market measure, they use the profit earned by the breaching party as the measure, which effectuates a disgorgement.<sup>134</sup> Accordingly, the Restatement offers the disgorgement section as a *new rule* for disgorging profits from opportunistic breach of contract based on unjust enrichment principles. If the overt combination of breach of contract and disgorgement is new, then historical analysis provides little to no guidance.

A pure, functional, remedial analysis likely supports a finding that the shifting of promisor's gain to the promisee is a legal money judgment that ought to trigger the parties' jury-trial right. The Restatement comments argue for this interpretation and assert that disgorgement does not operate on the promisor; it does not command any act on the promisor's part.<sup>135</sup> Rather, disgorgement will resemble a damage remedy that is enforceable via traditional damage routes like writs of execution. Further, the Restatement urges throughout that the restitutionary disgorgement remedy

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lower court opinion that failed to heed the Seventh Circuit's implied conclusion is *SEC v. Buntrock*, No. 02C2180, 2004 U.S. Dist. LEXIS 9495, at \*7-9 (N.D. Ill. May 25, 2004) (concluding that "generic" disgorgement is an equitable remedy). The Seventh Circuit opinion handed down after *Great-West* is *SEC v. Lipson*, 278 F.3d 656, 662-63 (7th Cir. 2002) ("Disgorgement is another name for restitution . . . and restitution, as we have noted in several non-SEC cases, is both a legal and an equitable remedy."); see also George P. Roach, *Counter-Restitution For Monetary Remedies in Equity*, 68 WASH. & LEE L. REV. 1271 (2011).

132. See Melvin A. Eisenberg, *The Disgorgement Interest In Contract Law*, 105 MICH. L. REV. 559, 578-97 (2006) (discussing cases acknowledging a disgorgement interest in remedying breach of contract).

133. See Farnsworth, *supra* note 71, at 1371 ("[C]ourts have often applied traditional damage rules in such a way as to favor disgorgement. They have done this first, by looking to market price rather than the buyer's actual cover price and, second, by looking to the seller's actual resale price as evidence of market price . . .").

134. *Id.*; see also *Roth v. Speck*, 126 A.2d 153, 156 (D.C. 1956) (calculating plaintiff salon owner's damages as the difference between stylist's salary before and after stylist breached contract by joining new hair salon at higher pay).

135. RESTATEMENT (THIRD) § 39 cmt. c.

be viewed as legal rather than equitable. Given the historical, equitable roots of disgorgement in other substantive areas, however, courts and lawyers may continue to view disgorgement as ancillary to equitable remedies, such as accounting for profits. The Restatement appears to favor "legal" characterization (with the accompanying jury trial right) so that the disgorgement remedy will avoid the fears of unbounded judicial discretion—*Palmtree Justice* via the "Chancellor's clumsy foot."<sup>136</sup> In addition, defendants may well fear that juries will seize on disgorgement to deter perceived opportunism and honor promise-keeping. The drafters hope the Restatement's cabining of the disgorgement rule will bound jury decision making.<sup>137</sup>

If disgorgement for opportunistic breach of contract is equitable, should courts require a plaintiff to establish inadequacy to attain a disgorgement remedy? The Restatement asserts "no" in its explicit rejection of the inadequacy prerequisite.<sup>138</sup> It declares that raising this anachronistic barrier for any unjust enrichment claim is fundamentally flawed: "Courts too often recite that one of the requirements of a claim based on unjust enrichment is absence of an adequate legal remedy. This spurious proposition rests on an obvious fallacy, and it obscures what courts are actually doing when they invoke it."<sup>139</sup> Thus, even if the restitutionary remedy is equitable, courts should not bar remedial access based on the availability of legal remedies. The pre-publication draft Restatement attempted to further barricade disgorgement from equity's ghosts by declaring it legal.<sup>140</sup> The final, published version of the Restatement is silent on the classification of disgorgement.

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136. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 335 (1982) (Stevens, J., dissenting). Deleting "*Palmtree Justice*" does not change anything. See Sarah Worthington, *Majority Rule: When Can Minorities Cry Foul?*, 40 STETSON L. REV. (forthcoming 2012) (manuscript at 11) ("[T]he House of Lords decided in broad terms that unfettered discretion is something that the law does not admit.") (on file with the Washington and Lee Law Review).

137. See RESTATEMENT (THIRD) § 39 cmt. f ("The cumulative requirements of § 39 will exclude the great majority of contractual defaults."). The Comment elaborates by noting that "[t]he scope of [§ 39] is further restricted by the requirement that breach be deliberate—thereby excluding cases in which breach results from the defendant's inadvertence, negligence, or unsuccessful attempt at performance." *Id.*

138. *Id.* § 4(2).

139. *Id.* § 4 cmt. e.

140. See RESTATEMENT (THIRD) § 4 cmt. e (Tentative Draft No. 7, 2010) (warning that it would be a grave mistake to regard the newly formulated rule of disgorgement in § 39 as "equitable").

If courts treat disgorgement as legal, it is plain that the Restatement commands rejection of the inadequacy prerequisite for all unjust enrichment remedies, including disgorgement.<sup>141</sup> Well, it is plain in Section 4(2). Plain, at least, in the main text, but the clarity fades in the Restatement's comments: "Section 4(2) is stated in broad terms, without reference to Section 39, in order to convey as clearly as possible a general truth about the modern law of restitution and unjust enrichment; but Section 4(2) may be qualified by reference to Section 39(1), to the extent of any perceived inconsistency."<sup>142</sup> Unfortunately, the operational section for the remedy of disgorgement for opportunistic breach, Section 39, is also unnecessarily confusing on this score. The blackletter portion dangerously resurrects remnants of equitable rhetoric:

If a deliberate breach of contract results in profit to the defaulting promisor and *the available damage remedy affords inadequate protection to the promisee's contractual entitlement*, the promisee has a claim to restitution of the profit realized by the promisor as a result of breach.<sup>143</sup>

It further reiterates disgorgement's distinction from damage remedies: "Restitution by the rule of this section is *an alternative to a remedy in damages*."<sup>144</sup> The comments, notably, draw a parallel between disgorgement and the equitable remedy of specific performance.<sup>145</sup> Despite the italicized language in both quotes, the Restatement assures that disgorgement for opportunistic breach is legal and not an extraordinary equitable remedy<sup>146</sup> and that plaintiffs seeking disgorgement need not overcome an inadequacy-of-legal-remedies hurdle.

Is the Restatement speaking out of both sides of its mouth? Did drafting compromises lead to mixed messages? The next section analyzes how lawyers and judges may decipher such competing signals. It also urges a normative approach that will help exorcize equity's ghosts, eliminate false remedial hierarchies, and focus the debate on the appropriate

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141. See RESTATEMENT (THIRD) § 4(2) (liberating all unjust enrichment remedies from showing the inadequacy of available remedies at law).

142. *Id.* § 4 cmt. e.

143. *Id.* § 39(1) (emphasis added).

144. *Id.* (emphasis added).

145. *Id.* § 39 cmt. c.

146. See *id.* ("Disgorgement is a monetary remedy enforceable only against defendant's property, not by attempting to coerce the defendant's conduct, and the value of the judgment is the same for each side.").

substantive limits of restitutionary disgorgement for opportunistic breach of contract.

*IV. Inadequacy's Inadequacy for Restitution's Contractual Disgorgement Remedy*

*A. Inadequacy by Any Other Name Does Not Smell So Sweet*

Restitution's contractual disgorgement remedy for opportunistic breach of contract ensnares disgorgement in the language of equity by resurrecting inadequacy with an "inadequate protection" analysis. With one hand, the Restatement eschews the inadequacy-of-legal-remedies test, but with the other it endorses a hurdle of "inadequate protection" of damage remedies for access to the *alternate* remedy of disgorgement. The Restatement recognizes the potential for misinterpretation:

The rule of § 39 . . . allowing disgorgement of profits realized by an opportunistic breach of contract, inquires whether "the available damage remedy affords inadequate protection to the promisee's contractual entitlement. . . ." By inquiring whether "the available damage remedy affords inadequate protection to the promisee's contractual entitlement," the rule of § 39 echoes the functional question at the heart of the traditional inquiry into adequacy of legal remedies.<sup>147</sup>

The Restatement admits the apparent inconsistency between disgorgement's inadequate protection requirement and the Restatement's abandonment of the inadequacy test for unjust enrichment remedies.<sup>148</sup> The operational disgorgement section reiterates the problematic resemblance to equity's inadequacy of legal remedies test and again warns against viewing the new disgorgement rule as an equitable remedy subject to anachronistic jurisdictional hurdles of equity.<sup>149</sup> The Restatement reiterates its intent to shed the inadequacy prerequisite for all remedies based on unjust enrichment: "*Properly interpreted*, there is no conflict between the

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147. *Id.* § 4 cmt. e, reporter's note e.

148. *Id.* § 4 reporter's note e ("The final paragraph of Comment E acknowledges a possible inconsistency between §§ 4(2) and 39(1).").

149. *Id.* § 39 cmt. c ("Although [this] inquiry . . . resembles the traditional threshold test for equitable jurisdiction, stated in terms of 'adequacy of remedy at law,' it would be erroneous and anachronistic to regard this newly-formulated rule as a species of equitable relief, or to limit its availability by reference to obsolete jurisdictional boundaries.").

requirements of § 39 and the general proposition of § 4(2)."<sup>150</sup> The problem lies in whether lawyers and judges will *properly interpret* the "inadequate protection" language shrouding this new disgorgement remedy for opportunistic breach.

Faith in proper interpretation is difficult to muster. Proper interpretation is unlikely given the basic misperceptions of unjust enrichment and the lasting pull of equitable framing of unjust enrichment and continuing rhetorical force of the inadequacy of legal remedies prerequisite. The commentary in the Restatement may do little to ensure proper interpretation due to its conclusory assertions in an already muddled landscape.

The Restatement's blackletter aims to secure proper interpretation through explicit construction of inadequate protection. It defines when inadequate protection exists:

A case in which damages afford inadequate protection to the promisee's contractual entitlement is ordinarily one in which damages will not permit the promisee to acquire the full equivalent to the promised performance in a substitute transaction.<sup>151</sup>

Will this section sufficiently distinguish inadequate protection from the inadequacy of legal remedies prerequisite? I have critiqued this section elsewhere, based on the promisee's likely sense of inadequate protection versus a court's interpretation of full equivalent,<sup>152</sup> such as the Restatement's nonconforming widget illustration.<sup>153</sup>

In the widget illustration, Seller confronts an unexpected price increase in manufacturing and then *deliberately* delivers nonconforming widgets and *profits* by saving \$50,000, but Buyer's remedy will be limited to "an ordinary damage remedy" of \$10,000 (the difference in value between the promised widgets and the delivered nonconforming widgets) rather than a disgorgement of the \$50,000.<sup>154</sup> Disgorgement, per the illustration, is unavailable because "there is no reason to conclude that Buyer's entitlement

150. *Id.* § 39 cmt. c (emphasis added).

151. *Id.* § 39(2).

152. Roberts, *Restitutionary Disgorgement*, *supra* note 80, at 1021–24 (analyzing Restatement illustration formerly numbered 13 (now 16)).

153. *See* RESTATEMENT (THIRD) § 39 illus. 16, reporter's note i (basing the illustration on "a hypothetical example designed to emphasize the point that a breach of contract may be deliberate and profitable (not to mention 'efficient') without being opportunistic").

154. *Id.* § 39 cmt. i, illus. 16.

is inadequately protected by an ordinary damage remedy."<sup>155</sup> The illustration asserts that "[d]amages measured by difference in value give Buyer 'a full equivalent to the promised performance,' and the case is one in which specific performance would have been denied."<sup>156</sup>

Given the underlying subject matter of the illustration—goods, widgets—commodification into money damages is palatable, if not expected. Yet, what if Buyer alleges inadequate protection because the difference in value measure will not yield the full equivalent to the promised performance in fact? Is the inadequate protection analysis distinct from asking whether an adequate legal remedy exists? Buyer, who may desire disgorgement or specific performance, is effectively denied such a remedy because Buyer must accept that a difference-in-value measure will be adequate. The difference-in-value measure may be a form of an expectancy measure,<sup>157</sup> but it does not ensure Buyer's contractual entitlement.

My critique does not require that we provide Buyer the disgorgement remedy, which may constitute an after-the-fact, monetized form of specific performance. Rather, the challenge is whether the inadequate protection requirement will likely drag lawyers and courts into anachronistic inadequacy-of-legal-damages analysis and unnecessarily reinforce remedial hierarchies. If disgorgement is inappropriate as a remedy for the widget Buyer in the illustration, we should center the debate on substantive reasons for denying the remedy, such as in cases in which the breaching behavior does not rise to the level of wrongfulness we wish to deter.<sup>158</sup> For example,

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155. *Id.*

156. *Id.*

157. Expectancy can be under-compensatory. See Alan Schwartz, *The Myth That Promisees Prefer Supra-compensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 YALE L.J. 369, 405 (1990) (critiquing the judicial trend of awarding punitive damages for breach of contract but not enforcing liquidated damages clauses or granting specific performance as unfaithful to contracting parties' expectation interest); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 305 (1979) (arguing specific performance should be available on request because it would better meet the goals of compensation and expectancy).

158. RESTATEMENT (THIRD) § 39 cmt. i ("Facts along these lines are a staple of commentators' accounts of circumstances in which a party's intentional breach of contract should not be regarded as a wrong."). The Restatement cites Professor Laycock regarding parallel examples in which courts denied specific performance on the basis of disproportionate hardship to the promisor. *Id.* (citing LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 175–76 (1991)). Although Professor Laycock's work effectively shows that disproportionate hardship, not the irreparable injury rule, is the real reason that



Seller's breach may be deliberate and profitable but "committed only to avert a larger loss."<sup>159</sup> The touchstones for line drawing on the restitutionary disgorgement remedy should be the breaching party's behavior, the need to promote promise keeping, and the interest in deterring the particular type of breach in question.

To the extent that inadequate protection exists, it is not with respect to the classic monetary remedy but, rather, it exists when a stronger party took advantage of a less sophisticated party, at possibly two turns: (1) the bargaining phase that left the less sophisticated party without a liquidated damage clause, and (2) the pre-breach phase in which the promisor did not renegotiate with Buyer but, instead, consciously took without asking. It is for these reasons that a disgorgement remedy should be available. Yet, given the newness of the rule of disgorgement for opportunistic breach in America, it may be wise to cabin disgorgement to certain cases rather than allowing it to be accessible on the non-breaching party's prerogative. The lines of limitation should focus on which breaches are worthy of deterrence (i.e., which breaches are *opportunistic*).

*B. A Normative Approach for Restitutionary Disgorgement for Opportunistic Breach*

The American restitution revival is an exciting time for restitution scholars worldwide. It reengages our contribution to the global dialogue on the appropriate boundaries of an artful, powerful body of unjust enrichment law and remedies. In order for the new Restatement of restitution to make the most splash, it is essential that its promise not be lost in clunky, unfamiliar vernacular. One of the Restatement's primary values is the modernization and clarification of the language of the doctrine and its remedies. The more vexing problem may well prove to be the shackles of equity. Recognizing the pitfalls, the drafters sought to eradicate all references to the law-equity divide from the project.<sup>160</sup> The drafters

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courts deny specific performance, courts often conduct an irreparable injury analysis under a rubric in which the promisee must show entitlement to specific performance—what the courts still deem an extraordinary remedy—in the face of the preferred expectancy measure. Fortunately, the disproportionate hardship focus at least concentrates attention on the breaching party, which more naturally comports with the restitutionary disgorgement remedy.

159. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 118–19 (4th ed. 1992).

160. Andrew Kull, Remarks at the Restitution Rollout Symposium (Feb. 25, 2011),

succeeded with this endeavor with minor exceptions, such as the constructive trust remedy, which has equitable roots that simply run too deep.<sup>161</sup>

In the overarching frame, the Restatement may bend too dramatically in its abandonment of equitable principles—all things flexible, discretionary, and rooted in natural justice. The American law of restitution need not adopt an anachronistic law-equity divide, but we would be wise to retain the beauty and flexibility of the underlying doctrine. At its core, restitution doctrine requires that one be unjustly enriched. "Unjustly" means that either a judge (if the equitable historical characterization sticks) or a jury (if the legal conception prevails) must determine whether it is "unjust" for a breaching party to retain the benefits without paying the non-breaching party. That determination inherently calls for a sense of justice, of right and wrong, in consideration of the whole context. Accordingly, the introductory definitional provision of the Restatement should not be interpreted as devoid of justice considerations. Rather, interpretation requires considerations of justice, but those considerations should be principled and evaluated with the helpful guidance of the whole body of the Restatement with all of its blackletter, illustrations, and commentary on the categories of wrongdoing that restitution law seeks to deter.

With respect to disgorgement, the Restatement eschews the equity rubric with one breath, while utilizing an inadequate protection requirement that may raise equity's ghosts in the minds of interpreters. Given that it is too late for a substantive change to the text of the disgorgement rule, courts and scholars would be wise to focus the analysis on the appropriate level of conscious wrongdoing, coupled with profiting, to warrant application of the disgorgement remedy. In the American contract law tradition, the debate regarding the proper scope of disgorgement liability should encompass recognition of contract law's varied, and sometimes competing, goals: predictability, certainty, the flow of the wheels of commerce, efficiency, flexibility, and promise keeping. Restitution law adds the deterrence element and encourages renegotiation for breaches of contract that are at the ethical margins, rather than garden-variety, tolerable breaches. Drawing this line will be difficult, but it must be done. I maintain that we should engage in the substantive line drawing process rather than focus on the promisee's ability to establish that legal remedies will adequately protect her contractual

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available at <http://law.wlu.edu/news/archivemultimedia.asp>.

161. *Id.*

entitlement. American law should follow the Commonwealth and other countries towards less rigidity on the hierarchy of a promisee's access to remedies and focus more on whether access to supercompensatory remedies, like disgorgement, should be available as a tool to encourage promise keeping and deter conscious taking without asking.

To the extent that disgorgement cannot shake an equitable remedy characterization, judges should use bounded discretion. They should base recovery in disgorgement on the case illustrations of the Restatement. Although the Restatement cannot anticipate the creative opportunism of future breaching parties, judges can study the collection of restatement cases across disciplines to discern when the breaching behavior rises to the level of wrongfulness justifying stripping gains and reallocating those gains to the nonbreaching party. If the Restatement conception of disgorgement as legal prevails, judges should exercise their gatekeeping functions on the issues of deliberateness and profitability, and juries should award disgorgement if they are convinced that plaintiff's proof of opportunism warrants restitutionary recovery.

*V. Keep on Merging and Embrace Disgorgement Remedy for Opportunistic Breach*

America's restitution revival should embrace the justice and fairness roots of unjust enrichment. At the same time, the restitution revival must carefully exorcise equity's ghosts in order to avoid the further misconceptions of the doctrine and faulty conclusions causing unnecessary denials of unjust enrichment claims and remedies. The Restatement project admirably streamlines the language of unjust enrichment but, at times, strains to cabin the reach of new, provocative sections like disgorgement. Efforts to compromise and allay fears may result in unfortunate entanglement with equity's ghosts, especially the irreparable injury rule.

The wise approach is to avoid lingering in the purgatory of equity's remnants. Instead: "When the ghosts of the past stand in the path of justice clanking their medieval chains the proper course of the judges is to pass through them undeterred."<sup>162</sup> As lawyers, judges, and scholars offer

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162. *United Australia v. Barclays Bank*, [1941] A.C. 28–29 (H.L.) (lamenting legal restitution's historical path from the contract doctrine of *assumpsit*, which, over time, required legal fictions that implied a "debt" and a "promise to repay"). Lord Atkin remarked, "These fantastic resemblances of contracts invented in order to meet requirements

important early interpretations of disgorgement's boundaries in American law, let the focus be on the set of breaches warranting deterrence and justifying the promotion of promise keeping and prevention of unjust enrichment.

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of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights." *Id.*

