1. Scope of the Chapter
This chapter presents an economic analysis of some of the most typical cases involving the law of restitution, which is generally defined as the class of all claims grounded in the unjust enrichment of the defendant (Goff and Jones 1993, p. 3). Actions that seek damages based upon restitutionary principles at law are frequently characterized as quasi-contractual in nature. However, restitutionary remedies are also available in equity, as with the constructive trust that a court can impose on property to avoid the defendant’s unjust enrichment. This chapter will question the economic utility of a generalized theory of unjust enrichment, but defends the economic wisdom of three of the most common categories of relief that have gone under that umbrella term.

The first of these sources of restitutionary or quasi-contractual relief involves plaintiffs who did something that purposely but unofficiously benefited defendants, such as a physician who provided emergency medical services to an unconscious patient. An economic rationale could be that the law is seeking to provide an incentive for providers to render services that the recipients value more than their cost but that cannot be negotiated contractually by virtue of high transaction costs.

If the rescue is indeed efficient, one question is whether the potential rescuer should be under an affirmative duty to provide the service (Epstein 1973, p. 190). Thus, this chapter will explore both restitutionary ‘carrots’ for rescuers and potential tort or criminal ‘sticks’ that might be imposed on nonrescuers.

The rescue situation, however, is by no means the only scenario in which restitutionary relief is available. This chapter will discuss two other broad patterns of cases. One pattern concerns transfers that were not fully voluntary or informed, as with payments of money by mistake or pursuant to a contract that has become impossible to perform. In such situations, plaintiffs can often recover restitutionary recoveries from defendants, although defendants may be able to interpose defenses such as changed circumstances.

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1 Cotnam v. Wisdom, 104 S.W. 164 (Ark. 1907); In re Crisan Estate, 107 N.W.2d 907 (Mich. 1961).
circumstances in reliance on the payments made. The economic theory here is that full divestiture of the plaintiff’s property as a consequence of mistake would encourage excessive care in the avoidance of mistakes or in the contractual transfer of possession. If the social cost of a mistaken or contractual transfer is small, it would not be wise to allow the private cost of the transfer to be large.

A third common restitutionary pattern is the benefit-based remedies for wrongs committed. For example, if the defendant converts property belonging to the plaintiff and uses the property to make some profit, the plaintiff may be able to ‘waive the tort and sue in assumpsit’ to recover the gain the defendant has made. The economic theory here is essentially one of deterring a defendant from bypassing market transactions where transaction costs are low enough to make such transactions feasible.

2. The Anomaly of Benefit-based Liability
The essence of restitutionary claims is often said to be the focus on the defendant’s gain as opposed to the plaintiff’s loss (Dobbs 1993, section 4.1). From an economic perspective, this is immediately anomalous. Economic analysis generally sees legal intervention as a response to conduct that imposes harm, seeking to sanction or ‘price’ that behavior so as to reduce its incidence to more optimal levels. Barring some argument based upon envy or spite, the presence of a gain as such is not a reason for the law to become concerned (Wonnell 1996, pp. 177–90). To the contrary, the defendant’s gain is normally a factor that cuts against the wisdom of trying to impose sanctions on the defendant for harms that the defendant may have caused.

For example, one imposes sanctions on a contract breacher because of the harm that breach inflicts on the promisee, but one might worry about excessively large sanctions that would deter even efficient breaches where the defendant’s gain from breach exceeded any harm caused (Posner 2007, pp. 119–20). Similarly, one imposes tort liability on an ultra-hazardous activity because of its predictable harms or costs, but one is not led to embrace criminal sanctions, injunctions, or benefit-based liability against the blaster precisely because of the gains that the defendants (and their contractual partners) are making from their blasting activity. And, of course, under Learned Hand’s famous test of negligence in the Carroll Towing case, an action can be considered non-negligent and therefore escape liability precisely when the benefits from not taking care were larger than the expected harm.2 Finally, the paradigm case of damnum

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2 United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).
can be compensated precisely because the gains made by defendants and their
contracting partners from the ability to compete freely are too large.

These facts strongly suggest that ‘unjust enrichment’ is never going to
have the unity as a field that might be possessed by other great categories
of the law such as tort and contract (Wonnell 1996). The conclusory label
‘unjust’ hides the nature of the harm that warrants legal intervention. And
there must be some special, rather than general, reason to regard ‘enrich-
ment’ as an integral part of the wrong rather than as a factor in complete
or partial mitigation of the wrong.

This chapter suggests that ‘unjust enrichment’ is really a shorthand for
three essentially different concepts. The first is the theory of rewarding
those who intentionally confer positive externalities on others with the
fruits that could have been earned by contract had transaction costs been
lower. The second is the idea of incomplete divestiture of property. The
third is the notion of deterring the conscious bypassing of available market
options.

3. Hypothetical Contracts for Rescuers; Duty to Rescue

One situation in which the law has awarded ‘restitutionary’ remedies
involves the plaintiff who rescued the defendant’s person or property and
seeks compensation for costs incurred in the rescue. Physicians are fre-
quently awarded their reasonable fee when they render emergency medical
services to unconscious patients. Other situational rescuers are sometimes
given compensation for their out-of-pocket costs, although many provid-
ers of services are denied compensation for having acting ‘officiously’
(Dawson 1961). If tort law penalizes the imposition of negative exter-
nalities, this branch of restitution law rewards the creation of positive
externalities (Epstein 1994, p. 1377).

Dramatic rescues from death or serious bodily injury are not the only
element of this class of remedies. In Continental countries, a party can
recover in negotorium gestio for costs incurred in repairing storm damage
to the house of a neighbor who was out of the country. Co-owners of
property are often allowed to make necessary repairs or maintenance
expenses on the common property and to bring actions against their co-
owners for compensation. A party who creates a common fund, such as a
class-action plaintiff or her attorney, can often recover in restitution from
others benefited by the plaintiff’s action (Silver 1991, p. 656). Although
less dramatic than the rescue cases, the essential principles of these cases
are the same. The transaction costs of a voluntary transaction are high,
whether because of unavailability of a party, bilateral monopoly condi-
tions, or free rider effects, and the Kaldor-Hicks efficiency of the service
is sufficiently obvious that the risk of judicial error appears tolerably low (Bouckaert and De Geest 1995, p. 485).

It is certainly true that not all providers of valued services are entitled to compensation from the enriched recipients. Courts tend to deny recovery to those who ‘intermeddle’ or provide services ‘officiously’. When transaction costs are low enough to enable a voluntary transaction, there is no efficiency advantage to allowing parties to provide services without consent and then to demand compensation after the fact.

It is somewhat doubtful that the principle involved in the rescue cases is one of benefit-based liability at all (Levmore 1994, p. 1427). The physician who performs emergency medical services is not really asking for a benefit-based remedy (Saiman 2007, p. 13). If the service was ineffective, the plaintiff can recover although the defendant derived no benefit. And if the service was effective, the benefit derived is the value of the defendant’s extended life, which is not awarded. Nor should it be, from the standpoint of efficiency, for such a ‘rescue’ which provided no benefit to the defendant would encourage the defendant, who controls the regular use of herself and her property, to exercise excessive care to avoid the need to be ‘rescued’ (Wittman 1985, p. 182). The plaintiff’s regular fee is normally a good measure of the defendant’s benefit because it is a reflection of alternatives available to the defendant; if many people are willing to perform a service for a particular fee, any one service provider cannot benefit the defendant by more than the fee she could have paid instead. However, in the rescue context, there may have been no other service providers, so the plaintiff’s regular fee is no longer an indication of the extent of the defendant’s benefit (Wonnell 1996, pp. 169–71).

Instead, the principle of the rescue cases is essentially one of hypothetical contract, imposing on the defendant the contract which would have been consented to had the transaction costs been lower (Long 1984, pp. 415–16). It is properly denied when the plaintiff had no contractual intent, as when the services were offered with the intention of extending them as a gift. The label ‘quasi-contract’ has a bad reputation with restitution scholars, because the notion of ‘contract’ is so misleading in describing why the defendant is liable in the case of mistaken transfers or in the case of willful conversions (Goff and Jones 1993, p. 6). In the rescue setting, however, the contract analogy seems apt, as long as one remembers that the consent is hypothetical and indicative only of how the parties would have contracted had the opportunity been available.

Rescuers are not always treated well by the courts (Dagan 1999, p. 1152). Courts may dismiss rescuers as intermeddlers too frequently, leading to an inefficiently low number of rescue attempts (Wade 1966, p. 1212). One situation in which rescuers fare somewhat better is in
admiralty, where successful rescuers are often awarded a considerable fee for their efforts (Albert 1986, pp. 111–15). The need for professional rescuers to engage in investments in rescue-related equipment may partially explain the sympathy accorded to such rescuers in admiralty. It has been argued that the structure of compensation for rescuers in admiralty closely approximates the terms of a transaction that the parties would have made with the rescuer had a transaction been possible (Landes and Posner 1978, pp. 103–04).

Are there good economic reasons for the law to take a different attitude toward sanctioning inflictors of negative externalities as opposed to subsidizing generators of positive externalities? It has been questioned whether there are sound economic distinctions, and that the law’s asymmetry in this regard is better understood in non-economic terms about responding to ‘harms’ or ‘rights violations’ rather than all costs (Hershovitz 2006, p. 1152). On the other hand, liability for harm and lack of awards for benefits both put the onus for negotiating a change in legal status on the active party who might be better situated to undertake that function (Levmore 1985, p. 70). In some circumstances, a reasonable level of efficiency can be obtained by the party who wants to create positive externalities obtaining the consent of one or a few beneficiaries. The others can free ride but, unlike parties protected by property rules against harms, cannot hold out in such a way as to block settlements altogether (Porat 2009, p. 205).

An interesting question is whether rescues, if they are clearly efficient, should be required rather than left to the law of quasi-contract. An award that was substantial enough to clearly exceed the plaintiff’s costs should be sufficient to inspire rescue. If restitutionary awards are generous, a duty to rescue could be superfluous, but by the same token it would appear to be a harmless supplemental incentive.

The most serious problem with penalties (especially when pursued to the exclusion of liberal restitutionary awards) is their indirect effects on incentives. A person who realizes that her talents and properties can be conscripted to help others will not have as much incentive to develop those talents and properties in the first place or have them in a place where they could be useful to others, although the empirical significance of this problem will vary with the circumstances (Levmore 1986, pp. 889–92). This problem might be quite unimportant where the cost of the rescue was trivial, as with the paradigm case of the person who refused to throw a rope to a drowning swimmer.

The incentive problem with mandatory rescue as opposed to restitutionary regimes is essentially a problem of governmental knowledge. To impose an efficient duty to help, one would need to know about the previous choices available to potential rescuers and what effect the prospect of
liability might have on those choices. To create a hypothetical contract, one can instead ignore past choices, as a mutually beneficial transaction should not deter others similarly situated from making the choices which would place them in a position to be of service to others.

This is not to say that a duty to rescue would always be inefficient. Where one party is both a better avoider of the loss and a better insurer against uncertain outcomes, it may be an express or implied part of a contract that one will provide rescue services when needed by the other. This may explain why the law sometimes imposes a duty to rescue between parties in a ‘special relationship’ with each other, such as common carriers or innkeepers and their guests (Prosser and Keeton 1984, section 56, pp. 376–7). Another possible case for an efficient rescue duty would be a setting in which one was equally likely to be a rescuer or a rescuee. In that case, a party may actually be encouraged to be in a position where she can be of service, as an unintended byproduct of wanting to be somewhere that others would have a duty to rescue if one got into trouble (Hasen 1995, p. 141).

Another potential problem with a duty to rescue is that the would-be rescuee loses some of her incentive not to be in a position that would require rescue (Wittman 1981, p. 89). In principle, this should be accounted for in saying that the duty is truly an efficient one, for if the rescuee is a cheaper cost-avoider, the would-be rescuer’s duty would not be efficient (Calabresi and Hirschoff 1972, pp. 1060–61). However, this would once again require considerable knowledge on the part of the state as to the steps that could have been taken by would-be rescuers and rescuees.

If knowledge of decisions available in prior periods is unavailable, the safer course may be to try to construct mutually beneficial bargains by generous rewards extended to rescuers, at least where there is no reason to fear that a plaintiff may have induced the demand for her own rescue services (Levmore 1986, p. 886). It is true that a restitutionary award, by making rescues more likely, will increase the incentive of potential rescuees to act in ways that will require their rescue, but because rescuees will be forced to pay for the service rendered to them, the effect will be considerably smaller than that generated by a duty to rescue.

Still another potential problem with the duty to rescue concerns administrative costs. Parallels can be drawn with the great costs of trying to enforce against consensual or victimless crimes, where lack of evidence is a serious problem unless one resorts to very aggressive law enforcement techniques. The person who was not rescued may be deceased and unavailable as a witness, while other witnesses to the nonrescue may be equally culpable as nonrescuers and thus unwilling to bring forward their information (Rubin 1986, p. 274). And if multiple nonrescuers were
involved, there will be difficulties in assessing relative responsibility. There may be some incentive gain from the purely symbolic effect of creating a largely unenforceable legal duty to rescue, although this would have to be traded off against any losses that might occur in the feelings of altruism or heroism that might result from the perception that one was performing only a legal duty (Rubin 1986, p. 275).

The economic argument for a duty to rescue – somewhat uncertain, as noted above, at least for rescues of nontrivial cost – should be distinguished from the broader social or utilitarian argument for redistribution from those with surplus resources to those with greater need for the resources. The economic argument asserts that each rescue is a Kaldor-Hicks efficient transaction, and can add that rescue situations are sufficiently unpredictable that a general duty of rescue might well be in everyone’s ex ante interest to accept. The redistributive argument would assert that people have a duty to do their part for others in dire need even if the economic value of their resources (as contrasted with their utility) is not higher in the rescuer’s hands, and despite the fact that the rescuer may have no reasonable expectation of receiving reciprocal benefits. In normal circumstances, a welfare state would be the sensible mechanism for coordinating such a duty, but in rare emergency cases the person who should act might be sufficiently individuated that a private law rescue duty could supplement the system of taxation and public protection. At least some commentators appear to make both the economic and the redistributive arguments for a duty to rescue (Weinrib 1980, pp. 272, 292). The redistributive argument of course suffers from the more general moral hazard problems of welfare states in altering behavior by shielding people from the consequences of their choices.

4. Incomplete Divestiture
Suppose that the plaintiff pays money to the defendant by mistake, perhaps having miscounted the money or misidentified the defendant’s account number. It has been argued that these cases raise purely distributitional concerns and do not create social costs that would require economic analysis (Gergen 2001, p. 1929). But in fact there is an economic rationale for requiring the defendant to return the money.

The essential idea is that the plaintiff is in a position to make decisions over her own property, and the law should create an incentive to optimize these decisions. There may be a modest social cost created if the plaintiff is careless in directing her money, as the mistake must then be identified and corrected at some administrative effort. Ideally, the property holder should be liable for these costs in order to ensure that she takes proper care to avoid mistakes. However, it would not be efficient to punish mistakes
with full divestiture of the plaintiff’s rights to the value of the money. Such a rule would impose a private cost on the plaintiff much larger than the social cost of correcting a mistake. The plaintiff would be induced to exercise too much care to avoid her mistake (Huber 1988, p. 99). Moreover, the defendant would have a perverse incentive not to correct, or even potentially to cause, the plaintiff’s mistake.

It should be noted that restitution claims do not always involve a literal transfer of property from the plaintiff to the defendant. The plaintiff may have provided services, or discharged the defendant’s debt, but there has been a transfer of wealth from the plaintiff to the defendant, measured abstractly (Lionel Smith 2001, p. 2142). And ‘property’ can be a contestable basis for defining appropriate enrichments (Dagan 2004, pp. 21–2). On the other hand, it has been argued that restitution is a field potentially allowing excessive judicial discretion, and that the primary cases for relief should be those where harm and enrichment are clearly defined by property entitlements previously established (Sherwin 2005, p. 1182).

In the case of money, the social cost of the mistake is usually small, although it may be large if the defendant took actions in detrimental reliance on what reasonably appeared to be new wealth. In other situations, the social cost of mistake may be quite substantial. A common pattern involves a plaintiff who constructs a building by mistake on the defendant’s land.3 As the defendant did not ask for the building, it may be worth considerably less than the value of the plaintiff’s labor and materials invested in the project (Dickinson 1985, pp. 62–3).

Older cases tended to deny recovery to the plaintiff builder on the theory that the defendant should not be made worse off by being required to pay for an improvement she did not want. 4 This approach, however, does create an incentive for the plaintiff to exercise excessive care in avoiding mistakes, and for the defendant to exercise insufficient care to avoid such mistakes by the plaintiff.

Many recent cases have granted a restitutionary recovery for the plaintiff who constructs a building on the defendant’s land by mistake. The Betterment Acts enacted in most US jurisdictions give an owner the choice between paying the value of the improvement or selling the land to the improver at its unimproved value (Dagan 2001, pp. 1128–9). The problem with this approach is that the social cost of the mistake is difficult

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to measure. The illiquidity of the newfound wealth imposes different costs on different types of parties, depending upon their overall preferences and financial situation (Kull 1997). Perhaps the best approach would be for the courts to make generous assumptions about the amount of harm that will be caused by the illiquidity, and to award the plaintiff an amount that one can assert with considerable confidence will not make the defendant worse off from the overall transaction.

The essence of the plaintiff’s claim is not that the defendant has been enriched. If for some reason the plaintiff’s building looked particularly good on the defendant’s land, there is no reason to require the defendant to disgorge the gains received in excess of the costs plaintiff has incurred. Rather, the plaintiff’s essential claim is harm caused by the incomplete divestiture of property.

It would clearly be undesirable to allow the plaintiff to retain formal title to the building while the defendant retained formal title to the underlying land. This would create serious problems of bilateral monopoly and accompanying high transaction costs of breaking the compulsory relationship (Wonnell 1996, p. 197). Property, however, is a bundle of severable sticks, and the fact that necessity compels the divestiture of the plaintiff’s physical rights to the property does not mean that the plaintiff must also lose her rights to the value of that property.

Incomplete divestiture is the counterpart to the more familiar idea of incomplete privilege (Bohlen 1925). A defendant who is caught in a storm and needs to use the plaintiff’s docking facilities is not confronted with legal rules designed to prevent use of the plaintiff’s property, such as criminal sanctions, injunctions, or benefit-based liability. However, the defendant remains liable for the costs imposed, as an incentive for the defendant to take the potential for such emergencies into account in evaluating how to make use of her own property. Necessity compels the yielding of exclusive physical rights to the property (and the right to charge any price made possible by free contract), but it does not compel the yielding of the plaintiff’s rights to the value of the property. ‘Restitution’ in these cases is essentially the same principle, but where the plaintiff rather than the defendant is the active party, and accordingly where the law must remain alert to the possible harms caused by the activity in question.

Contracts provide the backdrop for many restitutionary remedies. In some circumstances, especially important in losing contracts, the courts

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5 Madrid v. Spears, 250 F.2d 51, 54 (10th Cir. 1957); Rzeppa v. Seymour, 203 N.W. 62, 63 (Mich. 1925).
6 Vincent v. Lake Erie Transportation Co., 124 N.W. 221, 222 (Minn. 1910).
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may allow a restitutionary recovery as an alternative to standard expectation principles of damages. This is quite a problematic idea, as it allows the plaintiff to escape the allocation of a risk that the contract may have efficiently placed (Kull 1994, pp. 1465–70). It also gives the plaintiff a perverse incentive to induce the defendant to breach a contract, or to jump on breaches of uncertain materiality as excuses for rescission. However, in some situations it seems likely that the parties would have wanted a restitutionary recovery, especially where the defendant completely failed to perform and the plaintiff’s restitutionary interest is much easier to calculate than her expectation (Kull 1994).

Restitution is also granted in many cases to the breaching party to a contract. As a general idea, this is simply a way of ensuring that the nonbreaching party receives her expectation interest, but only her expectation interest, upon breach. It is therefore justified by the general economic argument that favors expectation damages and disfavors punitive damages, involving the principle of efficient breach and the desire to avoid high-transaction-cost bargaining over the surpluses from breach between bilateral monopolists (Posner 2007, p. 119). On the other hand, in some circumstances it may be difficult to calculate the expectation interest, with the result that a restitutionary recovery for the breaching party threatens to undercompensate the nonbreacher and thereby underdeter breach.

Parties sometimes provide for forfeitures of downpayments without regard to actual damages as an implicit recognition of this phenomenon of restitutionary awards leading to undercompensation of the nonbreaching party. The general argument that contracts are presumed efficient (at least between informed parties) would argue for the enforcement of such bargained-for forfeitures.

Finally, restitution is often granted in the case of broken contracts, such as those held to be unenforceable under the Statute of Frauds, or those that become impossible to perform through some intervening condition or statute. Again, we face a case of incomplete divestiture of property. The parties parted with their goods or services on assumptions that have proved to be invalid. If the court were to simply leave the parties where it finds them, the parties would have incentives to strategically and uneconomically delay the transfer of physical possession of resources involved in the contracting process (Bouckaert and De Geest 1995, p. 475). To induce parties to use optimal timing in contracts, transfers should be undone if

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7 Restatement of Restitution (1937, section 108(b)).
no social harm has been caused (by, for example, affixing resources to projects that no longer have value).

If a net social harm has been caused by contractual activity, the problem is more complex. Indeed, there is a terminological issue of whether ‘restitution’ is really involved when the plaintiff’s work caused loss to the plaintiff but did not actually enhance the defendant’s wealth (Petty 2008, pp. 371–5). Clearly, there are many such cases in which a remedy called ‘restitution’ has been allowed (Dawson 1961, p. 577), but it has been argued that this use of the restitution (or ‘restoration’) concept without unjust enrichment is productive of confusion (Kull 1995, p. 1193). From an economic point of view, when there is a net social loss one might ask which of the parties is more efficiently situated to have prevented or insured against that loss (Posner and Rosenfield 1977, p. 83). In this sense, the problem is analogous to the economics of accidents (Dagan 2001, p. 1795).

5. Disgorgement for Bypassing Viable Market Options

Another use of the restitutionary idea is as an alternative remedy for wrongs. It should be noted that not all commentators are comfortable that the concept of ‘restitution’ governing disgorgement remedies is the same unjust enrichment concept creating substantive liability in other settings (Edelman 2001, p. 1869). In a somewhat similar vein, others have argued that ‘restitution’, with its connotation of ‘giving back’, can be a misleading label for such a disgorgement approach (McInnes 1999, pp. 24–5; Stephen Smith 2003, pp. 1042–3).

Terminological issues aside, a person who intentionally converts property belonging to another is liable in tort for the harm caused, but may also be liable in restitution for the benefit received from her own use of the ill-gotten property. It is said that the plaintiff can ‘waive the tort and sue in assumpsit’ to recover gains larger than the plaintiff’s loss (Palmer 1978, Section 2.10). Restitution can be awarded against those who procured the plaintiff’s property ‘through imposition (express or implied), or extortion; or oppression; or an undue advantage taken of the plaintiff’s situation, contrary to laws made for the protection of persons under those circumstances’. Willful takers of intellectual property belonging to the plaintiff have often found themselves affected by this principle (Gordon 1992).

Is this remedy an exemplar of the broader principle that a person should not ‘profit from a wrong’? From an economic perspective, this depends

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10 Restatement of Restitution (1937, section 3).
greatly on how ‘wrong’ is defined. If ‘wrong’ is confined to well-defined, easily avoidable conduct that unambiguously imposes more harm than benefit, it would certainly be true that efficiency would require that the defendant not be permitted to profit from the wrong. The law needs to deter such conduct, and disgorgement is the minimum sanction sufficient in principle to effectuate such deterrence. Of course, in this case, economic analysis would see no reason for trying to put the defendant on her own indifference curve between right and wrong conduct (Wittman 1985, p. 182). If the behavior is clearly defined and unambiguously inefficient, punitive damages or criminal sanctions may be in order, or certainly liability for harm caused (by definition, larger than the benefit received). Thus the disgorgement principle, while valid, would be properly submerged in the law beneath more severe penalties.

On the other hand, if ‘wrong’ is defined as conduct that the law ought to sanction, it is no longer true that we would want a rule that a person should not ‘profit from a wrong’. In economic theory, sanctions are imposed because the behavior in question might be inefficient, or because the precise behavior involved is inefficient but is difficult to distinguish before the defendant’s action is taken from other behavior, the inefficiency of which is less clear. In such cases, the liability needs to be measured by harm caused rather than benefit derived. Harm-based liability gives the defendant an incentive to undertake the activity if and only if her benefits truly exceed the harm caused. Benefit-based liability would make the defendant indifferent to the costs imposed on the plaintiff (as these did not affect remedies) and to the benefits she herself derived (as these would be taken away in any event).\(^\text{11}\)

One should not expect, therefore, any robust general principle of law that involves disgorgement of gains received. Gains in themselves are not objectionable; they serve to mitigate wrongdoing. Gains should be disgorged in cases where the actual remedies are likely to be considerably more severe, so that the disgorgement idea is unnoticed. When other penalties are inappropriate, this is usually because of factors that make the disgorgement idea inappropriate as well.

There is one situation, however, where disgorgement is a sensible remedial approach, namely, the conscious bypassing of readily available market alternatives. This behavior is clearly inefficient, because even if the defendant had more valuable uses for the property in question than the plaintiff, she could, by definition, have obtained those efficiencies by consensual means. Many takings are inefficient, and the litigation costs of

distinguishing those that are from those that are not are likely to dwarf the transaction costs of a voluntary move of the property.

An interesting question is whether this principle should result in a defendant’s duty to disgorge gains made by a breach of contract (Farnsworth 1985, p. 1369). The theory would be that a promise constitutes property of the plaintiff, and that the defendant has converted that property by retaining the benefits of refusing to perform. On the other hand, the contract breach setting is one of bilateral monopoly, and the parties might have considerable difficulty agreeing on a voluntary distribution of the gains from breach. Where that situation obtains, a disgorge ment rule might threaten to undermine the gains from breach entirely, or result in their dissipation through haggling over their distribution (Posner 2007, pp. 119–20). The traditional rule disfavoring disgorge ment remedies for breach of contract may well be efficient for that reason (Campbell and Harris 2002, p. 236), although it should certainly yield in the face of evidence that the contracting parties intended a disgorge ment remedy to apply.

The disgorge ment remedy has gained strength in recent years. The House of Lords embraced the concept in Attorney General v. Blake.12 The tentative draft of the new Restatement (Third) of Restitution provides for disgorge ment as a contract remedy when the breach is ‘profitable’ and ‘opportunistic’.13 According to Andrew Kull, Reporter for the new Restatement, ‘profitable’ does not mean that the breach itself makes money for the defendant (or is rational), but that it continues to make money despite the duty to pay damages (Kull 2001, p. 2057). ‘Opportunistic’ is designed to exclude a breach in which the defendant renders a substitute performance that fulfills the plaintiff’s expectation interest. The former concept seems in direct tension with the idea of efficient breach, but the latter appears to leave room for a breach motivated by changes in circumstances if the defendant exhibits a good faith willingness to acknowledge responsibility for her contractual obligations and the harm she has caused.

The concept of “efficient breach” has its critics. The difficulty of measuring the loss to the plaintiff, and the existence of unrecoverable costs such as attorney’s fees, emotional distress, and subjective harms not provable with reasonable certainty, have suggested to some that stronger remedies based upon pacta sunt servanda notions are needed. (Eisenberg, 2006, pp. 570-578). A disgorge ment remedy in this sense is rather similar to specific

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performance, and counts on private bargaining in the shadow of strong remedies as a Coasian solution to whatever inefficiencies might arise when circumstances change after contracts are entered.

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