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Commercial Bribery: Choice and Measurement Within a Remedies Smorgasbord

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Abstract

Searching for the most suitable money remedy for a simple commercial bribe promptly lands a lawyer, judge, professor, student, or researcher in a remedial smorgasbord. De-emphasizing injunctions, commercial bribery offers a spectrum of monetary remedies.

The plaintiff has two defendants, the briber and the bribee. He has two major remedies, damages and restitution. The overlapping policies consist of compensating the plaintiff, preventing the defendants' unjust enrichment, deterring the defendants and others, and punishing the defendants. Courts implement these policies with compensatory damages, restitution, and punitive damages. A bribe can be returned as damages or restitution, a significant distinction. Punishment points the court's remedial compass at punitive damages. The law distinguishes between legal restitution and equitable restitution. Equitable restitution distinguishes between constructive trust and accounting-disgorgement; if a defendant has other creditors, the distinction takes center stage. Recovery from the briber adds the possibility of duplication. The possibilities of confusion and excess lurk in the wings.

Bribery is a private law-public law hybrid; commercial bribery is on the private law side. Commercial bribery plays a role in three recent Restatements; Employment, Restitution, and

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Agency. Courts in the United States cite persuasive authority from other common-law jurisdictions to fill gaps in local positive law. Domestic courts may learn from others about alternative solutions to shared problems. Some differences, for example, in jury trial, statutes, punitive damages and equitable restitution, frustrate complete unification.

Stating the courts' choice and measurement alternatives proves to be a daunting task. In addition, this Article is generous with advice about the routes lawyers and courts should take. This Article adduces legal theory in an effort to clarify the better choices. Plaintiffs' lawyers have a wide range of possibilities. The courts' demanding duty is to align policies, remedies rules, and solutions. The results turn out to be challenging at best, often problematic. The risk of inaccuracy and over-correction is pervasive. The search has not found a substitute for human judgment. Principles of confinement, understanding of alternatives, and careful contextual analysis will improve courts' decision making.

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I. Introduction

This Article will examine civil courts' money remedies to deal with private commercial bribery through the lens of the following hypothetical.

Sam Sailer "gives" Ben Beyer's purchasing agent, Alice Aggie, a sound system worth $8,000. Sailer's "gratuity" facilitates Aggie's decision to buy Sailer's speakers to sell in Beyer's NoisiStan Stores. Beyer learns about Aggie's new speakers and consults a lawyer.

My Remedies course in the spring of 2014 spent two class sessions on commercial bribery.[1] The students began the course thinking of Remedies law as having separate pigeonholes named contract and tort, law and equity, damages and restitution; overall, they were baffled during our commercial bribery sessions. My experience with commercial bribery in the classroom drew me to develop further the subject that David Mills and Robert Weisberg refer to as "a fascinatingly under-explored area."[2]

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1. *See* DOUG RENDLEMAN & CAPRICE ROBERTS, REMEDIES 857–63 (8th ed. 2011) (supplying the hypothetical for this article and providing a rough first draft for it).

2. David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White-Collar Crime*, 60 STAN. L. REV. 1371, 1406 (2008).

A. Gift or Bribe?

A bribe is a transfer that often takes the ostensible form of a gift. In property law, the elements of a gift are the donor's intent to give plus a transfer to the donee; a gift does not require an exchange of consideration.[3] But a bribe concealed as a gift involves the parties' surreptitious exchange of consideration whereby the bribe recipient agrees to "earn" the transfer.[4]

In this shadow world, we inquire whether Sailer and Aggie created a corrupt bargain. Was Sailer's transfer to Aggie a gift that stemmed from his friendship and altruism? Or was it a bribe based on his self-interest? Was there a quid pro quo, Aggie's promise or a wink and nod? Standing alone, the parties' consideration may not be illegal on either side; but the addition of the bribe element is an illegal performance.[5]

Some employment-related transfers to agents are not bribes.[6] A "gift" to an employee that her employer knows about—a tip, for example—is not a bribe.[7] One rule of thumb is: "If you can eat it and drink it in a single sitting, it's not a bribe."[8]

In the grey area between a bribe and a gift, many "gifts" are based less on the "donor's" altruism than on his interest in

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3. *See* WALTER B. RAUSCHENBUSH, BROWN ON PERSONAL PROPERTY § 7.1 (3d ed. 1975) ("A gift may be defined as a voluntary transfer of his property by one to another without any consideration of compensation therefor." (quoting Gray v. Barton, 55 N.Y. 68, 72 (1873))).

4. *See* United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404–05 (1999) ("[F]or bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an . . . act.").

5. *See* GEORGE PALMER, THE LAW OF RESTITUTION §§ 8.5, 8.5 nn.6–7 (1978) [hereinafter PALMER, THE LAW OF RESTITUTION] (describing one form of illegal contract as where two parties agree to a transaction that, in and of itself, is illegal (citing Oscanyon v. Arms Co., 103 U.S. 261, 267 (1880))).

6. RESTATEMENT (SECOND) OF AGENCY § 388 cmt. b, illus. 5 (AM. LAW INST. 1958).

7. *See* Jaclyn, Inc. v. Edison Bros. Stores, 406 A.2d 474, 486, 491–92 (N.J. Super. Ct. Law Div. 1979) (stating that there is "no fraud perpetrated" where the employer is aware of the bonus, gift, or commission and consummates an agreement for business anyway).

8. Stephanie Francis Ward, *Want to Be a Federal Judge by 35? 9th Circuit's Alexander Kozinski Shares Some Tips*, A.B.A. J. (July 20, 2015, 12:11 PM), http://www.abajournal.com/news/article/want_to_be_a_federal_judge_ by_ 35_9th_circuits_alex_kozinski_shares_some_tip/ (last visited Mar. 6, 2017) (on file with the Washington and Lee Law Review).

obtaining the "donee's" goodwill in one form or another.[9] On the "donee's" side, the human impulse to reciprocate may lead her to return the favor.[10] A campaign contributor, for example, may have a disinterested policy goal. Chief Justice Roberts wrote that "spending large sums of money in connection with elections . . . does not give rise to . . . quid pro quo corruption."[11] In the grey area, a contributor may achieve recognition or access that blends into influence and reciprocity. Or the contributor may cross the bribery line by conditioning his payment directly on the politician's specific vote on specific legislation.[12]

"At what point do the 'gifts' become so clearly transactional, however, that the behavior they induce is no longer viewed as altruistic, but crass? That is the key question. The answer lies both in the nature of the gift and the nature of the relationship between the creator of the gift and its recipient."[13] In tax law, for example, an instrumental gift is income to the recipient, an affectionate gift is subject to the donor's gift tax.[14] "As the word is most commonly used today, [criminal] 'bribery' probably denotes an actual or contemplated exchange of something of value for favorable governmental action, not simply a unilateral act intended to make favorable governmental action more likely."[15]

Our hypothetical is not in the grey area. Aggie is the purchasing agent for Beyer. Sailer gave her a "gratuity." She reciprocated. Suppose Beyer confronts Aggie with that "gift" and with her later purchase of Sailer's speakers for NoisaStan inventory. She responds that Sailer is "just a dear friend."

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9. *See generally* Mary Finley Wolfenbarger, *Motivations and Symbolism in Gift-Giving Behavior*, 17 ADVANCES IN CONSUMER RES. 699 (1990) (discussing self-interest as an elemental part of gift-giving).

10. *See id*. 699–706 (discussing social norms in the context of gift-giving).

11. McCutchen v. FEC, 134 S. Ct. 1434, 1450 (2014).

12. *See* JOHN T. NOONAN, BRIBES 621, 651, 688–90 (1987) (covering the topic of campaign contributions and bribery).

13. GUIDO CALABRESI, THE FUTURE OF LAW & ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION 105 (2016).

14. *See* United States v. Harris, 942 F.2d 1125, 1127 (7th Cir. 1991) (holding that sisters charged with tax evasion on money for sexual "favors" provided by their lover which they had claimed as gifts were not guilty of willful tax evasion).

15. Albert Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 FORDHAM L. REV. 463, 472 (2015).

How might a court respond to a similar tale? An employee of the United States Department of Agriculture accepted two automobiles and a deep freeze as "gifts" from one De Angelis who participated in programs the department administered.[16] Despite the employee's claims that Mr. De Angelis was just a friend and "a kind and generous man," the court entered judgment in favor of the Government.[17] Explaining the difference between a bribe and a perishable effort to "express friendship and assure a warm welcome," the United States Court of Appeals for the First Circuit observed that "if the jury agreed that a matured scheme existed, aimed at providing millions of dollars in which Harwood would share, no jury could rationally believe that this was merely to cultivate friendship."[18]

B. Civil and Criminal Remedies

Civil remedies for commercial bribery function in the penumbra of related areas of law. First, in criminal law, a private commercial bribe may also be a crime. Criminal statutes in thirty-nine states forbid commercial bribery; public-sector bribery is criminal nationwide.[19] The United States has no general

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16. *See* United States v. Drisko, 303 F. Supp. 858, 858–61 (E.D. Va. 1969) (providing no satisfactory reason why Mr. DeAngelis gave Mr. Drisko those "gifts").

17. *See id.* at 860 (finding "that the deep freezer, the automobiles and the money [the defendant] received from Mr. DeAngelis were secret profits and gratuities").

18. United States v. Potter, 463 F.3d 9, 19 (1st Cir. 2006); *see also* United States v. Carter, 217 U.S. 286, 311–17 (1910) (reviewing the facts arising from the illicit collection of contractors' excess profits by a government official in the amount of about $500,000).

19. *See, e.g.*, CAL. PENAL CODE § 641.3–641.4 (West 2010); N.J. STAT. ANN. § 2C:21-10 (West 1986); N.Y. PENAL LAW § 180.00-08 (McKinney 1983); TEX. PENAL CODE ANN. § 32.43 (West 1994); VA. CODE ANN. § 18.2-444 (2016); MODEL PENAL CODE § 224.8 (AM. LAW INST. 1962); Jeffery Boles, *Examining the Lax Treatment of Commercial Bribery in the United States: A Prescription for Reform*, 51 AM. BUS. L.J. 119, 159 (2014) ("While all fifty states have criminalized public sector bribery, such is not the case for commercial bribery. Eleven states have yet to criminalize the offense of commercial bribery."). The most important and informative book about bribery is Judge John Noonan's wide-ranging *Bribes* (1987), which deals almost exclusively with criminal treatment of bribery. *See generally* NOONAN, *supra* note 12.

domestic federal criminal-bribery statute.[20] But it has specific anti-bribery statutes, such as bribery of quiz show affiliates, for example.[21]

Bribery of a government official is serious. A civil consequence of bribery with public-law consequences is that Article II, Section 4 of the United States Constitution specifically lists bribery as a ground for impeachment and removal from office.[22] Criminal statutes that forbid and punish official bribery are universal.[23] Bribery of a public official to facilitate a sale or a contract, although more serious than private bribery, is relevant to our subject. While this article was being written and in press, a defense contractor's protracted and brazen bribery of Pacific Fleet officers including admirals was unraveling in guilty pleas.[24] Additionally, other criminal statutes come into play in the context of bribery. For example, former Vice-President Agnew was prosecuted for tax evasion on the kickbacks and bribes he received.[25] Federal statutes related to bribery are the

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20. *See* Boles, *supra* note 19, at 122 ("The U.S. Congress has not enacted a blanket criminal statute that outlaws the practice, although a patchwork of federal legislation has been used to prosecute commercial bribery."); Susan Rose-Ackerman, *The Law and Economics of Bribery and Extortion*, 6 ANN. REV. L. & SOC. SCI. 217, 226 (2010) ("Some legal systems criminalize private-to-private bribery, but in many jurisdictions such transactions are not against the law unless they involve another illegal offense, such as extortion or operation of an illegal business.").

21. *See* 47 U.S.C. § 509(a)(2) (2012) (prohibiting the use of coercion or bribery to influence a person to intentionally answer questions wrong or refrain from answering on a quiz show).

22. *See* U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

23. *See* MODEL PENAL CODE § 224.8 (AM. LAW INST. 1962); 18 U.S.C. § 201(b) (2012) (making illegal any payment or gift to a public official in order to corruptly influence that official to a specific official or otherwise illegal act).

24. *See* Craig Whitlock, *Navy Repeatedly Dismissed Evidence that 'Fat Leonard' was Cheating the 7th Fleet*, WASH. POST (Dec. 27, 2016), https://www.washingtonpost.com/investigations/navy-repeatedly-dismissed-evidence-that-fat-leonard-was-cheating-the-7th-fleet/2016/12/27/0afb2738-c5ab-11e6-85b5-76616a33048d_story.html?utm_term=.ddea1af112d8 (last visited Mar. 6, 2017) (detailing the scope of the fraud) (on file with the Washington and Lee Law Review).

25. *See* JAMES PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1971, at 776 (1996) (detailing Vice President Agnew's prosecution for tax evasion).

"honest-services" statute that courts have interpreted to cover kickbacks and bribery,[26] the False Claims Act,[27] the Whistleblower Protection Act,[28] the Federal Anti-Kickback Act,[29] wire fraud,[30] the Racketeering Influenced and Corrupt Organizations Act, (RICO),[31] and the Foreign Corrupt Practices Act.[32]

The Foreign Corrupt Practices Act, which makes it a crime for a United States company to bribe a government official in another country, is mostly enforced by SEC and DOJ settlements.[33] In late 2016, a generic drug maker settled criminal

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26. *See* Skilling v. United States, 561 U.S. 358, 408–09 (2010) (discussing case law demonstrating bribes and kickbacks to be at the "core [of] honest services fraud precedents" (citing United States v. Czubinski, 106 F.3d 1069, 1077 (1st Cir. 1997))); *see also* McDonnell v. United States, 136 S. Ct. 2355, 2368–69 (2016) (applying interpretive canon *noscitur a sociis* to find a narrow definition of official act); United States v. Drisko, 303 F. Supp. 858, 860–61 (E.D. Va. 1969) (determining that the United States should be awarded remedies where an employee of the Department of Agriculture received "gifts" from businessmen in order to use his office to further the businessmen's interests); United States v. Gaudreau, 860 F.2d 357, 362 (10th Cir. 1988) ("[T]he authorities are unanimous that an officer or agent breaches his duty of loyalty to his corporation or principal by accepting bribes to compromise his principal's interests."); United States v. St. Pierre, 377 F. Supp. 1063, 1064–65 (S.D. Fla. 1974) (stating that criminal prosecution does not bar recovery of civil remedies). *See generally* United States v. Rybicki, 287 F.3d 257 (2d Cir. 2002), *aff'd en banc*, 354 F.3d 124 (2d Cir. 2003) (analyzing personal injury lawyers' indirect kickbacks to insurance adjusters).

27. *See* 31 U.S.C. §§ 3729–3731 (2012) (laying out the False Claims Act as well as procedure for civil remedies under the Act.).

28. *See* 5 U.S.C. § 2302(b)(8) (2012) (prohibiting any employer from taking "personnel action," measures against anyone who reports a suspected violation of law or public health and safety, including termination).

29. *See* 42 U.S.C. § 1320a-7b(b) (2012) ("[In federal health care programs] whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind . . . shall be guilty of a felony.").

30 *See* Andrea Gerlin, *Deals on the Side: How a Penny Buyer Made Up to $1.5 Million of Vendors' Kickbacks*, WALL ST. J., Feb. 7, 1995, at A1 (detailing how vendors paid $1.5 million to a single buyer over four years).

31. *See* 18 U.S.C. § 1964 (2012) (authorizing civil remedies for RICO violations); *see also* Empress Casino Joliet Corp. v. Johnston, 763 F.3d 723, 728 (7th Cir. 2014) (discussing casino's civil RICO action alleging that members of horse-racing industry bribed governor).

32. *See* 15 U.S.C. § 78 (2012) (addressing bribery of foreign government officials by U.S. citizens).

33. *See* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks—U.S.

and civil charges for bribery of officials for $520 million.[34] A New York Times story describes how Wal-Mart's employees' bribery in Mexico affects the "culture" of the company, its governance, its employees, and its stockholders.[35]

Commentators have maintained that criminal statutes are needed because the private common and statutory law is "clearly inadequate."[36] However, private commercial bribery is rarely prosecuted as a crime.[37] Publicity-conscious companies sweep bribery cases under the rug.[38] An unscientific survey uncovered widespread ignorance of the criminal statutes.

Most enforcement of commercial bribery is civil.[39] A plaintiff's civil remedies for commercial bribery are, as we will

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Enforcement of the Foreign Corrupt Practices Act of 1977: Some Observations and Thoughts (Sept. 13, 2012), 2012 WL 4328247, at 3 (elaborating on the Department of Justice's preferred method of using deferred prosecution agreements to settle with defendants in FCPA cases); *see also* John R. Cook, *U.S. Department of Justice and Securities and Exchange Commission Guide to Foreign Corrupt Practices Act Enforcements*, 107 AM. J. INT'L L. 227, 227 (2013) ("The guide comes at a time of greatly increased FCPA enforcement, much involving foreign companies, including nearly $3.2 billion in settlements . . . .").

34. Charles Toutant, *Teva Agrees to Pay $520M Over Bribes to Foreign Officials*, LEGAL INTELLIGENCER (Dec. 22, 2016), http://www.thelegalintelligencer.com/id=1202775429882/Teva-Agrees-to-Pay-520M-Over-Bribes-to-Foreign-Officials (last visited Mar. 6, 2017) (describing the settlement as the largest criminal fine on a pharmaceutical company for FCPA violations) (on file with the Washington and Lee Law Review).

35. *See* Elizabeth A. Harris, *After Bribery Scandal, High-Level Departures at Walmart*, N.Y. TIMES, https://www.nytimes.com/2014/06/05/business/after-walmart-bribery-scandals-a-pattern-of-quiet-departures.html (last visited Mar. 6, 2017) (noting the company increased its compliance staff by 30% in two years) (on file with the Washington and Lee Law Review).

36. Note, *Commercial Bribery*, 28 COLUM. L. REV. 799, 801 (1928); *see also* Boles, *supra* note 19, at 120–21, 158 (highlighting the "rampant" nature of commercial bribery and the public benefits to statutory enforcement); Note, *Commercial Bribery: The Need for Legislation in Minnesota*, 46 MINN. L. REV. 599, 603–04 (1962) (discussing the inadequacy of civil remedies).

37. *See* Boles, *supra* note 19, at 165 ("At present, federal and state governments rarely prosecute commercial bribery, once called 'the most under-prosecuted crime in penal law.'" (quoting Bob Wacker, *Inside a Case of Commercial Bribery: How a Kickback Scheme in Hawaii Led to LI Sting,* NEWSDAY, Feb. 8, 1988, at 1)).

38. *See* Gerlin, *supra* note 30 (featuring Jim G. Locklear, the poster boy bribe-taking purchasing agent).

39. *See* Note, *Control of Nongovernmental Corruption by Criminal Legislation*, 108 U. PA. L. REV. 848, 853–55 (1960) ("The most salient feature of the cases in this area is that they are very few in number and most of those

see, formidable.[40] A student Note writer observed that the severe civil remedies may deter people from reporting commercial bribery to criminal authorities; but the Note continued by stating, "it is questionable whether modification would encourage disclosure."[41] A business's best defenses against bribery are its internal controls and practices.[42]

Generally speaking, criminal law is "public" law that the government uses to punish the defendant's misconduct.[43] Civil law is "private" law for a private plaintiff to maintain and vindicate his rights, and to receive a remedy.[44] The question of whether the state should deal with a person's misconduct as either a crime or a civil matter is that "an offence should be treated as a civil matter . . . if society wishes to trade off the benefits to the perpetrator against the costs."[45]

One observation is that "tort law prices, while criminal law punishes."[46] In commercial bribery, that observation is incomplete. Criminal and civil law are related as a Venn diagram of overlapping circles. The civil court can wield punitive damages to punish the defendant, but the civil defendant's criminal consequences may affect the amount of punitive damages.[47] If the

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which are to be found are civil rather than criminal.").

40. *See* Note, *Commercial Bribery: The Need for Legislation in Minnesota*, *supra* note 36, at 603–04 (stating that civil remedies include losses suffered in operating a business prior to the rescission of purchase, the cost of time lost by the principal, expenses incurred, non-taxable litigation expenses, attorney fees, the value of the amount actually bribed, and the ability to dismiss the agent).

41. Note, *Bribery in Commercial Relations*, 45 HARV. L. REV. 1248, 1251 (1932).

42. *See* Boles, *supra* note 19, at 168–72 (discussing the implementation of proactive compliance measures in the private sector).

43. *See generally* Randy E. Barnett, *Foreword: Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J.L. & PUB. POL'Y 267 (1986).

44. *See id.* at 271 (including subjects that define "the enforceable duties that all individuals owe to one another," such as contract, torts, property, and trusts and estates).

45. Rose-Ackerman, *supra* note 20, at 221 n.4.

46. John Coffee, *Does "Unlawful" Mean "Criminal": Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 194 (1991).

47. *See* Tuttle v. Raymond, 494 A.2d 1353, 1361–62 (Me. 1985) (deciding to affirm a judgment but vacate an award for punitive damages based on otherwise criminal activity because the defendant's recklessness did not amount to malice).

civil court grants the plaintiff an injunction, the defendant's subsequent breach may lead to criminal contempt.[48] Many types of misconduct are both civil and criminal—for example, assault-battery crimes against a person are also torts.[49] The civil law defines property, thus leading to the crime of theft and the tort of conversion.[50] As part of a criminal prosecution, the prosecuting officials may secure compensation, mislabeled as "restitution," for the victim.[51] The bribee's imprisonment may prevent her from earning any income. Criminal fines and civil-asset forfeitures may take the defendant's assets.[52] Ray Nagin, the former mayor of New Orleans, was convicted of taking bribes from businessmen in exchange for city work; in addition to his criminal sentence, the judge entered a forfeiture order for $501,000.[53]

What do the criminal commercial bribery statutes and rare prosecutions imply for the civil commercial-bribery process?[54] The government's criminal prosecution does not bar the private

48. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441–42 (1911) (discussing the role of criminal contempt in vindicating the authority of the court).

49. *See* Barnett, *supra* note 34, at 268 (discussing the philosophy behind the tort/crime distinction).

50. *See id.* (explaining that theft "offends public standards of 'good' conduct" but is "wrongful in that it deprives a particular individual of something that belonged to her").

51. *See* United States v. Paroline, 134 S. Ct. 1710, 1719–20 (2014) (using "proximate cause" analysis in tort to limit an award of restitution in a criminal case).

52. *See generally* Phillip Londen, Comment, *Arizona's Civil Asset Forfeiture Scheme: Distorted Justice*, 47 ARIZ. ST. L.J. 475 (2015) (providing summary, analysis, and criticism of federal and state forfeiture); James Simon, Note, *Virginia's Civil Asset Forfeiture System: Valuable Tool or Vehicle for Abuse?*, 74 WASH. & LEE L. REV. (forthcoming 2017).

53. *See* United States v. Nagin, 810 F.3d 348, 352–54 (5th Cir. 2016) (upholding personal money judgment against defendant); *see also* Gabrielle Levy, *Ray Nagin, Former New Orleans Mayor, Must Pay Back $500K*, UNITED PRESS INT'L (May 28, 2014 4:17 PM), http://www.upi.com/Top_News/US/2014/05/28/Ray-Nagin-former-New-Orleans-mayor-must-pay-back-500K/9251401306822/ (last visited Mar. 6, 2017) (detailing Mayor Ragin's payment order for his involvement in over 20 counts of fraud) (on file with the Washington and Lee Law Review).

54 *See generally* Graham Virgo, *We Do This in the Criminal Law and That in the Law of Tort: A New Fusion Debate*, *in* TORT LAW, CHALLENGING ORTHODOXY (Stephen Pitel, Jason Neyres & Erica Chamberlin eds., 2013).

plaintiff's recovery of civil remedies.[55] However, using a threat to prosecute another for a crime—for example, Sailer's threat to Aggie's mother—to secure a civil advantage or settlement, is improper duress.[56] The defendant's Fifth Amendment privilege against self-incrimination—if the civil defendant claims it—may impede the plaintiff's civil discovery and trial testimony; because of the defendant's privilege, the court will usually stay the civil process until the criminal process plays out.[57] Although delay is usually the defendant's friend, delay to wait out the criminal process may benefit the civil plaintiff because the defendant's criminal conviction or guilty plea will establish issue preclusion or estoppel in the civil case.[58] The burdens of proof differ. In criminal law proceedings require culpability beyond a reasonable doubt while civil proceedings only require a preponderance of the evidence. Accordingly, a defendant may be acquitted of the crime, but found liable to the civil plaintiff.[59]

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55. *See* United States v. St. Pierre, 377 F. Supp. 1063, 1064–65 (S.D. Fla. 1974) ("'[A]lternate tax and criminal remedies . . . do not bar the [plaintiff] from recovering the secret profits and gratuities thus received [in] civil action.'" (quoting United States v. Drisko, 303 F. Supp. 858, 860 (E.D. Va. 1969))).

56. *See* Bank of Tucson v. Adrian, 245 F. Supp. 595, 598–99 (D. Minn. 1964) (treating the threat of jail for a third party as arising to the level of duress entitling the threatened parties to recovery); *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 14 illus. 1 (AM. LAW INST. 2011) (illustrating how threatening a third party with legal action constitutes "impermissible coercion as a matter of law").

57. *See* Louis Vuitton Malletier S.A. v. LY USA, Inc., 676 F.3d 83, 97 (2d Cir. 2012) ("A stay can protect a civil defendant from facing the difficult choice between being prejudiced in the civil litigation, if the defendant asserts his or her Fifth Amendment privilege, or from being prejudiced in the criminal litigation if he or she waives that privilege in the civil litigation.").

58. *See* Taylor v. Sturgell, 553 U.S. 880, 892 (2008) ("Issue preclusion . . . bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court' . . . even if the issue recurs in the context of a different claim." (quoting New Hampshire v. Maine, 532 U.S. 742, 748–49 (2001))). *See generally* RESTATEMENT (SECOND) JUDGMENTS § 85 (AM. LAW INST. 1982).

59. *See* One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232, 235 (1972) ("The acquittal of the criminal charges may have only represented 'an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.' As to the issues raised, it does not constitute an adjudication on the preponderance-of-the-evidence burden applicable in civil proceedings." (internal citations omitted)); *see also* Ashley v. Chief Constable of Sussex Police [2008] UKHL 25 (HL) [para. 17–18] (appeal taken from [2006] EWCA Civ 1085) (UK) (holding that different standards of

This Article will next examine an employer's civil remedies against his bribed agent. Then it will move to his remedies against the bribing seller. After discussing the employer's remedies against the bribee and the briber separately, the Article will examine the defendants together.

II. Civil Remedies: The Employer Sues the Employee

The plaintiff's private substantive theories largely stem from the common law of agency, fiduciary duties, employment law, contract, and tort, but they also include statutory responses.[60] Courts' remedies include compensatory damages, legal and equitable restitution, and punitive damages along with their close relative, statutory multiplied damages.[61] The Article's technical doctrinal analysis will focus on courts' decisions and the policies of compensation, reversing unjust enrichment, deterrence, and punishment. Coordinating the principal's smorgasbord of remedies to avoid excess and duplication is subtle and difficult in light of the policy goals.

Courts in the United States rely on, and cite to, United Kingdom decisions.[62] The law of commercial bribery in other common law jurisdictions, although similar to the United States', differs in interesting ways depending not only on local statutes, but also in the differing weight courts assign to policies interests such as third-party interests, the importance of predictability, the initial decision-maker's discretion, and the need for rules rather than standards.[63]

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proof apply in civil and criminal cases dealing with assault).

60. *See* Deborah A. DeMott, *Relationships of Trust and Confidence in the Workplace*, 100 CORNELL L. REV. 1255, 1263 (2015) (discussing fiduciary relationship in the context of insider trading prohibition); *see, e.g.*, United States v. Manzo, 851 F. Supp. 2d 797, 806 (D.N.J. 2012) (assessing an allegation of bribery by looking to the general definition of bribery, state law precedent, the common law, and state statutes).

61. *See infra* notes 434–439 and accompanying text (describing the difficulties in combining compensatory damages and restitution when the plaintiff attempts to recover from both the giver and receiver of a bribe).

62. *See* United States v. Carter, 217 U.S. 286, 307–08 (1910) (referring to English decisions and scholarship).

63. *See generally* MELVIN EISENBERG, THE NATURE OF THE COMMON LAW 26–37 (1988); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL

"Bribery is an evil practice," wrote the Privy Council, "which threatens the foundations of any civilized society."[64] Sailer's bribe raised the price or lowered the quality of goods to Aggie's employer Beyer, whose customers, in turn, pay too much. As a result, rival sellers, Sailer, and the briber's competitors, lose the ability to compete.[65] The easiest part of our inquiry is the answer that popular and judicial intuitions combine with market economic theory to condemn a bribe as a wrong.

Human cussedness has not changed much. "[T]he principles governing the paying or giving of bribes and secret commissions to fiduciaries have been settled since at least the late 19th century," wrote Paul Finn, J., for the full Federal court in Australia in *Grimaldi v. Chameleon Mining*.[66]

Courts' common law reasoning proceeds through policy justification to rule, and through rule to result and remedy.[67] The courts' difficulties in aligning policy, rule, and result and their fuzziness in characterization, choice, and measurement are notable throughout this study. As a consequence, an untidy result orientation may occur because courts and juries appear to be avid in reversing commercial bribery and suppressing it in the future. Working in the grey areas and fringes to identify excess zeal is the difficult aspect of this inquiry.

EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 118–26 (1991).

64. Attorney General for H.K. v. Reid [1994] 1 AC 324 (PC) 330 (appeal taken from NZCA) (UK); *see also* Rose-Ackerman, *supra* note 20, at 218 ("[C]orruption is associated with lower levels of investment, productivity, and growth and . . . discourages both capital inflows and foreign direct investment . . . . Overall, corruption reduces the perceived legitimacy of democratic governments."). *But see* Mills & Weisberg, *supra* note 2, at 1412–15 (noting that bribery is not always anticompetitive).

65. *See* Franklin A. Gevurtz, *Commercial Bribery and the Sherman Act: The Case for Per Se Illegality*, 42 MIAMI L. REV. 365, 390–91 (1987) (showing the anticompetitive effects of commercial bribery, including the raising of prices generally).

66. N.L. [No 2] (2012) 200 FCR 296, 348 (Austl.). The law of bribery is related enough to Judge Finn's subject, the law of business self and double-dealing to qualify the latter as precedent for bribery. *See generally Reid*, 1 AC 324 (PC) at 330.

67. *See generally* EISENBERG, *supra* note 63, at 26–37; SCHAUER, *supra* note 63, at 118–26.

A. Breach of Duty?

What branch of civil misconduct has Aggie committed? Commercial bribery law is rooted in contract, tort, employment-law, and agency-fiduciary principles.[68] In general, an employer's contract remedies—compensatory damages—are more conservative than tort or agency-fiduciary remedies—often, restitution. In addition to lower recovery, the defendant will prefer a contract characterization because neither the plaintiff's recovery for breach of fiduciary duty nor his recovery for most intentional torts will be discharged in her bankruptcy.[69]

Scholarly ferment surrounds the fiduciary's legal-theory and doctrinal home. A leading private-law scholar, Professor Lionel Smith, rejects a contract base for commercial bribery; the solution to a fiduciary's breach does not "derive from a breach of a promissory obligation."[70] Fiduciary law, Smith writes, has no deterrent function; not instrumental, fiduciary law is based in the normative structure.[71] For Smith, fiduciary duties are "unified" and loyalty is a requirement, not a duty.[72] Courts' solutions to fiduciary disputes are rules of primary attribution, not secondary remedies rules.[73]

On the other hand, Professor Adit Bagchi moves his analysis of the related duty of loyalty from fiduciary status to contract. [74]

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68. *See* United States v. Manzo, 851 F. Supp. 2d 797, 806 (D.N.J. 2012) (detailing the various sources and origins of the law of bribery).

69. *See* 11 U.S.C. §§ 523(a)(4), (6) (2012) (recognizing that a discharge for "fraud or defalcation while acting in a fiduciary capacity" or for "willful and malicious injury by the debtor to another entity" will not occur).

70. Lionel Smith, *Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another*, 130 L.Q. REV. 608, 613–14 (2014) [hereinafter Smith, *Fiduciary Relationships*].

71. *See id.* at 626 ("I disagree with Lord Millett when he says that fiduciary law has a deterrent function or is driven by public policy; in my view, it reflects the normative structure of the fiduciary relationship.").

72. *See id.* at 633 ("In private law, fiduciary relationships are characterised by three elements: the requirement of loyalty, the no-conflict rules, and the no-profit rule. They form a unified system for ensuring the loyal exercise of judgement on behalf of another.").

73. *See id.* at 628 (arguing that the right of the beneficiary to recover profit is born of the fiduciary duty to render the profit, not from a secondary duty to repay after being found liable for wrongdoing).

74. *See* Adit Bagchi, *Exit, Choice and Employee Loyalty*, *in* CONTRACT STATUS, AND FIDUCIARY LAW 17–19 (Paul B. Miller & Andrew S. Gold eds.,

An employee's duty of loyalty, he maintains, is contractual; it implements the employee's contractual duty of good faith; it is not founded on the employee's fiduciary status.[75]

In general, the conditions for creation of a fiduciary duty are satisfied when a principal delegates power to an agent; the agent substituting for the principal exercises power to decide; and the delegation and decisions create a risk of abuse and misconduct that neither the principal nor the market can prevent.[76]

Fiduciary duty is not "monolithic."[77] "Fiduciary" is not a unified concept, but it varies from one application to another. A corporate officer is also an agent. An officer's fiduciary duties are more demanding than a director's. An errant officer ought to "face a greater risk of personal liability for misconduct."[78] Suppose, for example, a mother's will creates a special-needs trust naming her intellectually disabled daughter as beneficiary and her son as trustee. Contrast these relationships with our problem of fiduciary law as a subset of agency law—for example, a business owner and a purchasing agent where the owner can monitor, direct, and discharge the agent.

Between the employer and employee, commercial bribery is part of the familiar law-and-economics doctrine of agency cost.[79] An agent's interest conflicts with her employer's.[80] In a principal-agent pair, the principal-employer is the boss who

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forthcoming 2017), http://ssrn.com/abstract=2759401 (arguing that employers wield too much power over employees without a formal contract).

75. *See id.* at 2 ("As a mandatory duty applied to the (generally) less informed and less powerful party to contract, it should be narrowly construed where job duties and terms of exist are unspecified in an employment contract ex ante.").

76. *See* Rash v. J.V. Intermediate, Ltd., 498 F.3d 1201, 1211 (10th Cir. 2007) ("The fiduciary duty exists because of the 'peculiar' trust between the employee-agent and his employer-principal." (citing Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 200 (Tex. 2002))).

77. RESTATEMENT (THIRD) AGENCY § 8.01 cmt. c (AM. LAW INST. 2006).

78. Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1603 (2005).

79. *See generally* LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004).

80. *See* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 637 (2004) [hereinafter Sitkoff, *Agency Costs Theory*] ("The losses to the parties that stem from such a misalignment of interests are called agency costs.").

delegates discretionary decision-making authority to his subordinate, the agent-employee.[81] Tensions arise. The employer cannot hire, train, and monitor employees to assure that his interest will always be implemented, and he has limited ability to control employees with rewards and penalties.[82] An employee with specialized knowledge may maximize return and minimize effort.[83] The conflicts of interest are inevitable, as anyone who has been either an employer or an employee knows.[84] The gap between the employer's aspiration and the employee's reality is the agency cost.[85]

When an agent accepts a bribe, she is no longer working loyally on behalf of her principal's interest, but rather she is advancing the briber's and her own self-interest. A commercial bribe has a more serious agency cost than an employee's goldbricking or personal internet surfing to shop on the office computer.[86] When discovered, it will usually trigger the employee's discharge, and it often catapults the parties into court.[87] As a Minnesota court stated, "[f]idelity in the agent is what is aimed at, and, as a means of securing it, the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal."[88]

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81. *See generally* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

82. *See id.* at 308 (adding that "the agent will not always act in the best interests of the principal").

83. *Id.*

84. *See id.* (noting that it is "generally impossible" for the principal to ensure that the agent will make optimal decisions, which maximize the principal's utility).

85. *See generally* Sitkoff, *Agency Costs Theory*, *supra* note 80 (highlighting the agency cost emerging from the phenomenon of misaligned interests).

86. *See* Gevurtz, *supra* note 65, at 390–91 (showing the harsh effects, in particular anticompetitive effects, of commercial bribery).

87. *See* Note, *Commercial Bribery: The Need for Legislation in Minnesota*, *supra* note 36, at 603–04 (highlighting normal procedure in the course of civil litigation for remedying commercial bribery).

88. Tarnowski v. Resop, 51 N.W.2d 801, 802–03 (Minn. 1952)*; see also* United States v. Carter, 217 U.S. 286, 306 (1910) (discussing the importance of establishing rules that prevent agents from hiding self-serving practices from their principal); United States v. Bowen, 290 F.2d 40, 42 (5th Cir. 1961) ("The law exacts a faithful single-minded devotion to the interests of the master.");

The Employment Restatement defines the employee's duty of loyalty, fiduciary duty, as one of "trust and confidence."[89] An employee with a fiduciary duty based on trust and confidence may be liable for disgorgement and forfeiture.[90] In contrast, a "rank and file" employee with only an implied fiduciary duty is liable for more limited contract damages.[91]

Even though lawyers and courts may consult the newly minted Restatement of Employment Law,[92] the "national" employment law is often neither structured nor uniform, a situation that creates opportunities and choices for lawyers' advocacy and courts' characterization. Within employment law, the law on employer remedies against an employee is underdeveloped, because most former employees lack money to pay a judgment and the employer is usually satisfied with firing.[93]

"[F]iduciary law is vague and open-ended around the edges."[94] In the grey areas, a court can select the desired remedy, and then work backward to characterize the appropriate substantive base.[95] As the Connecticut court

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Jaclyn, Inc. v. Edison Bros. Stores, 406 A.2d 474, 485 (N.J. Super. Ct. Law Div. 1979) ("The evil of commercial bribery is the invasion of the principal's right to undivided loyalty from his agent which results from secret payments to the agent."); Laseter v. Sistrunk, 168 So. 2d 652, 656 (Miss. 1964) ("[The agent] is duty bound not to act adversely to the interest of his employer by serving or acquiring any private interest of his own in antagonism or opposition thereto.").

89. RESTATEMENT (THIRD) EMPLOYMENT LAW § 8.01 (AM. LAW INST. 2015).

90. *See id.* § 9.09(d) ("If an employee personally profits from a breach of fiduciary duty, the employer can recover those profits from the employee.").

91. *Id.* § 9.09(a)–(c).

92. *See generally* RESTATEMENT (THIRD) EMPLOYMENT LAW (AM. LAW INST. 2015).

93. *See* Charles Sullivan, *Restating Employment Remedies*, 100 CORNELL L. REV. 1391, 1401 n.58, 1410 n.109, 1419 n.162 (2015) (referencing instances where employers were satisfied with termination, where employees were viewed as judgment proof, or where employers were actually able to recover damages).

94. Henry E. Smith, *Why Fiduciary Law Is Equitable*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 261, 273 (Andrew S. Gold & Paul B. Miller eds., 2014).

95. *See* Harper v. Adametz, 113 A.2d 136, 139 (Conn. 1955) (discussing the trend to stay away from outright definition of the term "fiduciary" in order to leave "the bars down" to new situations); *see also* George P. Roach, *Compensation Forfeiture: Stacking Remedies Against Disloyal Agents and Employees*, 47 ST. MARY'S L.J. 249, 317–18 (noting disagreement on the precise requirements of the duty of loyalty for rank-and-file workers).

explained, "equity has carefully refrained from defining a fiduciary relationship in precise detail and in such a manner as to exclude new situations. It has left the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other."[96] "A fiduciary," a lawyer quipped, "is what the judge calls your client right before finding against him."

Sailer has bribed Aggie to buy his speakers. As a purchasing agent, Aggie enjoys her employer's trust and confidence. An agent like Aggie owes a fiduciary duty of loyalty to her principal. A fiduciary must be other-regarding and favor her principal's interests above hers and others'.[97] Aggie has breached either her freestanding fiduciary duty or an implied fiduciary term of loyalty in her contract with her employer.

She also owes him a tort fiduciary duty of loyalty;[98] her self-dealing breaches that duty.[99] Her secret profit breached two duties: her contract and her fiduciary duty.[100] The contract-fiduciary-tort distinction is our first area of choice or characterization.

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96. *Id.*

97. *See generally* Smith, *Fiduciary Relationships*, *supra* note 70.

98. *See* RESTATEMENT (SECOND) OF TORTS § 874 (AM. LAW INST. 1979) (characterizing breach of fiduciary duty as a tort).

99. *See supra* notes 87–90 (providing for an employee's duty of "trust and confidence," and providing damages for employee disloyalty, as well as damages for disgorgement in the even the employee directly profits from the disloyalty); RESTATEMENT (THIRD) AGENCY §§ 8.01 cmt. d, 8.02 cmt. e (2006) (dealing with remedies for breach of fiduciary duty). *See generally* HOWARD A. SPECTER & MATTHEW W. FINKIN, INDIVIDUAL EMPLOYMENT LAW AND LITIGATION § 9.06 (1989). When the ALI's members approved the proposed final draft of the third Restatement of Employment Law at the May 2014 meeting, § 8.01's fiduciary duty of loyalty was amended. The duty is only owed by an employee who occupies a position of trust and confidence, but depending on the circumstances, an employee may owe an implied duty of loyalty. RESTATEMENT (THIRD) EMPLOYMENT LAW § 8.01 (AM. LAW INST. 2015).

100. *See generally* DAN B. DOBBS ET AL., THE LAW OF TORTS § 699 (2d ed. 2011) [hereinafter DOBBS ET AL., THE LAW OF TORTS]. *See also* United States v. Bowen, 290 F.2d 40, 44 (5th Cir. 1961) (criticizing the district court for viewing the issue too narrowly by classifying it as merely a breach of contract); Jaclyn, Inc. v. Edison Bros. Stores, Inc., 406 A.2d 474, 491 (N.J. Super. Ct. Law Div. 1979). (stating that New Jersey courts have treated such situations as both tort actions and trust actions).

The Restatements of Agency and Employment provide for an injunction to forbid the briber from continuing his misconduct.[101] Although some employers may seek an injunction, Beyer—who has fired Aggie—will not patronize Sailer again. He is not interested in an injunction. We turn below to Beyer's money remedies.

The employer may choose between compensatory damages and restitution.[102] This Article considers compensatory damages, restitution, and punitive damages. Within compensatory damages, the employer may choose between contract and tort.[103] A contract plaintiff may usually not recover punitive damages, unless the breach includes an independent tort.[104] The employer's tort damages will usually be larger because recoveries for emotional distress are available for a tort,[105] and, if the defendant's misconduct surmounts the jurisdiction's threshold, a tort plaintiff may recover punitive damages.[106]

Restitution takes two forms, legal and equitable.[107] Restitution may be augmented with punitive damages.[108]

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101. *See* RESTATEMENT (THIRD) EMPLOYMENT LAW § 9.08(b) (AM. LAW INST. 2015) (providing for an injunction); RESTATEMENT (THIRD) AGENCY § 8.01 cmt. d (AM. LAW INST. 2006) (same); RESTATEMENT (SECOND) OF AGENCY § 312 cmt. d (AM. LAW INST. 1958) (same). If Aggie violates a noncompetition covenant, Beyer may seek an injunction prohibiting future violations. *See* Presto-X-Company v. Ewing, 442 N.W.2d 85, 89–91 (Iowa 1989) (remanding on grounds that the lower court should have issued an injunction where a non-compete agreement was involved); Robert S. Weiss & Assocs. v. Weiderlight, 546 A.2d 216, 226 (Conn. 1988).

102. *See* Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1048 (2011) (contrasting compensatory damages with disgorgement).

103. *See* Lazar v. Superior Court, 12 Cal. 4th 631, 638 (Cal. 1996) ("Recovery . . . may be limited by the rule against double recovery of tort and contract compensatory damages." (citing Tavaglione v. Billings, 4 Cal. 4th 1150, 1159 (Cal. 1993))).

104. *See* Gen. Motors Corp. v. Piskor, 381 A.2d 16, 22 (Md. 1977) ("[T]he rule has developed that punitive damages may never be recovered in pure breach of contract suits . . . .").

105. DOBBS ET AL., THE LAW OF TORTS, *supra* note 100, § 382.

106. *See* TRW Inc. v. Andrews, 534 U.S. 19, 25 (2001) (describing a case where the appellee sought punitive damages for "embarrassment, humiliation, and emotional distress").

107. *See generally* RENDLEMAN & ROBERTS, *supra* note 1, at 491–92.

108. *See* Ward v. Taggert, 336 P.2d 534, 538 (Cal. 1959) ("Courts award exemplary damages to discourage oppression, fraud, or malice by punishing the

Equitable restitution, in turn, takes two forms, constructive trust[109] and accounting.[110] We will observe a shifting focus on compensation, reversing unjust enrichment, deterrence, and punishment below as courts examine the employer's money remedies that flow from commercial bribery.[111]

We will inquire whether the employer's remedies are well adjusted to the employee's blameworthiness or are potentially too harsh, too draconian.

B. Salary Forfeiture

For an employer's remedies, we begin with salary forfeiture. The court may order a bribed employee to forfeit her compensation, subject to statutes on wage payment and to

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wrongdoer. Such damages are appropriate in cases . . . where restitution would have little or no deterrent effect, for wrongdoers would run no risk of liability to their victims beyond that of returning what they wrongfully obtained." (internal citation omitted)). The Restatement (Third) of Restitution and Unjust Enrichment states:

> [B]ecause disgorgement, at least in theory, imposes no net loss on the defendant, there are situations in which a court may conclude that the threat of liability to disgorge profits will not adequately deter the misconduct . . . . A court that reaches this conclusion will sometimes supplement the defendant's liability in restitution with an award of exemplary damages.

RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. k (AM. LAW INST. 2011).

109. *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. a (AM. LAW INST. 2011).

110. *See id.* § 51 cmt. a ("Restitution measured by the defendant's wrongful gain is frequently called 'disgorgement.' Other cases refer to an 'accounting' or an 'accounting for profits.'").

111. *See* RESTATEMENT (THIRD) OF AGENCY § 8.02 cmt. e, reporter's note e (AM. LAW INST. 2006) (articulating the available remedies "to a principal when an agent receives a secret commission from a third party," "a third party's liability to the principal," and "when a defendant is a director or senior executive of a corporation"); ANDREW BURROWS, REMEDIES FOR TORTS AND BREACH OF CONTRACT 615–21 (3d ed. 2004) [hereinafter BURROWS, REMEDIES] (discussing remedies for bribes and secret commissions); DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 10.6 (2d ed. 1993) [hereinafter DOBBS, LAW OF REMEDIES] (discussing liabilities for a bribing seller's liability to the buyer and to competitors for commercial bribery and associated harms). *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 cmt. d, illus. 17–18; *id.* § 44 cmt. b, illus. 8 (AM. LAW INST. 2011).

feasible apportionment.[112] "Mr. Kelly's claims," a court wrote, "for back salary and expense reimbursement are dismissed as not recoverable because of his disloyalty to his employer during the period for which he is making those claims."[113] The bribe negates an element of an agent's contract cause of action for wages, and it serves as the employer's affirmative defense.[114] Forfeiture may also be an employer's freestanding equitable restitution remedy interposed either as a claim or a counterclaim.[115] Forfeiture may comprise the largest portion of the employer's remedy.[116]

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112. *See* Kaye v. Rosefielde, 121 A.3d 862, 874–75 (N.J. 2015) (ordering former executive to disgorge salary during periods of disloyalty even though employer had no compensatory damages). *See generally* PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 14.9; RESTATEMENT (THIRD) EMPLOYMENT LAW § 9.09 (AM. LAW INST. 2015); RESTATEMENT (THIRD) AGENCY § 8.01 cmt. d(2) (AM. LAW INST. 2006) ("An agent's breach of fiduciary duty is a basis on which the agent may be required to forfeit commissions and other compensation. The availability of forfeiture is not limited to its use as a defense to an agent's claim for compensation."); RESTATEMENT (SECOND) OF AGENCY § 456 cmt. b (AM. LAW INST. 1958) ("If an agent is paid a salary apportioned to periods of time, or compensation apportioned to the completion of specified items of work, he is entitled to receive the stipulated compensation for periods or items properly completed before his renunciation or discharge."); *id.* § 469 cmt. d ("The fact that [an agent] has been disloyal or insubordinate in one transaction does not disentitle him to indemnity on account of other transactions."); *Commercial Bribery*, *supra* note 36, at 800 ("The breach of duty would privilege the principal in discharging the agent, without incurring any liability for the compensation that he had agreed to pay . . . ." (citing Dennison v. Aldirch, 114 Mo. App. 700 (1905))); *Commercial Bribery: The Need for Legislation in Minnesota*, *supra* note 36, at 603–04 ("[T]he principal may dismiss the disloyal agent without incurring any liability for breach of an employment contract . . . . However, the agent's disloyalty does not allow the principal to withhold compensation for prior or subsequent faithful service unless such payment includes some compensation for willfully disloyal service."). *See generally Control of Nongovernmental Corruption by Criminal Legislation*, *supra* note 39, at 855.

113. MDO Dev. Corp. v. Kelly, 726 F. Supp. 79, 86 (S.D.N.Y. 1989); *see also* Dorsett Carpet Mills, Inc. v. Whitt Tile & Marble Distrib. Co., 734 S.W.2d 322, 323–26 (Tenn. 1987).

114. *See Control of Nongovernmental Corruption by Criminal Legislation*, *supra* note 39, at 855 ("Another frequent situation finds the agent or employee suing the seller on their contract to recover the compensation promised for his services. Such a contract is of course not recognized if the seller can prove that it was in violation of the criminal statutes." (citing Stone v. Freeman, 298 N.Y. 268, 271 (1948))).

115. *See generally* Kaye v. Rosefielde, 121 A.3d 862, 872 (N.J. 2015). For more detailed discussion of forfeiture, see Roach, *supra* note 95, at 305–07, 311.

116. *See* Roach, *supra* note 95 at 292, app. (comparing recoveries in ten cases).

If Beyer sues her, Aggie's counterclaim to recover her back salary may fail. Indeed Beyer may recover her salary from the disloyal period. The reason for saying "may" twice in the preceding sentences is that the Employment Restatement, without resolving the issue definitively, seems to present the defendant's wage forfeiture as an alternative to the plaintiff's compensatory damages: first, it hints that forfeiture may constitute "double recovery"—that is, apparently duplicating damages[117]—and, second, that forfeiture will occur when the employer lacks a "practicable method for making a reasonable calculation of the harm"—that is, when damages cannot be calculated.[118]

The Employment Restatement's comments articulate several ways to calculate the amount the agent forfeits based on time, task, willfulness, and the employer's damages.[119] Its comments retreat from stern moralistic "forfeiture for disloyalty" positions and apparently adopt a flexible multi-factor approach.[120] Although the Employment Restatement does not focus on commercial bribery, we commend a commercial-bribery court to adopt its flexible, multi-factor approach to calculate Aggie's wage forfeiture.

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117. *See* RESTATEMENT (THIRD) EMPLOYMENT LAW § 9.09(c) (AM. LAW INST. 2015) (stating that an employer can deny compensation owed and obtain the return of any compensation paid except where the employer would obtain from double recovery).

118.

> [A]n employer may deny any compensation owed, and obtain the return of any compensation paid, to an employee who breaches the employee's duty of loyalty owed the employer where . . . the nature of the employee's dishonesty is such that there is no practicable method for making a reasonable calculation of the harm caused the employer by the employee's disloyal services.

Id.

119. *See id.* cmt. c (describing the possible ways to determine the amount an employee forfeits based on the extent to which an employee's compensation can be allocated to time periods or tasks, willful breach of the duty of loyalty, and harm caused by the employee's breach); *see also* Roach, *supra* note 95, at 332–38.

120. *See id.* ("This Section adopts a position similar to those jurisdictions that have rejected a flat-out 'forfeiture for disloyalty' approach. [Instead], the employer can deny compensation to the disloyal employee to the extent the economic harm caused by the employee's disloyal services exceeds any benefit provided by the employee.").

Professor Charles Sullivan would circumscribe the employer's forfeiture remedy even more.[121] He would limit it to higher-level employees because board control is either weak or absent.[122] He would narrow it there to include only the employee's subjective willful misconduct.[123] Lower-level employees do not owe their employers a duty of loyalty for fiduciary status and a forfeiture remedy, but they are liable for contract damages only.[124] He would eliminate wage forfeiture for an employee's theft, limiting the employer to tort and criminal remedies.[125] He took no position on kickbacks.[126]

C. Compensatory Damages

The policy basis of compensatory damages begins with compensation, to put the plaintiff where he would have been economically without the defendant's breach.[127] Another policy justification for damages is deterrence, to reduce the incentive to cause harm,[128] the harm here being to receive or give a bribe.[129] The Employment Restatement allows the employer to recover money damages for "past and reasonably certain future

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121. *See generally* Charles Sullivan, *Mastering the Faithless Servant: Reconciling Employment Law, Contract Law and Fiduciary Duty*, 2011 WIS. L. REV. 777, 814–18 (2011).

122. *Id.* at 819–22 ("Although in theory even higher-level employees are subject to the control of the employer, typically a corporation's board of directors, in practice the exercise of such control is likely to be weak or even nonexistent, a reality that has generated numerous proposals for reform of corporate governance.").

123. *Id.* at 822–26 (arguing that narrowing the remedy to willful misconduct "would at least provide courts with an escape hatch from forfeiture where the breach was not egregious, and . . . such an escape hatch would be used more frequently when the employer suffered no harm").

124. *Id.* at 819.

125. *Id.* at 817.

126. *See generally id.* at 817–25.

127. *See* DOBBS, LAW OF REMEDIES, *supra* note 111, § 1.1 ("The damages remedy is a money remedy aimed at making good the plaintiff's losses.").

128. DOBBS ET AL., THE LAW OF TORTS, *supra* note 100, § 14.

129. *See generally Grimaldi v Chameleon Mining N. L. (No 2)* [2012] 200 FCR 296, 349, 421 (Austl.); PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 339 (1989) [hereinafter BIRKS, AN INTRODUCTION].

economic loss and noneconomic loss."[130] Aggie's employer may also recover special damages.[131] For example, he may recover proved lost business profits.[132] The Employment Restatement doesn't develop the employer's damages remedy but refers the reader back to its earlier section on the employee's damages when the employer breaches.[133] More specific statements of the employer's compensatory damages comprise pecuniary damages for his lost business profit and good will as well as nonpecuniary damages for his emotional distress.

The Minnesota court's decision in *Tarnowski v. Resop*[134] illustrates an employer's compensatory damages for a commercial bribery. The parties entered into a fiduciary relationship in which the agent agreed to inspect coin-operated music machines on behalf of the principal, who wished to purchase the machines if they met certain specifications.[135] The agent not only lied about the location and profitability of the machines, but he also accepted bribes from the machine seller.[136] Even though the principal rescinded his contract with the seller, the court found the agent liable for the amount of the bribe plus all damages that could reasonably be foreseen because of his tortious breach of fiduciary duty.[137] Compensation for injury to the principal's business and attorney's fees were among the principal's foreseeable damages.[138]

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130. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 9.09(b) (AM. LAW INST. 2015).

131. RESTATEMENT (THIRD) OF AGENCY § 8.02 cmt. e (AM. LAW INST. 2006).

132. *See* Tarnowski v. Resop, 51 N.W.2d 801, 804 (Minn. 1952) (allowing for recovery of lost profits); Dorsett Carpet Mills, Inc. v. Whitt Tile & Marble Distrib. Co., 734 S.W.2d 322, 323–26 (Tenn. 1987) (same); Banks v. Mario Indus. of Va., Inc., 650 S.E.2d 687, 696 (Va. 2007) (same); RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 9.09(b) (AM. LAW INST. 2015) (same).

133. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 9.09 cmt. b (AM. LAW INST. 2015).

134. 51 N.W.2d 801 (Minn. 1952).

135. *Id.* at 802.

136. *Id.*

137. *Id.* at 803–05.

138. *Id.* at 803.

Her employer may recover the bribe from the bribed employee.[139] We will turn below to the ambiguity about whether recovery of the bribe is restitution or compensatory damages.

D. Restitution

Restitution's policy base is twofold: to reverse or prevent the defendant's unjust enrichment and to deter the defendant and others from engaging in similar misconduct.[140] Recovery of damages to compensate the plaintiff for loss is not involved in restitution.

In general, a faithless fiduciary must disgorge her unjust gains.[141] A court will speak in the language of fiduciary responsibility: a fiduciary who breaches a trust relationship and benefits as a result may not retain the benefit. Aggie's return of any compensation she received during her disloyal period[142] is

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139. *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43(1) illus. 17, 18 (AM. LAW INST. 2011); RESTATEMENT (THIRD) OF AGENCY § 8.02 cmt. e (AM. LAW INST. 2006). *See also* United States v. Killough, 848 F.2d 1523, 1532 (11th Cir. 1988) (holding that an employer may recover a bribe); United States v. King, 469 F. Supp. 167, 171 (D.S.C. 1979) (same); *Tarnowski*, 51 N.W.2d at 803 (same); Risvold v. Gustafson, 296 N.W. 411, 413 (Minn. 1941) (same); Jaclyn, Inc. v. Edison Bros. Stores, Inc., 406 A.2d 474, 492 (N.J. Super. Ct. Law Div. 1979) (same); *Commercial Bribery*, *supra* note 36, at 800 (discussing bribery of agents under the common law); *Commercial Bribery: The Need for Legislation in Minnesota*, *supra* note 36, at 603 (noting an employer may recover his actual damages, excluding the bribe, only once); *Control of Nongovernmental Corruption by Criminal Legislation*, *supra* note 39, at 855–56 (detailing who is entitled to the bribe money, against whom, and under what circumstances).

140. *See generally Grimaldi v Chameleon Mining N.L. (No 2)* [2012] 200 FCR 296, 349, 421 (Austl.); BIRKS, AN INTRODUCTION, *supra* note 129, at 339.

141. *See generally* United States v. Project on Gov't Oversight, 572 F. Supp. 2d 73, 76–77 (D.D.C. 2008); Daniel v. Falcon Interest Realty Corp., 190 S.W.3d 177, 186–87 (Tex. App. 2005); RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 9.09(d) (AM. LAW INST. 2015); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43(1) (AM. LAW INST. 2011); SPECTER & FINKIN, *supra* note 99, § 9.08; PALMER, THE LAW OF RESTITUTION, *supra* note 5, §§ 2.11, 8.5.

142. *See* RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 9.09(c) (AM. LAW INST. 2015) (allowing employer's to "recover any compensation paid" as a result of the breach of "the employee's fiduciary duty of loyalty to the employer"); United States v. Carter, 217 U.S. 286, 306 (1910) (arguing that "justice will not tolerate, under any circumstances, that a[n] [agent] shall retain any profit or advantage which he may realize through the acquirement of an interest in

restitution.[143] The agent's employer may recover his employee's personal profits from her breach of her fiduciary duty of loyalty.[144]

Restitution is divided into two categories, giving-back restitution and giving-up restitution.[145] In giving-back restitution, the plaintiff's minus is the defendant's plus—for example, an incorrect bank deposit where the depositor's gain is the bank's loss.[146] The employer's recapture of an embezzler's bezzle or a breaching employee's compensation—forfeiture—is giving-back restitution that is not otherwise involved in remedies for commercial bribery.[147]

In giving-up restitution—the focus here—the plaintiff has no minus or cannot prove one, and the defendant's benefit is from elsewhere. Giving-up restitution is usually based on defendant's tort or other wrong.[148] Giving-up restitution can be either the legal restitution common count of money had and received[149] or equitable restitution in the form of either a constructive trust or an accounting.[150] The pattern in restitution for commercial bribery is giving-up restitution; the bribe moved from the briber to the agent. This leaves the agent with a plus without any minus subtracted from the principal.

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conflict with his fidelity as an agent"); United States v. Bowen, 290 F.2d 40, 44 (5th Cir. 1961) (noting that a master "is entitled to all the fruits of the servant's dereliction" (citations omitted)); Laseter v. Sistrunk, 168 So. 2d 652, 656 (Miss. 1964) ("[A]n agent . . . cannot, without the latter's consent, retain profits or earnings received in the course of performance of the employer's business or in an undertaking which constitutes a breach of duty to the employer.").

143. *See* PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 8.5 n.9 (citing cases in support).

144. RESTATEMENT (THIRD) EMPLOYMENT LAW § 9.09(d) (AM. LAW INST. 2015).

145. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1(e)(3) (AM. LAW INST. 2011) ("A liability in unjust enrichment (restitution) is enforced by restitution's characteristic remedies, some (but not all) of which involve a literal restitution or giving back.").

146. *See id.* § 1(e)(1) ("Restitution restores something to someone, or restores someone to a previous position.").

147. *See id.* ("[Restitution] may do the former by restoring the very property that the claimant gave up, or by granting substitute property rights.").

148. *See generally id.* §§ 3, 39, 40–49, 51, 55.

149. *See generally* United States v. Carter, 217 U.S. 286, 317 (1910).

150. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 51, 55 (AM. LAW INST. 2011).

Although the Restatement of Restitution's basic section one says that the defendant's enrichment must be "at the expense of" the plaintiff, the comment explains that

> [W]hile the paradigm case of unjust enrichment is one in which the benefit on one side of the transaction corresponds to an observable loss on the other, the consecrated formula "at the expense of another" can also mean "in violation of the other's legally protected rights," without the need to show that the claimant has suffered a loss.[151]

Restitution is based on the defendant's gain, not on plaintiff's loss. A restitution plaintiff may recover the defendant's gain even though that gain exceeds the plaintiff's loss measured by compensatory damages.[152] Compensation drops out because the restitution plaintiff may lack any pecuniary loss for compensatory damages.[153] The commercial bribery plaintiff may recover the bribe as restitution, even if he has neither pecuniary loss nor compensatory damages.[154] The policies advanced by the buyer's restitution are preventing the defendants' unjust enrichment and deterrence restitution policies, not compensatory-damages policies.[155]

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151. *Id.* § 1 cmt. a; *see also* Caroline Needham, *Recovering the Profits of Bribery*, 95 L.Q. REV. 536, 537–38 (1979).

152. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 3 cmt. b (AM. LAW INST. 2011) (discussing circumstances where recovery may exceed compensatory damages).

153. *Id.*

154. *See* United States v. Carter, 217 U.S. 286, 307 (1910) (allowing employer to recover employee's illicit gains); United States v. Bowen, 290 F.2d 40, 44–45 (5th Cir. 1961) (reversing summary judgment on the grounds that evidence of an employee acting in his own self-interest at the expense of his employer provided sufficient facts upon which to state a claim of relief); Cty. of Cook v. Barrett, 344 N.E.2d 540, 546 (Ill. App. Ct. 1975) ("[W]hen a fiduciary, who has acted for his beneficiary or principal, receives a gift, or bonus or commission from a party with whom he has transacted business, that benefit may be recovered from him by the beneficiary of the fiduciary relationship."); Tarnowski v. Resop, 51 N.W.2d 801, 802–03 (Minn. 1952) ("If an agent has received a benefit as a result of violating his duty of loyalty, the principal is entitled to recover from him what he has so received, its value, or its proceeds, and also the amount of damage thereby caused . . . ." (internal citations omitted)). *See generally* PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 2.11.

155. *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 43 illus. 17–19, reporter's note; 44 illus. 9, reporter's note b (AM. LAW INST. 2011); RESTATEMENT (THIRD) AGENCY § 8.02 cmt. b (AM. LAW INST. 2006).

In *United States v. Carter*,[156] for example, a captain of the United States army with discretion to hire contractors fell into a bribery scheme with river and harbor contractors.[157] The work was completed satisfactorily.[158] Although the United States was unable to prove specific pecuniary injury or harm from his bribery scheme, it sought an accounting of all of Carter's illicit profits.[159] The Court found that "[i]t would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency."[160] The Court noted that agents are capable of hiding their deception and "[i]t [is] not easy to show in some instances that the work ha[s] suffered by the substitution of one material for another," making it difficult for the employer to prove specific harm.[161] As such, "[i]t is immaterial if that appears whether the complainant was able to show any specific abuse of discretion, or whether it was able to show that it had suffered any actual loss by fraud or otherwise."[162] The Court did not base the principal's recovery on a finding of its specific harm, but rather on the agent's abuse of trust that warranted an accounting of his illicit gains.[163]

In addition to the agent's breaches of fiduciary and confidential relationships that we are examining,[164] a restitution plaintiff either without compensatory damages or with compensatory damages that are less than the defendant's gain may recover the defendant's gain.[165] There are several well-known examples of this brand of restitution in torts: trespass,[166]

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156. 217 U.S. 286 (1910).

157. *Id.* at 297–98.

158. *Id.* at 298–300.

159. *Id.* at 317.

160. *Id.* at 305.

161. *Id.* at 302.

162. *Id.* at 305–06.

163. *Id.* at 303–04.

164. *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 illus. 14, 15 (AM. LAW INST. 2011).

165. *See generally id.* § 55, cmts. a, i; BURROWS, REMEDIES, *supra* note 111, at 616; PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 2.11.

166. *See* Edwards v. Lee's Adm'r, 96 S.W.2d 1028, 1028–29 (Ky. 1936) (discussing a case where two adjoining landowners' properties sat over a cave, and one landowner profited from charging visitors and the other sued to collect

overuse of an easement,[167] and conversion.[168] Statutes allow restitution that exceeds plaintiff's damages for a trademark infringer on non-competing goods or services,[169] a copyright infringer,[170] and a trade-secrets infringer.[171] In equity, a plaintiff may recover restitution that exceeds damages when, for example, the trustee of an express trust "borrows" trust money and profits from a forbidden investment,[172] a trustee buys at the auction,[173] or a business fiduciary improperly takes advantage of a business opportunity.[174] A final example of a plaintiff's restitution

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the profits reaped from trespass into his portion of the cave). *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40 (AM. LAW INST. 2011).

167. *See* Raven Red Ash v. Ball, 39 S.E.2d 231, 238 (Va. 1946) ("To limit plaintiff to the recovery of nominal damages for the repeated trespasses will enable defendant, as a trespasser, to obtain a more favorable position than a party contracting for the same right. Natural justice plainly requires the law to imply a promise to pay a fair value of the benefits received."). *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40 illus. 8 (AM. LAW INST. 2011).

168. *See* Olwell v. Nye & Nisson, 173 P.2d 652, 654 (Wash. 1946) (measuring defendant's gain from use of egg washing machine rather than plaintiff's loss for damages). *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40 illus. 17 (AM. LAW INST. 2011).

169. *See* Maier Brewing Co. v. Fleischmann Distilling Corp., 390 F.2d 117, 123–25 (9th Cir. 1968) (finding it appropriate to make trademark infringement "unprofitable," via an accounting of profits, to deter future infringement). *See generally* 15 U.S.C. § 1117(a) (2012).

170. *See generally* 17 U.S.C. § 504(b) (2012); Three Boys Music Corp. v. Bolton, 212 F.3d 477, 487 (9th Cir. 2000); Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 402 (1940); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 42 illus. 7–9 (AM. LAW INST. 2011).

171. *See generally* UNIF. TRADE SECRETS ACT § 3(a) (UNIF. LAW COMM'N 1985); RESTATEMENT OF (THIRD) OF UNFAIR COMPETITION § 37 cmt. b (AM. LAW INST. 1995).

172. *See* Slay v. Burnett Tr., 187 S.W.2d 377, 389–90 (Tex. 1945) (finding payments collected by trustees recoverable).

173. *See* Jackson v. Smith, 254 U.S. 586, 589 (1921) ("Since he did pursue it and profits resulted the law made him accountable to the trust estate for all the profits obtained by him and those who were associated with him in the matter, although the estate may not have been injured thereby."); Smith v. Credico Indus. Loan Co., 362 S.E.2d 735, 737 (Va. 1987) ("[W]e hold that a co-trustee under a deed of trust cannot purchase property on behalf of herself or another at a foreclosure sale, even where that sale is conducted by another trustee, and even where the trustee who makes the purchase was not an active participant in conducting the sale.").

174. *See generally* Sanford v. Keech (1726) 25 Eng. Rep. 223; RESTATEMENT

recovery that exceeds compensatory damages is insider trading.[175]

The court may describe Beyer's recovery of the amount of the bribe as restitution. If she keeps the speakers, Aggie will be benefitted or enriched. Her benefit from her breach of duty is an unjust one, for she secured it through a breach of contract and a tort. Restitution for her wrong seems straightforward.[176]

Suppose that Aggie's bribe caused no detriment to her principal because she purchased speakers that Beyer wanted from Sailer at a competitive price. Nevertheless, when an agent-employee accepts a bribe, she deprives her principal of her disinterested advice. Her conflict of interest and her breach of her duty of loyalty are obvious.[177] Since the agent should not

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(THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 illus. 14, 15 (AM. LAW INST. 2011).

175. Diamond v. Oreamuno, 248 N.E.2d 910, 912 (N.Y. 1969) ("It is well established . . . that a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit but must account to his principal for any profits derived therefrom."). *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 illus. 9 (AM. LAW INST. 2011).

176. *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 (AM. LAW INST. 2011).

177. *See* Tarnowski v. Resop, 51 N.W.2d 801, 802 (Minn. 1952) ("It matters not that the principal has suffered no damage or even that the transaction has been profitable to him"); Jaclyn, Inc. v. Edison Bros. Stores, Inc., 406 A.2d 474, 492 (N.J. Super. Ct. Law Div. 1979) ("An agent is presumed to be acting with absolute devotion to his principal at all times."); City of New York v. Liberman, 660 N.Y.S.2d 872, 876 (N.Y. App. Div. 1997) ("It is a matter of grave public concern that there be absolute honesty in the procuring of a public contract." (internal quotations omitted)). *See generally* RESTATEMENT (THIRD) EMPLOYMENT LAW § 9.09 (AM. LAW INST. 2015); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43(2) (AM. LAW INST. 2011); RESTATEMENT (THIRD) OF AGENCY §§ 8.01 cmt. d, 8.02 cmt. e, illus. 9 (AM. LAW INST. 2006); SPECTER & FINKIN, *supra* note 99, § 9.08; United States v. Carter, 217 U.S. 286, 305–06 (1910); United States v. Bowen, 290 F.2d 40, 44 (5th Cir. 1961); United States v. King, 469 F. Supp. 167, 171 (D.S.C. 1979).

retain the tainted benefit, no one else has a valid claim for it.[178] Beyer may recover the bribe, which is more than he lost.[179]

Describing the bribe as unjust enrichment, Beyer may recover restitution from Aggie. Beyer's recovery of $8,000, the amount of her unjust gain, from disloyal-employee Aggie seems relatively straightforward.[180]

E. Damages and Legal Restitution

A court may also characterize Beyer's recovery of Aggie's bribe as compensatory damages. The agent may have altered the course of the bribe money as follows: Aggie diverted a "benefit," the bribe, that might have otherwise gone to Beyer. Sailer's bribe represents what might have become Sailer's discount or reduced price to Beyer.[181] The court may state the employer's recovery of the bribe as compensatory damages because his payment to the seller included "an overpayment in the amount of the commission."[182]

In a complex English dispute about whether an owner-principal could recover bribes that contractors had paid to the owner's agent, the chancellor wrote that "the price [the owner paid the contractors] was actually increased by the amount of the

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178. *See generally* PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 2.11. For more examples see *United States v. Carter*, 217 U.S. 286, 307 (1910); *United States v. Bowen*, 290 F.2d 40, 44–45 (5th Cir. 1961); *Tarnowski v. Resop*, 51 N.W.2d 801, 802–03 (Minn. 1952); *Cty of Cook v. Barrett*, 344 N.E.2d 540, 544 (Ill. App. Ct. 1975).

179. *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. i (AM. LAW INST. 2011) (noting that excess recovery is possible when "[i]n a two-party restitution contest . . . if the defendant is a conscious wrongdoer or a defaulting fiduciary"); Smith, *Fiduciary Relationships*, *supra* note 59, at 628–31, n.83, n.91.

180. *See* DOBBS, LAW OF REMEDIES, *supra* note 111, §10.6 n.2 ("The employer is thus entitled to recover the amount of the bribe from the employee."). We set aside the question of whether the court should measure the employer's recovery by wholesale rather than retail.

181. Borough of Salford v. Lever, [1891] 1 Q.B. 168 (C.A. 1890).

182. PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 2.11 n.22; *see also* Needham, *supra* note 151, at 538–39 (discussing the presumption that the real price of a good includes the bribe). *See generally* City of New York v. Liberman, 660 N.Y.S.2d 872, 875 (N.Y. App. Div. 1997); Reading v. Attorney Gen., [1951] A.C. 507 (HL) (Eng.).

bribe" that the contractors had paid to the faithless agent.[183] "The purchase money is loaded by the amount of the bribe."[184]

In *City of New York v. Liberman*,[185] the City recovered the amount of the bribe even though the agent had returned it. The court articulated the result as "presumed" compensatory damages: it "presumed" injury because the bribe was included in the price.[186] By another way of articulating damages as the result, "institutional" harm resulted even though the employer had no pecuniary loss.[187]

Using the bribe to measure the employer's damages is imprecise. A maximizing briber would expect to make more than the amount of the bribe:

> Where bribes are accepted by a trustee, servant, agent or other fiduciary, loss and damage are caused to the beneficiaries, master or principal whose interests have been betrayed. The amount of loss or damages resulting from the acceptance of a bribe may or may not be quantifiable. In the present case the amount of harm caused to the administration of justice in Hong Kong by the [corrupt prosecuting attorney] in return for bribes cannot be quantified.[188]

A court may dispense with the amount of the bribe to measure damages and adopt an even more spacious measurement rule. One court distinguished between kickback and bribery schemes, and said that the damages measurement calculations are not necessarily identical. In *United States v. Killough*,[189] two Alabama state officials who were in charge of administering a housing program received kickbacks from

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183. Daraydan Holdings Ltd. v. Solland Int'l Ltd., [2004] EWHC (Ch.) 662, [para. 87].

184. Donemar v. Molloy, 169 N.E. 610, 611 (N.Y. 1930).

185. 660 N.Y.S.2d 872 (N.Y. App. Div. 1997).

186. *Id*. at 43–48.

187. *See* I.M. Jackman, *Restitution for Wrongs*, 48 CAMBRIDGE L.J. 302, 312–14 (1989) ("The rationale for disgorging the fiduciary's benefit might then not lie in protecting the beneficiaries from personal loss, but in preserving the integrity of the fiduciary relationship.").

188. Attorney Gen. for H.K. v. Reid [1994] 1 AC 324 (PC) 330 (appeal taken from NZCA) (UK). *See generally* Mills & Weisberg, *supra* note 2, at 1376, 1406; *Bribery in Commercial Relations*, *supra* note 41.

189. 848 F.2d 1523 (11th Cir. 1988).

contractors in exchange for granting them contracts.[190] The contractors inflated their prices to cover the amount of the kickback.[191] The United States sued under the False Claims Act and moved for summary judgment for the amount of the kickbacks.[192] The defendants argued that the government had "no actual damages" because none of the losing contractors' bids were lower than theirs.[193] The Court of Appeals responded with a spacious theory of injury and measurement: "When an official acting on behalf of the government receives money to which he is not entitled for the purpose of inducing that official to act in a certain manner, the government has been damaged to the extent that such corruption causes a diminution of the public's confidence in the government, as well as by any excess money it paid and the administration costs of prosecuting the case."[194]

The Court of Appeals rejected the amount the contractors paid the officials as the measure of damages.[195] The court said that kickbacks and bribes are two different legal violations; it stated that "[a]lthough a bribe and a kickback are both corrupt payments to a party to induce a desired reaction, they cannot be treated interchangeably for the method of computing damages."[196] The presumption of recovering the amount of a bribe did not apply to a kickback scheme. Instead, the court found that "[c]ase law indicates the measure of damages is generally determined to be the difference between what the government actually paid on the fraudulent claim and what it would have paid had there been fair, open and competitive bidding."[197] The amount of the bribes, although neither a floor nor a conclusive measure, was "circumstantial evidence."[198]

The amount of the bribe is more of a default rule than a measure of pecuniary damages.[199] "Many damages recoveries,"

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190. *Id*. at 1526.
191. *Id*.
192. *Id*.
193. *Id*.
194. *Id*. at 1532.
195. *Id*. at 1528.
196. *Id*. at 1532.
197. *Id*.
198. *Id*.
199. *See* John P. Woods, *Civil Forfeiture as a Remedy for Corruption in*

Dobbs wrote, "are built more on a legal convention than on a precise measurement and this seems to be one of them. But the amount of the bribe is clearly a good measure for recovery if no other is to be had and indeed might be better than most conventional measures."[200]

The Court of Appeals' circumlocutions and imprecision illustrate Dobbs's point above that the amount of the bribe, although imprecise, is better than alternative measures.[201] Another way to deal with a plaintiff who proves a cause of action but no damages is to award him nominal damages. However, courts seem to deal with damages measurement problems in commercial bribery by defaulting to award the bribe.[202]

Because restitution does measure the bribe recipient's unjust enrichment (or part of it), it is more analytically sound to identify the plaintiff's recovery of the amount of the bribe from the bribee as restitution rather than compensatory damages. Beyer's recovery of the bribe from Aggie even if he lost nothing identifies his remedy as restitution because the court measures restitution by the defendant's gain or unjust enrichment, not to compensate the plaintiff's loss.[203]

An English court said that recovering the amount of the bribe was either legal restitution, money had and received, or damages.[204] Up to this point, it doesn't matter whether Beyer's recovers $8,000 from Aggie as compensatory damages or legal restitution. Like a successful compensatory damages plaintiff, a successful legal restitution plaintiff receives a money judgment

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Public and Private Contracting in New York, 75 ALB. L. REV. 931, 960 n.209 (2011–2012) (reviewing cases arguing if bribe amount reflected the true economic damage then bribers would bid lower and not risk prosecution).

200. DOBBS, LAW OF REMEDIES, *supra* note 111, § 10.6.

201. *Id.*

202. *See id.* ("[T]he amount of the bribe is clearly a good measure for recovery if no other is to be had and indeed might be better than most conventional measures.").

203. *See* BURROWS, REMEDIES, *supra* note 111, at 616 ("The fact that the [plaintiff] had not lost anything was irrelevant: the measure of relief, as in all bribe cases, was therefore indisputably restitutionary.").

204. *See* Hovenden & Sons v. Millhoff, (1900) 83 LT 41 (CA) at 43 (Eng.) (finding that the recovery of a bribe has been interpreted differently, but "it makes little difference in the case which view is the right one . . . the same amount is recoverable whether the action is on an indebitatus count or in damages"). For further discussion, see Roach, *supra* note 95, at 312.

that ranks equally with the defendant's other similar creditors.[205] However, there are differences.

In some circumstances, restitution may be more beneficial to the plaintiff than compensatory damages.[206] The statute of limitations may differ between a shorter period to sue for a tort than for breach of contract or restitution.[207] The time bar for equitable restitution will usually be laches instead of the statute of limitations.[208] Tort or breach of contract damages and legal restitution for money had and received will be tried to a jury in the United States and lead to a personal money judgment.[209] For restitution, it is not necessary that the agent diverted a benefit that would have gone to her principal.[210] An agent's principal may recover a bribe from the agent even though it was never intended for the principal and couldn't be a lost price discount.[211] In a notable English case, the House of Lords granted the

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205. *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 60 (AM. LAW INST. 2011); Emily Sherwin, *Unjust Enrichment and Creditors*, 27 REV. LITIG. 141, 143 (2007).

206. *See* DOBBS, LAW OF REMEDIES, *supra* note 111, § 4.1(1) (explaining the relation between restitution and damages, and in which situations one may be preferred). *See generally* Kerr v. Charles F. Vatterott & Co., 184 F.3d 938, 944 (8th Cir. 1999).

207. *See* DOBBS, LAW OF REMEDIES, *supra* note 111, 4.1(1) ("For example, if the statute of limitations has run on damages claims but not on claims for restitution, the plaintiff will assert unjust enrichment and claim restitution to take advantage of the statute.").

208. *See id.* § 2.4(4) (noting that tradition holds that some statutes of limitation do not apply to equitable claims").

209. *See* First Nat'l Bank of DeWitt v. Cruthis, 203 S.W.3d 88, 94 (Ark. 2005) (finding that the circuit court erred in submitting a count to the jury because one of the remedies sought was an equitable one not based in contract). *See generally* Eric J. Hamilton, Note, *Federalism and the State Civil Jury Rights*, 65 STAN. L. REV. 851, 864 (2013).

210. *See* Savage v. Mayer, 203 P.2d 9, 10 (Cal. 1949) ("All benefits and advantages acquired by the agent as an outgrowth of the agency . . . are deemed to have been acquired for the benefit of the principal, and the principal is entitled to recover such benefits . . . ."). *See generally* Risvold v. Gustafson, 296 N.W. 411, 412–13 (Minn. 1941).

211. *See* United States v. Holzer, 840 F.2d 1343, 1348 (7th Cir. 1988) (explaining that a principal may recover the amount of bribes paid to an agent, not to compensate the principal for funds that were intended for him, but to deter agents from taking bribes or similar actions); *see also* PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 2.11 ("When a fiduciary profits through breach of a fiduciary obligation, he will be accountable to his principal without regard to whether or not the profit is at the expense of the principal.").

government restitution from Reading, a soldier, who, in an occupied country, had accepted bribes to accompany smugglers' trucks through checkpoints.[212] The United Kingdom's government would not have solicited or accepted the money Reading received from the smugglers. But the government, having seized the bribes, was allowed to retain them to prevent his unjust enrichment.

F. Equitable Restitution

Restitution for a commercial bribe takes two forms: First, legal restitution, for money had and received, which was discussed above.[213]

Second, discussed here, is equitable restitution for either a constructive trust or an accounting-disgorgement.[214] This subtle subject requires quite a bit of ink because of tracing, jury trial, and the difference between a money judgment and a personal order.

1. Constructive Trust

A constructive trust, which we introduce first, differs from an accounting, which follows. Courts have decided that agents hold bribes in constructive trust for their principals.[215] Summarizing

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212. *See* Reading v. Attorney Gen., [1951] AC 507 (HL) (Eng.) ("[A]ny official position, whether marked by a uniform or not, which enables the holder to earn money by its use gives his master a right to receive the money so earned even though it was earned by a criminal act.").

213. *See generally supra* notes 135–140 and accompanying text.

214. *See* DOBBS, LAW OF REMEDIES, *supra* note 111, §§ 4.3(2), 4.3(5) (examining the equitable doctrines of constructive trusts and accounting). *See generally* PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 2.11.

215. *See* United States v. Podell, 572 F.2d 31, 35 (2d Cir. 1978) (finding that the Government was entitled to impress a constructive trust on monies received by defendant in breach of his fiduciary duty as United States Congressman); Republic of Philippines v. Westinghouse Elec. Corp., 821 F. Supp. 292, 295 n.3, 298 n.6 (D.N.J. 1993) (explaining that "an agent is presumed to act on behalf of the principal, and therefore any bribes collected by the agent are held in trust for the principal's benefit"); United States v. King, 469 F. Supp. 167, 170 (D.S.C. 1979) (determining that a consular official breached her fiduciary duty to the government by accepting bribes, and that the government was thus entitled to a

the features and effects of tracing and personal orders in a constructive trust will aid understanding of the differences between the constructive trust and accounting-disgorgement.

Tracing is a constructive trust's most important feature. The plaintiff identifies the constructive trust asset or res as "his property" and follows or "traces" it.[216] The Restatement explains that "the effect of constructive trust is to vindicate [the plaintiff's] claim to equitable ownership. If the claimant cannot show an equitable entitlement to specific property in the hands of the defendant, the underlying basis of the remedy is lost."[217]

The judge enforces a constructive trust with a personal order to the defendant to execute the trust, to convey the trust asset or res to the plaintiff.[218] In contrast to the money judgment a successful legal-restitution plaintiff receives, a prevailing constructive trust plaintiff's remedy is the court's potentially coercive personal order that requires the defendant to transfer the asset to him.[219]

First, tracing and the court's in personam order will be crucial where the trust property or res is in another jurisdiction.[220] For example, a bribed prosecuting attorney moved

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constructive trust on the property purchased with the bribery money); Cent. Ill. Pub. Serv. Co. v. Schell, 238 Ill. App. 560, 565 (1925) ("[T]he moment [the appellant] received any part or portion of appellee's money, he became a trustee *ex maleficio,* and subject to the jurisdiction of a court of equity. In such case, equity will impress a constructive trust upon the money in his hands."); Jaclyn, Inc. v. Edison Bros. Stores, Inc., 406 A.2d 474, 491 (N.J. Super. Ct. Law Div. 1979) (stating that courts have adopted a rule imposing a constructive trust on payments received by an agent acting who is acting in a way that is a breach of fiduciary duty).

216. *See* Doug Rendleman, *Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages*, 68 WASH. & LEE L. REV. 973, 992 (2011) [hereinafter Rendleman, *Measurement of Restitution*] (providing examples of tracing).

217. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. h (AM. LAW INST. 2011).

218. *See* Pioneer Real Estate, Inc. v. Larese, 762 P.2d 720, 724 (Colo. App. 1988) ("[B]y imposing constructive trust, court awards successful plaintiff personal order requiring defendant to transfer specific property to plaintiff.").

219. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 (AM. LAW INST. 2011) (stating that the court may direct the conditions on which the constructive trustee must surrender the constructive trust property to the claimant). *See generally* PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 1.3.

220. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT

the bribe from Hong Kong to New Zealand, where he bought property.[221] Although the Hong Kong authorities sued him in New Zealand, a court in either jurisdiction with in personam power over him would have traced the bribes in Hong Kong into the New Zealand realty and held that he was a constructive trustee.[222]

Second, a constructive trust plaintiff may trace his asset to third parties.[223] Suppose Aggie gives an $8,000 money bribe to her daughter, Anjie. Anjie buys a racehorse named Devil His Due with the bribe money. Devil His Due finishes second in a handicap and earns a $16,000 purse. Beyer asks whether the court will find that Anjie, is a constructive trustee of the money, and later the horse, and whether the court will trace the bribe money into the horse, and from the horse into the purse, and impose a constructive trust against Aggie's equitable or beneficial property interest in the purse? "If so," a court wrote, "a constructive trust may be deemed imposed upon such funds, which trust would accordingly follow the 'beneficial interest' of ownership in the true asset."[224]

Third, under the court's constructive trust, the plaintiff has an ownership right in the traced trust res.[225] Suppose Aggie invested $6,000 of Beyer's bribe money in a Studebaker automobile that is exempt from her other creditors' claims.[226] If

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§ 55 (AM. LAW INST. 2011)).

221. Attorney Gen. for H.K. v. Reid [1994] 1 AC 324 (PC) 330 (appeal taken from NZCA) (UK).

222. *See generally* RENDLEMAN & ROBERTS, *supra* note 1, at 284–85.

223. *See* LiButti v. United States, 107 F.3d 110, 125 (2d Cir. 1997) ("It is universally understood that 'where a constructive trust has invested [wrongfully acquired] funds or has purchased other property [with wrongfully acquired funds], the [party for whose benefit a constructive trust has been imposed] can follow it wherever it can be traced.'" (citing Trustees of Clients' Sec. Fund v. Yucht, 578 A.2d 900, 909 (N.J. Super. Ct. Ch. Div. 1989))); *see also* Fed. Republic of Brazil v. Durant Int'l Corp., [2015] UKPC 35, [2016] AC 297 (appeal taken from the Court of Appeal of Jersey) (backwards tracing of bribery proceeds).

224. *Id.*

225. *See generally* GEORGE GLEASON BOGERT ET AL., BOGERT'S TRUSTS AND ESTATES § 471 (3d ed. Supp. 2016).

226. *See* VA. CODE ANN. § 34-26(8) (West) (providing that a debtor is entitled to hold motor vehicles valuing under $6000 exempt from creditor process).

Sailer can trace the bribe into the Studebaker, he can realize on it.[227]

Fourth, suppose Aggie invested the $8,000 bribe in a stock that doubled in value. As foreshadowed by examples of the houses in New Zealand and the horserace purse above, a plaintiff's constructive trust will capture the trust res's gain in value or appreciation for the plaintiff.[228]

Fifth, the plaintiff's equitable ownership interest in the asset enables the plaintiff to realize on the asset and to outrank the defendant's unsecured creditors in it.[229] Suppose that Aggie owes $40,000 to another creditor, Crayon, but has only one asset, a $10,000 bribe. If the court declares Aggie a constructive trustee for Beyer, then Beyer will recover in full, while Crayon will recover nothing. [230] On the other hand, if Beyer recovers a money judgment for compensatory damages, an accounting, or legal restitution, money had and received variety, then, in a bankruptcy or other distribution, Beyer and Crayon share the $10,000 asset pro rata, proportional to the amount of their respective debts, 20% and 80%, $2,000 and $8,000 respectively.[231]

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227. *See* Maki v. Chong, 75 P.3d 376, 379–80 (Nev. 2003) (providing that the exemption "homestead" protection does not apply to assets obtained with fraudulently acquired funds); Cox v. Waudby, 433 N.W.2d 716, 718 (Iowa 1988) ("As a general proposition, a party in whose favor a constructive trust has been established may trace the property to where it is held and may reach whatever has been obtained through the use of it, including profits or income generated through its use."). *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 55 cmt. d, 58 cmt. g, 58 reporter's note g (AM. LAW INST. 2011); PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 2.15(a).

228. *See generally* Attorney Gen. for H.K. v. Reid [1994] 1 AC 324 (PC) 330 (appeal taken from NZCA) (UK); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51(2) illus. 18 (AM. LAW INST. 2011); RESTATEMENT (THIRD) OF AGENCY § 8.02 cmt. e, illus. 9 (AM. LAW INST. 2006).

229. *See Reid*, 1 AC at 324 (describing the level of priority among creditors); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. d (AM. LAW INST. 2011) (stating the uses of a constructive trust as a means to priority). For additional examples, see *United States v. Carter*, 217 U.S. 286, 308 (1910); *ITT Cmty. Dev. v. Barton*, 569 F.2d 1351, 1360–62 (5th Cir. 1978); *United States v. King*, 469 F. Supp. 167, 170–71 (D.S.C. 1979).

230. *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. d (AM. LAW INST. 2011).

231. *See* Sherwin, *supra* note 205, at 143 (explaining that a constructive trust has priority over unsecured creditors, and that a plaintiff without a constructive trust would not have a higher priority).

Tracing that favors a constructive trust plaintiff over the defendant's other creditors has been controversial because, unlike the defendant, the defendant's other creditors are not wrongdoers.[232] The Restatement of Restitution gives the judge discretion to subordinate a constructive-trust plaintiff's recovery to the defendant's innocent unsecured creditors.[233]

An old-fashioned court might think that a commercial bribery plaintiff's money judgment for legal restitution, money had and received, is the plaintiff's adequate remedy at law.[234] A modern court's analysis would be more likely to be more functional and to focus on whether the plaintiff needs a feature of the constructive trust like tracing.[235] Discussing the "erosion" of the inadequacy test when a plaintiff who could recover legal restitution seeks an equitable remedy, the late Professor Palmer observed that "remedial law can be applied both more easily and more sensibly when courts are able to give the relief called for by the facts."[236]

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232. *See* PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 4.10(a) (providing an overview of how some courts have or have not justified tracing); James Rogers, *Indeterminacy and the Law of Restitution*, 68 WASH. & LEE L. REV. 1377, 1399–1405 (2011) (exploring whether or not it is valid to give preference to the claim of a creditor who can trace over the claims of creditors who cannot trace); Peter Watts, *Bribes and Constructive Trusts*, 110 L.Q. REV. 178, 179 (1994) ("[T]o give a proprietary remedy to a person who may have suffered no loss and who in any event would have other recourse, will, according to principle, operate to the prejudice of a person who, quite innocent of the source of the asset, lends money on an equitable security . . . . "); Dale Oesterle, *Restitution and Reform*, 79 MICH. L. REV. 336, 359 (1980) (book review) (arguing that tracing should not be allowed outside the context of a fiduciary relationship).

233. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 55 illus. 3, 61 (AM. LAW INST. 2011) ("The relative advantages of specific restitution make it virtually certain that [plaintiff's] remedy will instead be a decree that [defendant] holds [the property] in constructive trust for [plaintiff].").

234. *See* Waters v. Boyden, 176 N.E. 535, 566 (Mass. 1931) ("In such circumstances the plaintiffs have a complete remedy at law and the bill should not be retained merely because the obligation of the defendant is equitable as well as legal.").

235. *See* Cty. of Cook v. Barrett, 344 N.E.2d 540, 544 (Ill. App. Ct. 1975) (rejecting the defendant's argument that plaintiff's adequate remedy at law precluded a constructive trust).

236. PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 1.6. *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4 (AM. LAW INST. 2011).

2. Accounting-Disgorgement

An accounting is our second form of equitable restitution. An accounting is restitution for the defendant's wrong.[237] The Restatement of Restitution combines accounting with disgorgement; it requires defendant's intentional misconduct, which includes defendant's intentional tort and breach of her fiduciary duty.[238] The accounting defendant gives up her gains from third parties instead of giving back gains she obtained from the plaintiff.[239] Accounting lacks both of the constructive trust characteristics: it neither requires nor allows tracing and it ends with a money judgment that ranks equally with the defendant's other unsecured debts.[240]

The successful accounting plaintiff's measure of recovery is the greater of the defendant's "net profit" or the gain's "market value."[241] The court measures the plaintiff's accounting-disgorgement restitution by the defendant's gain from third-party sources, recovery that may exceed the plaintiff's loss.[242] A court imposes the harsh measurement rules of accounting-disgorgement restitution to "eliminate the possibility of [defendant's] profit from conscious wrongdoing."[243] As defined in the Restatement, contemporary accounting-disgorgement

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237. *See* Rendleman, *Measurement of Restitution*, *supra* note 216, at 994 ("Accounting . . . is a vehicle for equitable restitution that is not based on a res or fund . . . [I]t captures the defendant's gains from other sources.").

238. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. a (AM. LAW INST. 2011) (noting that restitution measured by a defendant's wrongdoing has been referred to as both a "disgorgement" and as an "accounting").

239. *See* Rendleman, *Measurement of Restitution*, *supra* note 216, at 994–95 (explaining that a successful accounting plaintiff is not limited to recovering only her former property, but may capture gains obtained from other sources).

240. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. b (AM. LAW INST. 2011) (describing the relation of asset based remedies in restitution and stating that the successful accounting plaintiffs have a judgment that ranks equally with the rights of competing creditors and unsecured creditors); WILLIAM DE FUNIAK, A HANDBOOK OF MODERN EQUITY § 103 (2d ed. 1956) (explaining the priority of an accounting judgment). *See generally* PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 1.5(c).

241. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. a (AM. LAW INST. 2011).

242. *Id.*

243. *Id.* § 51 cmt. c, 3.

includes a third-party wrongdoer unrelated to the plaintiff and is not limited to fiduciary relationships, but it turns on the defendant's intentional misconduct leading to unjust enrichment.[244]

Accounting is a complex and confusing subject, primarily because it has not shed its accumulated pre-merger barnacles.[245] Professor Eichengrun wrote that accounting functions as several different remedies.[246] The equitable bill of accounting began to compel an express trustee to account to the trust's beneficiaries for the management of the trust, which was under the Chancery court's exclusive jurisdiction.[247] Accounting was extended to an accounting incidental to another equitable remedy, a constructive trust.[248] A contemporary accounting can accompany a constructive trust, but today an accounting plaintiff need not trace, identify an asset,[249] an injunction,[250] or specific performance.[251] An accounting for discovery is obsolete because contemporary civil discovery rules apply to all lawsuits.[252] The

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244. *Id.* § 51. *See generally* Joel Eichengrun, *Remedying the Remedy of Accounting*, 60 IND. L.J. 463, 482–83 (1985).

245. *See* Cleland v. Stadt, 670 F. Supp. 814, 818 (N.D. Ill. 1987) (complexity); People *ex rel.* Hartigan v. Candy Club, 501 N.E.2d 188, 190 (Ill. App. 1986) (discovery); Jackson v. Cty. of Douglas, 388 N.W.2d 64, 66 (Neb. 1986) (complexity).

246. Eichengrun, *supra* note 244, at 482–83.

247. *See id.* at n.29 (speaking to the historical development of the bill of accounting).

248. *See* Rust v. Kelly, 741 P.2d 786, 787 (Mont. 1987) (applying an accounting to members of joint land development venture); Palazzo v. Palazzo, 503 N.Y.S.2d 381, 384 (N.Y. App. Div. 1986) (same in divorce proceeding); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. a (AM. LAW INST. 2011) (relating the principle of accounting to other remedies, including a constructive trust).

249. *See* Newby v. Enron, Inc., 188 F. Supp. 2d 684, 706 (S.D. Tex. 2000) ("A plaintiff seeking an equitable accounting rather than a constructive trust need not identify a particular asset or fund of money in the defendant's possession to which she is entitled.").

250. *See* Hamilton-Brown Shoe Co. v. Wolf Bros., 240 U.S. 251, 259 (1916) ("[T]he jurisdiction must be rested upon some other equitable ground—in ordinary cases, as in the present, the right to an injunction. . . .").

251. Eichengrun, *supra* note 244, at 482.

252. *See* Alts. Unlimited, Inc. v. New Balt. City Bd. of Sch. Comm'rs, 843 A.2d 252, 307–08 (Md. Ct. Spec. App. 2004) ("It is now clear, moreover, that whereas an equitable claim for an accounting once served a necessary discovery function, that function has been superseded by modern rules of discovery."). For

Supreme Court in *Dairy Queen v. Wood*[253] de-emphasized the claimant's need for an accounting when the parties' accounts are complicated because of the judge's ability to appoint a master.[254] Accounting wasidentified with fiduciary relations like a trustee of an express trust, above, or the agent-principal relationships here examined.[255]

Because the plaintiff's remedy for accounting-disgorgement is a money judgment, the question arises whether the parties have a constitutional right to a jury trial under the federal or state constitutions. There are two dominant tests for a federal constitutional jury right: the remedies test, which is the most important, and the historical test.[256] The issue of jury trial for an accounting is complex because it merges three amorphous and unfamiliar terms: equity, fiduciary, and accounting.

In *Dairy Queen*, the leading Supreme Court decision examining accounting under the federal Seventh Amendment, Justice Black held that a franchiser's lawsuit for an "accounting" seeking breach of contract and trademark infringement remedies from a former franchisee led to a right to a jury.[257] *Dairy Queen* is subject to at least three varying interpretations,[258] which we discuss below.

Dairy Queen followed a remedies test for jury trial. Under a historical test, however, an accounting is equitable.[259] Following

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further discussion, see Eichengrun, *supra* note 244, at 475–76.

253. 369 U.S. 459, 478 (1962).

254. *Id.*

255. Eichengrum, *supra* note 244, at 474 (iterating that accounting typically arose in cases involving a fiduciary relationship).

256. *See* Tull v. United States, 481 U.S. 412, 422 (1987) ("We reiterate our previously expressed view that characterizing the relief sought is 'more important' than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial."). For further analysis of the two tests, see RENDLEMAN & ROBERTS, *supra* note 1, at 345–47.

257. *See id.* at 477–78 (declaring that a right to a jury trial is not dependent on the litigant's "choice of words used in the pleadings," but that the court must examine the circumstances of the case to determine if it gives rise to a jury trial or not).

258. *See* Black & Decker Corp. v. Positec USA, Inc., 118 F. Supp. 3d 1056, 1059 (N.D. Ill. 2015) (describing the various ways courts have applied to determine whether a jury trial is guaranteed).

259. *See* Phillips v. Kaplus, 864 F.2d 807, 813 (11th Cir. 1985) (stating that

a historical test, money defendant obtained from plaintiff by abuse of fiduciary of confidential relationship is equitable.[260] The lack of a coercive remedy is irrelevant. Courts have held an accounting will not be tried to a jury.[261]

Because of the remedies test, my answer to the jury trial question is an inconclusive one.[262] If the plaintiff's complaint demands money, then a jury right may exist.[263] A restitution plaintiff's recovery of money is usually legal restitution.[264] Legal restitution includes plaintiff's recovery of a converter's proceeds from a profitable sale, traditionally named waiver of tort and suit in assumpsit.[265] An accounting that leads to a money judgment, not a trust or a lien, may be subject to a jury right under Dairy Queen.[266] An accounting decision that is a non-coercive money judgment "might be thought to require a jury trial."[267]

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accounting is "traditionally" equitable); DOBBS, LAW OF REMEDIES, *supra* note 111, § 2.6(3) ("The remedy known as accounting or accounting for profits is usually regarded as equitable, but it can ultimately resemble a money judgment."); PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 2.12 ("[R]ecovery of profits is associated with equitable accounting . . . .").

260. *See generally* PALMER, *supra* note 5, §§ 1.3, 1.6.

261. *See Kaplus*, 864 F.2d at 813 (finding that accounting is "traditionally" equitable); Levitin v. Rosenthal, 903 F. Supp. 400, 406 (E.D.N.Y. 1995) ("An accounting is an action in equity to be tried by the court without a jury . . . ."); Dick v. Dick, 355 A.2d 110, 116 (Conn. 1974) ("It is well settled that 'where the essential right asserted is equitable in its nature and damages are sought in lieu of equitable relief or as supplemental to it . . . the whole action is one in equity and there is no right to a jury trial."). *See generally* Henderson v. Ayres & Hartnett, P.C., 740 S.E.2d 518, 522 (Va. 2013); Van de Kamp v. Bank of Am., 251 Cal. Rptr. 530, 552–54 (Cal. Ct. App. 1988) .

262. *See* Caprice Roberts, *Supreme Disgorgement*, 67 FLA. L. REV. (forthcoming 2017) (manuscript at 10) (discussing the Seventh Amendment right to a jury trial) (on file with the Washington and Lee Law Review).

263. *See* DOBBS, LAW OF REMEDIES, *supra* note 111, §§ 2.6(3) n.22, 4.3(5) (accounting for profits is like a money judgment); 9 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2310 (3d ed. 1998) ("An accounting remedy is similar to a damage remedy, ...").

264. *See* Colleen Murphy, *Misclassifying Monetary Restitution*, 56 SMU L. REV. 1572, 1598–1607 (2002) (explaining the legal and equitable "facets" of restitution).

265. *See* PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 1.5 (providing examples of when courts have allowed a plaintiff to recover the proceeds of a sale when goods were wrongfully converted).

266. *See* DOBBS, LAW OF REMEDIES, *supra* note 111, § 2.6(3) (speaking to the application of *Dairy Queen* in subsequent cases).

267. *Id.* § 2.6(3).

On the other hand, Dairy Queen may mean that a pleader cannot avoid a jury trial by characterizing a breach of contract claim for damages as equitable by re-naming it an accounting.[268] If the plaintiff calls contract damages an accounting, then the novel characterization of "common law" as equitable will fail; the plaintiff's claim will be subject to the litigants' jury right.[269]

The constructive trust and the equitable lien are asset-based or proprietary remedies because the defendant's unjust enrichment originated with the plaintiff.[270] An accounting is not an asset-based or proprietary remedy; the defendant's unjust enrichment came from others, not the plaintiff.[271] In the commercial bribery dispute we are following, defendant Aggie is liable to the plaintiff and must account for or disgorge her unjust enrichment. But the fund originated from Sailer, a third person, not from Beyer, the plaintiff. If the plaintiff seeks restitution of defendant's gains from other sources, is that claim legal or equitable? Courts have required a jury for the plaintiff to recover defendant's profits from copyright infringement and trademark infringement.[272]

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268. *See* Phillips v. Kaplus, 764 F.2d 807, 814 (11th Cir. 1985) (examining whether the case at issue was truly equitable or if it was a case typically settled at law that was being disguised as an equitable claim); Douglas Laycock, *Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 757–58 (1991) ("A few plaintiffs may manipulate the choice of remedy to deprive defendants of their right to jury trial, but this risk does not extend widely . . . . This risk of manipulation in a small number of cases cannot justify a preference for legal remedies in all cases.").

269. *See* Dairy Queen v. Wood, 369 U.S. 469, 478 (1962) ("The constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings.").

270. *See generally* Rendleman, *Measurement of Restitution*, *supra* note 216.

271. *See id.* at 994 ("Accounting . . . captures the defendant's gains from other sources.").

272. *See* Black & Decker Corp. v. Positec USA, Inc., 118 F. Supp. 3d 1056, 1065 (N.D. Ill. 2015) (discussing the conflicting precedent and other courts' confused and muddled reasoning and finding a jury right in a case concerning patent infringement). The decision in *Black & Decker Corp.* may be based on the idea that because restitution is "equitable," there is no right to a jury trial, a mistake referred to as the "equity fallacy" in *Rendleman & Roberts, supra* note 1, at 493–94. *See generally,* Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157, 1175 (9th Cir. 1977).

Will the judge employ a coercive order to pay to enforce an accounting remedy?[273] An order to turn over property or money that the judge has found the defendant possesses does not imprison the defendant to collect a civil debt.[274] However, an order to pay a money judgment enforced by coercive contempt may lead to the defendant's imprisonment to collect a civil debt.[275] The possibility of coercive confinement militates against an equitable classification of accounting.[276]

In personam relief—the judge's order to the defendant to convey—is equitable.[277] The plaintiff's claim that requires tracing, enforced by a judge with an order to convey, is equitable.[278] Tracing for either profit-based restitution or specific restitution to reach another asset is equitable in United States law.[279] The plaintiff may need to trace the res through changes in form or into the hands of a third person or because the defendant is insolvent.[280]

If an accounting plaintiff is suing to recover a fund that has been traced, the case seems to be equitable, and therefore not subject to a constitutional jury right. My tentative answer is to advise an equitable restitution plaintiff who traces and seeks to avoid a jury trial to sue for a constructive trust with a possible coercive remedy.

My tentative solution for the right to a jury trial is, first, to subscribe to a remedies test for the right to a jury trial and, second, to approve a constitutional right to jury trial for an accounting that will lead to a money judgment rather than to a coercive order.

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273. *See generally* DOBBS, LAW OF REMEDIES, *supra* note 111, §§ 1.1, 2.6(3).

274. *See generally* DOUG RENDLEMAN, COMPLEX LITIGATION: INJUNCTIONS, STRUCTURAL REMEDIES, AND CONTEMPT 703–04 (2010).

275. *See id.* at 702–703 (providing examples of when a court uses coercive contempt to enforce a court ordered monetary obligation).

276. *See id.* at 790–91 (coercive contempt may violate the prohibition against debtors' prisons).

277. For examples and discussion of the intersection of equity and in personam jurisdiction, see Howard W. Brill, *The Maxims of Equity*, 1993 ARK. L. NOTES 29, 30.

278. PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 2.12.

279. *See generally id.* § 2.14.

280. For more extensive discussion, see Murphy, *supra* note 264, at 1598–1607.

Professor Kull—later the Restatement's Reporter—expressed the difficulty of administering the law-equity characterization when he wrote that the plaintiff's restitution against the intentional converter is either legal or equitable.[281]

It is appropriate to conclude my discussion of the constitutional jury right in an accounting by emphasizing its tentative nature. A recent accounting decision where a trademark plaintiff sued to recover defendant's profits may have been based on the unexpressed incorrect premise that all restitution is equitable.[282] The court found a constitutional right to jury; it based its conclusion on the idea that the plaintiff's trademark infringement claim for an accounting of the defendant's profits stemmed from policies of unjust enrichment, deterrence, and compensation.[283] The accounting was compensatory because defendant's profits may be a "proxy" or "rough measure" that can measure plaintiff's damages.[284]

3. Constructive Trust or Accounting?

Sometimes either a constructive trust or an accounting will be appropriate. When the defendant still has the money and does not have any other creditors, there is not any difference between an accounting and a constructive trust.[285]

Suppose Sailer bribed Aggie with $8,000 in cash that Aggie later invested in a propitious commodity trade that doubled its

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281. Andrew Kull, *Restitution and the Noncontractual Transfer*, 11 J. CONT. L. 93, 100 (1997).

282. *See* Black & Decker Corp. v. Positec USA, Inc., 118 F. Supp. 3d 1056, 1064 (N.D. Ill. 2015) (resolving that a trademark holder had a Seventh Amendment right to jury trial on claims demanding alleged infringers' profits).

283. *See id.* at 1061 (finding that an accounting in the context of a trademark infringement case may be based on "unjust enrichment, deterrence, and compensation").

284. *See id.* at 1067 ("Plaintiffs appear to have a viable theory that profits serve as a proxy for damages.").

285. *See* Matthew Harding, *Constructive Trusts and Distributive Justice*, *in* PRINCIPLES OF PROPRIETARY REMEDIES 20, 34 (Elise Bant & Michael Bryan eds., 2013) ("Note, though, that if an account of profits is able to achieve the same measure of disgorgement as a constructive trust, it might be neither here nor there, from the perspective of distributive justice, which remedy is awarded (at least in a two party case).").

value. May Beyer recover $16,000? According to constructive trust tracing principles, the plaintiff's recovery would include the gains and profits she made.[286] Strict constructive trust reasoning leads to stripping all profit from the fiduciary.[287] An agent who invests the bribe successfully is responsible to "account for all the profits of [her] wrongdoing to the principal, consistently with the courts goal of maintaining 'a very high standard of conduct on the part of fiduciaries.'"[288] The counterargument is that the agent should account for only the bribe because her gains and profits cannot be traced back to either the plaintiff's asset or the plaintiff's opportunity.[289]

In two foundational decisions, one American, the other British, the defendants published books based on national security information and received royalties from their publishers.[290] Each court imposed a constructive trust on its defendant's royalties in favor of the respective governments.[291] The United States Supreme Court found that Snepp, the defendant in *Snepp v. United States*,[292] had breached a fiduciary duty as a substantive prerequisite for the constructive trust.[293] The House of Lords based its constructive trust on the defendant Blake's breach of contract.[294]

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286. *See* Rendleman, *Measurement of Restitution*, *supra* note 216, at 992–93 (explaining that tracing ends where the money ends and that the plaintiff may recover profits as long as she can trace to them).

287. *See id.* at 994 (describing the mechanisms of strict tracing).

288. Charles Mitchell, *Civil Liability for Bribery*, 117 L.Q. REV. 207, 213 (2001). *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 51(4), 55(1) (AM. LAW INST. 2011).

289. *See generally id.* § 61 cmt. b.

290. Snepp v. United States, 444 U.S. 507 (1980); Attorney Gen. v. Blake, [2001] 1 AC 268 (HL).

291. *See Snepp*, 444 U.S. at 515 ("A constructive trust, on the other hand, protects both the Government and the former agent from unwarranted risks. This remedy is the natural and customary consequence of a breach of trust."); *Blake*, [2001] 1 AC 268 (HL) ("[C]ircumstances do arise when the just response to a breach of contract is that the wrongdoer should not be permitted to retain any profit from the breach.").

292. 444 U.S. 507 (1980).

293. *Id.* at 515. The Supreme Court didn't adjust the amount of the constructive trust for the time Snepp spent writing the book. *Id.*

294. *See Blake*, [2001] 1 AC 268 (HL) (comparing the case at bar to *Blake* and noting the number of factual similarities). Although in some contexts the difference between a constructive trust and an accounting is important, the

Although Beyer can respond that the bribe Aggie received from Sailer was a discount that he was entitled to receive,[295] the argument that the seller's bribe was built back into the price the principal paid the seller fails completely in both national security decisions.[296] Snepp's and Blake's enrichment came from the book buyers and the publishers, not the governments; neither was enriched at the expense of the government.[297] Both plaintiffs wanted their agents to follow their covenants.[298] Each would have eschewed royalties from an agent's book that it did not want published. Neither the "at the expense of" nor the "discount" description explains the decisions.

The late Professor Peter Birks rejected the concept of a constructive trust with tracing unless the defendant's enrichment was subtracted from the plaintiff's ownership.[299] In technical restitution language, the defendants' enrichment did not come "at the expense of" the governments. Neither diverted a benefit that would otherwise have gone to his government. As discussed above, the Restatement of Restitution rejected Birks's argument for giving-up restitution.[300] Although section one of the Restatement states that defendant's enrichment must be "at the expense of" a plaintiff, "at the expense of" can mean the defendant may have acquired title "in violation of the [plaintiff's] rights."[301]

Restatement of Restitution is indifferent to the substantive basis, contract vs. fiduciary, that leads to the constructive trust. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 illus. 4 (AM. LAW INST. 2011); *see also* Roy Ryden Anderson, *The Compensatory Disgorgement Alternative to Restatement Third's New Remedy for Breach of Contract*, 68 SMU L. REV. 953, 1001–03 nn.294–311 (2015) (Snepp's fiduciary obligation "concocted"; Blake's constructive trust "carefully reasoned").

295. *See* Cty. of San Bernardino v. Walsh, 69 Cal. Rptr. 3d 848, 855–57 (Cal. Ct. App. 2007) (discussing the defendant's argument that the county did not incur any damage by his taking of bribes, and ultimately rejecting the argument).

296. *See infra* notes 274–279.

297. *See generally* Snepp v. United States, 444 U.S. 507 (1980); Attorney Gen. v. Blake, [2001] 1 AC 268 (HL).

298. *Snepp*, 444 U.S.; *Blake*, [2001] 1 AC 268 (HL).

299. BIRKS, AN INTRODUCTION, *supra* note 129, at 387–89.

300. *See generally supra* note 216 and accompanying text.

301. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 1 cmt. 1, 51 (AM. LAW INST. 2011); *see also* Cty. of Cook v. Barrett, 344 N.E.2d 540,

A court may require a constructive trust plaintiff to trace its asset into the defendant's hands.[302] Equitable restitution implemented through a constructive trust gave the government a special priority right in Snepp's and Blake's enrichment.[303] In *Snepp* and *Blake*, however, some would maintain, accounting or disgorgement would be a more technically accurate remedy than a constructive trust.[304]

What supports the courts' decisions to award the plaintiffs constructive trusts and special priority rights in the defendants' royalties? If the defendants had other creditors, were the royalties sufficiently identified with the plaintiffs or with the defendants' wrongs to qualify for constructive trust status? The chancellor in *Daraydan Holdings, Limited v. Sollard International, Limited*[305] wrote:

> There are powerful policy reasons for ensuring that a fiduciary does not retain gains acquired in violation of fiduciary duty, and I do not consider that it should make any difference whether the fiduciary is insolvent. There is no injustice to the [fiduciary's] creditors in their not sharing in an asset for which the fiduciary has not given value, and which the fiduciary should not have had.[306]

We think that the respective governments' claims to royalties would outrank Snepp's and Blake's other creditors.

Similarly, Aggie's enrichment came from Sailer. Was Aggie unjustly enriched "at the expense" of Beyer? Unlike Aggie and

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544 (Ill. Ct. App. 1975) (rejecting the argument that defendant's enrichment from the briber was not "at the expense" of plaintiff).

302. *See* Bender v. CenTrust Mort. Corp., 51 F.3d 1027, 1030 (11th Cir. 1995) ("[I]t is well settled that Florida courts will impress property with a constructive trust only if the trust res is specific, identifiable property or if it can be clearly traced in assets of the defendant which are claimed by the party seeking such relief." (citation omitted)).

303. *See generally* Snepp v. United States, 444 U.S. 507 (1980); Attorney Gen. v. Blake, [2001] 1 AC 268 (HL).

304. *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 (AM. LAW INST. 2011).

305. [2004] EWHC (Ch.) 662 [86] (Eng.).

306. *Id.* Disagreeing, Professor Burrows wrote that "[I]t is hard to see why a victim claiming restitution for a wrong should have priority on the wrongdoer's insolvency given that a compensation-claimant does not have such priority." ANDREW BURROWS, THE LAW OF RESTITUTION 687 (3d ed. 2011) [hereinafter BURROWS, RESTITUTION]; *see also* BURROWS, REMEDIES, *supra* note 111, at 619.

the agent-defendant in *Daraydan Holdings,* Snepp and Blake were not the kind of agent-fiduciaries who manage property or conduct business for a principal.[307] Their governments cannot argue that the defendants diverted royalties that would have otherwise accrued to them. If Aggie's enrichment came from Sailer, do the preceding points support giving Beyer a constructive trust with priority rights over Aggie and her other creditors? The principal's trust and confidence, and the need to suppress bribery, both support tracing.[308] The origin of the bribe militates against it.

A constructive trust that captures the trust res's appreciation may, however, under some circumstances, be too generous to the plaintiff. Another possible equitable remedy is an equitable lien in the particular asset; that remedy would allow the plaintiff to trace the bribe money, award the plaintiff a security interest in it, and let the plaintiff recover it without capturing its appreciation.[309] If a constructive trust, in Dobbs's words, "overkills," then the judge may impose an equitable lien.[310] If the defendant is insolvent and the commercial-bribery plaintiff is competing with the defendant's creditors who were not connected with the defendant's wrong, the Australian court in *Grimaldi v Chameleon Mining N.L. (No. 2),*[311] suggested awarding the plaintiff an equitable lien instead of a constructive trust.[312]

Under United Kingdom law, the difference between the two forms of equitable restitution, constructive trust or an accounting, becomes critical. In 2014 in *FHR European Ventures,*

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307. For a description of the roles of Snepp and Blake in their respective cases, see *Snepp v. United States*, 444 U.S. 507 (1980) and *Attorney General. v. Blake*, [2001] 1 AC 268 (HL).

308. *See* United States v. Holzer, 840 F.2d 1343, 1348 (7th Cir. 1988) ("A constructive trust is imposed on the bribes not because Holzer intercepted money intended for the state or failed to account for money received on the state's account but in order to deter bribery by depriving the bribed official of the benefit of the bribes.").

309. *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 56 (AM. LAW INST. 2011).

310. DOBBS, LAW OF REMEDIES, *supra* note 111, §§ 4.3(2), 4.3(3).

311. [2012] 200 FCR 296 (Austl.).

312. *Id.*

LLP v. Mankarious,[313] the Supreme Court of the United Kingdom considered a secret commission a buyer had paid to the seller's agent.[314] Was the seller's remedy an accounting or a constructive trust?

The difference was important. An accounting eschews tracing for a personal remedy, a judgment for money.[315] The United Kingdom remedy of constructive trust is "proprietary," not "remedial." The plaintiff traces his property—the trust res—and both captures the defendant's investment gain and outranks defendant's other creditors in the asset.

The distinction between the constructive trust and accounting—Etherton, L.J., wrote for the Court of Appeal below—had been "difficult to fit coherently into a neat set of rules."[316] Policy was difficult for the Court of Appeal to sort out:

> In considering those matters, there are important issues of policy, and the relative importance of different policies, to assess, including deterring fraud and corruption; the ability to strip the fiduciary of all benefits, including increases in the value of benefits, acquired by breach of duty, and vehicles or third parties through which those benefits have been channelled; the importance attached to the protection of those to whom fiduciary duties are owed; and the position of other creditors on the fiduciary's insolvency who may be prejudiced by a constructive trust or proprietary relief in favour of the fiduciary's principal but who, in the absence of such a trust and relief, would benefit from increases in value of assets acquired by the fiduciary's fraud, corruption or wrongdoing. It will also be necessary to bear in mind the international perspective applying to this area of trust law and equity, to which I have referred earlier in this judgment.[317]

Because of the United Kingdom's constructive trust's property base and unruly precedents, the Supreme Court of the United Kingdom's decision in *Mankarious* took on some of the

313. [2014] UKSC 45 (appeal taken from EWCA Civ).

314. *Id.*; FHR European Ventures, LLP v. Mankarious, [2013] EWCA (Civ) 17 (appeal taken from EWCA Ch. Div.).

315. *See generally* Newby v. Enron Corp., 188 F. Supp. 2d 684 (S.D. Tex. 2002); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. b (AM. LAW INST. 2011); PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 1.5(c).

316. *Mankarious*, [2013] EWCA (Civ) 17 at para. 15.

317. *Id.* at para. 116.

earmarks of driving a square peg into a round hole. The court appears to have located the seller's asset in a price that seemingly had been increased by the amount of the bribe.[318] The court examined tangled and unruly precedent:

> It shows that the mere fact that the fiduciary obtains the benefit from a third party, or obtains a benefit that could never be or would never be obtained by the principal, or that the principal has obtained what he or she wanted or intended from the opportunity, is not necessarily a bar to a constructive trust of the benefit wrongly obtained by the fiduciary by taking advantage of the opportunity.[319]

The bent agent, the court found, held the secret commission as a constructive trustee.[320]

The agent always accounts to the principal for the amount of the bribe "by way of equitable compensation," a personal and restitutionary remedy.[321] In addition, the agent may hold the bribe in a constructive trust.[322] The Supreme Court of the United Kingdom stated the rule: in some cases, "where an agent acquires a benefit which came to his notice as a result of his fiduciary position or pursuant to an opportunity which results from his fiduciary position," the court will treat the agent as having acquired the asset "on behalf of his principal" and treat the principal as the beneficial owner.[323] Does the rule apply to a bribe, an asset that cannot be traced to the principal?[324]

The issue is whether the principal's recovery of the agent's bribe is a "proprietary claim" "held by the agent on [constructive] trust for his principal" or is the principal's claim "for equitable compensation in a sum equal to the bribe."[325] The court noted the

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318. *Id*. at para. 67 ("What Investor Group has been deprived of is the opportunity to have purchased the hotel for up to €10 million less than they paid for it.").

319. *Id*. at para. 100.

320. FHR European Ventures, LLP v. Cedar Capitol Partners, LLC, [2014] UKSC 45 [para. 7] (appeal taken from EWCA (Civ)).

321. *Id*. at para. 6.

322. *See id*. at para. 7 (explaining that the principal can elect between a propriety remedy and a personal remedy against the agent).

323. *Id.*

324. *See id*. at para. 7–9 (stating that the "rule" has been strictly applied in numerous cases).

325. *Id.* at para. 1.

two differences between the constructive trust and the accounting: the constructive trust plaintiff who holds a proprietary claim (1) may trace and (2) outranks the agent's general creditors in the asset.[326] Does the principal also have a proprietary remedy?

The Supreme Court of the United Kingdom cited the Privy Council's decision in *Attorney General v. Reid*,[327] which held that the bribed prosecuting attorney held the bribe money as a constructive trust that can be traced to his house.[328] The Court adduced several policy reasons to support its decision that the bribe led to a constructive trust, not an account: to suppress anomalies, to regard the bribe as a potential price reduction, and to deter bribes.[329]

The court did not think that bribes had much effect on the agent's general creditors.[330] Other common law jurisdictions, Australia, New Zealand, Singapore, the United States, and Canada, consider that all benefits are in trust.[331] Courts should learn from each other and harmonize the common law.[332] In fact,

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326. *See id.* at para. 42 (discussing that if a principal has a proprietary claim to the bribe, he can trace and follow it in equity and that if the agent becomes insolvent, a propriety claim would give the principal priority over agent's unsecured creditors).

327. Attorney General for H.K. v. Reid [1994] 1 AC 324 (PC) 330 (appeal taken from NZCA) (UK).

328. *See* FHR European Ventures, LLP v. Cedar Capitol Partners, LLC [2014] UKSC 45 [para. 28] (appeal taken from EWCA (Civ)) (describing the reasoning of the Privy Council in *Attorney General for Hong Kong v. Reid* [1994] 1 AC 324 (PC) 330 (appeal taken from NZCA) (UK)).

329. *See id*. at para. 42 ("Wider policy considerations also support the respondents' case that bribes and secret commissions received by an agent should be treated as property of his principal, rather than merely giving rise to a claim for equitable compensation.").

330. *See id*. at para. 43 (explaining that a bribe would not have much of an effect on the agent's creditors because the proceeds of a bribe should not be in the agent's estate and bribes often reduce the benefit of the relevant transaction and can fairly be said to be property of the principal).

331. *See* FHR European Ventures, LLP v. Mankarious, [2013] EWCA (Civ) 17 [para. 80] (appeal taken from EWCA (Ch)) (explaining that the law in England and Wales differs not only from Australia, but also New Zealand, Singapore, Canada and some United States jurisdictions).

332. *See Cedar Capitol Partners*, [2014] UKSC 4 at para. 46 ("[I]t seems to us highly desirable for all those jurisdictions to learn from eachother, and at least to lean in favor of harmonizing the development of the common law round the world.").

the events and contracts in the lawsuit were in foreign nations on the continent, but United Kingdom law applied, probably because of a choice-of-law clause.[333]

One questionable feature of the decision was to reject the remedial constructive trust and to retain artificial property-based constructive trust.[334] If the Supreme Court of the United Kingdom had followed Australian Judge Paul Finn's 2012 decision in *Grimaldi v. Chameleon Mining N.L. (No 2)*,[335] it would have spared itself from technical distinctions and a labored conclusion. Although *Grimaldi* involved corporate misconduct, Judge Finn discussed the closely related bribery precedents.[336]

The United Kingdom constructive trust is property-based: it "requires a claimant to show that he previously owned the very property in which he now claims an interest, or else that the defendant acquired this property in exchange for property that was previously owned by the claimant."[337] In the United Kingdom, a constructive trust is "yes" or "no" depending on matching the facts with the elements. The judge lacks discretion.[338]

Judge Finn's policy-based approach is functional; it rejects a property prerequisite in favor of results that implement relevant policies.[339] He based the distinction between a constructive trust and accounting on "the cardinal principal of equity that the remedy must be fashioned to fit the nature of the case and the particular facts."[340] The defendant's constructive trust is "not

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333. *Id.* at para. 24; FHR European Ventures v. Mankarious [2011] EWHC 2308 (Ch). [24].

334. *See generally* FHR European Ventures v. Mankarious [2014] UKSC 45 [47] (Ch.).

335. [2012] 200 FCR 296 (Austl.).

336. *Id* at 418–23.

337. GOFF & JONES, THE LAW OF UNJUST ENRICHMENT 37-10 (Charles Mitchell, Paul Mitchell & Stephen Watterson eds., 8th ed. 2011). Professor Burrows is less technical. The defendant's unjust enrichment "exists in . . . [the defendant's] surviving asset." BURROWS, RESTITUTION, *supra* note 306, at 173.

338. GOFF & JONES, *supra* note 337, at 38-17.

339. *See Grimaldi* [2012] 200 FCR 296 at 403 ("It is the case that, in many instances and for many types of equitable wrong, the remedy that is the most appropriate will self select absent unusual circumstances.").

340. *Id.*

based on inflexible formulae."[341] The "liability arises as a matter of conscience not of property."[342] Property-based United Kingdom constructive trust law is too narrow, in part because it rejects discretion in choosing a constructive trust.[343] In Australia, a bribe leads to a constructive trust: the plaintiff captures the profits the defendant earned with the trust money.[344]

Judge Finn found principles of confinement in appropriate and practical justice.[345] Discretion to award a remedy means not always awarding it.[346] The countervailing considerations are predictability, avoiding excessive recovery, whether another appropriate remedy exists, and consideration of the parties' future relations. A constructive trust is not "penal;" its purpose is to prevent the defendant's unjust enrichment, not to punish him.[347] Finally, if the plaintiff seeks to capture the constructive trust asset's appreciation, the judge's discretion may adjust the measurement of the constructive trust for the defendant's time and skill spent in achieving that appreciation.[348]

Judge Finn's decision boosts the precedential value of the Privy Council's decision in *Reid*[349] over earlier incongruent United Kingdom decisions. But he observed in the same paragraph that Australia disagrees with *Reid* on when a

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341. *Id*. at 357–58. *See generally* GOFF & JONES, *supra* note 337, at 37-24.

342. *Grimaldi v Chameleon Mining N.L. (No. 2)* [2012] 200 FCR 296, 381 (Austl.).

343. *Id*. at 420.

344. *Id*. at 420, 431.

345. *See id*. at 403 (referencing "the 'principle of appropriateness' and the requirement to do 'practical justice'").

346. *See id*. at 423 (indicating that a constructive trust need not necessarily be imposed if there are other orders capable of doing full justice).

347. *See id*. at 406, 410 (explaining that because a constructive trust is confined to profits actually made, its purpose is to prevent unjust enrichment, not to punish); *see also* United States v. Project on Gov't Oversight, 572 F. Supp. 2d 73, 77 (D.D.C. 2008) (arguing that disgorgement may not be used punitively).

348. *Grimaldi v Chameleon Mining N.L. (No. 2)* [2012] 200 FCR 296, 410, 450, 453 (Austl.). Before the Court of Appeals' decision in *Mankarious*, Professor Burrows had written approvingly of a similar result—measurement of the constructive trust could be adjusted by granting the judge discretion to adjust the amount of restitution in consideration of the defendant's time and skill. BURROWS, REMEDIES, *supra* note 111, at 620.

349. Attorney General for H.K. v. Reid [1994] 1 AC 324 (PC) 330 (appeal taken from NZCA) (UK).

constructive trust begins.[350] In New Zealand, a constructive trust commences under property concepts upon the defendant's receipt of the bribe in contrast to Australia, where the court has equitable discretion to set the effective date according to policy and context.[351]

A court deciding the remedy for a commercial bribery should have equitable discretion to decide that, if the defendant deliberately breached her fiduciary duty by receiving a bribe and made profits, the plaintiff may recover the defendant's bribe and her profits as a constructive trustee.[352] The court ought to consider the defendant's general creditors' plight, real or imagined.[353] Generalized concern that the constructive trust overreaches the defendant's general creditors should not be the basis for a general rule against a constructive trust.

Like the Australian constructive trust, the constructive trust in the United States is flexible, pragmatic, and remedial, although with variations from state to state.[354] As the Reporter of the Third Restatement of Restitution, Professor Andrew Kull wrote:

> [I]t is nothing less than extraordinary, to a U.S. lawyer, to hear anyone . . . describe a constructive trust as a species of trust. To us this seems just as old-fashioned, and just as fundamentally misleading, as to describe a quasi-contractual

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350. *See Grimaldi* [2012] 200 FCR at 422 ("*Reid* has the constructive trust arising the moment the bribe is received. In Australia, the constructive trust in this setting is a discretionary remedy.").

351. *Id*.

352. *See* Graham Virgo, Whose Conscience? Unconscionability in the Common Law of Obligations 35 (unpublished manuscript) ("Personal liability for unjust enrichment can be converted into a proprietary claim by virtue of the defendant's subjective fault.") (on file with the Washington and Lee Law Review); Mitchell, *supra* note 288, at 209–10 (discussing constructive trusts under English law).

353. *See* Anthony Mason, *The Place of Equity and Equitable Remedies in the Contemporary Common Law World*, 110 L.Q. REV. 238, 253 (1994)

> [T]he impact upon general creditors of proprietary relief and equitable interests not registered as charges has been recognised as a concern in other contexts as equity intrudes into the commercial world via the Quistclose trust and the Romalpa clause and as the substantive principles of equity and the common law converge.

354. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55, 58 (AM. LAW INST. 2011) (indicating that courts have discretion on conditioning the surrender of the constructive trust property).

> obligation as a species of contract. Enlightenment on this point came to U.S. lawyers over a century ago . . . . We see the constructive trust as a remedy for certain cases . . . . We do not spend any time worrying about the distinction between a "remedial constructive trust" and some other [proprietary] kind, because no U.S. lawyer has ever heard that there is any other kind.[355]

A United States judge should have the discretion and flexibility to choose between a constructive trust and an accounting-disgorgement in Beyer's lawsuit against Aggie according to the judge's sense of where justice lies.

III. Civil Remedies: The Employer Sues the Briber

Suppose, for now, that Aggie is beyond the reach of Beyer's legal process. Or Aggie is obviously broke. When Beyer scans the horizon for deep-pocket defendants, he spots Sailer. Sailer facilitated Aggie's violation of her fiduciary duty to Beyer. Sailer's bribe deprived Beyer of Aggie's judgment and loyalty. Sailer, the briber, is a wrongdoer even if Aggie had refused the bribe. Sailer may be liable to Beyer.

First a detour. Suppose Aggie "suggested" to Sailer that her home speakers were inadequate. She more than hinted that new speakers would facilitate her decision to buy Sailer's for Beyer. Setting aside Sailer's option to exit and, perhaps, to speak to the authorities or to Beyer, Sailer, in short, may have been the victim of Aggie's "extortion." If so, we think that Sailer escapes both criminal liability[356] and civil liability.[357] In *City of New York v. Liberman*,[358] the court wrote that although "the distinction between bribe and extortion is a fine one," it is an important line for a court to draw.[359] The payer of a bribe is liable, but a victim

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355. Andrew Kull, *Deconstructing the Constructive Trust*, 40 CAN. BUS. L.J. 358, 359 (2004).

356. *See* MODEL PENAL CODE § 2.06(6)(a) (AM. LAW INST. 1981) ("[A] person is not an accomplice in an offense committed by another person if: (a) he is a victim of that offense."). *See generally* NOONAN, *supra* note 12, at 638.

357. *See* Woods, *supra* note 199, at 956–57, 957 n.189 (describing the analysis of *New York v. Liberman*, 232 A.D.2d 42 (N.Y. App. Div. 1997)).

358. 232 A.D.2d 42 (N.Y. App. Div. 1997).

359. *Id.* at 44.

of extortion is not liable for the payments that they were induced to make.[360]

A. The Briber's Duty?

Sailer is not a fiduciary for Beyer. His "contract" with Aggie is illegal and unenforceable.[361] What kind of legal duty did Sailer breach? He may be a joint tortfeasor with Aggie.[362] Or he may have committed the tort of inducing Aggie to breach her contract with Beyer.[363]

A New Jersey court took the employer's search for a defendant a step farther by finding a third party to a bribery scheme liable as a joint tortfeasor.[364] A lawyer agreed to act as a conduit for a bribery scheme involving a contractor and a public official.[365] The lawyer retained a $96,000 fee from the contractor for passing on a bribe for a city contract to the official.[366]

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360. *See id*. ("In the case of extortion, however, the one who is victimized by an extortion will not be held civilly liable for the amount of such payments." (citation omitted)).

361. *See* Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504, 555 (1980) (examining restitution where party fails to fulfill illegal contract to injure another); *Commercial Bribery*, *supra* note 36, at 801 (observing that criminal statutes have been passed that declare the corrupt influencing of an agent, servant, or employee to be a misdemeanor).

362. *See* Cont'l Mgmt., Inc. v. United States, 527 F.2d 613, 619 (Ct. Cl. 1975) ("[T]here is support for this result in views of the courts that have declared that all knowing participants in a scheme involving an agent's breach of duty may be held jointly liable . . . ."); Kinzbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509, 514 (Tex. 1942) ("It is settled as the law of this State that where a third party knowingly participates in the breach of a duty of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such.").

363. Dorsett Carpet Mills, Inc. v. Whitt Tile & Marble Distrib. Co., 734 S.W.2d 322, 323–26 (Tenn. 1987); *see* DOBBS, LAW OF REMEDIES, *supra* note 111, § 10.6 n.4 (explaining that the briber who suborns the fiduciary is generally guilty for the tort of inducing breach of contract). See Restatement (Second) of Agency § 312 cmt. d (Am. Law Inst. 2006) for a discussion regarding other tort approaches, including unfair competition and Restatement (Second) of Torts § 876 (Am. Law Inst. 1977) for a discussion regarding aiding and abetting.

364. *See* Twp. of Wayne v. Messercola, 789 F. Supp. 1305, 1313 (D.N.J. 1992) (finding that the attorney "as an aider and abettor is liable").

365. *See id*. at 1307 (describing that the attorney agreed to pass along the bribe to Messercola relating to a real estate development project).

366. *See id*. (explaining that of the $273,000 received, the attorney kept

Although the lawyer was neither the briber nor the rogue agent, he was found jointly liable for the full amount of the bribe plus the fee that he retained.[367]

The employer may recover either proved compensatory damages or restitution from Sailer, the briber.[368]

B. Compensatory Damages

In *Continental Management, Inc. v. United States*,[369] the Court of Claims held that the Government had a common law damages action against a bank whose former president had bribed federal employees to obtain mortgage insurance business with the Government.[370] The bank had the temerity to sue the Government to recover mortgage insurance.[371] The Government counterclaimed to recover the bribes.[372] Because the Government was unable to prove specific pecuniary damages, we assume that the company had performed the contracts satisfactorily and for the same consideration the Government would have had to pay anyway.[373]

The court articulated its reasoning to support the Government's recovery of compensatory damages:

$96,000 for himself).

367. *See id.* at 1311 ("[S]o long as double recovery is not awarded for the bribes, the aider and abettor who is a joint tortfeasor with the agent is jointly liable to the principal for the agent's secret profits." (citation omitted)).

368. *See* RESTATEMENT (SECOND) OF AGENCY § 312 cmt. d (AM. LAW INST. 1958) (explaining that a person who intentionally causes the violation of a duty to a principal is subject to liability either in tort or in restitution); DOBBS, LAW OF REMEDIES, *supra* note 111, § 10.6 ("From a briber, the victimized employer may recover either (1) proven damages or (2) restitution.").

369. 527 F.2d 613 (Ct. Cl. 1975).

370. *See id.* at 621 ("We hold, therefore, that the bribery for which plaintiffs are responsible was a wrong against the defendant . . . .").

371. *See id.* at 614 (describing the suit against the United States for sums allegedly due to them under contracts of mortgage insurance issued by the Federal Housing Administration).

372. *See id.* ("Only the first counterclaim, in which the Government seeks to collect from plaintiffs an amount equal to the sum of bribes paid . . . is before the court at this time on the parties' cross-motions.").

373. *See id.* at 615 ("Government has shown only that such unlawful payments were made and has not proved direct or specific monetary injury.").

> It is an old maxim of the law that, where the fact of injury is adequately shown, the court should not cavil at the absence of specific or detailed proof of the damages. Here, the plaintiffs engaged in wrongful conduct that clearly hurt the Government. Significant elements of that harm, such as the injury to the impartial administration of governmental programs, are not susceptible to an accurate monetary gauge. We should not deny the Government relief because Sirote managed to cause injury not readily traceable or measurable. Similarly, the Government's inability to attach an exact and provable dollar figure to the harm it sustained should not result in the effective exculpation of the plaintiffs. . . . As between the briber and the bribee's employer, the risks of damage determination should fall on the former.[374]

But how will the court measure those compensatory damages? It continued:

> On this premise the amount of the bribe provides a reasonable measure of damage, in the absence of a more precise yardstick. That is, after all, the value the plaintiffs placed on their corruption of the defendant's employees; the other side of the coin is that the [bribers] hoped and expected to benefit by more than the sum of the bribes. It is therefore fair to use that total as the measure of an injury which is probable in its impact but uncertain in its mathematical calculation. . . . Of course, the Government cannot recover the bribes twice—once from the briber and again from the corrupted employee. But it is entitled to one such recovery.[375]

In measuring the Government's compensatory damages, are we willing to accept this much imprecision about its loss or injury? The court set recovery at the amount of the bribe, which, as the court said, is the value the wrongdoers gave.[376] If the

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374. *Id.* at 619.

375. *Id.* (citations omitted); *see also* Franklin Med. Assocs. v. Newark Pub. Sch., 828 A.2d 966, 974–80 (N.J. Super. Ct. App. Div. 2003) (finding that the victim of a bribe by its agent may recover damages from an aider and abettor of a bribery scheme measured by the amount of the bribe without demonstrating actual loss); Jaclyn, Inc. v. Edison Bros. Stores, Inc., 406 A.2d 474, 492 (N.J. Super. Ct. Law Div. 1979) (explaining that the bribed agent's principal recovered the amount of the bribe from the briber, trebled under state RICO statute, plus the plaintiff's attorney fee, because the briber deprived the principal of the value of the agent's services and the bribe is the price put on it).

376. *See* Cont'l Mgmt., Inc. v. United States, 527 F.2d 613, 619 (Ct. Cl. 1975) (explaining the premise that the amount of bribe provides a reasonable way to measure damage).

briber was efficiency-minded, it expected to gain more than the amount of the bribe. But the defendant's gain or unjust enrichment measures restitution, not compensatory damages. Even though Beyer's injury is not palpably clear, deterrence of Sailer and other intentional wrongdoers seems to be a valid policy.

Perhaps the *Continental Management* court's view of the Government's remedy as compensatory damages clouded a focus on restitution. We turn to the employer's restitution.

C. Unjust Enrichment, Restitution, and Disgorgement

Sailer obtained something from Beyer: Aggie's loyalty and an economic advantage. Beyer's restitution from Sailer may take one of two forms: rescission-restitution and plain-vanilla restitution.

Aggie, as Beyer's agent, had actual authority to buy the speakers. Can Beyer, her principal, extricate himself from the transaction? Yes, he may rescind his bribe-induced contract with Sailer.[377]

Suppose Sailer has delivered the speakers to Beyer and Beyer has paid Sailer when he discovers that Sailer bribed Aggie. Beyer can rescind his contract with Sailer because of Sailer's fraud and receive a refund—restitution of his consideration. But in usual rescission-restitution law, Beyer should make restitution—return the speakers.[378] On first blush, there is a

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377. *See* Tarnowski v. Resop, 51 N.W.2d 801, 803 (Minn. 1952) (discussing a principal's ability to seek damages after rescinding a transaction subject to a bribe); *Jaclyn*, 406 A.2d at 484 n.7 (noting that, in private contracts, a person who discovers he has been defrauded has the option to ratify or rescind the contract); Black v. MTV Networks Inc. 576 N.Y.S.2d 846, 847 (N.Y. App. Div. 1991) (allowing MTV to terminate an agreement with Black who "secretly made gifts totaling thousands of dollars to MTV's director of personnel and . . . made an interest-free loan of $30,000 to another MTV employee"); Am. Assurance Underwriters Grp. v. Metlife Gen. Ins. Agency, 552 N.Y.S.2d 259, 260 (N.Y. App. Div. 1990) (allowing MetLife to terminate an agreement with AAUG who made "secret stock payments to MetLife's employees"); RESTATEMENT (THIRD) OF AGENCY § 8.02 cmt. e, illus. 9, 10 (AM. LAW INST. 2006) ("A principal may avoid a contract entered into by the agent with a third party who participated in the agent's breach of duty."). *See generally* Smith, *Fiduciary Relationships*, *supra* note 70; *Commercial Bribery*, *supra* note 36; *Commercial Bribery: The Need for Legislation in Minnesota*, *supra* note 36.

378. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 54(2)

striking difference between this result, and a partially executed contract where the speakers are delivered but Beyer has not paid; Beyer may receive the speakers without paying.

The court could resolve the difference by refusing restitution to Sailer because of his unclean hands—inequitable conduct.[379] Another possible solution is for the court to focus on Beyer's enrichment and utilize discretion in measurement to set an amount that Beyer should pay Sailer.

Suppose that after Sailer delivers the speakers to Beyer, Beyer learns about the bribe. Unpaid, Sailer sues Beyer for the price. The court should deny Sailer recovery on the ground that the "agreement" was tainted by the bribe and illegal in violation of public policy. Denial of recovery to a bribe-payer is straightforward—at least in government work. All the bribe-paying plaintiff's claims on the contract are forfeited, because the bribe is "fraud," which triggers "nonenforcement" on public policy grounds.[380] The court, however, may allow Beyer to keep the speakers without paying anyone anything for them. Does that go too far?

In *Jaclyn, Inc. v. Edison Bros. Stores, Inc.*,[381] agents of a handbag manufacturer frequently bribed employees of a retail company.[382] Although the retailer found out about the bribes its employees were receiving, it continued to purchase merchandise from the manufacturer without addressing the bribes.[383] Eventually the retailer defaulted on payments for the

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(AM. LAW INST. 2011) ("Rescission requires a mutual restoration and accounting in which each party (a) restores property received from the other, to the extent such restoration is feasible . . . .").

379. *See id.* § 63 ("Recovery in restitution to which an innocent claimant would be entitled may be limited or denied because of the claimant's inequitable conduct in the transaction that is the source of the asserted liability.").

380. *See* Supermex, Inc. v. United States, 35 Fed. Cl. 29, 40–42 (1996) (explaining that only through the remedy of non-enforcement can the procurement system free itself of the suspicion of undetected frauds); DOBBS, LAW OF REMEDIES, *supra* note 111, § 10.6 nn.6–7 ("[I]f the briber has sold goods to the victimized employer as a result of illegality, he cannot recover for their value; that is, his bribery is a defense to the claim.").

381. 406 A.2d 474 (N.J. Super. Ct. Law Div. 1979).

382. *Id.* at 477 (relating the facts of the case).

383. *See id.* at 478 (explaining that Edison acquired reliable knowledge in early 1976 that Jaclyn was making pay-offs to purchasing agents).

merchandise.[384] The manufacturer sued for the amount that was left unpaid for its merchandise, but the retailer offered the affirmative defense of commercial bribery under a New Jersey statute and counterclaimed for the amount of the bribe.[385] The court found that the affirmative defense of commercial bribery failed because the buyer knew about the bribery scheme and continued to let its agents purchase from the manufacturer.[386] However, the court found the manufacturer liable for the amount of the bribe, despite the prior knowledge of the buyer.[387]

If Sailer sues Beyer for the price and Beyer counterclaims, should the court, in addition to refusing to grant Sailer recovery, force Sailer to refund Beyer's earlier payments for the speakers? Beyer may argue that, because the transaction was tainted by the bribe, it was illegal in violation of public policy. In an official-bribery decision in *S.T. Grand, Inc. v. City of New York*,[388] the New York Court of Appeals went a little farther. The firm that had bribed a city employee sued the City for the balance "due" on the tainted contract.[389] The court, turning the tables, held that the City could recover all of the amounts it had paid the briber under the bribe-induced contract.[390]

Should the court, in addition, force Sailer to refund Beyer's earlier payments for the speakers? Following *S.T. Grand* above into a private bribery, an unpaid Sailer cannot recover the price and, perhaps, must return Buyer's earlier payments. If so, the

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384. *See id.* at 480–81 (describing a "clearance policy" in which no invoices would be paid or normal business resumed until the vendor "told the truth" regarding payments to buyers).

385. *See id*. at 483 ("Edison urges this court to hold that one who resorts to the acts employed by Jaclyn should be denied the right of recovering the agreed price of the goods sold and delivered, notwithstanding that the merchandise was retained by Edison and retailed at a profit.").

386. *See id*. at 484 (indicating that a contract to do an illegal act or one made in the violation of a penal statute is void and unenforceable).

387. *Id*. at 491.

388. 298 N.E.2d 105 (N.Y. 1973).

389. *See id*. at 106 (stating that the city was being sued for an unpaid balance due on the cleaning contract).

390. *See id.* at 108 (explaining that a municipality may recover from the vendor all amounts paid under an illegal contract in an effort to deter violation of the bidding statutes); *see also* Woods, *supra* note 199, at 931–33 (indicating that the described scandal effectively created a legal doctrine that is viewed as a deterrent to corruption).

court has allowed Beyer to keep the speakers without paying anyone anything for them. Does this go too far?

The employer may recover the amount of the bribe from the briber as plain restitution.[391] Courts have described this recovery of restitution as legal restitution of the money had and received.[392] Two decisions distort or "relax" tracing to find that the briber was constructive trustee for the amount it had paid plaintiff's agent.[393]

If Sailer was successful, was he enriched? Unjustly? By the value of his sales and profits?[394] Should a court award Beyer restitution from Sailer measured by the amount of the bribe?[395] The amount of Sailor's gross profit on the speakers? Both? Perhaps the larger of the two.[396]

The bribing seller's unjust enrichment does not match the amount of the bribe.[397] And the seller, having paid the bribe to

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391. *See* Sears, Roebuck & Co. v. Am. Plumbing & Supply Co., 19 F.R.D. 334, 345 (E.D. Wis. 1956) (defendant was constructive trustee for the amount it had paid plaintiff's agent); Cent. Ill. Pub. Serv. Co. v. Schell, 238 Ill. App. 560, 565 (Ill. App. Ct. 1925) (same); *see also In re* Browning's Estate, 30 N.Y.S.2d 604, 605 (N.Y. Sur. Ct. 1941) ("The vendor has had and received money *which belongs to the purchaser to the extent of the bribe*, which neither the vendor nor the unfaithful agent may in conscience and good morals retain."). *See generally* Kinzbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509, 514 (Tex. 1942); PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 8.6 n.43.

392. *See* United States v. Carter, 217 U.S. 286, 317 (1910) (indicating that a judgment was rendered for "money had and received for its use"). *See generally* Mahesan v. Malay. Hous. Soc'y, [1979] A.C. 374 (PC) (appeal taken from Fed. Ct. Malay.)).

393. *See* Sears, Roebuck & Co. v. Am. Plumbing & Supply Co., 19 F.R.D. 334, 346 (E.D. Wis. 1956) ("The Court being of the opinion that it is a situation where constructive trust has been established . . . the action is of equitable nature."); Cen. Ill. Pub. Serv. Co. v Schell, 238 Ill. App. 560, 564 (Ill. App. Ct. 1925) ("In such case, equity will impress a constructive trust upon the money in his hands.").

394. *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 (AM. LAW INST. 2011).

395. *See* PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 8.5 n.10 ("Whether paid or not there is also authority granting restitution to the principal from the defendant who paid or agreed to pay the commission, on the theory that the purchase price to the principal was increased by the amount of the commission or bribe.").

396. *See generally* RESTATEMENT (SECOND) OF AGENCY § 312 cmt. d (AM. LAW INST. 1958).

397. *See* James M. Fischer, *The Puzzle of the Actual Injury Requirement for Damages*, 42 LOY. L.A. L. REV. 197, 233–34, 233 n.142 (2008) (demonstrating

the agent, does not retain the bribe. "There is less doctrinal strain," Professor Palmer observed, "if the [employer's] recovery [from the seller of the amount of the bribe] is regarded as damages."[398] Professor Peter Birks also questioned the theoretical base of restitution to recover the amount of the bribe from the briber: the bribe "is apparently not money received but money laid out."[399] Dobbs wrote that "the amount of the bribe becomes surrogate for the actual benefits received by the briber when those benefits cannot be identified."[400]

Suppose the briber gained more than the amount of the bribe. The defendant's unjust enrichment, if it exceeds the bribed agent's principal's loss, measures the principal's recovery. Bribery leads to restitution, the briber's disgorgement of all profits.[401]

In *Williams Electronics Games v. Garrity*,[402] the U.S. Court of Appeals for the Seventh Circuit held that the employer-principal may recover from the briber of his employee.[403] Its recovery is measured by either its damages or the briber's profits (restitution),[404] whichever is larger. The damages formula is the bribe plus revenue from the bribe minus the defendant's legitimate costs.[405]

In a 2006 New Jersey decision, the defendant-Bank's employee had bribed a public official to obtain the

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the difficulty in establishing an action for unjust enrichment against a briber because tying the benefit to the briber may be difficult).

398. PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 2.11 n.22.

399. BIRKS, AN INTRODUCTION, *supra* note 129, at 338.

400. DOBBS, LAW OF REMEDIES, *supra* note 111, §10.6.

401. *See* Cty. of San Bernardino v. Walsh, 69 Cal. Rptr. 3d 848, 855 (Cal. Ct. App. 2007) ("[T]he evidence and law support the trial court and warrant a damage award based on disgorgement of the amounts by which [the defendants] were unjustly enriched."); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 44 illus. 9 (AM. LAW INST. 2011) (noting that "Buyer is entitled to recover $5000 from Seller" when Seller bribes Buyer with $5000 because "it may be presumed . . . that Seller has derived a benefit of at least $5000 from the illegal transaction").

402. 366 F.3d 569, 579 (7th Cir. 2004)

403. *See id.* at 579 (reversing the lower court's rejection of an employer's claim).

404. *See id.* at 576 (noting the damages remedy and restitution remedy are both available to bribery victims).

405. *See id.* (calculating a briber's total profits).

plaintiff-County's bond business.[406] The dispute had been through criminal prosecutions and the SEC before the County's civil action against the Bank was tried. Although the Bank had already paid the County the amount of the kickbacks, $206,809.22, the County sued the Bank to recover its unjust enrichment.[407] The County sought disgorgement of the Bank's "underwriter's discount."[408] After a complex submission that included several other substantive theories, the jury's verdict for the County was for unjust enrichment-disgorgement.[409]

The New Jersey Supreme Court hinged its decision on restitution of the defendant's unjust enrichment, not the plaintiff's loss.[410] The Bank's disgorgement, the court said, is "not related to whether the County suffered damages."[411] The court turned to measurement of restitution.[412] The County could recover the Bank's gross profits, the "total fees received [and retained] by the bank."[413] Finally, prejudgment interest ran from the date of the improper transaction, not the date of the plaintiff's complaint.[414] The remedy was full disgorgement, by which means the court intended to deter future bribes.[415]

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406. *See generally* Cty. of Essex v. First Union Nat'l Bank, 891 A.2d 600, 602 (N.J. 2006).

407. *Id.* at 602.

408. *See id.* at 603 ("In the aggregate, the Bank received underwriting fees of $2,883,019.15.").

409. *See id.* ("The jury returned a verdict in favorof the County for its unjust enrichment/disgorgement claim . . . in the amount of $ 600,000.").

410. *See id.* at 607 (highlighting restitution).

411. *Id.* at 607.

412. *See id.* at 608–09 (assessing the amount the Bank should disgorge to the County).

413. *Id.* at 604.

414. *See id.* at 609 (calculating the interest based on the date of the bribe).

415. *See id.* at 607 ("Strong remedies are necessary to combat unlawful conduct involving public officials. Disgorgement in favor of the public entity serves as a harsh remedy against those who bribe a public official to secure a public contract and provides a deterrent to such unlawful activity."). *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 44 illus. 9 (AM. LAW INST. 2011).

IV. Loose Ends

We have not considered the legal relations between Sailer and Aggie and the way the bribe affects third parties.

After bribing Aggie, suppose Sailer gets cold feet and changes his mind about selling speakers to Beyer. Sailer sues Aggie for restitution. Even though keeping the speakers leaves Aggie unjustly enriched, a court will be likely to cite Sailer's inequitable conduct or unclean hands and refuse to grant him a refund.[416] Sailer cannot recover the bribe because the court will conclude that his misconduct has forfeited his claim to recover it.[417]

The other side of that coin supposes that Aggie buys Sailer's speakers for Beyer's inventory. Aggie, the agent who has not received the bribe, cannot enforce the briber's illegal promise to pay it.[418]

Is there honor among thieves? The cynical "advice" to a bribe-giver and his taker is to leave nothing executory, to exchange consideration simultaneously.

Because of Sailer's bribe to Aggie, Sailer's competitors did not sell their speakers to Beyer. Sailer may be liable to a competitor for interference with its prospective advantage.[419]

Beyond the seller's competitors, we have run out of plaintiffs. Taxpayer-citizens lack "standing" to sue a crooked official for

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416. *See* Womack v. Maner, 301 S.W.2d 438, 439 (Ark. 1957) (affirming the defendant's demurrer when the plaintiff sued to recover bribes paid to the defendant). *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 32(3) illus. 12, note, 63 (AM. LAW INST. 2011); PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 3.6.

417. *See* Attorney Gen. for H.K. v. Reid [1994] 1 AC 324 (PC) 330 [2] (appeal taken from NZCA) (UK) ("The provider of a bribe cannot recover it because he committed a criminal offence when he paid the bribe.").

418. *See* Oscanyon v. Arms Co., 103 U.S. 261, 267 (1880) ("The court will not listen to claims founded upon services rendered in violation of common decency, public morality, or the law."); Wolfe v. Int'l Reinsurance Corp., 73 F.2d 267, 269 (2d Cir. 1934) (L. Hand, J.) (denying recovery for services rendered when the principals involved had conflicting relations); *see also* PALMER, THE LAW OF RESTITUTION, *supra* note 5, § 8.5 (noting that in "nearly all authority," an agent cannot recover a commission where there is illegality on the part of both parties). *See generally* Gray v. Pankey, 100 So. 880, 881 (Ala. 1924); Friedmann, *supra* note 361, at 555–56; *Commercial Bribery*, *supra* note 36, at 801.

419. *See generally* DOBBS, LAW OF REMEDIES, *supra* note 111, § 10.6.

equitable restitution of his bribe.[420] In *Fuchs v. Bidwill*,[421] an Illinois court held that citizens, residents, and taxpayers lacked standing to sue on behalf of the state for equitable restitution of corrupt profits allegedly earned by state legislators.[422] The State Attorney General, the majority held, was the real party in interest who could have sued, but individual citizens and taxpayers could not.[423]

V. Double Recovery, Punitive Damages, and Multiple Damages

To examine the risk of excess and the need for principles of confinement we take up double recovery, punitive damages, and multiple damages.

A. Employer Sues Both the Briber and the Employee

Suppose Aggie is back. May Beyer recover the amount of the bribe twice, from both Aggie—the bribe recipient—and Sailer—the bribe payer?

Beyer may sue both Aggie and Sailer as joint tortfeasors. Usually each joint tortfeasor is responsible for all of the plaintiff's damages.[424] A plaintiff may be successful against more than one defendant under more than one substantive theory, but that plaintiff should recover only once—a single satisfaction.[425] A

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420. *See* Fuchs v. Bidwill, 359 N.E.2d 158, 162 (Ill. 1976) (stating that the public interest would not benefit from allowing private citizens to bring such suits).

421. 359 N.E.2d 158 (Ill. 1976).

422. *Id.* at 162.

423. *Id*. Justice Schaefer wrote a strong dissent. *Id.* at 162–65 (Schaefer, J. dissenting). *But see* ALASKA STAT. § 39.50.100 (West 2016) (permitting Alaska voters to bring suits to enforce certain statutes concerning public finances); Mackey v. McDonald, 504 S.W.2d 726, 731 (Ark. 1974) (permitting a citizen suit concerning misappropriation of public money).

424. *See* DOBBS ET AL., THE LAW OF TORTS, *supra* note 100, § 488. ("When two or more tortfeasors are jointly and severally liable, each defendant is subject to liability for all of the plaintiff's damages.").

425. *See id.* § 487 ("If joint and several liability applies, each defendant will be liable to the plaintiff . . . subject to the caveat that the plaintiff can only receive one satisfaction of the judgement.").

plaintiff may not recover the same element of compensatory damages from two defendants.[426] The plaintiff is entitled to recover only once.[427]

Suppose Beyer sues Sailer alone first and recovers the amount of the bribe. Considering the reasons to compel a bribe-taker to disgorge, should the court limit the plaintiff to that one recovery? Two of our courts say "Yes."[428] However, forbidding the plaintiff from recovering the amount of the bribe twice, from the briber and the bribee, may erode the idea that the breaching fiduciary must surrender the fruits of her breach even though the principal lost nothing. If Beyer sues Sailer first, recovers, and second sues Aggie, then the policy tension is between eschewing Beyer's double recovery of the bribe, on the one hand, and on the other, deterring bribes and preventing Aggie's unjust enrichment.

If Beyer sues Aggie first, Beyer's recovery from her may leave nothing for Sailer to pay later. This may erode the policy of deterring bribes.[429] We see no possibility for Aggie to pay Beyer and then recover indemnity from Sailer.[430] We turn to the Tennessee court for some enlightenment.

In litigation involving an employer's claims against a bribing seller and an employee who had received kickbacks, the trial judge had entered judgment against the seller for the tort of procuring breach of contract.[431] The court measured the employer's recovery by the amount of the employee's salary

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426. *See id.* § 479 (discussing the basic elements and limitations on compensatory damage calculations).

427. *See* United States v. Project on Gov't Oversight, 572 F. Supp. 2d 73, 77 (D.D.C. 2008) (declining "to award . . . another judgment against [the defendant] in the same amount arising out of the same conduct"); Twp. of Wayne v. Messercola, 789 F. Supp. 1305, 1311–12 (D.N.J. 1992) (finding that the plaintiff could only recover once for bribery). *See generally* DOBBS ET AL., THE LAW OF TORTS, *supra* note 100, § 488.

428. *See* Cont'l Mgmt, Inc. v. United States, 527 F.2d 613, 619 (Ct. Cl. 1975) (noting that a plaintiff "cannot recover the bribes twice"); Dorsett Carpet Mills, Inc. v. Whitt Tile & Marble Distrib. Co., 734 S.W.2d 322, 325 (Tenn. 1987).

429. *See supra* note 155 and accompanying text (stating that restitution may serve as a deterrent to future acts of bribery).

430. *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 23 (AM. LAW INST. 2011).

431. *Dorsett Carpet Mills*, 734 S.W.2d at 323.

"during the period of his duplicitous conduct."[432] "The trial court also rendered a judgment against both [the bribing seller and the corrupt employee] for the amount of secret commissions."[433] The seller appealed.[434]

The Tennessee Supreme Court thought the employee's salary was an appropriate recovery for the employer against the employee.[435] But the employee's salary was, the court said, "an inappropriate element of damage to charge against the procurer of the breach."[436] The secret kickbacks that the seller had paid the employee were the employer's proper recovery against that defendant. The court articulated this recovery as compensatory damages for the employer's loss: "[H]ad [the bribing seller] not paid this money to [plaintiff's employee], it may be presumed that these funds would have inured to the benefit of [the employer] in the form of lower prices or greater commissions."[437] The court also approved trebled recovery under a Tennessee statute that forbids inducing breach of contract.[438]

The employer, Birks wrote, "can have either restitution or compensation, and whichever he chooses he cannot have it from both briber and bribee."[439] However, the court's focus on tort damages might lead it to neglect the other policies of deterrence and preventing unjust enrichment. Considering deterrence of both payers and receivers of bribes, should the court limit the plaintiff to one recovery? If not, how much should the recovery be? And how should the court measure it? The Tennessee court said that the employer may recover the employee's salary from the employee and the briber's bribe from it—but not the employee's salary from the briber.[440]

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432. *Id.* at 325.

433. *Id.* at 323–24.

434. *Id.* at 324.

435. *Id.* at 325.

436. *Id.*

437. *Id.* at 326.

438. *See id.* (trebling the damages according to a state statute).

439. BIRKS, AN INTRODUCTION, *supra* note 129, at 338.

440. Dorsett Carpet Mills, Inc. v. Whitt Tile & Marble Distrib. Co., 734 S.W.2d 322, 326 (Tenn. 1987).

The Tennessee court quoted the Restatement of Torts: "any damages in fact paid by the third person will reduce the damages actually recoverable" for interference with contract.[441]

The question of whether the employer could collect judgments from both the seller and the employee without receiving duplicated recovery was not, however, raised.[442] The Tennessee court's quotation from the Torts Restatement probably meant that the court thought that the agent's re-payment of her salary to her principal will reduce the amount the briber owes the principal.

If, on the other hand, the court measures restitution by the amount of the defendants' unjust enrichment, rather than the plaintiff's loss, then it may allow the employer to recover from both the briber and the bribee even though, as restitution often does, it exceeds compensatory damages.[443] Citing decisions that go both ways, Dobbs wrote, "[suppose] the employer first recovers damages (not restitution) from the briber, then seeks restitution from the employee. . . . [T]he second recovery appears desirable to force the disloyal employee to disgorge his unjust gain."[444]

Reporters' notes from two Restatements, Agency Third, and Restitution Third, show the policy conflicts and difficulty in combining compensatory damages and restitution with recovery from both the giver and the receiver of a bribe.[445]

The Restatement of Agency begins by saying that the employer may not recover the bribe twice, once from employee and once from briber.[446] But it continues: "If a principal recovers damages from a third party as a consequence of an agent's breach

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441. *Id.* at 325 (quoting RESTATEMENT (SECOND) OF TORTS § 774A(2) (AM. LAW INST. 1979)).

442. *See id.*

443. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 44 rep. note b (AM. LAW INST. 2011) ("[W]here the goal of the remedy is accordingly disgorgement rather than compensation, courts have allowed the victim to recover the amount of the bribe twice—once from the bribe-giver and once from the faithless agent.").

444. DOBBS, LAW OF REMEDIES, *supra* note 111, § 10.6.

445. *See infra* notes 446–450 and accompanying text (describing the policies that inform damages and restitution).

446. RESTATEMENT (THIRD) OF AGENCY § 8.02 rep. note e (AM. LAW INST. 2006) (citing Franklin Med. Assocs. v. Newark Pub. Schs., 828 A.2d 966, 976 (N.J. Super. App. Div. 2003)).

of fiduciary duty, the principal remains entitled to recover from the agent any benefit that the agent improperly received from the transaction."[447] Beyer, it seems, may recover damages from Sailer and the bribe from Aggie.[448]

The Restatement of Restitution's Illustration states: "if a double recovery . . . would constitute an inappropriate windfall, Buyer's recovery from Seller may be reduced by the amount of any recovery that Buyer obtains from Agent . . . ."[449] No double recovery from both Sailer and Aggie? The Reporter's Note on the Illustration continues:

> The analytical choice between presumed benefit to the bribe-giver (justifying a recovery in restitution) and presumed loss to the victim (justifying an award of damages in tort) may appear somewhat arbitrary. In a commercial bribery case where the theory of recovery is indeed unjust enrichment rather than injury, and where the goal of the remedy is accordingly disgorgement rather than compensation, courts have allowed the victim to recover the amount of the bribe twice—once from the bribe-giver and once from the faithless agent. (The rules of the present Topic consistently allow restitution from a conscious wrongdoer in an amount exceeding the claimant's loss.) By contrast, the possibility of a double recovery will be properly rejected by a court that sees the remedy in a bribery case as an award of damages for tort.[450]

The principle against unjust enrichment, it seems, overcomes duplication and windfall to support Beyer's recovery of the amount of the bribe from both Sailer and Aggie. An observer may inquire whether this goes too far.

B. Punitive Damages

What about punitive damages for bribery? When we consider common law punitive damages, we put the policies of compensation and preventing unjust enrichment behind us. The

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447. *Id.*

448. *Id.*

449. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 44 illus. 9 (AM. LAW INST. 2011).

450. *Id.* § 44 rep. note b.

uniform purposes of taking punitive damages from the defendant are to punish that defendant and to deter future misconduct, hers and others.[451] The policies that support awarding the punitive damages to the plaintiff are to pay the plaintiff a bounty for bringing a wrongdoer to book, to finance the plaintiff's litigation as a surrogate for attorney fee recovery, and to provide the plaintiff a peaceful substitute for private vengeance.[452]

The defendants' misconduct may be sufficiently aggravated to qualify the plaintiff for punitive damages under the jurisdiction's misconduct threshold, which may be either actual malice, implied malice, conscious reckless disregard, or gross negligence.[453] Punitive damages may be available in addition to compensatory damages or restitution.[454]

A court may analyze an employee's breach of fiduciary duty to her employer as a tort that qualifies the employer to recover punitive damages. Courts have approved punitive damages in bribery and breach of fiduciary duty cases.[455] The Restitution, Employment, and Agency Restatements allow the employer of a

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451. *See* Tuttle v. Raymond, 494 A.2d 1353, 1355 (Me. 1985) ("[A] substantial majority of jurisdictions today allow common law punitive damages . . . for the purpose of deterrence or punishment or both."); Jaclyn, Inc. v. Edison Bros. Stores, Inc., 406 A.2d 474, 492 (N.J. Super. Ct. Law Div. 1979) ("[Punitive damages] are awarded upon a theory of punishment to the offender for aggravated misconduct and to deter such conduct in the future." (quoting Leimgruber v. Claridge Associates, Ltd., 73 N.J. 450, 375 A.2d 652, 654 (1977))).

452. *See* Doug Rendleman, *Common Law Punitive Damages: Something for Everyone?*, 7 U. ST. THOMAS L.J. 1, 18 (2009) [hereinafter Rendleman, *Common Law Punitive Damages*] (discussing *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008)); Dorsey D. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982) (discussing the theories underlying punitive damages).

453. *See generally* RENDLEMAN & ROBERTS, *supra* note 1, at 149–51; *Jaclyn, Inc.*, 406 A.2d at 492.

454. *See Jaclyn*, 406 A.2d at 494 (adding punitive damages to compensatory damages).

455. *See* Cty. of San Bernardino v. Walsh, 69 Cal. Rptr. 3d 848, 855 (Cal. Ct. App. 2007) (calculating recovery for bribed public official as the disgorgement of all profits plus punitive damages); Hensley v. Tri–QSI Denver Corp., 98 P.3d 965, 968 (Colo. Ct. App. 2004) (finding that punitive damages are not "strictly limited to the amount of actual damages" awarded); *Jaclyn*, 406 A.2d at 492–94 (permitting the recovery of punitive damages from a briber); Banks v. Mario Indus. of Va., Inc., 650 S.E.2d 687, 699 (Va. 2007) (outlining the non-bribe fiduciary duty and awarding punitive damages because of defendants' "sinister or corrupt motive").

bribed employee to recover compensatory damages and restitution, plus punitive damages.[456]

The Restatement of Restitution explains the combination of restitution with punitive damages:

> Disgorgement of wrongful gain is not a punitive remedy. . . . The rationale of punitive or exemplary damages is independent of the law of unjust enrichment. The rules that govern such damages are part of the tort law of a given jurisdiction, ... If the defendant's conduct meets the applicable standard for additional liability, there is no intrinsic inconsistency in a judgment that reinforces disgorgement of wrongful gain with an explicitly punitive award.[457]

Characterization of bribery as breach of contract militates against the plaintiff's recovery of punitive damages unless the defendant also committed an independent tort.[458] That tort may be fiduciary breach. In *Hensley v. Tri–QSI Denver Corp.*,[459] the employer-plaintiff recovered $131,109 for breach of contract, which was large, and $5,451 for breach of fiduciary duty, which was small.[460] But the court held that the plaintiff was entitled to punitive damages under the Colorado statute based only on the fiduciary tort.[461]

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456. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. k (AM. LAW INST. 2011) (noting that courts "will sometimes supplement the defendant's liability in restitution with an award of exemplary damages"); RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 9.09(b) (AM. LAW INST. 2015) (permitting punitive damages in addition to losses for an employee's breach of tort-based or fiduciary duty); RESTATEMENT (THIRD) AGENCY § 8.01 cmt. d (AM. LAW INST. 2006) ("A breach of fiduciary duty may also subject the agent to liability for punitive damages when the circumstances satisfy generally applicable standards for their imposition."); *see also* Smith, *Fiduciary Relationships*, *supra* note 70, at 622 ("In some jurisdictions, fiduciaries may be subject to punitive damages.").

457. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. k (AM. LAW INST. 2011).

458. *See* RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 9.09(b) (AM. LAW INST. 2015) (permitting punitive damages for breaches of tort based duties or fiduciary duties).

459. 98 P.3d 965 (Colo. Ct. App 2004).

460. *See id.* at 966 ("The company was awarded $131,109.52 on its breach of contract claim and $5,451.39 on its breach of fiduciary duty claim . . . .").

461. *See id.* at 968 ("No amount of punitive damages could have been recovered by the company on its contract breach claim; its breach of fiduciary

In *Kann v. Kann*,[462] however, the Maryland Court of Appeals held that "there is no universal or omnibus tort for the redress of breach of fiduciary duty by any and all fiduciaries."[463] The decision affects the litigants' right to a jury trial and the winner's opportunity to recover punitive damages. Is the Maryland court's view—rejecting an independent tort of fiduciary breach and punitive damages—an unnecessary limitation or a salutary principle of confinement?

C. Multiplied Recovery

The bait of increased recovery leads commercial bribery plaintiffs to sue under multiple-damages statutes. In Rhode Island, the plaintiff need not search far because the commercial bribery statute provides for double damages.[464] Examples of multiple damages statutes in commercial bribery follow.

In *Kewaunee Science Corporation v. Pegram*,[465] Kewaunee, the former employer, sued both its former purchasing agent and several sellers who had bribed its purchasing agent.[466] The court accepted the plaintiff's argument "that they should not have to prove out of pocket loss due to the transaction."[467] "[C]ommercial bribery," the court said, "harms an employer as a matter of law, and the proper measure of damages suffered must include at a minimum the amount of the commercial bribes the third party paid."[468] Moreover, defendants' bribery qualified the plaintiff for treble "damages" because it is considered misconduct under the North Carolina unfair and deceptive trade practices act.[469]

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duty claim was the only tort claim that was presented for resolution.").

462. 690 A.2d 509 (Md. 1997).

463. *Id.* at 521.

464. *See* R.I. GEN. LAWS § 11-7-6 (1956) (establishing double damages in civil liability for bribery).

465. 503 S.E.2d 417 (N.C. Ct. App. 1998).

466. *Id.* at 419 (describing a suit to recover damages resulting from a bribery).

467. *Id.*

468. *Id.* at 419–20.

469. *See id.* at 420 (trebling damages under North Carolina law).

In *Franklin Medical Associates v. Newark Public Schools*,[470] a New Jersey court trebled the amount of the bribe under the state RICO statute and added the plaintiff's attorney fee.[471] The Tennessee court trebled the bribed employee's employer's compensatory damages under a statute that forbids inducing breach of contract.[472] In *Killough*, the False Claims Act called for statutory penalties plus doubled damages.[473]

A trebled RICO damages judgment is also a variation on punitive damages.[474] "Bribery of a government official . . . can serve as a predicate [offense] for a RICO violation."[475] In *MDO Development Corporation v. Kelly*,[476] an employer sued an embezzling employee under the federal Racketeer Influenced Corrupt Organizations (RICO) Act.[477] In addition to rejecting the defendant's claim for wages, the court imposed a constructive trust on a house that the defendant had purchased with the bezzle.[478] It trebled the RICO damages judgment.[479]

If the court's policy of restitution is to deter future misconduct, can there be too much of a good thing? In *MDO Development*, is the constructive trust, trebling, and denial of

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470. 828 A.2d 966 (Super. Ct. N.J. App. Div. 2003)

471. *See id.* at 974–80 (allowing treble damages and attorney's fees).

472. *See* Dorsett Carpet Mills, Inc. v. Whitt Tile & Marble Distrib. Co., 734 S.W.2d 322, 323–26 (Tenn. 1987) (allowing trebled damages).

473. *See* United States v. Killough, 848 F.2d 1523, 1532 (11th Cir. 1988) (affirming doubled damages under the FCA); *supra* note 189 and accompanying text (relating the facts in *Killough*). Congress amended the statute to treble the damages in 1986. *See Killough*, 848 F.2d at 1532 n.4. This action was filed in 1985. *Id.* at 1526. The Government did not seek trebled damages reflecting that change. *Id.* at 1532 n.4.

474. *See* MDO Dev. Corp. v. Kelly, 726 F. Supp. 79, 86 (S.D.N.Y. 1989) (declining "to assess punitive damages . . . because the imposition of treble damages . . . is already sufficient punishment").

475. Empress Casino Joliet Corp. v. Johnston, 763 F.3d 723, 729 (7th Cir. 2014).

476. 726 F. Supp. 79 (S.D.N.Y. 1989).

477. *Id.* at 81. *See generally* 18 U.S.C. § 1961–63 (2012) (establishing treble damages, the bribe, plus a "reasonable" attorney fee § 1964(c), or a constructive trust).

478. *See MDO Dev. Corp.*, 726 F. Supp. at 85 (imposing a constructive trust).

479. *See id.* at 86 (trebling damages).

reimbursement[480] an excessive recovery, a "windfall" to the plaintiff?

Courts have awarded our commercial bribery plaintiffs common law punitive damages and multiple recovery under an unfair trade practices act, federal and state RICO statutes, the federal False Claims Act, and a statute for interference with contract.[481] The obscurity and fuzziness this paper has observed in choice and measurement of remedies continues in multiple damages and their cousin, statutory penalties.

A court applying a statute does not go through the common law reasoning process of examining policy justification, rule, and result that leads to creating the law as it applies the statute. The court will apply an unambiguous statute as it is written.[482]

The policies of multiple recovery are not easy to pin down. Legislatures have passed many multiple statutes with policies that vary from one state to another. A researcher found every policy this paper discusses in courts' decisions discussing multiple, statutory, and "liquidated" recoveries.

Although multiplying occurs under a statute that caps plaintiff's recovery, courts cite statutory multiple damages to justify and explain non-statutory common law punitive damages.[483] Although a careful researcher did not find a direct citation, "enhanced"—that is, trebled—damages for a defendant's "willful" patent infringement are, in everything but name,

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480. *See id.* at 85–86 (imposing a constructive trust and treble damages, and dismissing claims for reimbursement).

481. *See generally supra* notes 466–475 and accompanying text.

482. *See* DOBBS, LAW OF REMEDIES, *supra* note 111, § 3.12 (describing the nature of multiple damages statutes and how courts have construed them).

483. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 490–515 (2008) (discussing statutory multiple damages when determining the question of punitive damages in the maritime law context); Tuttle v. Raymond, 494 A.2d 1353, 1355–56 (Me. 1985) (looking to statutory multiple damages when examining Maine punitive damages law).

punitive damages.[484] Other major federal multiple statutes are RICO, false claims, and antitrust.[485]

Support can be found for punitive policies.[486] One court held that "liquidated" or statutory damages are punitive, but that recovery of interest is compensatory, so that recovery of both is not duplicative.[487] Other support is on the fence between punitive and "remedial" damages.[488] Some decisions identify "remedial" damages.[489] By "remedial" courts seem to mean favoring the private litigant instead of the public-law functions of punishment and deterrence.[490] The Supreme Court said that Congress may have enacted multiple damage statutes to arm private plaintiffs as private attorneys general to vindicate the statute's policy because of scarce prosecutorial resources.[491] Closing the circle, a court said that human rights act treble damages are compensatory.[492] In *Killough*, the Court of Appeals said that

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484. *See* Halo Elecs. v. Pulse Electronics, 136 S. Ct. 1923, 1935–36 (2016) (noting that willful and "egregious"" misconduct may permit the court to award enhanced damages); Christopher Seaman, *Willful Patent Infringement and Enhanced Damages After In Re* Seagate*: An Empirical Study*, 97 IOWA L. REV. 417, 422 (2012) (noting the potential impact of enhanced damages in patent remedies).

485. *See* 18 U.S.C. § 1963–64 (2012) (establishing civil and criminal penalties for RICO violations); 31 U.S.C. § 3729(a) (2012) (establishing liability and penalties for FCA violations); 15 U.S.C. § 1 (2012) (establishing antitrust penalties).

486. *See* Genty v. Resolution Tr. Corp., 937 F.2d 899, 910 (3d Cir. 1991) (discussing Congress's intent behind RICO); Bryan T. Camp, *Dual Construction of RICO: The Road Not Taken in* Reves, 51 WASH. & LEE L. REV. 61, 80–81 (1994) (discussing punitive and remedial purposes underlying RICO penalties).

487. *See* Lilley v. BTM Corp., 958 F.2d 746, 755 (6th Cir. 1992) (finding prejudgment interest and liquidated damages to be not duplicative).

488. *See* E. Thomas Sullivan, *Antitrust Regulation of Land Use: Federalism's Triumph over Competition, The Last Fifty Years*, 3 WASH. U. J.L. & POL'Y 473, 506 n.178 (2000) (citing lower court cases that found treble damages to be remedial).

489. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 240–41 (1987) (discussing RICO's remedial purposes).

490. *See* Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 151 (1987) (noting the pressure on "private attorneys general").

491. *See id.* (discussing the aims of two multiple damages statutes).

492. *See* Convent of the Visitation Sch. v. Cont'l Cas. Co., 707 F. Supp. 412, 416 (D. Minn. 1989) (noting statutory language to this effect).

purpose of doubling and forfeiture in the False Claims Act was to reimburse the cost of investigation and litigation.[493]

Finally, in *Rex Trailer v. United States*,[494] the Supreme Court dealt with a statutory penalty plus doubling for defendant's violation of the Surplus Property Act after World War II.[495] The Court used "restitution" in a quotation to describe compensatory damages; it equated multiple damages with liquidated damages; and it hinted in a footnote that unjust enrichment was also involved.[496]

Multiple damages for commercial bribery are based on several policies: to punish, to deter, to compensate for the plaintiff's hard-to-prove loss, to encourage private litigation, and to unwind the defendant's unjust enrichment.[497] But an observer may inquire whether multiple damages are, on balance, a wise and balanced solution.

VI. Principled Choice and Measurement Decisions

After surveying the possible smorgasbord of defendants and monetary remedies, we will attempt some legal theory and jurisprudential generalizations about choice and measurement of remedies.[498] The parties to a bribe are not trying to help the future plaintiff when they engage in an intentional, bad-faith wrong. Their misconduct may, but may not, cause the agent's principal to lose. Commercial bribery, in addition to being a crime, leads to monetary civil remedies, wage forfeiture,

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493. *See* United States v. Killough, 848 F.2d 1523, 1534 (1988) ("Forfeitures and double damages recompense the government for costs of the investigation and litigation as well as the actual monetary damage incurred because of the defendant's fraud."). *But see* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 800 (2000) (describing the trebled damages imposed after the 1986 FCA amendments as "essentially punitive in nature").

494. 350 U.S. 148 (1956).

495. *Id.*

496. *See id.* at 151–53 (examining the Surplus Property Act's remedies provisions).

497. *See supra* notes 465–496 and accompanying text (providing examples of different policy justifications for imposing multiple damages).

498. *See infra* notes 500–549 and accompanying text (discussing various legal theories of distributive justice and how to measure remedies).

damages-restitution, often measured by the bribe, both legal and equitable restitution, and multiple and punitive damages.[499]

Legal theory examines the bipolar question of "yes" or "no," usually not the more nuanced remedies questions of choice and measurement. Our analysis modifies a framework based on variations of Professor Cooter's three-part economic and policy based analysis of categories of substantive standards leading to remedies. Cooter names these categories: first, a liability right, more accurately and hereafter a right to compensatory damages; second, a right to disgorgement or restitution; and, third, punitive damages, called disgorgement-plus.[500]

First, if a defendant has breached a compensatory damages rule, then—surprise!—the court will award that plaintiff compensatory damages. Compensating the plaintiff's loss, Cooter posits, means that the court sets the plaintiff's recovery at a level to allow the defendant's activity to continue but also to deter similar potentially harmful activity because it forces the defendant to internalize its activity's full cost.[501]

The compensatory damages rule covers defendant's negligence and breach of contract. Commercial bribery, as discussed above, breaches the employment contract, but it is also an independent tort-type of intentional misconduct.[502] An example of compensatory damages in commercial bribery is the plaintiff's recovery of lost profits. In legal theory, corrective justice unwinds an improper transaction; it requires the wrongdoer to compensate the victim. Corrective justice applies to giving-back restitution, for example, when the bank has mistakenly deposited money in the defendant's account. By one way of looking at it, an owner's property is involved and the bank never stopped owning the money. Corrective justice focuses on

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499. *See supra* notes 48–53**Error! Bookmark not defined.** and accompanying text (explaining the various consequences, both civil and criminal, of commercial bribery).

500. *See* Robert Cooter, *Punitive Damages, Social Norms, and Economic Analysis*, 60 LAW & CONTEMP. PROBS. 73, 76–77 (1997) (examining the purpose and effects of legal punishments).

501. *See id.* at 77 (discussing incentives and deterrents in compensatory and prohibitive damages structures).

502. *See supra* notes 67–87 and accompanying text (discussing the basis of liability for commercial bribery).

the wrongdoer's repair of remedial duties. Helpful for compensatory damages and giving-back restitution,[503] corrective justice does not explain nominal damages, punitive damages, or giving-up restitution.

Corrective justice explains some, but not all, remedies for commercial bribery. Measuring the principal's compensatory damages by the amount of the bribe is inaccurate and incongruous with the idea that a plaintiff must prove damages. In addition, a commercial bribery plaintiff can seek restitution.

Second, in Cooter's analysis, suppose the defendant breached a standard with what he calls a "disgorgement" or restitution measure.[504] The court will measure the plaintiff's recovery to force the defendant to disgorge all of her gains to the victim.[505] The defendant's forced payment to the plaintiff will arguably deter repetition by making the defendant, and other potential defendants, reconsider whether they should begin or continue any misconduct.

The reason giving-back restitution does not work in commercial bribery is that nothing exists for the defendant to "return" to the plaintiff. The bribe flowed from the briber to the bribee without ever resting with the plaintiff. Giving-up restitution enters here because the recipient benefitted from the bribe unjustly. The court can measure the bribed agent's restitution by the amount of the bribe. It can name the restitution as money had and received, accounting-disgorgement, or constructive trust. Measuring what the briber pays to the principal by the amount of the bribe is more difficult to explain.

Often in restitution, the defendant should give up an asset that the plaintiff has not lost. The most difficult example is the bribee's return on investment when the bribe is invested and makes a profit.[506] The Supreme Court required a bribe recipient

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503. *See* Katy Barnett, *Distributive Justice and Proprietary Remedies Over Bribes*, 35 LEGAL STUD. 302, 306 (2015) (discussing corrective justice).

504. *See* Cooter, *supra* note 500, at 76–77 (describing disgorgement as part of a three-category remedies survey).

505. *See id.* ("'Perfect disgorgement' is a sum of money that leaves the injurer indifferent between the injury with liability for damages or no injury.").

506. *See* Harding, *supra* note 285, at 33–34 (discussing the contested question of whether a fiduciary holds such a non-diverted gain on constructive trust for the plaintiff, when that constructive trust is formed, and whether she must "account for her gain by way of a personal remedy").

to account for everything taken, exceeding the amount traced and the amount of the plaintiff's damages.[507] Professor Harding justified "the fullest possible disgorgement" for bribery: "the value of trusting interpersonal relationships and guaranteeing the trustworthiness of trustees and fiduciaries and moral injunctions against using other people."[508] Surrendering the bribe, in addition to profits generated from the bribe, to the plaintiff makes the defendant reconsider repeating the misconduct, finances the plaintiff's litigation, and creates an incentive for the plaintiff to enforce the norm; it prevents and it redresses.

The chief distinction between the compensatory damages and restitution is that compensatory damages respond to the plaintiff's loss, while restitution responds to the defendant's gain. Although both are said to deter, if disgorgement-restitution exceeds compensatory damages, restitution will be the greater deterrent.

Civil-recourse theory posits that when someone commits a legal wrong, the victim is entitled to a remedy to hold the wrongdoer to account to satisfaction, vindication, and redress.[509] Oriented to explaining liability more than the remedy and its measurement, civil-recourse theory helps explain compensatory damages but also nominal and punitive damages, restitution, and disgorgement of unjust gains.

Distributive justice is another approach to giving-up restitution disgorgement.[510] The principal never owned a bribe, so a property-based approach falls short. There is no transaction to reverse, nothing to return. The defendant's disgorgement of the bribe is distributive justice.

Professor Katy Barnett maintains that distributive justice principles justify a court in imposing a constructive trust for a

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507. United States v. Carter, 217 U.S. 286, 317 (1910) (summarizing the costs owed by the bribe recipient, which included "whatever gains, profits or gratuities" he received).

508. Harding, *supra* note 285, at 34.

509. *See* John C.P. Goldberg, *Inexcusable Wrongs*, 103 CAL. L. REV. 467, 503 (2015) ("Tort law is largely about victims' rights: the right of potential victims not to be injured, and the right of actual victims to respond to their injury.").

510. *See generally* Harding, *supra* note 285, at 24–26, 30, 31–33, 34.

bribe.[511] Distributive justice requires the court to make a moral judgment about which party deserves the property. To choose between the three remedies of equitable lien, accounting, and constructive trust, she subscribes to a discretionary remedial constructive trust based on the court's analysis of dessert, needs, and equality.[512] A court, she maintains, should award a commercial-bribery plaintiff a constructive trust because that "claimant deserves the property more than any other person who may have a claim to it."[513] She regards the need to find a plaintiff's pre-existing property interest as a legal fiction that prevents the court from admitting that it is redistributing the defendant's profit to the plaintiff.[514]

Barnett writes that tracing the bribe to third parties prevents a defendant from "laundering" the money and deters future bribes.[515] Decisions about deterrence should be contextual, depending on the facts of each case. For this purpose, a discretionary remedial constructive trust is superior to a proprietary constructive trust.[516] Barnett confirms the position I took above on the remedial constructive trust.

Applying Barnett's analysis, a constructive trust plaintiff should outrank a third party in the trust res unless the third party is a bona fide purchaser.[517] A constructive trust also captures the trust res's gain in value for the plaintiff. Because the defendant's creditors are not wrongdoers, however, Barnett favors a personal judgment for an accounting instead of a constructive trust when the defendant is insolvent.[518]

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511. *See* Barnett, *supra* note 503, at 306 ("The claimant *deserves* the property more than any other person who may have a claim to it."); *see also* Harding, *supra* note 285, at 35 (explaining that responses to breaches of duties by distributive justice in cases of non-diverted gains often hinges on the argument that the fiduciary's breach may be grounds for disgorgement via "allocation *tout court*" by division according to a "norm of distributive justice").

512. *Id.* at 306–07.

513. *Id.* at 306.

514. *Id.* at 315–16.

515. *Id.* at 320 n.115. For further discussion of deterrence, see Harding, *supra* note 285, at 35.

516. Barnett, *supra* note 503, at 320.

517. *Id.* at 303–04.

518. *See generally id.* at 312–13 (citing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 61 (AM. LAW INST. 2011)).

Cooter's third category, punitive damages, is the plaintiff's recovery that exceeds compensatory damages and restitution-disgorgement.[519] The court responds to the defendant's aggravated misconduct by imposing punitive damages on the defendant to punish and deter a potential defendant's intentional wrongdoing. With punishment, criminal justice policy re-enters. In comparing restitution with punitive damages, a court will mete out and measure both restitution and punitive damages to deter the defendant's profitable misconduct by taking the defendant's benefit or profit. The policy bases are not identical. The court awards a plaintiff restitution to deter and to prevent or reverse the defendant's unjust enrichment. Nevertheless, disgorgement-restitution has a punitive quality.[520]

The court imposes punitive damages on a defendant to punish and to deter that defendant and others from misconduct. The court has separate reasons to give punitive damages to the plaintiff; these include to pay the plaintiff a bounty for bagging a miscreant, to finance the plaintiff's expensive litigation, to obviate private revenge, and to award the plaintiff concealed compensation, perhaps for losses under- or un-compensated by compensatory damages measures.[521]

Punitive damages may be appropriate for commercial bribery. Defendants intentionally breached a specific duty to act in the best interest of the plaintiff—an identified person. Defendants' concealed intentional misconduct, based on greed for illicit profit, comprises commercial bribery. Also, commercial bribery is usually a crime—a public wrong. The retributive policies associated with criminal punishment appropriately lead to punishment beyond compensating the victim. Three restatements with scholarly approbation support punitive damages with restitution in appropriate cases of defendants' aggravated wrongdoing.[522]

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519. *See* Cooter, *supra* note 500, at 77 (explaining that punitive damages are both "extra-compensatory" and "extra-disgorging").

520. *See* Mark Gergen, *What Renders Enrichment Unjust*, 79 TEX. L. REV. 1927, 1934, 1964 n.181 (2001) (noting that, in utilitarian terms, disgorgement-restitution serves a deterrent purpose because of its punitive nature).

521. *See generally* Rendleman, *Common Law Punitive Damages*, *supra* note 452, at 7.

522. *See generally* RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 9.09(b) (AM.

Along the moral continuum, labeling a defendant's misconduct as criminal is more serious than labeling it as a tort accompanied by punitive damages. For one thing, the civil procedure leading to punitive damages is less demanding than criminal procedure; for another, the criminal label's consequences and stigma are more opprobrious.[523]

Once we examine the categories above and seek to align the rules with policy justifications, we notice that observers' views of the appropriate function of civil remedies diverge.[524]

Deterrence is cited as a policy justification for every remedy we have examined; compensatory damages, disgorgement-restitution, and punitive damages. "When you want to stop the others from doing something they would otherwise do, that is deterrence."[525] A short examination of deterrence will illuminate commercial bribery policies.

Bribery may be deterred by legal and remedial rules because, based on the defendants' greed, bribery is intentional, calculated in advance, and involves two or more people. Commercial bribery is a crime in most states in addition to a civil cause of action. Like most property crimes, commercial bribery is planned.

The basic goals of torts are compensation, deterrence, and morality-corrective justice.[526] Under Judge Learned Hand's formulation in *United States v. Carroll Towing Co.*,[527] the

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LAW INST. 2015); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. k (AM. LAW INST. 2011) (citing Ward v. Taggert, 336 P.2d 534 (Cal. 1959)); RESTATEMENT (THIRD) AGENCY §§ 8.01 cmt. d (AM. LAW INST. 2006); NICHOLAS MCBRIDE, RESTITUTION FOR WRONGS IN THE RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT: CRITICAL AND COMPARATIVE ESSAYS 251, 259, 265 (Charles Mitchell & William Swadling eds., 2013). *See also* Smith, *Fiduciary Relationships, supra* note 70, at 622 (("[T]aking away the profit that a person makes from a transaction is not a logical way to deter them from making such profitable transactions. A properly designed deterrent has to go beyond that.").

523. *See* Goldberg, *supra* note 509, at 501 (discussing wrongdoing in the criminal and tort context).

524. For an in-depth consideration of this divergence, see Jeff Berryman, *Nudge, Nudge, Wink, Wink: Behavioural Modification, Cy-Pres Distributions and Class Actions*, 53 SUP. CRT. L.R. 133, 134–39 (2011).

525. AVINASH DIXIT & BARRY NALEBUFF, THE ART OF STRATEGY: A GAME THEORIST'S GUIDE TO SUCCESS IN BUSINESS AND LIFE 183 (2008).

526. DOBBS ET AL., THE LAW OF TORTS, *supra* note 100, § 10.

527. 159 F.2d 169 (2d Cir. 1947).

measure of compensatory damages that a plaintiff receives for the defendant's negligent tort sets the amount that the defendant and other potential defendants in the future should spend on prevention.[528] A defendant is negligent when the damages, the magnitude of the risk calculated by considering both how probable and how severe the plaintiff's injury is, exceeds the cost or burden of risk prevention.[529]

The goal of disgorgement-restitution is to prevent or reverse defendant's unjust enrichment. This measure deters by taking the defendant's benefit and may lead to plaintiff's recovery that exceeds compensation.

Punitive damages for a defendant's aggravated tort add punishment and deterrence. They are a deadweight loss to the defendant in addition to and unrelated to the plaintiff's compensatory damages.

Deterrence looks forward to future incentives to behave or misbehave. It stems from a rational-actor view based on law and economics.[530] A potential wrongdoer will calculate depending on the probability of detection and the penalties or costs including shame and reputation.[531] If enforcement mechanisms demonstrate a credible ability to impose costs, deterrence calculations convince its target that prospective costs outweigh prospective benefits.

Professor Rose-Ackerman discusses using the criminal law to deter bribery.[532] Bearing in mind that commercial bribery is also a crime, her analysis begins, "An offence should be treated as a civil matter if society wishes to trade off the benefits to the perpetrator against the costs."[533] A potential participant in bribery should face a penalty that equals or exceeds her gains calculated in consideration of the probability of her being found

528. *See id.* at 173 (discussing a formulaic approach to the duty of care).

529. *Id.*

530. *See* Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 181–203 (2011–2012) (arguing that tort liability serves as a clear warning sign to rational actors in the marketplace).

531. Rose-Ackerman, *supra* note 20, at 222.

532. *See id.* at 223 ("To deter bribery, at least one side of the corrupt transaction must face penalties that reflect its own gains.").

533. *Id.* at 221 n.4.

out.[534] The penalty should exceed the benefit. When the chance of detection is less than 100%, "to properly deter, the penalty should be a multiple of the gain to the firm."[535] Criminal "penalties for bribers should not be tied to those costs unless they are a good proxy for the briber's benefits."[536] The briber's gains are a better proxy than the bribe.[537] As Professor Rose-Ackerman explains:

> Once one takes the costs of prevention into account, the level of deterrence expenditures should be set where the net benefits are maximized, that is where marginal benefits equal the marginal costs. A higher level of deterrence would not be worth the extra costs, a lower level would sacrifice the net benefits of increased enforcement.[538]

Some undetected bribery will occur, but the court's response sanction should be stiff.

Yet deterrence calculations may often be ineffectual. Its effects are difficult to locate and pin down. Because deterrence of this defendant and other potential defendants casts its effect into the future, it is imprecise to measure. Deterrence succeeds when nothing happens; this leads to difficult calculations about cause and effect.[539] What caused nothing to happen? What does inaction mean? Is it lack of intent or intent that lapsed? Is it perhaps a fear of a sanction or something unrelated to deterrence's threat? Honesty, training?

Fiduciary law, Professor Sherwin maintains, is based on a strong deterrence policy.[540] "Breach of fiduciary duty," Professor

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534. *See id.* at 223 (arguing those convicted of bribery should be penalized a multiple of their gain).

535. *Id.* at 225.

536. *Id.* at 224.

537. *See id*. ("To have a marginal effect, the penalties should be tied to the briber's gains (their excess profits, for example), not to the size of the bribe.").

538. *Id.* at 225.

539. *See generally* LAWERENCE FREEDMAN, STRATEGY: A HISTORY 159 (2013).

540. *See* EMILY SHERWIN, FORMAL ELEMENTS OF CONTRACT AND FIDUCIARY LAW IN CONTRACT, STATUS, AND FIDUCIARY LAW 16 (Paul B. Miller & Andrew S. Gold eds.) (forthcoming 2017) ("Strong deterrence is necessary because even a well-meaning fiduciary may be subtly affected by self-interest, and also because the beneficiary of the relationship typically is not in a position to monitor the fiduciary's behavior.").

Friedmann wrote, "constitutes perhaps the most conspicuous area of application of deterrent principles to restitution."[541]

On the other hand, Professor Lionel Smith eschews deterrence as a justification or policy in fiduciary law.[542] Fiduciary law, Smith writes, has no deterrent function; not instrumental, fiduciary law is based in the normative structure.[543] Business entities, market participants, and insurance carriers that are conscious of potential liability implement preventive measures to prevent or deter casualties. Careful businesses check references, and train and monitor employees.[544]

Professor Gary Schwartz's thorough study found only moderate deterrence in torts, mostly negligence, treated sector by sector.[545] The economic model that compensatory damages deter has mixed success in actually altering potential defendants' conduct. Fine tuning, Schwartz concluded, will not reach perfect deterrence.[546] Professors Cardi, Penfield, and Yoon used experimental surveys of law students to yield a negative answer to their title's question "Does Tort Law Deter?"[547] Looking at the other end of the remedial spectrum, Professor Anthony Sebok rejected the argument that deterrence justifies punitive damages.

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541. Friedmann, *supra* note 361, at 553.

542. *See* Smith, *Fiduciary Relationships*, *supra* note 70, at 627 (arguing for the inadequacy of deterrent theories).

543. *Id.* at 628 n.81; *see also*, Barnett, *supra* note 503, at 306, 310–11, 320 (maintaining that deterrence in constructive trust depends on context).

544. *See generally* Popper, *supra* note 530, at 181–203.

545. *See* Gary T. Schwartz, *Realty in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 378–79 (1994) (finding that tort law provides some deterrence, but considerably less than economic models generally estimate).

546. *See id.* ("Given the imprecision in the processes by which tort liability affects behavior, these efforts at fine-tuning, though intellectually challenging, are likely to be socially irrelevant."); *see also* Daniel Shuman, *The Psychology of Compensation in Tort Law*, 43 U. KAN. L. REV. 39, 43 (1994) (disagreeing with basing torts on deterrence because "proof that the tort system deters with any degree of precision has not been made"); Linda Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 400, 418 n.82 (2014) (registering skepticism about deterrence because of the lack of empirical support). *See generally* Jonathan Cardi et al., *Does Tort Law Det*er? 9 J. EMPIRICAL LEGAL STUD. 567, 567–603 (2012).

547. *See generally* Cardi, *supra* note 546, at 567–603.

Retribution—punishment—is, in Sebok's view, the better justification.[548]

The rational actor view of deterrence, which dominated criminal policy making and sentencing decisions, has faltered recently. Professor Ulen defected from the economic analysis idea that potential criminals compare benefits with consequences discounted by the probability of avoiding detection.[549] The rational actor model may have an uncertain impact on bribe payers and recipients. Rational choice theory may not predict the behavior of those most in need of deterrence. Instead, commercial bribery occurs because of over-confident people who know commercial bribery is wrong but are not risk-aversive.[550]

What the New York court said in *Walker v. Sheldon*[551] about punitive damages to deter fraud is, with bracketed interpolation, instructive about courts' views of deterrence of commercial bribery:

> Exemplary damages are more likely to serve their desired purpose of deterring similar conduct in a fraud [bribery] case, such as that before us, than in any other area of tort. One who acts out of anger or hate, for instance, in committing assault or libel, is not likely to be deterred by the fear of punitive damages. On the other hand, those who deliberately and coolly engage in a far-flung fraudulent [bribery] scheme, systematically conducted for profit, are very much more likely to pause and consider the consequences if they have to pay more than the actual loss suffered by an individual plaintiff.[552]

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548. *See generally* Anthony Sebok, *Normative Theories of Punitive Damages: The Case of Deterrence*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS (John Oberdeik ed., 2014).

549. *See* Thomas S. Ulen, *Skepticism About Deterrence*, 46 LOY. U. CHI. L.J. 381, 397 (2014) (describing criminals as overly optimistic about their chances of success). Former federal district judge, Shira Scheindlin, replied to her own inquiry whether "the length of the sentence deter[s] people outside the courtroom from committing crimes?" that "Over time, I came to believe it is a fiction." Shira A. Scheindlin, *I sentenced criminals to hundreds more years than I wanted to. I had no choice.*, WASH. POST, (Feb. 17, 2017), https://www.washingtonpost.com/posteverything/wp/2017/02/17/i-sentenced-criminals-to-hundreds-more-years-than-i-wanted-to-i-had-no-choice/ (last visited Mar. 6, 2017) (on file with the Washington and Lee Law Review).

550. *Id.* at 403.

551. 179 N.E.2d 497 (N.Y. 1961).

552. *Id.* at 499.

A student writer concluded that the employer's civil remedies are inadequate; the "basically ineffectual" remedies' "negligible deterrent effect" show the need for stern criminal measures.[553] Examining the court's choice of remedies for commercial bribery, Barnett maintained that a potential constructive trust instead of a money judgment is a refinement that will not deter the parties to a bribe.[554]

Working with policies of compensation, reversing unjust enrichment, deterrence, and punishment is difficult because of the blurred and subjective borders between them. In *State Farm Mutual Automobile Insurance Co. v. Campbell*,[555] the Supreme Court quoted a Comment in the Restatement of Torts for the idea that compensatory damages for a plaintiff's emotional distress already contain a punitive element: "In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both."[556] Nevertheless, the same Court explained in *Cooper Industries v. Leatherman Tool Group*[557] that "compensatory damages and punitive damages . . . serve distinct purposes";[558] while "[t]he former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct, . . . [t]he latter, which have been described as 'quasi-criminal,' operate as 'private fines' intended to punish the defendant and to deter future wrongdoing."[559] Indeed, as the Court put it more bluntly in *State Farm*, "[punitive] awards serve the same purposes as criminal penalties."[560]

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553. *Commercial Bribery: The Need for Legislation in Minnesota*, *supra* note 36, at 604.

554. *See* Barnett, *supra* note 503, at 306 (considering the effects of a constructive trust).

555. 538 U.S. 408 (2003).

556. State Farm Mut. Auto. Ins. v. Campbell, 538 U.S. 408, 426 (2003) (citing RESTATEMENT (SECOND) OF TORTS § 908 cmt. c (AM. LAW INST. 1977)).

557. 121 S. Ct. 1678 (2001).

558. *Id.* at 1683.

559. *Id.*

560. *State Farm Mut. Auto. Ins.*, 538 U.S. at 417.

Although the policies of compensatory damages, restitution and punitive damages differ, courts seldom distinguish the remedies based on their policies. When they do distinguish, it may be for a reason divorced from awarding a remedy. An example of the latter occurred in Texas. Dealing with a constructive-trust judgment debtor's supersedeas bond on appeal, the court distinguished compensatory damages, punitive damages, and disgorgement-restitution as well as costs, interest, and attorney fee to apply a statute that required a bond only for compensatory damages.[561]

Restitution and compensation overlap. Restitution of the give-it-back variety equals compensatory damages. In addition, the remedies and policies overlap. In 2015, a federal judge wrote that trademark infringement for an accounting is based on policies of deterrence, unjust enrichment, and compensation, the latter because defendant's profits, in addition to unjust enrichment, may be a "proxy" "rough measure" that can measure plaintiff's damages.[562] The disgorgement restitution we are examining exceeds the plaintiff's compensatory damages, which may not exist at all. If the line between compensatory damages and punitive damages is fuzzy, the line between restitution and penalty is unfortunately blurred.[563] "I concede," Professor Partlett wrote, "that it [is] not always easy to distinguish retribution from deterrence, particularly when courts use loaded retributive rhetoric. This is certainly the case with punitive damages."[564]

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561. *See In re* Longview Energy Co., 464 S.W.3d 353, 360–61 (Tex. 2015) (rejecting constructive trust as unrelated to any recognized form of damages); *see also* Mansik & Young Plaza, LLC v. K-Town Mgmt., LLC, 470 S.W.3d 840, 843–44 (Tex. Ct. App. 2015) (finding that attorney fees are not compensatory damages and are therefore not part of Texas supersedeas bond).

562. *See generally* Black & Decker Corp. v. Positec USA, Inc., 118 F. Supp. 3d 1056 (N.D. Ill. 2015).

563. *See* SEC v. First City Fin. Corp., 890 F.2d 1215, 1232 (D.C. Cir. 1989) ("In the insider trading context, courts typically require the violator to return all profits made on the illegal trades, have rejected calls to restrict the disgorgement to the precise impact of the illegal trading on the market price.").

564. David Partlett, *Remedies in a Wide-Angle Lens; Observations on Remedial Concilience*, 63 EMORY L.J. ONLINE 53, 62 (2014), http://law.emory.edu/elj/elj-online/volume-63/responses/observations-remedial-concilience.html (last visited Mar. 6, 2017) (on file with the Washington and Lee Law Review); *see also* Roach, *supra* note 95, at 282–83, 347 ("stacked" remedies,

The legal-realist view I have taken in this Article is process-oriented and eclectic; it considers compensation, deterrence, punishment-retribution, corrective justice, normative articulation, and civil recourse theory as overlapping and, as such, relatively compatible.[565] A court deciding between two remedies needs a sense of proportion and context to avoid excess and overlapping remedies. When I sensed that the law tended to excess above, I posed a question to focus on the potential. A court setting punitive damages should take counsel from the multiple statutes that doubling, at most trebling, suffices.

VII. Conclusion

I am not sure that the preceding analysis, featuring rule and policy complexity, overlapping remedies, grey areas, and unanswered questions would dispel my Remedies students' fog that launched it. The simple commercial bribery that transmogrified into an advanced, but mini, course in Remedies may leave them still muddled; but, I aspire to have stimulated analysis on a more advanced plane. Aligning policy with rule, remedy, and result turns out to be an inconclusive quest even for their professor. Tort, contract, employment, fiduciary, and agency policies are not always congruent, leading from contort to choices. The boundaries between the remedies overlap and leave contested grey territory open to adversary argument and judicial characterization. Moreover, the categories are founded on multiple policy justifications and feature primary, secondary, and overlapping justifications. Observers question basic premises. The overarching policy of deterrence leads to questions of whether and how accurately legal rules deter and, if so, how much to deter. What take-home points can we posit?

My advice for Beyer or another bribery victim comes from the 1209 "crusade" against the heretic Albigensians in southern France. When "the papal legate was asked should Catholics be spared, he answered, 'Kill them all, for God knows His own.'"[566]

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punitive damages plus forfeiture and compensation, can be excessive).

565. *See generally* Schwartz, *supra* note 545.

566. WILL DURANT, THE STORY OF CIVILIZATION: THE AGE OF FAITH 775 (1950).

My advice to a commercial bribery plaintiff is to take the legate's advice. Sue both the bribe giver and the recipient. Include other wrongdoers or recipients because a constructive trust allows the plaintiff to trace the bribe to third persons. Allege both breach of contract and torts, breach of fiduciary duty and interference with contract. If a multiple-damages statute may cover the case, add another count. Demand compensatory damages, punitive damages, legal restitution money, had and received, equitable restitution, a constructive trust and an accounting, along with multiplied recovery and attorney's fees. The court "knows His own."[567]

Taking a broader perspective than a lawyer maximizing a client's interest, the court should identify, locate, and measure the parties' just desserts. A court should strive to match a legal rule or remedy with its policy justifications.[568] Our comments above should dispel some of the substantive and remedial cloud that shrouds commercial bribery. Precedent decisions will reduce uncertainty.[569]

My tentative recommendation on Beyer's recovery from Aggie and Sailer follows for the entertainment and edification of readers who have studied their peculations. Aggie turns the $8,000 bribe over to Sailer as restitution for breach of her fiduciary duty. Sailer's obligation to Beyer for his tort of interference with contract is in the $5,000 to $15,000 damages range. Do the defendants get off too lightly? The stripped-down hypothetical lacks sufficient facts and context to evaluate whether the court might impose punitive damages on these intentional wrongdoers.

The human factor is crucial in decision making. As Professor Tim Dare wrote:

> No matter how carefully we construct our systems of rules and principles, cases inevitably arise in which we are unsure which rule applies, in which we want to make an exception to an applicable rule, or in which we think an apparently

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567. *Id.*

568. *See generally* EISENBERG, *supra* note 63, at 26–37.

569. *See* Mason, *supra* note 353, at 258 ("If the present trend continues, the element of uncertainty which is associated with the greater emphasis on good conscience will be dissipated by an increase in the number of decisions on a wide range of fact situations.").

> inapplicable rule should after all be applied in a particular case. In such cases, judgment or practical wisdom is required if we are to obtain the benefit of general rules and principles without paying the considerable costs threatened by their mindless application.[570]

Bringing the money remedies for commercial bribery forward exposes the risk of excess. Professor Sherwin contrasts fiduciary to contract law. The fiduciary remedies, she shows, are stricter than the contract remedies.[571] In particular, courts dealing with a breaching fiduciary impose maximum liability with no equity default or safety valve and but one exception, apportionment.[572] Potential excess lurks in speculative compensatory damages, restitution unchecked by policy, duplicated recovery, punitive damages, and multiplied recovery. The court needs to overcome justified disapprobation for the defendants' misconduct and, like Goldilocks, pick enough but not too much porridge from the remedial smorgasbord. The court's equitable discretion and principles of confinement should stem from careful fact-finding, examination of the commercial and individual contexts, a sense of proportion, and clear identification of the policies.

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570. *See generally* TIM DARE, THE COUNSEL OF ROGUES?: A DEFENSE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE 155–56 (2009).

571. *See* EMILY SHERWIN, *supra* note 540, at 2 ("Contract law . . . has resources that allow courts to announce, determinate, seemingly absolute, rules but make exceptions at the enforcement stage . . . . Fiduciary law responds with a combination of broad standards of behavior and concrete prophylactic rules, all backed by strict rules of enforcement.").

572. *See id.* at 19 ("There is one way in which courts may make allowances in a fiduciary's favor in compelling cases: the effect of a disgorgement remedy may be tempered by apportionment of gross profits between the fiduciary and the beneficiaries claiming breach of duty.").