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Abstract

A quiet revolution is underway. A new rule proposed in the forthcoming *Restatement (Third) of Restitution* seeks to deter conscious wrongdoers from retaining profits from “opportunistic” breaches of contract. The proposed disgorgement remedy for defendant’s opportunistic breach of contract will have fundamental consequences for contract theory and practice. This contractual remedy is gain-based rather than compensatory. Restitutionary disgorgement, rooted in unjust enrichment, may shift the conventional paradigm of contract law.

This article examines whether a restitutionary disgorgement remedy for certain breaches of contract is compatible with traditional contract principles such as Justice Holmes’s choice principle. Recall his oft-repeated declaration, “*The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, – nothing else.*” Disgorgement calls for certain value choices, including moral blameworthiness and promise-keeping. Furthermore, the underlying rationale for disgorgement is in tension with efficient breach theory. This article assesses whether disgorgement can coexist with conventional contract theories, and, if not, whether disgorgement’s values should be preferred. Ultimately, restitutionary disgorgement for opportunistic breach of contract is a promising development for contract law and restitutionary theory. There is, however, room for further refinement before the ink is dry on the pending *Restatement*.

* * *

Restitutionary Disgorgement as a Moral Compass for Breach of Contract

Caprice L. Roberts*

*The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, – nothing else.*¹

*To say that we are morally obligated to keep our promises means precisely that: that we are obligated. The promise imposes an imperative from an earlier to a later self to be obeyed, not an option to be weighed.*²

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* * *

I. INTRODUCTION

There is a quiet revolution underway. Section 39 of the pending *Restatement (Third) of Restitution and Unjust Enrichment* sanctions a restitutionary remedy of

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¹ Oliver Wendell Holmes, Jr., *The Path of Law*, 10 HARV. L. REV. 457, 462 (1897).

² Robin West, *Three Positivisms*, 78 B.U. L. REV. 791, 811 (1998).

disgorgement where one profits from an “opportunistic breach.”³ While couched in the language of limitation, this section is breathtaking in its potential transformation of the traditional contractual landscape from a choice model of contract law to a perspective that values keeping promises and condemns certain breaches. The choice model emphasizes individual freedom to choose behavior, including contract breach, without fear of punishment.⁴ An actor is free to enter a contract and choose to breach as long as she is prepared to pay for the consequences of breach.⁵ Contract law generally does not morally judge the breaching party.⁶ Section 39 injects blameworthiness into the remedy calculation for breach of contract by authorizing restitutionary disgorgement for certain breaches – *opportunistic* ones.

³ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Tentative Draft No. 4) (April 8, 2005).

⁴ See, e.g., Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977) (“The modern law of contract damages is based on the premise that a contractual obligation is not necessarily an obligation to perform, but rather an obligation to choose between performance and compensatory damages.”) (citing *inter alia* E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1147 (1970); Holmes, Jr., *The Path of Law*, 10 HARV. L. REV. 457, 462 (1897)).

⁵ Holmes, *supra* note 1, at 462.

⁶ The “amoral” perspective of contract law is neither universal nor without its critics. See, e.g., Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 719-22, 749 (2007) (examining the divergence between contract law and morality and advancing “a more positive theory of contract that would treat the conditions of moral agency and the culture of promising in a more complementary way”); Peter Linzer, *On the Amoral of Contract Remedies – Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111, 112, 138-39 (1981) (advocating widespread enforcement of specific performance as a contract remedy in order to shift away from the “amoral approach of Holmes” and the *Restatement (Second) of Contracts* and towards the view “that one should stand by one’s word” while still advancing “predictability, economic efficiency, and fairness”). Contract law is not wholly amoral. For example, the Uniform Commercial Code (“U.C.C.”) includes morally infused provisions such as the duty of good faith and fair dealing, U.C.C. § 1-304, and the common law contains promissory estoppel with its emphasis on avoiding injustice, RESTATEMENT (SECOND) OF CONTRACTS, § 90(3). Even with respect to core principles of contract law, moral notions are visible. Specific performance honors keeping promises, and further availability of specific performance “would not give promisees an incentive to exploit breaching promisors.” Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 271 (1979) (arguing that specific performance should be available on request because it would better meet the goals of compensation and expectancy). This remedy, however, is not the law’s default; rather, it remains available only in extraordinary circumstances. One may view contract law’s expectancy damage principle – benefit of the bargain – as based on moral intuitions to make injured parties whole. Accordingly, common sense morality may blend with economic efficiency to drive contract doctrine. Section 39, however, instills a morality framing that is a departure from the existing landscape because it authorizes disgorgement to deter, and perhaps punish, breach; its moral position favors keeping promises and curtailing conscious wrongdoing.

The title of this new section is “Profit Derived from Opportunistic Breach.”⁷ The section provides a restitutionary disgorgement remedy for *opportunistic* breaches of contract. If the contract breach is “both material and opportunistic,” the aggrieved party may disgorge “the profit realized by the defaulting promisor as a result of breach.”⁸ For such breaches, the defendant unjustly sits with a benefit. Disgorgement corrects the imbalance by yielding the profits to the injured party where the breacher derived profits from an opportunistic breach.

But what is an *opportunistic* breach? No consensus definition exists. It has a pejorative connotation unless one views as an “ultimate virtue” taking selfish advantage of opportunities.⁹ At minimum, common conceptions might include exploitive, selfish, and advantageous behavior. Opportunistic may further mean “exploiting opportunities and situations in general, especially in a devious, unscrupulous, or unprincipled way.”¹⁰ The *Restatement* employs “conscious advantage-taking” and “taking without asking.”¹¹ Section 39 limits “opportunism” in the black-letter by requiring the breach to be “deliberate” and “profitable” and dictating further that a damage remedy must be “inadequate.”¹² Regardless of the precise definition, § 39 requires an assessment of the breaching party’s *mens rea* and seeks to deter, if not punish, breach. In other words, it incentivizes keeping your word.

⁷ RESTATEMENT OF RESTITUTION, *supra* note 3, § 39.

⁸ *Id.* § 39(1).

⁹ AYN RAND, THE VIRTUE OF SELFISHNESS, *The Objectivist Ethics* (1964).

¹⁰ ENCARTA DICTIONARY: ENGLISH (NORTH AMERICA).

¹¹ RESTATEMENT OF RESTITUTION, *supra* note 3, cmt. *b*, at 7.

¹² *Id.* § 39(2).

In an article predating the pending *Restatement*, Professor Andrew Kull, the Reporter, poses the question: “Is there a disgorgement remedy for breach of contract?”¹³ As the drafter of the *Restatement*, he now definitively answers the question in the affirmative by providing § 39 towards achieving that end. Section 39 will operationalize the restitutionary disgorgement remedy for a subset of contract breaches. According to Professor Kull, this provision is an “essentially new” rule, although case support already exists.¹⁴

In Professor Kull’s earlier article, published in 2001, he concludes, “[d]isgorgement awarding the plaintiff more than he lost is justified in a narrow class of cases in which the defendant’s election to breach imposes harms that a potential liability for provable damages will not adequately deter.”¹⁵ In narrowing the category of applicability, he then offers a “hypothesis, that the necessary breach of contract be both profitable and opportunistic.”¹⁶ Section 39 now encapsulates this hypothesis. Professor Kull, with great skill and care, artfully delimits the precise parameters of application of this ‘essentially new’ rule. I echo countless professors who have commended Professor

¹³ Andrew Kull, *Disgorgement for Breach, the “Restitution Interest,” and the Restatement of Contracts*, 79 TEX. L. REV. 2021, 2021 (2001). Professor Kull poses the disgorgement question as the lead to Part I entitled “The Problem” and then differentiates two forms the disgorgement remedy might take: (i) treating “profitable and opportunistic breach of contract” as an “analogy of the claim in restitution for the profits of intentional tort or infringement” in order to provide the contract “plaintiff *the benefits realized by defendant as the result of the breach*[.]” and (ii) disgorging, at plaintiff’s election, “*the benefits realized by the defendant as the result of the plaintiff’s performance*” from a defendant who causes a material, but not necessarily profitable or opportunistic, breach of contract. *Id.* at 2121-22. He notes that the first form of disgorgement is “[t]he more familiar proposition in the academic literature[.]” while the second form is “[t]he distinct and more urgent proposition of some recently decided cases.” *Id.* It is the first form – not the second – that Professor Kull selectively puts forth in the new *Restatement* as § 39. Although the first form “might indeed give the plaintiff more than he lost,” Professor Kull rejects enshrining the second form as it goes further “because the breach in question need be neither profitable nor opportunistic; and because the remedy proposes to strip the defendant, not merely of profits *resulting from the breach*, but of all benefits traceable to the plaintiff’s performance.” *Id.* at 2023.

¹⁴ RESTATEMENT OF RESTITUTION, *supra* note 3, at xv, Reporter’s Introductory Memorandum.

¹⁵ Kull, *Disgorgement for Breach*, *supra* note 13, at 2052.

¹⁶ *Id.*

Kull on his stewardship of the revised *Restatement of Restitution*. All of the pages of the draft versions evidence the expanse of knowledge and thoughtful consideration that he brings to the project.

With the benefit of hindsight regarding the original version of the *Restatement of Restitution*¹⁷ and an ounce of likely trepidation regarding how the revisions might be misapplied, Professor Kull uses surgical precision to carve the exact contours of any potentially new territory covered by § 39. Will his direction for narrow application be appreciated and understood by students, scholars, lawyers, and judges? Assuming judges ‘get it right,’ is it possible that the principles underlying § 39 will strike a chord and have broader implications nonetheless? If so, should we fear this potential larger significance or embrace it cautiously?

This article explores the moral underpinnings and potentially broad consequences of restitutionary disgorgement as proposed in the pending *Restatement (Third) of Restitution*.¹⁸ According to Professor Mark Gergen, the ‘most important,’ or perhaps, ‘best part’ of the pending Restatement is the provision for ‘disgorgement for knowing wrongs in the case of opportunistic breach of contract.’¹⁹ Yet, the Reporter unveils the draft *Restatement* with serious words of demarcation and limitation. Perhaps, Professor Kull wisely includes limiting language in order to direct proper applications.

Despite this narrowing context, there may be effects – potentially unintended – that will stem from the underlying moral foundation of the disgorgement remedy. The

¹⁷ RESTATEMENT OF THE LAW OF RESTITUTION (1937).

¹⁸ Recognizing the danger of treading where others have toiled for decades, this Remedies Forum piece seeks modestly to raise questions and fresh perspectives from one who continues to learn much from those who have devoted scores of articles to the relevant, unique doctrinal fields and their nuanced intersections.

¹⁹ With all the necessary caveats, the author believes this captures the introductory remarks of Professor Gergen from the *Restitution – New Restatement Panel* at the AALS Annual Meeting, Jan. 3, 2007. Professor Gergen also discussed the notion that the disgorgement remedy for conscious wrongdoing is a “Biblical remedy.”

consequences may be far-reaching for a host of traditional contract doctrines including mitigation, foreseeability, and expectancy. Such effects may include altering the traditional Holmesian choice model of contracts to a conception grounded in moral obligation and judgment.²⁰ Restitutionary disgorgement for breach of contract warrants support because it broadens the alternatives for remedying contract breach. Embracing the remedy's formalization in the *Restatement* necessarily also brings a moral stance that encourages keeping promises and deters conscious advantage-taking without asking.

Restitutionary disgorgement lures plaintiffs with its result – stripping defendant's profits from breach. The threat of disgorgement ideally will encourage a potential breaching party to renegotiate with plaintiff.²¹ The remedy offers a wealth-distribution preference for the aggrieved party over the conscious breacher. What is the philosophical rationale for this new preference? The remedy possesses Kantian notions of avoiding treating the non-breaching party as a means rather than an end. Its restitutionary roots are Aristotelian in that the remedy seeks to correct the unjust enrichment. Through the lens of virtue ethics, which focuses on the actor's moral character, does § 39 emphasize the development of moral character? Section 39's focus on the character and motives of the breaching agent appears to comport with a basic conception of virtue ethics.

²⁰ See Holmes, *The Path of the Law*, *supra* note 1. Professor Shiffrin laments the absence of morality from contract law and emphasizes the counter position of the moral stance: "A promisor is morally expected to keep her promise through performance. Absent the consent of the promisee, the moral requirement would not be satisfied if the promisor merely supplied the financial equivalent of what was promised." Shiffrin, *supra* note 6, at 722.

²¹ As drafted, § 39's clunky, mechanical framework, however, may foster uncertainty and thus inefficient litigation. For example, § 39 includes two cumbersome subsections outlining an inadequacy requirement for the remedy. RESTATEMENT OF RESTITUTION, *supra* note 3, §§ 39(2)(c)(i); 39(2)(c)(ii). Section 39 also authorizes judicial discretion in denying the remedy in the event of disgorgement resulting in "an inappropriate windfall to the promisee, or would otherwise be inequitable in a particular case." *Id.* § 39(4)(b). This subsection will generate formidable counterarguments on behalf of the breaching party.

This moral position poses tension with the utilitarian model of consequentialism that underlies economic influences in American contract law. A utilitarian position includes the translation of all items into money damages and the maximization of well-being that flows as a consequence of the encouraged action. For example, efficient breach theory encourages breach when one party will be economically “better off” and the other party not “worse off” because the breaching party is willing to pay the consequences of breach, such as expectancy damages.²²

In contrast, the restitutionary disgorgement remedy appears to have inspiration from virtue ethics because it requires that one consider the effects of opportunistic breach on the character of the defendant and the plaintiff who might become discouraged or vengeful in the face of insufficient redress for breach. It encourages behavior deemed to be more virtuous – keeping promises or at least treating the vulnerable party better by asking before consciously taking. The monetary remedy – disgorging profits gained through breach – will serve to deter opportunistic breaches, but still has little tie to plaintiff’s harm. It is difficult to understand why plaintiff should receive the wealth preference unless we acknowledge that the remedy seeks to commodify intangible harms.²³ Accordingly, restitutionary disgorgement for breach of contract favors certain notions of justice over the economic influences of traditional contract law.

This article will examine the philosophical and practical challenges posed by restitutionary disgorgement and conclude that the values fostered by Section 39 will move contract law in a desirable direction. Part II of this article sets forth the new

²² Part IV.B. explores efficient breach theory and the potential tensions with restitutionary disgorgement.

²³ Alternative nonmonetary remedies may exist that would further deterrence goals; these might include disclosure requirements regarding past breaches, loss of licensure, and bans from certain trades. These creative remedies are more common in the tort arena where both deterrence and *punishment* are goals.

restitutionary disgorgement provision, the pending black-letter restatement of the law. Part III includes an exploration of Professor Kull's rationale supporting disgorgement for opportunistic breach in limited circumstances. It will also analyze the language of limitation shrouding the new provision. In Part IV, I will suggest the significance of the disgorgement provision despite the prescribed narrow boundaries of its intended application. Part IV will also explore whether this provision sounds the death knell for the "efficient breach" model.²⁴ This article will conclude that the restitutionary disgorgement remedy for opportunistic breach of contract will have significantly broader reach, at least theoretically, than intended, but that we should welcome the conceptual movement because it would embrace a corrective justice baseline into the field of contract law.²⁵

II. PROPOSED BLACK-LETTER LAW OF DISGORGEMENT FOR OPPORTUNISTIC BREACH

The original *Restatement of the Law of Restitution* arrived formally in 1937.²⁶ As the current Reporter, Professor Kull spearheads the effort to revise the *Restatement*. This formidable revision project has been ten years in the making.²⁷ Interestingly, there is no 'Second' Restatement.²⁸ This impressive effort ambitiously seeks to update the original version in order create a coherent, cohesive body of doctrine that will have traction with lawyers, judges, and scholars. The deadline for the *Third Restatement of Restitution* is May 2010.

²⁴ See *infra* Part IV.B. (exploring the efficient breach theory and its potential dismantling in light of § 39's inconsistent rationale).

²⁵ For a provocative argument that corrective justice theory may explain the existing structure of contract law despite contract law's lack of interest in the wrongfulness of breach, see generally Curtis Bridgman, *Reconciling Strict Liability with Corrective Justice in Contract Law*, 75 FORDHAM L. REV. 3013 (2007).

²⁶ RESTATEMENT OF THE LAW OF RESTITUTION, *supra* note 17.

²⁷ RESTATEMENT OF RESTITUTION, *supra* note 3.

²⁸ Members of the American Law Institute decided to abandon the Second Restatement project.

This undertaking is vast, complex, and, at times, controversial. As Professor Kull explains, some of the difficulty stems from this fact: “The linguistic confusion that bedevils the law of restitution – necessitating laborious definitions before anyone can understand what you are talking about – affords an early indication that the common name of this neglected body of law was singularly ill-chosen.”²⁹ The complexity compounds given that the remedy of restitution intersects with contract, property, and tort law, but also exists in its own right for freestanding unjust enrichment claims. For these reasons, any elucidation or alteration to the language and law of restitution and unjust enrichment has broad consequences. This article focuses, not on freestanding unjust enrichment claims, but on the overlap between restitution and contract law.

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

§ 39. Profit Derived from Opportunistic Breach

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

- (2) A breach is “opportunistic” if
- (a) the breach is deliberate;
 - (b) the breach is profitable by the test of subsection (3); and
 - (c) the promisee’s right to recover damages for the breach affords inadequate protection to the promisee’s contractual entitlement. In determining the adequacy of damages for this purpose,
 - (i) damages are ordinarily an adequate remedy if they can be used to acquire a full equivalent to the promised performance in a substitute transaction; and

²⁹ Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1191-92 (1995).

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

(3) A breach is “profitable” when it results in gains to the defaulting promisor (net of potential liability in damages) greater than the promisor would have realized from performance of the contract. Profits from breach include saved expenditure and consequential gains that the defaulting promisor would not have realized but for the breach. The amount of such profits must be proved with reasonable certainty.

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

- (a) if the parties’ agreement authorizes the promisor to choose between performance of the contract and a remedial alternative such as payment of liquidated damages; or
- (b) to the extent that disgorgement would result in an inappropriate windfall to the promisee, or would otherwise be inequitable in a particular case.³⁰

Section 39 offers a compelling avenue for certain plaintiffs in the wake of a breach that yields profits for an opportunistic defendant. According to Professor Kull, however, profits based on disgorgement raise distinctive problems vis-à-vis other restitution-based remedies.³¹ Disgorgement, simply put, strips all or part of defendant’s gain through breach. Such gain constitutes unjust enrichment that defendant must disgorge in order to resecure a just equilibrium.³² Unjust enrichment is itself an elusive concept,³³ so any limitations of scope for disgorgement will need to flow from the language and interpretative comments of § 39.

³⁰ *Id.*

³¹ Andrew Kull, *Restitution – New Restatement Panel*, AALS Annual Meeting, Jan. 3, 2007.

³² Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 56 (1936) (noting that the “restitution interest, involving a combination of unjust impoverishment with unjust gain, presents the strongest case for relief” if our goal is Aristotle’s justice where we keep “an equilibrium of goods among members of society”).

³³ Modern unjust enrichment grounds itself in Lord Mansfield’s reliance on “natural justice” and “equity” to require a defendant to refund plaintiff’s money. *Moses v. Macferlan*, 97 Eng. Rep. 676 (K.B. 1760). Efforts to characterize unjust enrichment often include words of caveat and expanse such as “indefinable,” “imprecise,” “defies formulation,” “creative,” “injustice,” “fairness.” See, e.g., GEORGE E. PALMER, *THE LAW OF RESTITUTION* § 1.1, at 5, § 1.7, at 44 (1978).

Such explicit limitations are necessary given that disgorgement generally is a ‘favorite’ remedy of plaintiff’s attorneys, as Professor Kull observes. The attraction stems, at least in part, to the fact that disgorgement can result in a recovery that is more than the client’s loss. Again, disgorgement is not based on plaintiff’s loss, but on defendant’s gain. If defendant is more culpable, then disgorge all profits – as long as there is a direct link between defendant’s wrong and the profit.³⁴ Professor Dawson disagreed with the tailoring of a harsher remedy to defendant’s culpability. He also strongly warned against the application of a freestanding unjust enrichment because courts will yield to temptation and sully the rule of law with vague notions of ‘justice’ and ‘morality.’³⁵ Although § 39 does not rest on freestanding unjust enrichment, the risks expressed by Professor Dawson remain because restitutionary disgorgement stems from a desire to block an opportunistic breacher from *unjustly benefiting* by profiting at plaintiff’s expense.

Yet, must we have an all or nothing approach instead? In order to save freestanding unjust enrichment from abuse or demise and to maintain necessary judicial flexibility, Professor Doug Rendleman proposed an addition to the three traditional common law factors for unjust enrichment claims: (1) “Has the defendant benefited or been enriched?,” (2) “Was the defendant’s enrichment unjust?,” (3) “Was the defendant’s benefit, if any, at the plaintiff’s expense?,” and (4) “*Will granting the plaintiff restitution*

³⁴ See RESTATEMENT OF RESTITUTION, *supra* note 3, at § 39(1) (limiting restitutionary disgorgement for opportunistic breach “to the profit realized by the defaulting promisor as a result of the breach”).

³⁵ See DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 4.1(2), at 557 (2d ed. 1993); *see also* Doug Rendleman, *When Is Enrichment Unjust? Restitution Visits an Onyx Bathroom*, 36 LOY. L.A. L. REV. 991, 997 (2003) (“Dawson thought that unjust enrichment standing alone enabled a court to become a dangerous roving commission; wandering, perhaps intoxicated by the heady brew of its rhetoric, off the end of the dock. . .” (expounding upon JOHN P. DAWSON, UNJUST ENRICHMENT (1951))).

*undermine a policy of property, contract, tort or other substantive law?”*³⁶ This final factor asks that courts, at minimum, pause before offering a remedy that might have inconsistent consequences with the traditional substantive landscape in other doctrines. Section 39’s incorporation of restitutionary disgorgement as an alternative remedy for contractual breach has the potential to alter the substantive law of contract. Accordingly, the relevant inquiry must include whether any alteration will enhance or undermine existing contract doctrine. Regardless of our end goals, we should pause to examine the possible shift in underlying rationale and its consequences.

III. SECTION 39’S RATIONALE – ‘IT’S NEW, BUT LIMITED’

A. *The New Disgorgement Remedy for Contractual Breach*

As noted, Professor Kull acknowledges that § 39’s provision “on profitable breach of contract” is “essentially new.”³⁷ Yet the section is not an invention made out of whole cloth. For example, a host of Commonwealth scholars recognize the potential efficacy of a disgorgement remedy for breach of contract.³⁸ They focus their attentions on where to draw the appropriate line for access to the remedy.³⁹ Precedent support exists, but may require creative interpretation and stretching.⁴⁰

³⁶ Rendleman, *supra* note 35, at 1002-03 (emphasis added) (noting further that “[a] court should not award a plaintiff restitution without examining restitution’s effect on other substantive doctrines that decline liability”).

³⁷ RESTATEMENT OF RESTITUTION, *supra* note 3, at xv, Reporter’s Introductory Memorandum.

³⁸ See Caprice L. Roberts, *A Commonwealth of Perspective on Restitutionary Disgorgement for Breach of Contract*, 65 WASH. & LEE L. REV. __ (forthcoming 2008) (exploring lessons from the Commonwealth’s experience for the American disgorgement project), available at <http://ssrn.com/abstract=1154746>; John D. McCamus, *Disgorgement for Breach of Contract: A Comparative Perspective*, 36 LOY. L.A. L. REV. 943 (2003).

³⁹ See, e.g., THE LAW COMMISSION, *Aggravated, Exemplary and Restitutionary Damages*, REPORT No. 247, at 43 (London 1997) (approving disgorgement for any civil wrong only where defendant’s actions show “a deliberate and outrageous disregard of plaintiff’s rights”); Lionel D. Smith, *Disgorgement of the Profits of Breach of Contract: Property, Contract and “Efficient Breach,”* 24 CAN. BUS. L.J. 121 (1994-1995) (arguing that disgorgement should not be denied to contract plaintiffs given its widespread availability in other areas of law); Gareth Jones, *The Recovery of Benefits Gained from a Breach of Contract*, 99 L.Q. REV. 443, 459 (1983) (endorsing broadly gain-based damages for breach of contract); Robert J. Sharpe &

The newness in America stems from the fact that “[t]raditional contract law contains no rule identifying the cases in which disgorgement is an appropriate remedy for breach.”⁴¹ Notably, “[s]ection 39 has no counterpart in either the first or second *Restatement of Contracts*.”⁴² Professor Kull offers § 39 as a new contractual remedy and deposits it in the new *Restatement of Restitution*. A catalyst justifying § 39, in Professor Kull’s estimation, exists:

Increased scholarly attention to the question in recent decades has led to broad acceptance of the premise that disgorgement in such cases corresponds to a liability in unjust enrichment, and that it is appropriate – in some limited set of cases – to treat a deliberate and profitable breach of contract by analogy to an intentional and profitable interference with other legally protected interests.⁴³

S. M. Waddams, *Damages for Lost Opportunity to Bargain*, 2 OXFORD J. LEGAL STUD. 290 (1982). See also Sam Doyle & David Wright, *Restitutionary Damages – The Unnecessary Remedy?*, 25 MEL. U. L. REV. 1, 4-6 (2001) (detailing case and scholarly range of treatments for gain-based contract relief).

⁴⁰ The watershed example in England is *Attorney General v. Blake*, 1 AC 268 (HL 2001). In America, some support stems from *Laurin v. DeCarolus Constr. Co.*, 363 N.E.2d 675, 691-92 (1977) (approving an award of the fair market value of gravel that defendant, in a “deliberate and willful breach of contract,” wrongfully removed). Given the lack of precedent prior to *Blake*, Professor Robert Stevens argues that the rationale for disgorgement is nonexistent and that the *Restatement* view is a common misreading of the cases. See Robert Stevens, *Damages and the Right to Performance: A Golden Victory or Not* (forthcoming 2008) (manuscript on file with author) (demonstrating how *Blake*’s disgorgement remedy was an invention lacking precedent) (advocating that a gain-based remedy has support in compensatory principles); JAMES EDELMAN, GAIN-BASED DAMAGES: CONTRACT, TORT, EQUITY AND INTELLECTUAL PROPERTY 149 (2002); Mitchell McInnes, *Disgorgement for Breach of Contract: The Search for a Principled Relationship*, in UNJUST ENRICHMENT & THE LAW OF CONTRACT 241 (E.J.H. Schrage, ed. 2001); Hanoch Dagan, *Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory*, 1 THEORETICAL INQUIRIES IN LAW 115, 115 (2000). For a more narrow support of disgorgement for breach of contract, see for example PETER BENSON, *Disgorgement for Breach of Contract and Corrective Justice: An Analysis in Outline*, in UNDERSTANDING UNJUST ENRICHMENT 310-30 (Jason W. Neyers, Mitchell McInnes, & Stephen G.A. Pitel, eds., 2004). For opposition to disgorgement based on disgorgement’s inconsistency with the “internal coherence” of contract law within a corrective justice model, see Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55 (2003).

⁴¹ RESTATEMENT OF RESTITUTION, *supra* note 3, at 11.

⁴² *Id.* at 29, Reporter’s Note.

⁴³ *Id.* (citing *e.g.*, GOFF & JONES, LAW OF RESTITUTION 515-26 (6th ed. 2002); MADDAUGH & MCCAMUS, THE LAW OF RESTITUTION 753-74 (2d ed. 2004); PALMER, LAW OF RESTITUTION, *supra* note 33, at § 4.9; Peter Birks, *Restitutionary Damages for Breach of Contract: Snegg and the Fusion of Law and Equity*, LLOYD’S MAR. & COM. L.Q. 421 (1987); HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 260-82 (2004); Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175, 186-89 (1959); E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339 (1985)).

So, what is the ‘limited set of cases’ suggested? According to the proposed “Comment” in the new draft *Restatement of Restitution*, the disgorgement remedy will be available only “[i]n exceptional cases, [where] a party’s profitable breach of contract may be a source of unjust enrichment at the expense of the other contracting party.”⁴⁴ Thus, the section embodies “an instance of restitution for benefits wrongfully obtained.”⁴⁵ Despite the creation of a new “general theory of disgorgement”⁴⁶ as a remedy in contract law, “a primary object of § 39 is to prevent the unjust enrichment of the defendant at the expense of the plaintiff.”⁴⁷

Notably, a plaintiff asserting § 39’s disgorgement remedy “may recover the defendant’s profits from breach, even if they exceed the provable value to the claimant of the defendant’s defaulted performance.”⁴⁸ As Professor Kull recognizes, this feature shifts the traditional contract paradigm. He acknowledges, “[j]udged by the usual presumptions of contract law, a recovery for breach that exceeds plaintiff’s damages is anomalous on its face.”⁴⁹ As he observes,

Standard contract remedies afford specific or compensatory relief, and a breach of contract – *whatever the actor’s state of mind* – is not usually treated in law as a wrong to the injured party, comparable to a tort or breach of equitable duty.⁵⁰

⁴⁴ RESTATEMENT OF RESTITUTION, *supra* note 3, at 4.

⁴⁵ *Id.*

⁴⁶ *Id.* at 11.

⁴⁷ *Id.* at 5.

⁴⁸ *Id.* (noting further that “[r]estitution exceeding the claimant’s loss is authorized nowhere else in Chapter 4, though it is a distinguishing feature of the rules stated in Chapter 5” – “Restitution for Wrongs,” including tort and other breach of duty claims). It is an open question as to whether permitting restitution that exceeds plaintiff’s loss in a contractual setting will create a broader convergence between contract law and tort law.

⁴⁹ *Id.*

⁵⁰ *Id.* (emphasis added). Although American contract law generally prohibits the award of punitive damages, scholars have argued for extended availability of punitive damages in contract law for willful breaches. See, e.g., Curtis Bridgeman, *Corrective Justice in Contract Law: Is There a Case for Punitive Damages*, 56 VAND. L. REV. 237, 260-69 (2003) (appealing to Kantian moral theory for an extension of punitive damages for willful breaches of contract); William S. Dodge, *The Case for Punitive Damages in*

Significantly, § 39 does exactly that – it requires an analysis of the breaching party’s state of mind and treats the breacher worse in the face of demonstrated “opportunistic breach.” Through the disgorgement remedy, § 39 strips the breaching party of any resulting monetary benefits of the breach and incentivizes the breacher to avoid such behavior in the future. Ideally, this remedy seeks to achieve both specific and general deterrence for opportunistic contractual breaches. Or, from a retributive perspective, it punishes a breaching party for morally blameworthy conduct.⁵¹ The conscious breacher will receive his just deserts and thus be unable to profit from the wrongdoing.

Contracts professors (and perhaps remedies professors also) commonly emphasize the divergence and underlying policy distinctions between contract and tort remedies. It therefore might be common to hear a contracts professor utter any or all of the following premises:

- Contract law generally does not inquire into a breaching party’s mindset. Don’t love them; don’t hate them.
- Contract law involves voluntary, private bargaining in a hopeful world, but reality dictates that parties can, do, and will breach.
- A party may *choose* to perform or breach and pay the consequences.⁵²
- Simply determine the ideal contractual remedy to *compensate* plaintiff for her loss and assuming it is not unique, then ask what monetary award will (i) fulfill plaintiff’s contractual expectancy by achieving the benefit of the bargain, (ii) recoup plaintiff’s reliance via compensating for out-of-pocket costs, or (iii) restore plaintiff by providing restitutionary value for anything plaintiff provided to another party who lacks the right to retain it without paying.

Contracts, 48 DUKE L.J. 629 (1999) (reasoning that economic theory supports punitive damages for breach of contract).

⁵¹ See, e.g., MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 91 (1997) (“Retributivism is a very straightforward theory of punishment: We are justified in punishing because . . . offenders deserve it.”).

⁵² Holmes, *supra* note 20.

- Contractual breach may disappoint us but any moral shortcoming is a matter for the “tribunal of conscience”⁵³ rather than contractual liability and remedy.
- Contract law is not interested in punishing breachers. If you think punishment should be in order, then you will need to find grounds creating tortious or criminal liability.
- Contract foreseeability keys to the “quantum” of damage anticipated unlike torts.⁵⁴

Perhaps these sorts of statements were never fully true,⁵⁵ but many casebooks and contracts professors engage in cognitive dissonance in the face of precedent that fails to respect these foundational principles.⁵⁶ In other words, if the court, in a breach of contract case, appeared to be punishing a breaching party or utilizing defendant’s profits as the base of damage, the professor might ask: did the court ‘get it wrong’ here in terms of traditional conceptions of contractual liability and remedies. At minimum, many contracts casebooks and professors would treat the case as anomalous with the guiding principles of contract jurisprudence. Now, a new category of damage would exist with a potentially radical underlying rationale.

Section 39 may not undo all of these premises, but it certainly flows from alternative and inconsistent principles. Even if rare in application, the underlying

⁵³ *Mills v. Wyman*, 20 Mass. (3 Pick.) 207 (Mass. 1825) (“What a man ought to do, generally he ought to be made to do whether he promise or refuse. But the law of society has left most of such obligations to the interior forum, as the tribunal of conscience has been aptly called.”).

⁵⁴ R. W. Byrom, *Do Damages Depend on the Same Principles Throughout the Law of Tort and Contract*, 6 U. QUEENSLAND L.J. 118, 120-22 (1968) (contrasting contract’s *Hadley v Baxendale* foreseeability limitation on the quantum of harm from breach with tort where “damages are recoverable in full or not at all [and] not limited by reference to a reasonable quantum”); *see also* DOUG RENDLEMAN, *REMEDIES CASES & MATERIALS* 530-53 (7th ed. 2006) (exploring and comparing the underlying principles and goals of tort and contract doctrine).

⁵⁵ *See* Curtis Bridgeman, *Default Rules, Penalty Default Rules, and New Formalism*, 33 FL. ST. U. L. REV. 683 (2006) (describing how new formalists like Alan Schwartz and Robert Scott have argued that few, if any, default rules actually exist in contract law, notwithstanding conventional wisdom).

⁵⁶ This phenomenon finds some support in Professor Kull’s assessment that “[a]lthough case authority for the particular Illustrations [for § 39’s application] is reasonably extensive, courts and commentators have hesitated to formulate a rule – *seemingly at variance with basic assumptions about liability in contract* – that would generalize the outcomes they represent.” *RESTATEMENT OF RESTITUTION*, *supra* note 3, at 29, Reporter’s Note (emphasis added).

premise of restitutionary disgorgement for opportunistic contractual breaches will require a rewiring for many contracts professors (and former students who are now lawyers, judges, and legislators). It may well be that the time is ripe for a reconsideration of some of contract law's premises, but we should engage in this process with our eyes open to broader implications.

*B. The Reporter Doth Protest Too Much?*⁵⁷

1. "The Camel's Nose": Assessing the Reporter's claim that contractual disgorgement will rarely apply.

In Comment *g* to the proposed *Restatement*, entitled "The exceptional nature of the claim," Professor Kull placates fears by noting that § 39 disgorgement "is the least frequently encountered" reaction to a contractual breach.⁵⁸ He grounds this claim on his view that "[t]he cumulative requirements of opportunistic breach (as defined in § 39(2)) will exclude the vast majority of contractual defaults."⁵⁹ Yet, the scope of the rationale encompasses broader import. In other words, if the underlying justification for this 'new' avenue of recovery in contract law is expansive, then the impact may be significant despite the limited intended applicability of the remedy. Couching a provision in language of limitation will not necessarily lessen the ring of change that it may sound in the minds of many.

Professor Kull attempts to allay fears about the import and potential radical nature of disgorgement for opportunistic breach. According to Professor Kull, potential critics need not worry because, in essence, 'there is nothing to see here' given that application of such restitution claims will be so rare. The new doctrine secures its rarity of application

⁵⁷ With appropriate apologies to William Shakespeare, *Hamlet*, act 3 sc. 2.

⁵⁸ RESTATEMENT OF RESTITUTION, *supra* note 3, at 21 cmt. *g*.

⁵⁹ *Id.*

by including specific triggers that are (and I would not disagree) narrow. For example, he incorporates the “inadequacy test.”⁶⁰ Despite Professor Laycock’s declaration of the “death of the irreparable injury rule” for injunction relief, the test remains in use in the injunction context, and here Professor Kull extends it as a primary limiting feature of the new disgorgement for opportunistic breach. According to Professor Laycock, “Injury is irreparable if plaintiff cannot use damages to replace the specific thing he has lost.”⁶¹ This traditional equitable remedy test will serve to limit application of the new § 39. The creation of a higher hurdle, however, will not prevent plaintiffs’ lawyers and judges from attempting the jump. Further, limited application will not eliminate broader implications stemming from the underlying rationale of restitutionary disgorgement.

2. “In the Tent”: Debunking the Reporter’s claim the contractual disgorgement will not punish.

During Professor Kull’s AALS presentation, he first discussed the revised *Restatement of Restitution*’s key components regarding legal restitution. In this vein, disgorgement – an ancient remedy – is instinctively attractive.⁶² Importantly, he emphasized that the disgorgement remedy for opportunistic contractual breach would yield a monetary award ‘greater than compensation’ and ‘not tied to compensation.’

⁶⁰ At the AALS 2006 annual meeting, Professor Kull discussed § 39’s disgorgement under “legal restitution,” and the remedy would yield money damages. The inadequacy test historically applies exclusively in the context of equitable remedies such as specific performance and injunctions. Assuming that disgorgement is a legal remedy for the purposes of rights to a jury trial, then it is unclear how Professor Kull’s analogy to injunction or specific performance and his borrowing of the “inadequacy test” in order to limit disgorgement’s application to profitable contractual breaches may alter the determination of whether the relief is legal or equitable.

⁶¹ LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 37 (1991) (cited and adopted by Professor Kull, RESTATEMENT OF RESTITUTION, *supra* note 3, at 30, Reporter’s Note).

⁶² *Warran v. Century Bankcorp., Inc.*, 741 P.2d 846, 852 (Okla. 1987) (“The remedy in restitution rests on the ancient principle of disgorgement. Beneath the cloak of restitution lies the dagger that compels the conscious wrongdoer to ‘disgorge’ his gains.”).

As a guiding principle, this restitutionary disgorgement remedy hinges on the claim that “conscious wrongdoing should not be a profitable choice.” Accordingly, the corresponding remedy should “strip” the profit – or at least the portion of the “[p]rofit ‘realized as a result of the breach.’”⁶³ Effectively, this maneuver seeks to *de-opportunize* the breach – disgorging the opportunity from breach.

Yet, Professor Kull insists that it is not punitive – disgorgement “operates to make breach unprofitable, but it does not punish a breach of contract by requiring forfeiture of the entire profit from the transaction as a whole.”⁶⁴ This sentiment echoes a classic contracts case that noted the nonpunitive nature of a disgorgement remedy that “merely deprives the defendant of a profit wrongfully made, a profit which the plaintiff was entitled to make.”⁶⁵ Why the need to distinguish from punitive damages?⁶⁶ Can scholars disclaim a punitive connection if the restitutionary remedy calibrates to the degree of fault and awards an amount exceeding plaintiff’s loss?⁶⁷ What is the fear? Isn’t the implication of the remedy a judgment of blameworthiness and, as such, we may be punishing the opportunistic among us? If Professor Kull acknowledges the non-compensatory nature of such an award, then what classification is appropriate? Perhaps,

⁶³ RESTATEMENT OF RESTITUTION, *supra* note 3, at 20.

⁶⁴ *Id.* Yet, in the proposed Comment *i* on “efficient breach,” language connotes a punishment element, *e.g.*, “precisely the conduct that the law of restitution *condemns*” and “§ 39 does not automatically *punish* an efficient breach with a disgorgement remedy, however, because of the requirement that the breach be opportunistic.” *Id.* at 26 (emphasis added); *see also infra* Part IV.B. (discussing § 39’s effect on the efficient breach model). Is it possible that the disgorgement remedy will deter and *punish* opportunistic breach, but not be deemed a punitive award because, among other reasons, the jury would not be assessing a number out of the air in order to punish the defendant for her outrageous conduct? I would suggest rethinking the adjectives used to describe any remedial goals of disgorgement for contractual breach.

⁶⁵ *Laurin v. DeCarolis Constr. Co.*, 363 N.E.2d 675 (Mass. 1977) (discussed in conjunction with Illustration 2 by Professor Kull, RESTATEMENT OF RESTITUTION, *supra* note 3, at 31, Reporter’s Note).

⁶⁶ Punitive functions in American law exist primarily in tort and criminal law. Japan cabins punitive damages further by limiting application to only criminal law.

⁶⁷ *McDougald v. Garber*, 536 N.E.2d 372, 378 (N.Y. 1989) (“The fundamental distinction between punitive and compensatory damages is that the former exceed the amount necessary to replace what the plaintiff lost.”) (citation omitted).

the remedy achieves deterrence short of punishment. The revised *Restatement of Restitution* justifies disgorging the profit under the rubric of deterrence policy not punishment,⁶⁸ which assumes these remedial goals can run independently of one another. Notably, if we admit any punitive element, then greater controversy would unfold. The inconsistency with traditional contract underpinnings intensifies, and application of any arguably punitive award might trigger applicability of the Supreme Court's mired due process jurisprudence regarding limitations on punitive damages.⁶⁹

Does this feature of restitution remove any incentive to breach? Should we have never abided incentives to breach because we prefer a culture of collegiality and commitment? Yet, the reality is that people can, will, and, at times, need to, breach. Kull reasons that the disgorgement feature will not affect them because it is sharply circumscribed to apply to only a limited set of rare and unique situations. Is this remedy the proverbial camel's nose in the tent? If so, what tent – restitution, contract law, criminal law, or beyond?

Professor Kull maintains that “[b]y *condemning* this form of opportunism, the rule of § 39 reinforces the contractual position of the vulnerable party and *condemns* a form of

⁶⁸ See RESTATEMENT OF RESTITUTION, *supra* note 3, at 8 (noting the remedy seeks to “frustrate conscious wrongdoers”). According to Professor Kull, the restitutionary disgorgement remedy also seeks “to reinforce the stability of contract itself, enhancing the ability of the parties to negotiate for contractual performance that may not be easily valued in money [and thereby] expand the range of transactions for which parties may effectively bargain.” *Id.*

⁶⁹ This article seeks to stimulate open debate. If serious concerns arise about any punitive nature of the disgorgement remedy for profitable contractual breaches, a future article would need to address the significant potential implications. In fairness, the Court's due process jurisprudence regarding punitive damages has received a mixed scholarly reception. For a nice capsulization of citations of competing scholarly treatments, see Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1, 4 n.7 (2004). See also Caprice L. Roberts, *Ratios, (Ir)rationality & Civil Rights Punitive Awards*, 39 AKRON L. REV. 1019 (2006) (critiquing one prong of the Court's due process ‘guideposts’ – the ratio of compensatory harm to punitive damages – in terms of its inconsistent application in the federal civil rights context). For a recent case example demonstrating a flawed extension of Supreme Court punitive damage precedent, see for example, *Arpin v. United States*, Nos. 07-1079, 07-1106 (7th Cir. April 8, 2008) (Posner, J.) (misapplying the ratio guidepost to loss of consortium damage award, which is itself, a compensatory rather than punitive award).

conscious advantage-taking that is the equivalent, in the contractual context, of an intentional and profitable tort.”⁷⁰ At minimum, disgorgement for opportunistic breach belies the notion of “efficient breach.”⁷¹

Efficient breach theorists encourage breach where Pareto optimality is attainable, i.e., breach will cause at least one party to be better off and no party to be worse off.⁷² In other words, a party should breach if she can pay the consequences of breach (expectancy damages) and maintain a profit.⁷³ Under this view, efficient breach increases social welfare by ensuring that the promised items are put to their most valued use.

“[D]isgorgement is at odds with the notion of efficient breach.”⁷⁴ The law of restitutionary disgorgement requires “the promisor to disgorge gains made through the breach [and thus] removes the incentive for the promisor to engage in this wealth-maximizing step.”⁷⁵ Further, a central component of efficient breach is “channeling resources to their most valued use;”⁷⁶ whereas, “corrective justice shares with the disgorgement principle the supposition that breach of contract is wrong.”⁷⁷ As Professor Robin Kar aptly notes regarding the larger fault lines, the law and economics movement has “had an important, if underappreciated, influence on legal discussions: it has tended to alter our conception of who bears the burden of persuasion when deciding the

⁷⁰ RESTATEMENT OF RESTITUTION, *supra* note 3, at 7 (emphasis added). Does this remedy open the door to claimants seeking a punitive award in addition to the disgorgement remedy for opportunistic breach?

⁷¹ See *infra* Part IV.B. (comparing rationales underlying restitutionary disgorgement with efficient breach justifications).

⁷² See V. PARETO, MANUAL OF POLITICAL ECONOMY 451 (A. Schweir trans. 1971); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 1.2, at 13.

⁷³ See, e.g., Goetz & Scott, *supra* note 4, at 558.

⁷⁴ Weinrib, *supra* note 40, at 73. In the face of increasing openness to disgorgement for contract breach in Canada, England, and Israel, Professor Weinrib does not advocate the utilization of disgorgement; rather, he expresses concern that the disgorgement remedy will disturb the “law’s internal coherence” by injecting punishment of “malevolent conduct,” which has not been a component of traditional contract law. *Id.* at 103.40

⁷⁵ *Id.* at 73.

⁷⁶ *Id.* at 74.

⁷⁷ *Id.*

relevance of fairness considerations to the private law.”⁷⁸ If the conflict between law and economics and the goals of disgorgement is unavoidable, should the private law of contract support the principles underlying disgorgement versus efficient breach?

Since the development of the efficient breach model, some scholars criticized its existence, its incentives, and its moral implications. These legal scholars may be protective of their domain and fear its transmogrification from the influence of economic theories.⁷⁹ Yet the criticisms are not lacking in specific content. For example, some legal scholars consider efficient breach theory to be amoral.⁸⁰ Further, fostering efficient breach may belie virtue ethics by taking the breaching parties’ profit motives out of consideration. Detractors maintain that efficient breaches are virtually nonexistent in the real world especially given the reality of transaction costs,⁸¹ yet the model is often alive and well in the classroom⁸² and scholarship abounds.⁸³ Others posit that economic theory cannot adequately explain or support contract doctrine.⁸⁴ Critics lament the

⁷⁸ Robin Bradley Kar, *Contract Law and the Second-Person Standpoint: Why Efficiency-Maximization Principles Can Neither Explain Nor Justify the Expectation Damages Remedy*, 40 LOY. L.A. LAW REV. ____ (forthcoming 2008), available at: <http://ssrn.com/abstract=1093369>.

⁷⁹ See Donald L. Boudreaux, *Law and Economics*, in THE ELGAR COMPANION TO AUSTRIAN ECONOMICS 267 (1994) (opining that legal scholars pen literature critiquing economic analysis of law in an effort to “protect their intellectual turf from trespass by economists”).

⁸⁰ See, e.g., Shiffrin, *supra* note 6, at 722; Linzer, *supra* note 6, at 112-13.

⁸¹ Linzer, *supra* note 6, at 116 (“Even in the commercial setting, efficiency analysis may offer false guidance because of the law’s failure to compensate a victim of breach for all his transaction costs.”).

⁸² Casebook treatment demonstrates that teaching interest exists. See, e.g., RENDLEMAN, *supra* note 54, at 599-604 (exploring “efficient-opportunistic breach,” outlining arguments for and against efficient breach, and ultimately querying whether wealth maximization sufficiently justifies breach given that counter ethical commitments may exist).

⁸³ See, e.g., Gordley, *A Perennial Misstep: From Cajetan to Fuller and Purdue to “Efficient Breach,”* ISSUES IN LEGAL SCHOLARSHIP SYMPOSIUM: FULLER AND PURDUE (2001); R. Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629 (1988); Dan Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 VA. L. REV. 1443 (1980).

⁸⁴ See, e.g., Kar, *supra* note 78, at ____ (maintaining that “the law and economics movement cannot account for the very features of private law obligations that make them private *obligations*” and advocating abandoning the law and economics conception in favor of a position that “takes more seriously the second-personal aspects [such as agent-centered and relational features] of our private legal interactions with one another”). But cf. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 133

emphasis on accumulation of wealth at the perceived expense of good will, relationship maintenance, and keeping promises.⁸⁵ Pursuant to a virtue ethics view, for example, the decision to breach may have negative repercussions for the breaching party and society as well as the non-breaching party.

Advocates of efficient breach posit that such breaches enhance resource allocation and social welfare.⁸⁶ Simply put, the law ought to foster efficiency.⁸⁷ One court described efficient breach as resolving the dispute with “perfect fairness.”⁸⁸ If, for example, promised goods might be put to their best use through breach, shouldn’t the law encourage the more advantageous resource allocation? Accordingly, under this rubric, “society loses if people do not breach contracts that would cost them more to perform than to pay compensation for breaching.”⁸⁹

Regardless, efficient breach theory *encourages* efficient breaches; thus, its underlying rationale is in tension with disgorgement, which *discourages* breaches. If disgorgement for “opportunistic” breach moves not in the name of punishment yet seeks to remove (or at least lessen) the possibility of efficient breach, doesn’t it make a judgment, award more than compensation, remove incentives, and deter, which in essence punishes the breacher to some extent? Is it possible to create rules enforcing a

YALE L.J. 541, 543 (2003) (“Contract law has neither a complete descriptive theory, explaining what the law is, nor a complete normative theory, explaining what the law should be.”).

⁸⁵ See, e.g., Pat Marschall, *Willfulness: A Crucial Factor in Choosing Remedies for Breach of Contract*, 24 ARIZ. L. REV. 733 (1982) (advocating that individuals ought to keep promises).

⁸⁶ See, e.g., Goetz & Scott, *supra* note 4, at 558.

⁸⁷ Schwartz & Scott, *supra* note 84, at 549-56 (justifying an efficient theory of contract law and defending the goal of “welfare-maximization as applied to contracts of sophisticated actors”).

⁸⁸ *Eastern S.S. Lines, Inc. v. United States*, 125 Ct. Cl. 422 (1953) (permitting the promisor to breach efficiently by paying money damages and maintaining a profit). See also *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, 799 F.2d 265, 279-80 (7th Cir. 1986) (Posner, J.) (exploring a seller’s efficient breach).

⁸⁹ W. DAVID SLAWSON, *BINDING PROMISES* 122 (1996) (noting further that contract law should not countenance punitive damages because breaching parties “have done nothing wrong if they pay full compensation”).

certain conception of the moral order and simultaneously disclaim any punishment? Are we simply passing judgment and deterring a defendant from considering such options in the future?

IV. SIGNIFICANCE OF RESTITUTIONARY DISGORGEMENT FOR OPPORTUNISTIC BREACH

If restitutionary disgorgement is rare because in fact the new test is hard to meet (and there is influence in affirmatively stating that courts and lawyers should view this tool as rare), does this cabin the implications of disgorgement for opportunistic breach? Or, instead, does this doctrine and remedy dramatically shift existing paradigms?

At first blush, this avenue of recovery (either in its creation or approval of a path sometimes taken despite contrary governing doctrines) will alter teaching across law disciplines. Perhaps restitutionary disgorgement has always operated in this manner. Restitution confuses contracts professors, and its complex definition and historical roots engender sloppy lawyering and inartful judging. All too often constituencies misapply and misclassify the underlying concepts of restitution and unjust enrichment. Understanding these doctrines is essential to appropriate application of restitutionary disgorgement for contract breaches. Until unjust enrichment receives its rightful place as a freestanding course in the first-year curriculum of law schools, contracts professors will remain on the front lines of teaching restitutionary concepts and will need to reconcile their conceptions with the new *Restatement of Restitution*. There are also deeper implications of the shift in terms of theoretical and jurisprudential underpinnings and corresponding consequences of restitution, contracts, torts, criminal, law and economics, and beyond.

A. *Moral Models: Blameworthiness, Efficiency & Promise-Keeping*

Should a handshake constitute an end in itself? Should the law track common sense conventional morality that fosters keeping one's word? "The principle of fidelity to one's word is an ancient one."⁹⁰ Shouldn't the law follow this ethical principle? With traditional contracts courses in America following Justice Holmes's presumed logic, the answer is a resounding no, at least not legally. The clearest examples involve the cases of "past consideration" in which one makes a *moral* obligation to pay for a benefit received in the past, but the obligation does not ripen into a *legal* one under traditional contract law.⁹¹ Even though an individual promised to pay after a benefit has passed or to go to dinner without an exchange promise, the individual owes nothing legally. Morally breaking a promise (regardless of a lack of legal consideration) *may* remain ethically problematic unless the *prima facie* moral obligation is trumped by sufficient justification (e.g., an emergency).

In the legal context, once one passes the consideration hurdle, the obligation does not disappear upon breach;⁹² rather, it has a residual effect – the breaching party must pay

⁹⁰ CHARLES FRIED, CONTRACT AS PROMISE 2 (1981). As Professor Fried eloquently articulates,

What is a promise, that by my words I should make wrong what before was morally indifferent? A promise is a communication—usually verbal; it says something. But how can my saying something put a moral charge on a choice that before was morally neutral? Well, by my misleading you, or by lying. Is lying not the very paradigm of doing wrong by speaking? But this won't do, for *a promise puts the moral charge on a potential act—the wrong is done later, when the promise is not kept*—while a lie is a wrong committed at the time of its utterance. Both wrongs abuse trust, but in different ways. When I speak I commit myself to the truth of my utterance, but when I promise I commit myself to act, later.

Id. at 9 (emphasis added).

⁹¹ See, e.g., *Mills v. Wyman*, 20 Mass. (3 Pick.) 207 (Mass. 1825). But see *Webb v. McGowan*, 168 So. 196 (Ala. App. 1935) (enforcing the promise on the theory of the promisor having received a "material benefit").

⁹² See Weinrib, *supra* note 40, at 80 ("The nature of the required performance is defined by the contract between the parties and has no juridical existence independent of their relationship. The contract imposes an obligation to perform, that is, to do or abstain from doing a particular act, which is personal to the

the consequences for the legal misstep. The existence of a more advantageous bargain does not likely trump a moral obligation to keep one's word,⁹³ but it is sufficient in some circles to justify breaching the original contract *as long as* one answers for the legal consequences. Breach might even be the preferred course.⁹⁴

Recall Holmes's famous words: "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, – nothing else."⁹⁵ In fact, much of contract law seeks to limit liability and thus follows Holmesian logic in order to distinguish contract law from the broader liability and "moral sententiousness" of tort law.⁹⁶ Professor Kull notes the "substantial truth, though not of course the whole

promisor. Although the promisor can act inconsistently with the contractual obligation and breach it, the breach is not an alienation. The relationship of entitlement and obligation as between the parties remains intact.").

⁹³ See Shiffrin, *supra* note 6, at 722 (noting that the moral requirement to keep one's promise through performance remains even if the promisor pays expectancy damages). A proponent of efficient breach theory might argue that advancing social welfare and optimizing resource allocation are moral ends and should trump the moral intuition to keep one's word. See e.g., Boudreaux, *supra* note 79, at 268-69 (advocating efficiency and wealth maximization as moral qualities).

⁹⁴ Boudreaux, *supra* note 79, at 267 ("Is it not plausible that two parties to a potential contract both prefer, ex ante, that the law allows one or both of the parties to breach and pay damages?").

⁹⁵ Holmes, *supra* note 20, at 702. Professor Gilmore elaborates on Justice Holmes's reasoning regarding limiting liability in contract law versus tort:

Liability, although absolute—at least in theory—was nevertheless, to be severely limited. The equitable remedy of specific performance was to be avoided so far as possible—no doubt we would all be better off if Lord Coke's views had prevailed in the seventeenth century and the equitable remedy had never developed at all. Money damages for breach of contract were to be "compensatory," never punitive; the contract-breaker's motivation, Holmes explained, makes no legal difference whatever and indeed every man has a right "to break his contract if he chooses"—that is, a right to elect to pay damages instead of performing his contractual obligation. Therefore the wicked contract-breaker should pay no more in damages than the innocent and the pure in heart. The "compensatory" damages, which were theoretically recoverable, turned out to be a good deal less than enough to compensate the victim for the losses which in fact he might have suffered. Damages in contract, it was pointed out, were one thing and damages in tort another; the contract-breaker was not to be held responsible, as the tortfeasor was, for all the consequences of his actions.

GRANT GILMORE, *THE DEATH OF CONTRACTS* 15 (1974, 1995).

⁹⁶ See GILMORE, *supra* note 95, at 15, 18. Regarding contract law's purposefully circumscribed stance on liability, Professor Gilmore forcefully maintains that

story, in the Holmesian paradox according to which the obligation imposed by contract lies in a choice between performance and payment of damages.”⁹⁷ A bedrock of contract law is that breach is not about assessing blame,⁹⁸ but instead about choices between performing or paying damages.⁹⁹ As noted above, scores of law professors utter this legal chestnut repeatedly in first-year contracts courses. This utterance no doubt now extends into courtrooms, boardrooms, business schools, economics programs, and beyond. Prominent casebooks emphasize excerpts from Justice Holmes’s famous treatment of contractual breach in *The Path of the Law*.¹⁰⁰ Professor Robin West asks: “Do we give up something, and something quite precious, when we abandon, in our law,

The theory [of contract law] seems to have been dedicated to the proposition that, ideally no one should be liable to anyone for anything. Since the ideal was not attainable, the compromise solution was to restrict liability within the narrowest possible limits. Within those limits, however, liability was to be absolute: as Holmes put it, “The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass.”

Id. at 15.

⁹⁷ RESTATEMENT OF RESTITUTION, *supra* note 3, at 5-6 (emphasizing further that Holmes’s “observation is most accurate in those transactional contexts where damages can be calculated with relative confidence as a full equivalent of performance”).

⁹⁸ Of course, this sentiment echoes more generally the positivist tradition. “Legal positivists from John Austin to Holmes (and Holmes’s alter ego, John Gray) to Hans Kelsen to H.L.A. Hart have, despite their differences, treated the separation of law and morals as the defining characteristic of positivism.” Albert W. Alschuler, *The Descending Trail: Holmes’ Path of the Law One Hundred Years Later*, 49 FLA. L. REV. 353, 380-81 (1997). In Alschuler’s biography of Holmes, *Law without Values: The Life, Work, and Legacy of Justice Holmes*, he attacks Holmes’s most famous essay, *The Path of the Law*. See also Mathias Reimann, *Horrible Holmes*, 100 MICH. L. REV. 1676, 1679 (2002) (“The whole piece is full of ill-considered and implausible statements, and Alschuler finds virtually nothing to be said in its favor.”). Alschuler notes: “We have walked Holmes’s path and have lost our way.” ALBERT W. ASCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 187 (2000). Professor Reimann believes that Professor Alschuler’s book critique of Holmes serves as a “valuable reminder” that: “if American legal culture continues to revere a Nietzschean nihilist, a power-addicted war enthusiast, and an emotional cripple without sympathy for the underdog, it is flirting with moral bankruptcy.” Reimann, *supra*, at 1689. But cf. Patrick J. Kelley, *A Critical Analysis of Holmes’s Theory of Contract*, 75 NOTRE DAME L. REV. 1681 (2000) (“Holmes’s general theory of civil and criminal liability was evolutionary.”).

⁹⁹ “If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference” between the remedy for contract and tort liability. Holmes, *supra* note 20, at 702. According to Professor Grant Gilmore, “Holmes sharply distinguished between contract and tort law – vastly expanding the domain of contract at the expense of tort.” Grant Gilmore, *Some Reflections on Oliver Wendell Holmes, Jr.*, 2 GREEN BAG 2D 379, 389 (1999).

¹⁰⁰ See, e.g., DAWSON, HARVEY, & HENDERSON, *CONTRACTS CASES & COMMENT* (8th ed. 2003).

*the language and concepts of moral obligation and embrace in its stead the sovereignty of choice?”*¹⁰¹

According to Holmes’s version of realism, parties to private bargaining moments possessed a choice between performance and breach coupled with a realization that breach would require payment of the consequences of breach, *i.e.*, benefit of the bargain. A classic measurement of expectancy damages, benefit of the bargain, for a breach of contract would be the award of monetary damages that would place plaintiff in the position she expected to be had defendant not breached the contract. Professor West summarizes the potential attraction and force of such logic as follows:

The change, in other words, wrought by the transformation of common law norms and regulatory regimes suggested by Holmes’s Essay is additive: Nothing is taken away or diminished. If the moral act is, say (a), how can it possibly harm anyone, or diminish anything, to provide the actor with a choice between (a) or (b), where, furthermore, a pre-condition of (b) is that everyone affected by opening up the actor’s eyes to the fact that he has such a choice, is indifferent? The good man can, after all, still proceed according to conscience, if he doesn’t mind needlessly assuming an inefficient cost.¹⁰²

Holmes’s logic liberates actors by minimizing legal consequences when one fails to keep one’s word. To choose breach is not free from legal consequence;¹⁰³ rather, it is simply free from legal punishment. Accordingly, the actor may choose “the path of productivity” instead of “the path of conscience,” and “so long as compensation is forthcoming . . . the law will not censor him.”¹⁰⁴ Does this disconnect between law and

¹⁰¹ West, *supra* note 2, at 810.

¹⁰² *Id.*

¹⁰³ Breach may entail both moral and legal consequence, and, through enforcement, the law of contract may reaffirm freedom. See FRIED, *supra* note 90, at 132 (“The law of contracts, just because it is rooted in promise and so in right and wrong, is a ramifying system of moral judgments working out the entailments of a few primitive principles – primitive principles that determine the terms on which free men and women may stand apart or combine with each other. These are indeed the laws of freedom.”).

¹⁰⁴ West, *supra* note 2, at 810. This free choice model is not without controversy. See Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 FORDHAM L. REV.

conscience cause damage to the parties and society by minimizing the virtue of keeping one's word?

In a simplistic example of Holmesian logic, if defendant promised to provide 200 bushels of wheat for \$2,000 and defendant breached, then the expectancy measure would ask how much plaintiff would have to pay on the market to obtain like wheat in the amount promised. If \$3,000, then the expectancy measure would be the fair market value (\$3,000) minus the contract price (\$2,000), which equals \$1,000. And, of course, if plaintiff secured comparable wheat for less than the agreed contract price, then plaintiff's expectancy damages would be zero.¹⁰⁵ Notably, traditional contract law would not key damages to defendant's profit as a result of the breach. So, for example, if defendant took the promised 200 bushels, breached (simply breached or *opportunistically* breached), and sold them to a third party (who lacked any knowledge of the prior deal) for \$4,000, plaintiff would not traditionally receive the amount of profit realized from the breach, \$2,000. The plaintiff in *Acme Mills* unsuccessfully pursued such an argument.¹⁰⁶

Even assuming in contract law that the express contract was legally insufficient (*e.g.*, a statute-of-frauds barrier) and the quasi-contract¹⁰⁷ provided a viable alternative because otherwise the defendant would be unjustly enriched at plaintiff's expense, then here the measure would be to return any money paid from plaintiff to defendant. If plaintiff had performed a requested service for defendant and defendant breached without

1085, 1087 (2000) (arguing that the proper interpretation of Holmes's view is one where "breach of contract was as much an offense against the law – a legal wrong – as a tort, not the free choice that the misinterpreters of Holmes believe he advocated"). Whether Professor Perillo is correct regarding the proper interpretation of Holmes, however, is immaterial here because canons of legal scholarship and conclusions purportedly flowing from the Holmesian choice model premise have permeated contract legal doctrine at all levels.

¹⁰⁵ See *Acme Mills & Elevator Co. v. Johnson*, 133 S.W. 784 (Ky. 1911).

¹⁰⁶ *Id.*

¹⁰⁷ The phrases "quasi-contract" and "contract-implied-in-law" are fraught with peril, yet their use persists in contract law. See RENDLEMAN, *supra* note 54, at 400-01.

paying, then quantum meruit – “as much as he deserves” – would provide the proper valuation by yielding the “reasonable value” of what defendant would have to pay on the market for services of the nature plaintiff rendered. Again, this restitutionary measure in contract law does not use as its referent defendant’s gain unless one views defendant’s payment of the reasonable value as proxy for payment for the value of the gain. At any rate, such quantum meruit is not equivalent to stripping, or disgorging, all profits that defendant unjustly gains as a result of breaching the contract.

This conceptualization dovetails quite nicely with the underpinnings of capitalism and also has tangible appeal to law-and-economics theorists.¹⁰⁸ Holmes took the focus away from moral implications of breaking one’s word toward the practical, financial implications coupled with the freedom of choice. Professor West cautions of the potential loss by applying Holmesian logic: “By re-defining the moral act as simply one of several possible desired choices, we may sacrifice in the bargain the essence of moral decision-making: It is, after all, central to the moral act as a moral act that it be obligatory.”¹⁰⁹ She fears that in following this “path,” we might “whittle away . . . our

¹⁰⁸ Interestingly, Justice Holmes noted that “[f]or the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.” Martha Minow, *The Path as Prologue*, 110 HARV. L. REV. 1023, 1027 n.1 (quoting Holmes’s writings). Professor Minow writes in a hypothetical memorandum to Justice Holmes that many members of the law and economics moment, beginning in the 1960s, “avidly claim your work as their inspiration, and with good reason.” *Id.* at 1024. According to Professor Gary Minda, Judge Posner views Holmes as “the first serious scholar to attempt to overcome the predicaments of legal modernism . . . in getting legal thinkers to shift their attention from Langdell’s theory of ‘law as a science.’” Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 IND. L. REV. 353, 377 (1994).

¹⁰⁹ West, *supra* note 2, at 810-11. It may not be a zero-sum game to all. Reflecting on Holmes’s famous essay, Judge Posner offered: “Law in the recognizable sense, the sense that will eventually be superseded, is continuous with morality. It enforces a subset of moral duties that is determined by considerations of feasibility and by the cost and efficacy of alternative methods for securing compliance. So it enforces some but not all promises Still, law is saturated with moral terms.” Richard A. Posner, *The Path Away from the Law*, 110 HARV. L. REV. 1039, 1040 (1997).

moral compass.”¹¹⁰ Rather than choose between “acting prudently and paying damages,”¹¹¹ “we should question, rather than cave in to, our apparent consumerist first order preference[,]” and instead “[i]f we have an obligation to keep our promises, perhaps we should re-evaluate, rather than endorse, the wealth earned by paying off our promises.”¹¹² She further opines: “Perhaps what we lose in the bargain is real and substantial, even if incalculable.”¹¹³ In closing, she advocates an “alternate path” to positivism and a reincorporation of moral sense into law because “[i]f we do not explore it, it will become overgrown with weeds and disappear from disuse.”¹¹⁴ Given the causal links between moral and legal norms, the consequence of not exploring an alternative path, according to Professor West, may then include:

the path Holmes has laid out – that in law we should view our obligations contingently rather than categorically, or disjunctively rather than absolutely – will have a distinctly unappealing endpoint: The moral option, for the perversely inefficient-minded actor, will have disappeared. And should that day come to pass, we will no longer be in any position whatsoever to evaluate the relative costs and benefits of the paths less traveled.¹¹⁵

The essence of Professor West’s message receives anecdotal support from my experience teaching contract law to first-year law students. To the extent that contracts casebooks include cases in which the court grants a remedy out of sync with a Holmesian formulation, many professors experience the cognitive dissonance discussed above. In other words, professors may subconsciously fail to recognize the departure or underplay the import of the case. For example, they may attempt to reconcile the case by

¹¹⁰ West, *supra* note 2, at 812.

¹¹¹ *Id.* at 811.

¹¹² *Id.* at 812.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

distinguishing it; they may note its alternative framework, but emphasize its lack of coherence with traditional doctrinal principles. Occasionally, students might resist the professor's analytical framing because the 'outlier' case, in which the court valued the remedy based on defendant's gain, resonated quite well with the student's own intuition, sense of justice, or desire for punishment to all those who fall short of their word. Then, the experience of many law students is that the contracts professor (echoed by many law professors throughout the first-year curriculum) asks the student to detach the moral self¹¹⁶ and think of contract law under the Holmesian choice model and thus any outlier cases as not in accord with traditional contract rules or principles.

The new *Restatement's* doctrinalization of disgorgement (in the rare moment of "opportunistic" breach) may simply right the ship and recalibrate our understanding of what was already happening, reconcile the results, and incorporate common sense. To the extent, however, that common sense and wisdom seep into an underlying desire to stamp out the choice of alternative opportunities following the original promise, punishment occurs. The consequences thus include required reconceptualization, Fourteenth Amendment due process implications, criminal law analogies, and seepage into broader applications, despite the *Restatement's* limiting language and narrowing devices. This seepage would occur because of the resonance with instincts to keep people to their word. This phenomenon occurs when disappointment and judgment flow outside "the law" when a person breaches for any reason. There may be a continuum

¹¹⁶ Detachment is neither attainable nor universally suggested, but students express that the study of contract law – its hierarchy, its doctrines, its professors, its casebooks – often devalues consideration of what the legal consequences "ought" to be unless rooted in concerns like economics, certainty, or predictability. Promissory estoppel includes a direct appeal to "justice" and comes close to promoting "keeping one's word" except that the remedy is limited to only so far as justice requires – ordinarily, expectancy or reliance damages. RESTATEMENT (SECOND) OF CONTRACTS, § 90. It does so based on the reasonable reliance created. Further, professors and judges often lament students' and lawyers' attraction to the doctrine.

upon which we would continue to excuse and charge a defendant with fewer damages for certain breaches, but the notion of “opportunistic” breach would likely grow. Assuming all of these consequences came to pass, would this proposed *Restatement* revision still be desirable?

B. Efficient Breach Model v. Restitutionary Disgorgement Model

Assuming that efficient breaches exist beyond the classroom, if one seeks to promote better resource allocation and social welfare, one would want to encourage breach where the breaching party will be better off even though she must compensate the nonbreacher for the benefit of the bargain (and handle transaction costs).¹¹⁷

Disgorgement discourages breach and incentivizes performance or at least negotiating before breaching. Given this apparent tension, is it possible that restitutionary disgorgement and efficient breach theory can coexist? Even assuming their underlying rationales are dissimilar (social welfare vs. keeping one’s word), might daylight exist between efficient breaches and opportunistic ones? If no daylight exists, should the law gravitate towards § 39’s incentives for keeping one’s word (or at least not behaving egregiously) and away from economic models that value efficiency and choice?

The proposed Comments to § 39 explicitly address the notion of efficient breach. Professor Kull begins: “Modern American contract scholarship devotes considerable attention to a hypothetical case in which breach of contract would be ‘efficient.’”¹¹⁸ Advocates of “the economic view of law often speak of the need to encourage efficient

¹¹⁷ See, e.g., Goetz & Scott, *supra* note 4, at 558 (stating that efficient breach “induces a result superior to performance, since one party receives the same benefits as performance while the other is able to do even better”).

¹¹⁸ RESTATEMENT OF RESTITUTION, *supra* note 3, at 25.

breach”¹¹⁹ Accordingly, proponents advise that a party “ought to breach a contract whenever the anticipated profits from breach would be more than sufficient to pay the other party’s damages, thereby leaving some parties better off and nobody worse off.”¹²⁰

Professor Kull acknowledges that “[t]he rationale of the disgorgement liability in restitution . . . is inherently at odds with the idea of efficient breach.”¹²¹ He elucidates this direct tension between the underlying justifications of restitutionary disgorgement and efficient breach: “To take without asking, having calculated that one’s anticipated liability in damages is less than the price one would have to pay to purchase the rights in question, is precisely the conduct the law of restitution condemns.”¹²² According to Professor Kull, however, the two concepts are not mutually exclusive. The disgorgement remedy of § 39, as Professor Kull frames it, “does not automatically *punish* an efficient breach with a disgorgement remedy, however, because of the requirement that the breach be opportunistic.”¹²³ In other words, efficient breach is not synonymous with opportunistic breach. The logical conclusion is that § 39 is not the death knell for efficient breach. Given the incongruous rationales for the two concepts, however, restitutionary disgorgement may serve as at least one nail in the efficient breach coffin.

The light that Professor Kull sees between the two may find support in his framing of § 39’s disgorgement remedy in narrow parameters. Recall that Professor Kull envisions that restitutionary disgorgement for opportunistic breach will be exceedingly rare because § 39(2) circumscribes application to a narrow set of defined opportunistic

¹¹⁹ DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 389 (Aspen Pub. 3d ed. 2002) [hereinafter LAYCOCK, REMEDIES].

¹²⁰ RESTATEMENT OF RESTITUTION, *supra* note 3, at 26.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* (emphasis added).

breaches.¹²⁴ By definition, then, in order to qualify as “opportunistic” the breach must be “*profitable* (as defined in § 39(3)),” which, in Kull’s estimation, “eliminates most instances of breach.”¹²⁵ Further, as Professor Kull delimits, the disgorgement avenue in restitution “principally” services “instances of conscious wrongdoing” and thus exempts “any default that results from the defendant’s inadvertence, negligence, or unsuccessful attempt.”¹²⁶

To illustrate that not all efficient breaches will result in restitutionary disgorgement, Professor Kull points to the following illustration:

Seller agrees to manufacture and deliver to Buyer 1000 widgets at \$1000 each. Seller’s normal cost of production is \$250 per widget. Before the date fixed for delivery, problems with Seller’s manufacturing equipment increase Seller’s cost of production to \$350 per widget. Seeking to minimize its own cost of performance, Seller acquires similar widgets from Supplier at \$300 each and tenders them to Buyer. Although Seller’s conduct is evidently self-interested, it is consistent, under the circumstances, with reasonable commercial standards of fair dealing in the trade (U.C.C. § 2-103(b)). Buyer accepts the goods but notifies Seller that they are nonconforming and sues for breach of warranty. Buyer proves at trial that the goods did not conform to the contract and that each of Supplier’s widgets was worth \$10 less than a comparable widget manufactured by Seller. *Seller’s breach of contract is deliberate and profitable* (saving \$50,000 by comparison with the cost to Seller of making a confirming tender), *but it is not opportunistic: on the facts assumed, there is no reason to conclude that Buyer’s entitlement will be inadequately protected by an ordinary damage remedy.* Buyer is entitled to damages of \$10,000 (U.C.C. § 2-714(2)), but Buyer is not entitled to Seller’s saved expenditure of \$50,000.¹²⁷

Accordingly, aligning with Professor Kull’s formulation, the above-illustrated breach is deliberate, profitable, and not opportunistic. It is also efficient because ultimately the

¹²⁴ *Id.* cmt. g, at 21.

¹²⁵ *Id.* His formulization would exclude the earlier wheat hypothetical, *supra* Part IV.A., even though the breach would be “deliberate” and “profitable.” Under § 39 properly construed, the restitutionary disgorgement remedy would be unavailable assuming a viable market substitute exists because then the buyer’s entitlement will be adequately protected by the ordinary damage remedy.

¹²⁶ *Id.* at 22.

¹²⁷ *Id.*, Illustration 13, at 23-24 (emphasis added).

defendant will pay \$10,000 in ordinary commercial contract damages – theoretically, and arguably, leaving the plaintiff no “worse off” and the defendant “better off” with the savings of \$40,000.¹²⁸

Is it possible that the \$10,000 traditional remedy could inadequately protect plaintiff’s entitlement? Recall that § 39(2)(c) explicitly sets forth the parameters of adequacy.¹²⁹ The traditional money damages are “ordinarily an adequate remedy if they can be used to acquire a full equivalent to the promised performance in a substitute transaction[,]” but they are “ordinarily an inadequate remedy if they cannot be used to acquire a full equivalent to the promised performance in a substitute transaction.”¹³⁰ As such, with respect to the above hypothetical, it appears that “ordinarily” is the pivotal term. Plaintiff will be unable to use the \$10,000 in a substitute transaction to buy the full equivalent of the widgets as promised. Accordingly, this result is “ordinarily” inadequate. Yet, we know that Professor Kull deems it adequate and therefore rules disgorgement inappropriate. Professor Kull meets this issue with further clarification in the comments: “there is no opportunism and no claim under this Section if the defendant tenders a performance that, when combined with money damages, yields a full equivalent of the plaintiff’s contractual entitlement.”¹³¹ Will plaintiff view the retention of nonconforming widgets plus the \$10,000 damage award as yielding the “full equivalent” of her contractual entitlement? Further, is there conduct that we may want to deter here – defendant’s deliberate decision to make a greater profit by avoiding the increased cost of performance, while likely knowing that the substitute widget would be nonconforming

¹²⁸ *Id.* at 24 & 26.

¹²⁹ *Id.* § 39(2)(c)(i)-(ii).

¹³⁰ *Id.*

¹³¹ *Id.* cmt. g, at 22.

with the promised widget? Is there an argument that this is “conscious wrongdoing” for which defendant should not be allowed to profit at plaintiff’s expense? In terms of economic analysis, couldn’t one argue that the defendant is the “least cost avoider” who could have avoided the problem at the least cost by more accurately accessing and anticipating the costs of production and adjusting the requested return consideration at the front end?¹³² This analysis supports holding defendant as the liable party, but for how much? Perhaps Professor Kull is right that defendant’s “self-interested” *choice* is consistent “with reasonable commercial standards of fair dealing in the trade” and not rising to the level of opportunism worthy of a disgorgement remedy. But, labels alone, especially labels that are difficult to decipher, will not convince situated plaintiffs who want the conforming widget that the combination of ordinary damages with the delivered nonconforming widget are the “full equivalent” of the promised entitlement, or that defendant’s deliberate and profitable maneuver is not opportunistic.

We are drawing lines here. Lines of morality. Lines of conscience. Lines that, once redrawn, will seep into mindsets of plaintiffs’ lawyers, judges, and academics, and then begin to affect what is and is not “reasonable” in commercial dealings and what is and is not a permissibly “efficient” breach.

Assuming *arguendo* that Professor Kull is correct that a theoretical efficient breach might exist that will *not* “automatically” garner the disgorgement remedy for the profitable and deliberate breach of contract, certainly the bulk of breaches that a law and economics scholar would have encouraged might now have the rug pulled out by means

¹³² For creation and articulation of the least cost avoider doctrine, see, e.g., GUIDO CALABRESI, THE COSTS OF ACCIDENTS 138-52 (1970); Guido Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656, 666-67 (1975); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L. J. 1055, 1070 (1972).

of disgorgement. Would law and economics scholars, as well as legal and business actors following such advice, bristle (or cower) at § 39? An economist might be neutral on the adoption of § 39 as long as the new damage rule is clear enough to facilitate renegotiation efforts by the parties. Professor Laycock's Remedies Casebook notes and discusses the fact that Judge Posner's economic analysis does not encourage non-deterrence of all efficient breaches, but instead, Judge Posner has recognized the appropriateness of deterrence for what might be "opportunistic" breaches.¹³³ As evidence of this recognition, Professor Laycock points to Judge Posner's exploration of the following from Posner's *Economic Analysis of the Law*:

If a promisor breaks his promise *merely to take advantage of the vulnerability of the promisee* in a setting (the normal contract setting) where performance is sequential rather than simultaneous, we might as well throw the book at the promisor. An example would be where A pays B in advance of goods and instead of delivering them B uses the money in another venture. Such conduct has *no economic justification* and ought simply to be deterred. . . . The promisor *broke his promise in order to make money* – *there can be no other reason* in the case of such a breach. We can deter this kind of behavior by making it worthless to the promisor, which we do by making him hand over all his profits from the breach to the promisee; no lighter sanction would deter.¹³⁴

If "opportunistic" breaches were breaches premised "merely" on a desire "to take advantage" of another's "vulnerability," the application of a restitutionary disgorgement remedy would be decidedly rare. In response to Judge Posner's opining, Professor Laycock poses further hypotheticals: "Suppose buyer pays in advance for goods in short supply. Suppose a third party with a more valuable use then offers seller a higher price for those goods. Suppose seller breaches her contract and sells to the third party." He

¹³³ LAYCOCK, REMEDIES, *supra* note 119, at 392.

¹³⁴ *Id.* (quoting POSNER, ECONOMIC ANALYSIS OF LAW § 4.8, at 130-31) (emphasis added).

then queries whether such examples are opportunistic or efficient.¹³⁵ What if one intends to perform, but later has a change of mind.¹³⁶ Again, these issues call for difficult line-drawing.¹³⁷

Professor Laycock ends the discussion on efficient breaches with two significant questions: (1) “Doesn’t the promisor who breaches for a higher price always do it ‘in order to make money,’?” and (2) “Can opportunistic and efficient breaches be clearly distinguished?”¹³⁸ This first question answers itself, and the second strongly implies that a clear distinction will be hard to discern. The difference between a breach we label or brand as opportunistic versus efficient will depend, in part, on the judgment and perspective of the observer.

Proponents of law and economic analysis who encourage efficient breaches are not likely to view the breaches as opportunistic even if deliberate and profitable. They might agree with some outside boundary of an inappropriate adulteration of efficient breach theory such as Judge Posner’s hypothetical breacher who takes advantage of a

¹³⁵ *Id.*

¹³⁶ See FRIED, *supra* note 90, at 10 (“But where is the injustice if I honestly intend to keep my promise at the time of making it, and later change my mind. If we feel I owe you recompense in that case too, it cannot be because of the benefit I have obtained through my promise If I owe you a duty to return that benefit it must be because of the promise. It is the promise that makes my enrichment at your expense unjust, and not the enrichment that makes the promise binding. And thus neither the statement of intention nor the benefit explains why, if at all, a promise does any moral work.”).

¹³⁷ Section 39’s rationale raises potential implications that may require further line-drawing with respect to the non-breaching party as well. To what extent should we impose obligations on the non-breaching party? The non-breaching party has a duty to mitigate damages, which has economic, as well as self-help, justifications. See Caprice L. Roberts, *Restitutionary Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages*, 42 LOY. L.A. L. REV. __ (forthcoming 2008), available at <http://ssrn.com/abstract=1152303> (maintaining that mitigation principles should serve as a prerequisite for seeking restitutionary disgorgement relief). Would a morality framing add other obligations? More precisely, through the lens of morality, why not ask whether, in certain circumstances, the non-breaching party should have a legal obligation to revisit the fit of the contractual bargain for both parties and consider releasing the other party or renegotiating the now ‘unfair’ terms in light of changes of circumstance. In some bargains, parties negotiate up front and calibrate risks for the long term. In other scenarios, one party may become dissatisfied with how the bargain unfolds in light of unforeseen, or not fully appreciated, circumstances. Disgorgement for opportunistic breach shines a moral light on the breaching party. This light may well shine beyond its intended target.

¹³⁸ LAYCOCK, REMEDIES, *supra* note 119, at 392.

vulnerable person purely for the money. More likely, however, they might view Judge Posner's example as not an efficient breach at all, but instead a distinguishable conversion-style maneuver. Professor Daniel Friedmann questions Judge Posner's "retreat" because the suggested disgorgement of profits for this "opportunistic" hypothetical "is diametrically opposed to the efficient breach theory, the essence of which is that the promisor should be allowed or even encouraged to commit a breach whenever his gains exceed the promisee's loss."¹³⁹

Opponents of the efficient breach model will seize this moment. They will use § 39 and its underlying rationale to dismantle efficient breach. Some academics already view the efficiency prediction as suspect given the transaction costs inherent in litigation.¹⁴⁰ Others resist the emphasis on choice and economic consequence rather than on the tone of the obligation and any collateral consequences on the conscience, good will, or reputation of the breacher.¹⁴¹ Some will likely view § 39 as dovetailing with their preferences and declare victory against efficient breach advocates.

It is premature for any declaration of victory. Professor Kull's draft comments to the *Restatement* claim to stop short of erasing an avenue for efficient breach. Section 39 will no doubt, however, deliver a serious blow to the efficient breach model. Its underlying rationale also burrows a fissure in the broader traditional theory underlying contract law – Holmes's conception that all the defendant need do is assess and choose whether she wishes to perform or pay the consequences. The premise is actual choice

¹³⁹ Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 3-4 (1989).

¹⁴⁰ See, e.g., Linzer, *supra* note 6, 118-21 (criticizing the economic assumption regarding a hypothetical world in which transaction costs do not exist). Cf. Ian R. MacNeil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947, 954 n.28 (1982).

¹⁴¹ See, e.g., Friedmann, *supra* note 139, at 13-18 (questioning the plausibility of the efficient breach model given its amoral perspective).

based on an ability to pay traditional contractual remedies such as expectancy damages. Now the consequences have dramatically changed (at least for a small subset of breachers). With § 39, a prospective breacher would be armed with the knowledge that the choice of breach comes potentially with a complete strip of the causally connected profits earned upon breach. Will § 39 deter individuals from not only maximizing their own wealth, but also the wealth of others? For example, where a court uses the defendant's profit as the measure instead of, or as a proxy for, plaintiff's loss, defendant loses the monetary benefit of the breach.¹⁴² Does this leave any choice at all? Will it be worth the transaction costs for a party to breach purely to attain intangible benefits from a *bigger, better deal* given that much, if not all, of the monetary benefits will be captured and given to the non-breaching party?

V. CONCLUSION

The anticipated release of the *Third Restatement of Restitution and Unjust Enrichment* presents a thrilling and critical moment for contracts, restitution, and remedies scholars. With each provision, opportunity remains for clarification. Section 39's allocation of restitutionary disgorgement for opportunistic breach of contract is a considerable contribution within the law of unjust enrichment that directly affects substantive contract law. Further, it will provide a powerful weapon for a claimant. The possibility for overuse and misuse exists. Before the ink is dry, our inquiry should include an exploration of whether the moral underpinning of restitutionary disgorgement will alter contract doctrine for good or ill.

¹⁴² To some extent, courts use this proxy in cases where Professor Kull would not intend that § 39 apply. *See, e.g.,* Roth v. Speck, 126 A.2d 153 (D.C. Mun. App. 1956) (awarding the employer the profit differential earned by the breaching employee from the new employer, effectively stripping the monetary benefit, and eliminating the potential for an efficient breach).

Despite protestations of limited application for restitutionary disgorgement for opportunistic breach, the intellectual shift in rationale is significant. It will inject moral blameworthiness into contractual legal obligation. It will honor the view that one's word is one's bond as Professor West hoped. It will send Holmesian-influenced contract teaching and lawmaking into a new period of introspection and, perhaps, revision. It will fuel efforts to dismantle efficient breach theory. It will resonate with moral instincts of some students, lawyers, and judges. It will deter. It will judge moral culpability. It will feel like punishment. It will ripple through contract law and related legal and business sectors. It will come with all of these potential consequences and perhaps more – all draped in language of limitation intended to tailor sharp boundaries of application. But, in the end, a Trojan horse is a bad thing only if you want the Greeks to lose.

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