Restitutionary Damages as Corrective Justice

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For corrective justice, liability is the consequence of the parties' being correlatively situated as the doer and sufferer of an injustice, and the remedy is seen as undoing that injustice to the extent possible. Combining consideration of legal doctrine and private law theory, this article applies the framework of corrective justice to gain-based damages for torts. Within this framework, restitutionary damages ought to be available only insofar as they correspond to a constituent element in the injustice that the defendant has done to the plaintiff. The radical proposal that allows restitutionary damages for any wrongful gain is unsatisfactory because it fails to link the damages that the plaintiff receives to the normative quality of the defendant's wrong. In contrast, dealings in another's property give rise to such damages because the idea of property includes within the owner's entitlement the potential gains from the property's use or alienation. Restitutionary damages should not be seen as serving a deterrent or punitive function; such a function cannot account for why the plaintiff, of all people, is entitled to the defendant's gain. Properly understood, even situations where the plaintiff's wilfulness or calculation increases the damage award fit within the framework of corrective justice. The corrective justice approach thus repudiates the notion that restitutionary damges are occasions for the promotion of social purposes extrinsic to the juridical relationship between the parties.

I. The Theoretical Framework

On what basis can damages for tortious conduct be measured by the defendant's gain rather than the plaintiff's loss? This question recently

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* I am indebted to Malcolm Thorburn for his assistance with this article.

has received increasing attention with the revival of interest in restitution throughout the common law world. The reason for this interest is not hard to see. Restitutionary damages for torts implicate fundamental issues in our conception of private law. On the one hand, they open up the possibility of a more nuanced assessment of damages both by extending the long-established jurisprudence of waiver of tort and by linking tortious liability with the appealing and newly invigorated principle of unjust enrichment. On the other hand, they present an intellectual puzzle. If tort law is concerned with wrongful injury to the plaintiff, special arguments are required to explain why, as a matter of justice, the remedy should refer to the gains of the defendant. The reparation of injury seems satisfied by compensating the plaintiff for his or her loss. To place into the plaintiff's hands the defendant's gain in excess of that loss seems to confer a windfall.

My immediate excuse for revisiting this topic is to draw attention to the relevance of inquiring into the *plaintiff's* entitlement to damages measured by the defendant's gain. Many of the current treatments of restitutionary damages for torts focus on the defendant's desert in the aftermath of wrongdoing or on the social good that can be achieved by compelling the disgorgement of the wrongdoer's gain. Hence commentators appeal to the idea that one should not profit from a wrong,[1] that disgorgement of wrongful gain is an effective deterrence for potential wrongdoers,[2] or that restitutionary damages are directed toward the protection of legal facilities in whose integrity the community has an interest.[3] However, the injustice or social inexpediency of the defendant's retention of the gain indicates only the party from whom the gain should be taken, not the party to whom it should be awarded. Thus, such accounts fail to provide a reason for the law to transfer the defendant's gain to the plaintiff, of all people.[4] If the basic difficulty with an award of gain-based damages is the supposed windfall of the plaintiff, an

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1 Andrew Burrows, The Law of Restitution 376, 395-6 (1993).

2 Peter Cane, *Exceptional Measures of Damages: In Search of a Principle, in* Peter Birks (ed.), Wrongs and Remedies in the Twenty-First Century 301 (1996).

3 I.M. Jackman, *Restitution for Wrongs*, 48 Cambridge L. J. 302 (1989). By "legal facilities" Jackman means "private property, relations of trust and confidence, and (with some qualification) contracts," which "require protection against those who seek to take the benefits of an institution without the burdens thereof." *Id.* at 302.

4 Burrows, *supra* note 1, shows some sensitivity to this problem. He accordingly suggests that restitutionary damages are available in situations where the idea that one should not profit from one's wrong can be supplemented by additional reasons for restitution, such as the need to protect facilitative institutions and to deter cynical wrongdoing. The difficulty is that these additional reasons no more single

adequate treatment must show either that the award is justified despite being a windfall or that the award, where appropriate, is not really a windfall but damages that the plaintiff may of right demand from the defendant. The latter is the strategy that I will essay here.

More broadly, my aim in this article is to situate restitutionary damages within the theoretical framework of corrective justice. Like any remedy, an award of restitutionary damages presupposes a conception of the injustice that it remedies. Because corrective justice views damages as undoing an injustice, it is particularly sensitive to the connection between the remedy that the plaintiff can claim and the wrong that the defendant has done. Accordingly, corrective justice holds out the promise of illuminating the relationship between the situations in which such damages ought to be awarded or refused and the content of the underlying tort norms. In this article, I hope to sketch how this promise might be redeemed.

Presupposed for my purposes is the idea that corrective justice is the proper framework for understanding private law. The theory of corrective justice is a philosophical elaboration — originally sketched by Aristotle and worked into the tradition of natural right by Kant and Hegel — of what it means to do justice between the parties to a private law action. Corrective justice focuses on the primary feature of private law, the bipolar relationship between the plaintiff and the defendant. In considering liability we might wonder, why is the plaintiff entitled to recover from this particular defendant rather than from someone more evil, or why is the defendant held liable to this particular plaintiff rather than to someone more needy? Corrective justice discloses the normative nature of the nexus between the two particular parties, thereby allowing us to conceive of private law as a coherent moral system.

Since I have treated corrective justice at length elsewhere,[5] it is perhaps sufficient here to set out the main features bearing on the present theme. In the following outline, the first two points deal with the nature of the injustice, the others with the structure of the remedy.

First, corrective justice asks whether the plaintiff has suffered an injustice at the hands of the defendant. As the doer and sufferer of the same injustice, the two parties are correlatively situated: the injustice done and the injustice suffered, far from being coincident but independent events, are normatively

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out the plaintiff than the consideration they supplement. He seems to think that a multiplicity of reasons for restitution that are not plaintiff-specific can generate a recovery that is plaintiff-specific.

5 Ernest J. Weinrib, The Idea of Private Law (1995).

inseparable. Because the doing and suffering of an injustice are the active and passive correlates of each other, the normative considerations that govern the parties' relationship apply correlatively to both. Hence, a reason for considering the defendant to have done an injustice must also be a reason for considering the plaintiff to have suffered that injustice; and, conversely, a consideration that embraces only one of the parties has no standing, for it fails to explain the legal position of the other. Thus, the linking of the parties through an injustice done and suffered means that correlativity provides the deep structure for the justifications operative within private law.

Second, the plaintiff's suit is an attempt to vindicate a right that the defendant has unjustly infringed. Just as corrective justice highlights the normative significance of the correlativity of doing and suffering, so the plaintiff's right and the defendant's corresponding duty are the normative categories expressive of that correlativity. Injustice consists in the defendant's doing or having something that is inconsistent with a right of the plaintiff. Right and duty are normatively correlated when the plaintiff's right is the basis of the defendant's duty and, conversely, when the scope of the duty includes the kind of right-infringement that the plaintiff suffered. Under those circumstances the reasons that justify the protection of the plaintiff's right are the same as the reasons that justify the existence of the defendant's duty.

Third, the remedy rectifies the injustice and thereby reflects its structure and content. Under corrective justice, the remedy does not provide the court with an opportunity to determine at some time after the injury what is best for the future, all things considered. Rather, since the rectification consists simply in undoing, to the extent possible, the very injustice that has been committed, the remedy must be intelligible as a response only to the factors that are constitutive of the injustice.

Fourth, just as the injustice is inconsistent with the plaintiff's right, so the remedy is a vindication of that right. The remedy is not simply the outcome of official power exercised at large in favor of the plaintiff but is something that the plaintiff can claim as of right in order to undo the particular injustice he or she has suffered. The nature of the right infringed determines the nature of the remedy to be awarded.

Finally, damages represent in monetary terms (to the extent that such a representation is possible) the injustice committed by the defendant upon the plaintiff. Through the mechanism of the damage award, a qualitatively unique moral event (the particular injustice done and suffered) receives the quantitative expression that enables it to be reversed through a monetary transfer. Since the injustice involves the infringement of a right, and the damages are a means of undoing that injustice, the damages are the notional

equivalent at the remedial stage of the right that has been wrongly infringed. Accordingly, the plaintiff is entitled to damages only to the extent that they quantify the injustice that the plaintiff seeks to correct. A head of damages that does not reflect the content of the plaintiff's substantive right is literally beyond his or her entitlement.

Corrective justice, then, embodies a notion both of the relationship of the remedy to the injustice that it remedies and of the relationship between the parties to that injustice. The two parties are correlatively situated as the doer and sufferer of an injustice that is itself undone by the corresponding remedy. Correlativity is inherent in the notion of liability, which treats the injustice done by former as the very injustice suffered by the latter. Correlativity is also inherent in the idea of damages, which treats the plaintiff as entitled to receive the very sum that the defendant is obligated to pay. These instances of correlativity are mirror images of each other, with the plaintiff's entitlement to damages from the defendant reflecting the plaintiff's entitlement to be free from suffering injustice at the defendant's hands.

This theoretical framework presents private law from the standpoint of its own institutional structure and doctrines. Both the structure of the lawsuit (the fact that the plaintiff sues the defendant) and the characteristic doctrines of private law (e.g., those concerning causation, contract formation, and enrichment at the expense of another) directly connect the parties to each other. The theory of corrective justice takes the nexus between the parties as its focus, and explores the conditions under which a particular defendant can justifiably be held liable to a particular plaintiff. It seeks to illuminate the central idea of private law — that the liability of the defendant is necessarily a liability to the plaintiff — through the logic of correlativity, and therefore through the moral status of rights and duties and through a mode of justification that embraces both parties equally.

The point of deploying this theoretical framework is not to generate legal doctrine out of philosophical abstraction, but to understand the particulars of private law in the light of its most general and pervasive ideas. As an integrative notion that connects both the defendant to the plaintiff and the remedy to the right, corrective justice sees internal coherence as private law's ultimate animating principle. The common law is a sophisticated justificatory practice that has been elaborated over many centuries. Such a practice could not have developed and endured unless it took its own systematic coherence seriously. Corrective justice presumes that, taken as a whole, the jurisprudence of the common law is a good faith attempt by many hands to work out for particular cases the normative implications of joining plaintiff to defendant and remedy to right. Corrective justice, accordingly, views doctrine as generated not by theoretical abstraction but

by the law's internal processes of justification. It claims, however, that these processes embody a critical standpoint for which corrective justice provides the theoretical expression. Corrective justice claims, therefore, to illuminate private law as a perspicuous whole, to exhibit the connection between aspects of this whole, and to subject them to the critical demands immanent in private law as a justificatory enterprise.

With respect to restitutionary damages, the features of corrective justice outlined above compel attention to the plaintiff's entitlement. Because the remedy mirrors the correlative structure of the injustice, corrective justice disqualifies accounts of restitutionary damages that focus solely on the tortfeasor. Among the accounts excluded on this basis are those that, under the banner of punishment and deterrence, focus on the past or future actions of defendants, thereby treating the plaintiff merely as a convenient conduit of social consequences rather as someone to whom damages are owed to correct the wrong suffered. Of course, this does not mean that explanations of restitutionary damages must be oriented to the plaintiff as some are now oriented to the defendant. Corrective justice rejects all one-sided accounts, regardless of the particular side singled out. Rather, the parties must be seen as related through the injustice in such a way that the plaintiff can demand such damages as of right from the defendant. Accordingly, the justification for awarding such damages must include not only the reason for making the defendant pay but also the reason for entitling the plaintiff to receive them; indeed, the same reason must apply on both sides. Only then is the correlativity that marks the injustice carried forward into the account of the remedy.[6]

The corrective justice framework, then, makes salient the need to account for the plaintiff's entitlement to restitutionary damages as a response to

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6 The basic idea of this article is identical to the one that has animated the analysis of the *Eingriffskondiktion* in German law since the writings of Wilburg and von Caemmerer, that the availability of restitution for an interference with the plaintiff's right depends on the scope and purpose that the legal order attributes to the right. *See* B. S. Markesinis, The German Law of Obligations, vol. 1 (The Law of Contracts and Restitution: A Comparative Introduction) 744-5 (1997). This congruence of approach is hardly surprising, since the German approach proceeds from the assumption that both restitution and delict are informed by Aristotle's notion of corrective justice; *see* E. von Caemmerer, *Bereicherung und unerlaubte Handlung, in* Festschrift fuer Ernst Rabel, Band I 333, 335 (1954). Wilburg's comment that restitution in the *Eingriffskondiktion* "grows organically out of the mother-right, so to speak of itself" (quoted in John Dawson, *Indirect Enrichment, in* Ius Privatum Gentium (Rheinstein Festschrift), vol. 2, 789, 798 (1969)) is a graphic way of portraying the intimate connection that corrective justice posits between the injustice and the remedy.

the defendant's wrongful impingement on the plaintiff's right. This article attempts to satisfy this need in the following steps. Section II deals with the radical proposal that would allow the plaintiff restitutionary damages for any wrongful gain. The problem with this proposal, that it does not adequately link the damages to the normative quality of the wrongful act, leads in Section III to an examination of the more traditional connection of gain-based damages with wrongful dealings with another's property. The virtue of the focus on dealings with another's property is that the idea of property includes within the proprietor's entitlement the potential gains from the property's use or alienation. Section IV generalizes from the property cases to the conclusion that restitutionary damages ought to be available only insofar as they correspond to a constituent element in the wrong that the defendant has done to the plaintiff. Section V discusses the relevance of the wilfulness of the wrong insofar as it entails a denial of the plaintiff's right, not because of notions of punishment or deterrence. The final Section deals with situations where the plaintiff's interest is not, strictly speaking, a proprietary one, but where the analysis of the property cases nonetheless applies.

II. THE GOFF-JONES PRINCIPLE

Requiring tortfeasors to disgorge their wrongful gains is an intuitively appealing idea. The tortfeasor's moral claim to retain the fruit of his or her own wrongdoing is a weak one. Permitting a wrongdoer to enjoy the benefits of the wrong might seem an additional victimization of the wronged party. Moreover, through the old "waiver of tort" cases, the law has long recognized the principle of disgorgement for certain torts, and the task of distinguishing torts that allow for disgorgement from those that do not has proved a difficult one. Indeed one might think that task misguided, on the ground that the morally relevant feature of the tortfeasor's situation is the commission of the wrong, not the kind of wrong committed.

Presumably these considerations lie behind the radical proposal of Lord Goff and Professor Jones that the victim of a tort should be allowed restitution of all wrongful gains. They formulate their proposal as follows: "If it can be shown that the tortfeasor has gained a benefit and that benefit would not have been gained but for the tort, he should be required to make restitution."[7] This suggestion has the advantage of simplicity, for it offers a

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7 Lord Goff of Chieveley and Gareth Jones, The Law of Restitution 781 (5th ed.

comprehensive principle that obviates the need to distinguish between torts that do and torts that do not admit of restitutionary damages.

Despite its simplicity and its intuitive appeal, the Goff-Jones principle has not been accepted by the courts. In the view of Professor Jones, this is because courts "fear the great unknown."[8] I would like to suggest a more charitable reason, arising out of an ambiguity in the notion of wrongful gain.

When we think of wrongful gains for restitutionary purposes, precisely how are the ideas of wrongfulness and gain connected? One possibility is that a gain is wrongful because of its history; that is, a gain is wrongful if it is the consequence of a wrongful act. Rather than pointing to a feature of the gain itself, "wrongful" is used to indicate that wrongful conduct by the defendant is an historical antecedent of the defendant's gain. The wrongdoing that underlies ascription of wrongfulness stands to the gain as cause to effect. "Wrongful gain," then, could be understood as a shorthand for the more accurate description "gain resulting from a wrongful act."

The other and more restrictive possibility is that we call a gain "wrongful" by virtue of its inherent normative quality. Here the significance of the wrongfulness is not merely that it produces the gain, but that it survives into the gain and informs it. The gain's origin in wrong is a necessary condition for the gain's having this normative quality, but something further is required. For the gain to take on the normative quality of wrongfulness, it must be the materialization of a possibility — the opportunity to gain — that rightfully belonged to the plaintiff. Because it is an incident of the plaintiff's entitlement that the defendant has wrongfully infringed, the gain is not merely the result of a wrongful act, but is the continuing embodiment of the injustice between the parties.

The Goff-Jones principle rests on the assumption that the relevant understanding of wrongful gain is the historical one. Using language reminiscent of the factual causation test in negligence law ("the benefit would not have been gained but for the tort"), they formulate the relation between wrongfulness and gain solely in terms of cause and effect. In their view, the fact that the plaintiff has been wronged by the defendant plus the fact that the defendant has consequently realized a benefit add up to the liability of the defendant to surrender the benefit to plaintiff.

Why might one be reluctant, as Jones notes that courts are, to accept

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1998). The only qualification that they recognize is that the gain must have been at the plaintiff's expense, thus, for example, excepting the defendant's gains from a book in which the plaintiff was incidentally libelled. *Id.* at 783-86.

8 Gareth Jones, Restitution in Public and Private Law 77 (1991).

a principle that bases liability on the historical rather than the normative connection between wrongdoing and gain? I suggest that it is because the Goff-Jones principle challenges the internal coherence of tort law. By this I mean not that the principle measures the plaintiff's injury by the defendant's gain (the waiver of tort cases show that this is not in itself unacceptable), but that the connection it posits between what the tortfeasor has done and what the victim recovers is at odds with the principle underlying the treatment of wrongful loss in negligence law.

The phenomenon of compensatory damages for wrongful loss is the counterpart to restitutionary damages for wrongful gain. In wrongful loss the same two conceptions of wrongfulness present themselves. A loss is wrongful by reference to its history if the occurrence of the loss was the result of the defendant's wrong. A loss is wrongful by reference to its normative quality if the potential for such loss is a reason for considering the defendant's conduct to have been wrongful in the first place.

The cases on duty and proximate cause in negligence illustrate the difference between these two ways of connecting wrongfulness and loss. In the famous case about duty, *Palsgraf v. Long Island Railroad*,[9] the plaintiff was injured by an act that negligently imperiled the property of someone else. The plaintiff's loss was wrongful in the historical sense, in that one of the historical antecedents of the loss was a wrongful act by the defendant. However, since the plaintiff was beyond the ambit of reasonably foreseeable injury, the prospect of her loss was not a reason for thinking that the defendant's conduct was wrongful. Because the conduct was not a wrong relative to her, the defendant was held not to have been under a duty with respect to her loss. Similarly, the *Wagon Mound* case holds that the requirement of proximate cause is not satisfied when the defendant negligently exposes the plaintiff to the risk of one kind of injury, but the plaintiff suffers an injury of a different kind.[10] Such losses are historically connected to the wrongful conduct, in that they would not have occurred without it, but they do not partake of the conduct's wrongful quality since they are not the losses by virtue of which the conduct is regarded as wrongful.

These doctrines show that in the context of compensatory damages for negligence, liability exists only when the connection between the wrongfulness and the loss is normative and not merely historical. That the negligent conduct is factually caused by the loss is not sufficient. To be

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9 248 N.Y. 339, 162 N.E. 99 (1928).

10 *The Wagon Mound, No.1* [1961] A.C. 388 (P.C.).

recoverable, the loss must be within the risk the creation of which rendered the defendant's act unreasonable.

From the perspective of corrective justice, negligence law has good reason for insisting, through the doctrines of duty and proximate cause, that a loss should be considered wrongful by virtue of its normative quality rather than merely its history.[11] In negligence law, wrongdoing consists in the creation of unreasonable risk. When the plaintiff's loss is within the ambit of the very risk that renders the defendant's conduct wrongful, the parties stand to each other as the active and passive poles of the same injustice. Because freedom from this kind of loss is both the content of the plaintiff's right and the object of the defendant's duty, the parties are normatively linked through the wrongfulness of the defendant's risk-creation. Liability then obligates the defendant to eliminate the loss with which the plaintiff has been wrongfully saddled, and thus to restore (to the extent that monetary damages can) the freedom from loss which was the plaintiff's original entitlement. In contrast, when the plaintiff's loss, although caused by the defendant's wrongdoing, is not within the ambit of what makes it wrongful, the defendant's conduct cannot be said to be wrongful with respect to that plaintiff's loss. Because the parties are then not related to each other as doer and sufferer of an injustice, the plaintiff lacks the moral standing to call upon the defendant to make good the loss.

Negligence law's treatment of wrongful loss undermines the Goff-Jones proposal concerning wrongful gain. To highlight the parallel between the two, one may say (echoing the Goff-Jones formulation) that negligence law rejects the principle that the tortfeasor must pay compensation "if it can be shown that the victim suffered a loss and that loss would not have been suffered but for the tort." The compensatory principle that negligence law rejects has the same structure as the restitutionary principle that Goff and Jones propose. Both principles use factual causation as a sufficient condition for the damage award. The only difference between them is that whereas the compensatory principle deals with loss and compensation, the Goff-Jones principle deals with gain and restitution. Since it is the significance of factual causation that is at issue in each, the fact that one deals with compensation for loss and the other with restitution for gain is unimportant. If the law has good reason for rejecting factual causation as a sufficient condition of liability for tortiously caused loss, then it also has good reason to reject it as the test for tortiously caused gain. Accepting the Goff-Jones principle would introduce the inconsistency of allowing factual causation

11 Weinrib, *supra* note 5, at 114-79.

to be sufficient for restitution when it has been found to be insufficient for compensation.

The corrective justice analysis of compensation for wrongful loss applies, *mutatis mutandis*, to restitution for wrongful gain. If the wrongfulness consists in creating the prospect of a loss (as, let us assume for the moment, is the case with negligence), the fact that the defendant has realized a gain as well adds nothing to the plaintiff's case. Because the gain lies beyond the wrong done to the plaintiff, the plaintiff suffers no injustice through the existence of the gain. The parties do and suffer injustice only with respect to the loss, not the gain; the gain remains external to their relationship. Accordingly, from the standpoint of corrective justice, factual causation no more suffices for liability on the gain side than it does on the loss side. What matters is not the historical connection of gain to wrong, but rather the nature of the wrong and whether the gain partakes of the wrong's normative quality. Gain-based damages are justified when the defendant's gain is of something that lies within the right of the plaintiff and is therefore integral to the continuing relationship of the parties as the doer and sufferer of an injustice. Then the gain stands not merely as the sequel to the wrong but as its present embodiment, and the plaintiff is as entitled to the gain as he or she was to the defendant's abstention from the wrong that produced it. A gain that thus embodies the injustice done by the defendant to the plaintiff carries with it the immediate implication of disgorgement.

The Goff-Jones principle has the twin virtues of simplicity of formulation and comprehensiveness of application, but it also has the corresponding vices. On the one hand, the proposed principle obviates the need to distinguish among wrongs by using the simple test of whether the wrong factually caused the gain. On the other hand, the principle is insensitive to the limited significance of factual causation and to the need to forge a normative link between the wrong and the gain. Given that the restitution of the gain depends on the gain's normative quality, and that that quality varies with the nature of the wrong, there is no alternative to the difficult task of distinguishing between the wrongs that do and the wrongs that do not admit of the restitution of their resulting gains.

Aside from highlighting the necessity for a normative connection between the defendant's wrong and the plaintiff's entitlement to the gain, the parallel between wrongful loss and wrongful gain suggests a more particular point: restitutionary damages are especially appropriate when property rights are violated. The reason that negligence law requires the defendant to compensate the plaintiff for wrongful loss is that such loss is the materialization of an adverse possibility — the unreasonably created risk of harm — to which the defendant ought not rightfully to have exposed

the plaintiff. Because the defendant then inflicts a loss from which the plaintiff is entitled to be immune, the loss constitutes an injustice between the parties that an award of compensatory damages reverses. Similarly, restitutionary damages should be available when the defendant's gain is the materialization of a favorable possibility — the opportunity to gain — that rightfully belonged to the plaintiff. Then the gain to be nullified by the award of restitutionary damages represents an injustice both committed by the defendant and suffered by the plaintiff. Since a proprietary right includes the opportunity to gain from what one owns, one may plausibly regard the defendant's dealings with the plaintiff's property as an occasion for restitutionary damages. That, at any rate, is the argument of the next Section.

III. Dealing with Another's Property

As has often been noted, the misappropriation of another's property is the paradigmatic example of a tort that gives rise to restitutionary damages.[12] Because property rights give proprietors the exclusive right to deal with the thing owned, including the right to profit from such dealings, any gains resulting from the misappropriation of property are necessarily subject to restitution. Gains from dealings in property are as much within the entitlement of the proprietor as the property itself.

The disgorgement of these proprietary gains fits readily within the correlativity of corrective justice. Property consists simultaneously in a right of the proprietor and in a correlative duty on others to respect that right. Just as the owner's right to set the terms on which property is used or transferred implies a correlative duty on others to abstain from using or selling it, so the owner's right to the profits from the use or transfer of the property imports a correlative duty on others to abstain from such profits. This correlativity of the proprietor's right and the wrongdoer's duty means that the realization of an unauthorized gain is an injustice as between them. The gain is the continuing embodiment of this injustice, and the injustice is undone when the gain is restored to the owner of the object from which the gain accrued.

Gain-based damages for dealing with another's property mirror the wrong

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12 *See especially* Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 Colum. L. Rev. 504 (1980).

and illuminate its nature. The law's focus on the benefits of ownership at the remedial stage presupposes the defendant's intention to act on the owned object at the stage of wrongdoing. In appropriating the benefits from using or alienating the object, the defendant implicitly asserts the ownership that alone would entitle the defendant to those benefits. Restitutionary damages reverse the wrong by showing, through the return of the benefits, that the law considers the defendant's implicit assertion of ownership to be a nullity whose consequences are to be undone. The remedy is conditioned, therefore, not merely on the defendant's realization of a benefit but on the defendant's having treated the object as if it were his or her own. One treats an object in this way when one so directs one's attention to the object, that its use or alienation can be regarded as an execution of one's purposes. In contrast, action that inadvertently produces an effect on the object does not qualify as an expression of one's will with respect to the object, and so is not the basis for restitutionary damages. Thus, restitutionary damages are available for intentional torts against property and not for harm to property that results from negligence.

From the perspective of corrective justice, restitutionary damages for proprietary wrongs are an entitlement of the proprietor, and not merely a mechanism for protecting the integrity of property as a facilitative institution.[13] The argument for referring to property as a facilitative institution is that since damages measured by the defendant's gain do not reflect an injury to the plaintiff personally, they must be justified by pointing to an institutional harm. The premise of this argument is false. The fact that the damages are gain-oriented does not exclude their reflecting an injury to the plaintiff personally. One's rights provide the baseline for measuring injury. If those rights include the possibility of gain, then the defendant's gain measures the extent of the plaintiff's injury. The relevance of property is not that it is a facilitative institution, but that it connects the parties in such a way as to make the object owned — and thus the gain that dealings in that object can produce — the locus of a right and a correlative duty.

Two broad categories of dealings in property can give rise to profits that the wrongdoer is obligated to disgorge. The defendant either might purport to alienate that which belongs to the plaintiff, or might benefit by putting it to an unauthorized use. In either instance the plaintiff ought to be allowed damages measured by the defendant's gain.

The disgorgement of gains has long been uncontroversial in connection with purported alienations of property. The old waiver of tort cases allowed

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13 Jackman, *supra* note 3.

recovery of the proceeds realized from a thief's sale of the owner's goods, even if the proceeds exceeded the goods' market value. To accomplish this within the framework of an action in *assumpsit* for money had and received, the courts implied a contract to repay, ascribing to the thief a fictitious relationship of agency. Although such reasoning led to well-known difficulties and is no longer necessary, its basic normative impulse was sound. The language of agency expressed the implications of property. The idea behind the ascription of agency was that the only legal basis for selling what belongs to another is that the seller is acting as the owner's agent and therefore holds the proceeds on the owner's behalf.

The jurisprudence concerning gains realized through the use rather than the purported alienation of another's property is more complex. The notorious case of *Phillips v. Homfray*[14] can be taken to indicate that such gains are not recoverable. In that case the plaintiff claimed wayleave rent for the use of underground passages through which certain minerals had secretly been conveyed. Because of the death of the defendants, the established doctrine that *actio personalis moritur cum persona* barred an action for tort. Accordingly, the plaintiff based his claim not on his own wrongful loss but on the defendant's wrongful gain through the free and unauthorized use of the passageways. The English Court of Appeal dismissed the claim. In the Court's view, one could recover only for wrongful gains in the form of property or the proceeds or value of property withdrawn from the plaintiff and added to the estate of the defendant. Here the defendant's profit in using the plaintiff's passageways consisted merely in the saving of an expense, not in bringing into the estate any additional property, or proceeds or value of property, belonging to the plaintiff.

This case is universally reprobated. The holding that the use of another's property is not a benefit is now rightly criticized by restitution scholars. Even under the doctrine of the day, the unauthorized use of another's land was compensable by the assessment of a wayleave rent, as is shown by other episodes in the protracted litigation of this plaintiff's claim.[15] Moreover, from the restitutionary standpoint it seems odd to distinguish between the enrichment that the estate would have achieved positively by having its assets swollen by the proceeds or value of property, and the enrichment it achieved negatively by not having its assets diminished by the payment of a wayleave rent.

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14 (1883) 24 Ch. D. 439 (C.A.).

15 W. M. C. Gummow, *Unjust Enrichment, Restitution, and Proprietary Remedies, in* P. D. Finn, Essays on Restitution 47 (1990).

Perhaps the best that can be said about the case is that it deals with a narrow point that arose out of the positive law of the time. On the death of the tortfeasor, the *actio personalis* rule necessitated a distinction between actions to repair a wrongful loss, which were barred, and actions to recover a gain, which were allowed. In cases of the unauthorized use of another's property, the action often can be conceptualized either way, since the use, in and of itself, is both a benefit to the defendant and a loss by the plaintiff of an opportunity to exploit a potentially profitable asset.[16] In the *Phillips* case the tortfeasor, by using the passageways without authorization, was spared the expense of negotiating for the plaintiff's consent or making arrangements that would avoid the need to trespass on the plaintiff's property. This, however, was merely "a negative benefit ... acquired by saving himself the expense of doing his duty."[17] There are few breaches of duty that could not be avoided by undertaking some expense. All interferences with property, for instance, can be seen either as wronging the owner or as sparing the wrongdoer the expense of purchasing the owner's consent. If the *actio personalis* rule barred actions for the former but allowed actions for the latter, its scope would be nugatory. The saving of the expense of doing one's duty, in other words, was not a benefit distinct from the wrongfulness of the loss, but was rather that wrongfulness itself, formulated in terms of a benefit. The court, anxious to preserve the integrity of the *actio personalis* rule (in the words of Lord Justice Bowen, "[i]t is part of the law, and while so, ought not to be frittered away"[18]), in effect held that the rule caught any gain that was indistinguishable from a wrongful loss.

Be that as it may, the holding should have no further vitality. In emphasizing the importance of property or its proceeds or value, the *Phillips* case in effect distinguishes, with respect to the availability of restitutionary damages, benefits realized through use from benefits realized through alienation. This distinction has no grounding in principle. If the key to the recovery of gain-based damages is that the defendant has dealt

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16 *Compare* Strand Electric and Engineering v. Brisford Entertainments, [1952] 2 Q.B. 246 (C.A.), where two members of the court analyzed the claim in terms of loss and one judge analyzed it in terms of gain. *See also* Robert J. Sharpe and S.M. Waddams, *Damages for Lost Opportunity to Bargain*, 2 Oxford J. of Legal Stud. 290 (1982) for the argument that damages for the use of another's property are compensatory rather than restitutionary, in that they compensate for the deprivation of the amount for which the plaintiff would have bargained away the right.

17 Phillips v. Homfray, 24 Ch. D. at 465 (Lord Justice Bowen uses this language to explain one of the cases on which he is relying).

18 *Id.* at 456.

with the plaintiff's property, the availability of such damages should not depend on whether the dealing took the form of a use or an alienation. It is true, as noted above, that the damages in cases of the unauthorized use of property often can be seen to be loss-based, because the defendant's use of the plaintiff's asset deprives the plaintiff of the opportunity to realize profits through it. Some cases, however — as where the defendant uses an object that has been stored[19] or that is part of a discontinued business[20] — are harder to construe as involving a loss, since the defendant's unauthorized use cannot realistically be said to have deprived the plaintiff of money that the plaintiff would otherwise have had. The damages in such cases are more easily regarded as based on the gain that the defendant realized by not paying for the use. Whether seen as quantifying a wrongful loss or a wrongful gain, restitutionary damages for unauthorized use are justified.

The difference between unauthorized use and purported alienation goes not to the availability of restitutionary damages but to the way in which they usually are computed. In the case of unauthorized use, the measure of the damages is the value of the use; in the case of alienation, the plaintiff can choose either the value of the thing alienated or the price the defendant received. This difference implies no principle that would bar restitutionary damages in cases of use, but merely reflects the contingency that, in contrast to alienation, unauthorized use does not necessarily involve the defendant in a further exchange of the plaintiff's property. Were such an exchange to take place (for instance, if the defendant charged a fee purportedly to license the use to a third party), the plaintiff presumably could choose to have the defendant disgorge this fee.[21]

From the perspective of corrective justice, two aspects of these damages call for comment: the role of the notion of value and the option of the plaintiff to insist on disgorgement if there has been an exchange.

The notion of value fits into corrective justice in the following way. Corrective justice deals with interacting parties correlatively as doer and sufferer of an injustice. Inasmuch as it governs interaction, corrective justice applies to parties who impinge upon each other by acting on particular things in the world pursuant to their specific needs and wants. But inasmuch as it embraces the two parties as correlatively situated, corrective justice abstracts to a common standpoint from the particularity of these things and

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19 Olwell v. Nye and Nissen, 173 P.2d. 652 (Wash. 1946).

20 Penarth Dock Engineering v. Pounds [1963] 1 Lloyd's List L. Rep. 359 (Q.B.D.).

21 *Cf.* Edwards v. Lee's Administrator, 96 S.W. 2d.1028 (Ky. Ct. App. 1936).

from the specificity of these needs and wants. Value is the economic notion that fulfills this abstracting function.[22]

By making objects quantitatively comparable, value enables corrective justice to apply to property despite the heterogeneity of persons' specific needs and wants. Because corrective justice is concerned with the correlativity of the doing and suffering of an injustice, it does not regard something owned merely as a particular thing used to minister to the specific needs and wants of the particular person who owns it. Its interest is in the thing as a factor in the juridical relationship between the owner and others. Value provides the means for quantitatively comparing the owner's wants to other wants and the owner's thing to other things, thereby enabling the possible uses of a thing to figure in the interactional framework of a juridical relationship. Consequently, from the standpoint of the interaction between owners and non-owners, owners have a right to the thing's value as well as to its use.[23]

When a property right is violated, corrective justice requires the wrongdoer to undo the wrong perpetrated against the proprietor. Neither the specific wants satisfied by the defendant's wrongful use nor the specific wants frustrated by the unavailability to the plaintiff of the thing used can be reversed in their specificity. Through an award of damages, however, the defendant gives the plaintiff the equivalent of what was taken. Seen in the light of the value of the thing taken or used, the defendant's infringement of the plaintiff's right becomes capable of a remedy in accordance with corrective justice. By awarding the value of the use, a court reverses the wrong that consists in the use. Similarly, by awarding the value of the thing alienated, a court reverses the wrong that consists in the alienation.

Also in accordance with corrective justice is the owner's option to recover the wrongdoer's gains from selling the thing at a higher price than the market. Because value arises from specific needs and wants, it includes the possibility of a purchaser who is willing to pay more than the market price. This possibility is as fully within the owner's entitlement as the thing itself and its value. For such a possibility to be the owner's, the payment that happens to realize the possibility must also be the owner's. Otherwise, the owner would have a possibility that is juridically incapable of fulfillment — which is no possibility at all. A lawyer may justify this conclusion by saying

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22 On value in corrective justice, see Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 Cardozo L. Rev. 1077, 1192-93 (1989).

23 G.W.F. Hegel, Philosophy of Right § 63 (Knox trans., 1952).

that it does not lie in the mouth of the wrongdoer to deny that the owner could have made the sale. What such a formulation points to, however, is not the empirical likelihood that the owner would have made this sale, but the irrelevance of who made it given that ownership carries with it an entitlement to the proceeds. Of course, the recovery of the proceeds remains merely an option that the owner need not exercise when the proceeds are less than the market value. This option is the continuation of every owner's entitlement either to retain the thing owned and its value or to dispose of it for the price that a willing buyer will pay. Thus, consistently with corrective justice, the plaintiff's option replicates at the remedial stage the content of the plaintiff's substantive right.

In sum, restitutionary damages are justified where there are dealings in — use or alienation of — another's property. Because property includes the possibility of gains, the plaintiff may as of right reclaim a gain realized through the defendant's use or alienation of the property. Contrary to the suggestion of *Phillips v. Homfray*, the distinction between use and alienation makes no difference in principle for the availability of restitutionary damages. These damages represent the quantification on the basis of value of the plaintiff's right, so that when the defendant usurps this right, restitutionary damages respond to and undo the injustice between the parties.

IV. Indirect Benefits

In denying the plaintiff's claim to sue for the unauthorized use of his passageways in *Phillips v. Homfray*, Lord Justice Bowen emphasized that the gain realized through the wrongdoer's trespass was an indirect or negative benefit that consisted in the expense saved from not paying a wayleave rent. The significance of this for Lord Justice Bowen was that the gain from the wrong did not increase, but merely avoided decreasing, the wrongdoer's estate. As noted above, critics of the judgment have rightly observed that this distinction makes no sense from a restitutionary standpoint. Nonetheless, I suggest that Lord Justice Bowen was struggling — unsatisfactorily but not without insight — with the necessity to distinguish recoverable from irrecoverable gains. This necessity is present even if one acknowledges, as Lord Justice Bowen did not, that the plaintiff should be able to recover the defendant's gain from the wrongful use of property. For then the question arises: what counts as the relevant benefit for purposes of assessing the restitutionary damages?

The case of *Olwell v. Nye and Nissen*[24] is an apt illustration of the need to be attentive to this issue. After selling his egg-packing business to the defendant, the plaintiff stored his egg-washing machine in an adjacent space. Subsequently, without the plaintiff's knowledge or consent, the defendant took the machine out of storage and began to use it. When the plaintiff discovered this, he offered to sell the machine to the defendant, but the negotiations fell through. The plaintiff then sued. The Washington Supreme Court held, following the waiver of tort cases, that since the defendant had benefited from his wrong, the plaintiff could elect to sue for restitution. Although the case involved unauthorized use of another's property, *Phillips* was effectively rejected in favor of the proposition from the Restatement of Restitution that "[a] person confers a benefit on another ... not only where he adds to the property of another, but also where he saves the other from expense or loss."[25] The Court then approved an assessment based on the expense that the defendant would have incurred had the eggs been washed by hand during the period that the machine was in use.

The Court's reasoning seems attractive. An action for loss-based damages runs into the difficulty that the defendant's conduct neither damaged the machine nor, since it was in storage, deprived the plaintiff of the income that it might generate. Gain-based damages, in contrast, allow reference to the defendant's enrichment regardless of what the plaintiff lost. The enrichment includes the saving of expense. Here the defendant was saved the expense of having the eggs washed by hand. Therefore the damage award is for the cost of having the eggs washed by hand.

Yet something has gone wrong. In the negotiations for the sale of the machine, the plaintiff had asked for $600 and the defendant had counter-offered $25. The Court, after considering the number of hours it would take to wash the eggs and the hourly wages of the washers, awarded $900. Remarkably, the plaintiff recovered 50% more from the use of the machine than the highest price he wanted from its sale.[26]

The Court committed two interrelated conceptual errors. First, the Court rejected the correct benefit. The defendant had argued that the damages "should be based on the use or rental value of the machine." The Court thought this measure of damages was unsuitable because it was loss-based and the plaintiff had suffered no loss from the defendant's use of a machine

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24 Olwell v. Nye, 173 P.2d 652.

25 § 1(b), at 12.

26 The full facts of the case were even more egregious. The expense of hand-washing the eggs came to $1560, but that amount turned out to be more than the plaintiff had claimed, and therefore was reduced on appeal.

that was not in the stream of commerce. However, as we have seen, damages geared to the value of the use can be gain-based as well as loss-based. One usually may characterize the avoidance of rental costs indifferently as an expense saved by the defendant or as income lost by the plaintiff. Even if on the *Olwell* facts the loss-based characterization is implausible, the gain-based characterization remains pertinent, since the opportunity for gain is within the owner's entitlement. Second, in focusing on the expense of hand-washing the eggs, the Court accepted the wrong benefit. It may well be the case that without the machine the defendant would have had the eggs washed by hand. But that is no concern of the plaintiff. The plaintiff's only interest in the defendant's egg-washing operation is in the use of this particular machine, not in how the defendant would have operated his business without it. Therefore, the Court should have based the calculation of damages on the value of the use of the machine.

Corrective justice illuminates the court's errors. Corrective justice requires that the remedy reflect the wrong and that the wrong consist in a breach of duty by the defendant with respect to the plaintiff's right. The role of damages within this framework is to make good the failure of the defendant to carry out his or her duty to the plaintiff. Basing the damages in *Olwell* on the cost of hand-washing the eggs implies that the defendant was under an obligation to the plaintiff to wash the eggs by hand. This is absurd. The plaintiff had a right in the machine but no right in hand-washed eggs. The only relevant duty that the defendant owed the plaintiff was not to use the machine. Accordingly the damages should have been set at the value of the use as reflected by the rental value of the machine.

One should observe that this criticism of calculating the damages by reference to the cost of hand-washing the eggs involves a conceptual point, not an empirical one. The criticism does not suppose that the defendant was in fact unlikely to have had the eggs hand-washed. The point is rather that, whatever the alternatives to using the machine and however probable their employment, none of them forms the basis for calculating the damages, because in principle none is directly relevant to the injustice between the parties. Assume the situation most favorable to the plaintiff, that in the absence of the machine there was no alternative to hand-washing the eggs if the defendant was to stay in business. Such an absence of alternatives presumably would have increased both the value of the machine and the value of the machine's use. The basis of the restitutionary damages, however, would still be the value of the use (increased by the necessity for hand-washing without it) rather than the cost of the hand-washing as such.

These deficiencies of the *Olwell* case illustrate a general point. Restitutionary damages, like other remedies in private law, must correct the

injustice that the defendant did to the plaintiff. Such damages accordingly must correspond to the elements constitutive of the juridical relationship between the parties. Factors absent from the law's conceptualization of the defendant's duty to the plaintiff, and therefore external to that relationship between the parties, ought not to be the basis for the calculation of damages. If, as in *Olwell*, the injustice consists in the unauthorized use of the plaintiff's property, the damages are to be calculated with reference to the value of the use. Since the alternatives to that use are external to the juridical relationship and their performance is not a duty owed to the plaintiff, the benefits of the savings from not having recourse to those alternatives also are not owed to the plaintiff.

This analysis suggests that Lord Justice Bowen's reference in *Phillips v. Homfray* to indirect benefit, although misconceived, is not completely off the mark. He was aware that the saving of expense does not in and of itself constitute a benefit that invariably gives rise to restitutionary damages. However, he formulated indirect benefits in terms of a contrast with benefits that increase the wrongdoer's assets. He ought to have formulated these benefits in terms of a contrast with benefits, including those involving the saving of an expense, that are within the ambit of the plaintiff's entitlement.

Understood in this way, the notion of indirect benefits applies to other situations besides the unauthorized use of property. The law of nuisance, for example, imposes an obligation not to interfere with the use and enjoyment of another's property. Take the example of a polluter who fails to install anti-pollution equipment costing x and causes discomfort assessed at y, and assume x is greater than y. The plaintiff cannot recover x. The defendant is under a duty to avoid causing the plaintiff the discomfort, which is quantified at y. How the plaintiff achieves this end is no business of the defendant. Of course, if the defendant had made expenditure x, the plaintiff would not have suffered the discomfort; but the tort consists in causing the discomfort, not in saving the expense that would have avoided the discomfort.[27]

The same applies to negligence law, where the defendant is under a duty not to create an unreasonable risk. Here recovery of the defendant's benefit is almost unheard of,[28] even though the defendant might have avoided the unlawful risk by undertaking certain expenditures. Assume that the risk, which caused the plaintiff damages of y, could have been avoided had the defendant expended x on precautions, and that x is greater than y. Again, the plaintiff does not recover x. It is true that the defendant realized a benefit by

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27 *Compare* Kirk v. Todd (1882) 21 Ch. D. 484 (C.A.).

28 *See infra* note 61.

not taking the precautions and that the injury would not have occurred had those precautions been taken. The duty owed, however, was to avoid imposing the risk, not to undertake the expenditures.[29]

Distinguishing the duty from the contingent means to avoid violating it fits within corrective justice in three related ways. First, corrective justice highlights the juridical connection between the plaintiff and the defendant. Because the juridical connection is forged through the correlativity of the plaintiff's right and the defendant's duty, the remedy is determined by the precise contours of the duty that is correlative to the plaintiff's right. The steps that the defendant can take to avoid violating the duty owed to the plaintiff do not in themselves juridically connect the defendant to the plaintiff. They are merely factual possibilities that pertain to the defendant's situation.

Second, in emphasizing the plaintiff's right and the defendant's correlative duty, corrective justice sets its face against consequentialist understandings of private law. The consequentialist assumes that what matters is the state of affairs that exists at the end of the day. Accordingly, from the consequentialist standpoint there is no reason to distinguish the defendant's duty from actions that produce the situation that will obtain if the duty is discharged. Corrective justice, in contrast, focuses on the normative dynamics internal to the interaction between the rights-holder and others. What matters is not the situation at the end of the day, but whether the defendant acted wrongfully with respect to the plaintiff's rights.

Third, the duties of corrective justice result from the moral capacity of rights to put others under obligations. The fact that these are duties

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29 Negligence is sometimes conceptualized, especially in the United States, in terms of a comparison between the burden of precautions, on the one hand, and the probability and gravity of injury, on the other. See Judge Learned Hand's judgment in *United States v. Carroll Towing*, 159 F. 2d 169, 173 (2d Cir. 1947). Under the Learned Hand formula, the cost of the precautions would be a constituent element of the wrong, and the plaintiff would be entitled to sue for the expense saved through omitting these precautions. While the risk and probability of injury refer to the anticipated rather than the actual injury, negligent action may produce an actual injury that is less that the burden of precautions. Proponents of this test would have to explain why damages are never computed by reference to the benefit. On the economic analysis, this is presumably because gain-oriented damages would distort incentives over the entire distribution of accidents both for the defendant, who must take cost-justified precautions, and for the plaintiff, who must also act efficiently to reduce the cost of an anticipated injury. The Learned Hand test, however, is not the conception of negligence appropriate to corrective justice. *See* Weinrib, *supra* note 5, at 147-52.

relative to rights rather than to other possible normative categories (for example, maximizing human welfare or fostering virtue) means that these duties are negative in nature: they function as prohibitions against wrongful interferences with another's rights rather than as positive commands to do particular acts, even if those acts promote another's good. The common law reflects the essentially negative nature of private law duties by denying the existence of duties in situations of non-feasance;[30] in such situations the actor's behavior, however morally reprehensible, merely fails to promote another's interest but does not interfere with another's rights. Accordingly, tort and other private law duties are defined negatively in terms of non-interference with rights rather than positively in terms of particular acts that are obligatory.[31] In view of this, a requirement in the examples discussed here to do a particular act, such as having eggs hand-washed or installing anti-pollution equipment or undertaking the burden of precautions, would be inconsistent with the structure of tort norms. Thus, the line between wronging the plaintiff and failing to do something that would result in the plaintiff's not being wronged, far from being adventitious, is both essential to the definition of duty within a tort system that embodies corrective justice and confirmed by the organization of the common law.

The key, then, to the availability of restitutionary damages lies in aligning the remedy with the injustice it corrects. Through the assessment of damages, the law transforms the defendant's breach of duty into its monetary equivalent, so that what the defendant owes the plaintiff at the remedial stage of their relationship corresponds to what the defendant owed the plaintiff at the stage of conduct. The law's specification of the defendant's duty therefore is crucial to the determination of the plaintiff's entitlement to gain-based damages. One must distinguish, however, between the duty itself and the measures that would avoid a breach of the duty. Only the former defines the legal relationship between the parties. The latter are

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30 This statement is subject to exceptions that are not relevant here and that, in any case, do not undermine the principle at stake. *See* Weinrib, *supra* note 5, at 153-54.

31 Even contractual obligations are not an exception: the promisor is obligated to perform the particular acts specified by the contract only because the contract has made the performance of those acts a right of the promisee. G. W. F. Hegel, Lectures on Natural Right and Political Science § 13 (Stewart and Hodgson, trans. 1996) puts the point succinctly:

> [A]ll imperatives of right ... are merely prohibitions. Right does not yet contain duties [in the positive sense]; actions in the sphere of rights are always merely negative. For example, "Abide by contracts" embraces positive actions, but the ultimate purpose is only negative: I place others in possession of something they already own; the aim is that what they own ... should not be impaired.

the merely contingent ways to prevent transforming that relationship into a wrongful one and are not as such constitutive of the defendant's legal duty. The defendant may owe the plaintiff a duty not to convert the plaintiff's egg-washing machine or not to commit a nuisance or not to create an unreasonable risk; and it may well be true that hand-washing the eggs or purchasing pollution equipment or undertaking precautions would in the circumstances have avoided the breach of these duties; and it may also be true that the defendant is better off for not having done these actions. But since these actions were not constitutive of the duties, they are not within the plaintiff's entitlement. Consequently, what the defendant gained by not performing these actions also is not within the plaintiff's entitlement.

The damages for the value of using another's property stand on a different footing. The reason that the Court in the *Olwell* case should have assessed damages at the rental value of the egg-washing machine is not because such a payment was a contingent means of preventing the wrong from occurring. Rather, such a payment would have been a quantification of the wrong that did occur. The defendant was under a duty to the plaintiff not to use the plaintiff's machine. By owning the machine, the plaintiff also owned the value that could be realized from using it. Since that value is an incident of the plaintiff's proprietary right, it is also an element in the duty correlative to that right.

These reflections provide theoretical support for what many commentators have observed, that dealing with another's property is the paradigmatic case for restitutionary damages. Indeed, from the standpoint of corrective justice, dealing with another's property appears to provide the only example for awarding a plaintiff the amount of the defendant's gain. This is because only the idea of property weaves the plaintiff's entitlement to gain into the fabric of the defendant's duty. In other situations the gains that a tortfeasor might realize are at best indirect, forming not an element of the duty but a benefit realized from the non-performance of the duty.

V. Innocent and Wilful Wrongdoing

I mentioned at the outset that, because it focuses on the bipolar relationship between the parties, corrective justice is unreceptive to justifications like punishment and deterrence that consider the defendant independently of the plaintiff. To some, this starting point may appear peremptorily to cut off a promising line of exploration, that restitutionary damages respond to deliberate or outrageous conduct. Such conduct is intuitively offensive to our moral sensibilities, and ideas like punishment and deterrence seem

particularly well-suited to the analysis of its legal consequences. Conversely, my emphasis on rights and their correlative duties seems less felicitous, since the rights of the plaintiff do not seem to be affected additionally by the defendant's state of mind.

To a certain extent the law reinforces these doubts about my dismissal of punishment and deterrence. The law presents instances where the deliberateness or innocence of the wrongdoing affects the plaintiff's remedy. One set of instances (discussed in this Section) concerns dealings in another's property, where restitutionary damages are uncontroversial but the extent of the damages depends on whether the wrongdoing was innocent or deliberate. Another set of instances (discussed in the following Section) concerns wrongs that are not proprietary, so that restitutionary damages seem unavailable on the approach suggested above, but where additional damages are nonetheless awarded on a restitutionary or punitive basis. Can such instances be comprehended within corrective justice?

An example of the law's differentiating innocent from wilful wrongdoing is the defendant's wrongful removal from the plaintiff's realty of some valuable resource, such as timber or minerals, that the plaintiff intends to exploit.[32] The severance enhances the value of the resource, and the general (though not invariable) rule is that the plaintiff recovers the enhanced value.[33] Such recovery is a straightforward application of restitutionary damages to dealings in another's property, and poses no special theoretical problem. Of particular interest, however, is the relevance of the trespasser's wilfulness to the question of whether the defendant is credited with the expense of severing the resource or of otherwise making it more marketable. An innocent trespasser (one who mistakenly thought that taking the resource was not a violation of the plaintiff's right) is allowed to deduct such expenses; a wilful trespasser is not.[34]

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32 For a recent discussion, see Hanoch Dagan, Unjust Enrichment: A Study of Private Law and Public Values 73-75 (1997).

33 A leading House of Lords case, however, *Livingstone v. Rawyards Coal*, 5 App. Cas. 25 (1880), awarded the owner of land from which coal was taken only the royalty value of the coal while it was in the ground. The Court emphasized the special features of the case: both parties thought that the trespasser had the right to take the coal, and the owner's plot was so small and so completely surrounded by the trespasser's holdings, that only the trespasser could have extracted the coal.

34 Dagan, *supra* note 32, distinguishes between the innocent trespasser, who does not know of the owner's claim or who inadvertently trespasses, and the trespasser who is aware of the owner's claim but acts bona fide in the mistaken belief that his own claim is superior. Dagan claims that in the latter case but not in the former the owner has the option of recovering the value of the resource in the ground if this should be more than the value of the severed resource minus the trespasser's expenses. This

My contention is that the higher damages that wilfulness attracts do not signal the presence of punitive considerations in the law's treatment of the trespasser. At the legal level, the law can be explained through the standard conceptual tools in the law of restitution — itself consistent with corrective justice[35] — for dealing with unjust enrichment. At the theoretical level, the distinction between the innocent and the wilful trespasser accords with the role that corrective justice ascribes to wilful wrongdoing.

From the standpoint of the law of restitution the rules concerning severed resources make sense. As noted above in Section III, the proprietor has an entitlement to any increase in the value of what is owned. With respect to the enhanced value, the innocent and the wilful trespasser stand on the same footing, since even the fact that the trespass was innocent does not create for the trespasser a proprietary interest. Their situations are different, however, with respect to the expense of severing the resource. By undertaking this expense, the wilful trespasser improved property known to belong to someone else. The law of restitution regards such an improvement as an officious intermeddling: the improver of property known to belong to another is considered to have willingly taken the risk of losing the value of the benefit conferred on the owner, so that the owner's retention of this benefit is not an injustice.[36] Accordingly, the owner who reclaims the property does not have to credit the wilful trespasser with the expenditure that improved it. In contrast, the expenditure by the trespasser who mistakenly thinks that he or she is entitled to sever the resource cannot be construed as a voluntary risk-taking. Rather, by innocently anticipating the plaintiff's own intended severance and exploitation of the resource, the expenditure can be considered an incontrovertible benefit, that is, a non-gratuitous enrichment that, because of the practical inevitability of the severance, can be returned without unduly interfering with the proprietor's autonomy.[37] Accordingly, the

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is implausible. The point of the option is to save the owner from suffering from the trespasser's uneconomic development of the resource, and it applies equally to both cases. Be that as it may, the point does not affect the argument that follows in the text.

35 Weinrib, *supra* note 5, at 140-41.

36 Peter Birks, An Introduction to the Law of Restitution 102-03 (1989).

37 Goff and Jones, *supra* note 7, at 22-25; Birks, *supra* note 36, at 116-24. Birks suggests that the argument of incontrovertible benefit is available to any defendant sued for damages, because then the claim turns the improvement into money and prevents the defendant from subjectively devaluing the benefit. Birks, *supra* note 36, at 122. If this suggestion is correct, the plaintiff in a severance case will have to credit the defendant's expenses even if the plaintiff did not intend to exploit the resource.

proprietor cannot claim from the innocent trespasser the enhanced value clear of the expenditure necessary to produce it.[38]

These rules disclose no trace of a punitive impulse.[39] They merely apply, in the context of increased value through trespass, the usual considerations at play in the restitution of unrequested benefits under the principles of unjust enrichment. The key questions are whether the benefit conferred by the trespasser plausibly can be regarded as gratuitous, and, if it cannot, whether restitution would be consistent with the owner's proprietary right. Since one cannot unilaterally create an obligation by marking another person out for a benefit for which one expects recompense, the law understands the wilful trespasser's knowing improvement of another's property as the manifestation of a donative intent. Consequently, justice between the parties allows the proprietor to keep what has thus been given gratuitously. In contrast, the innocent trespasser lacks a donative intent, and can recover the value of the benefit if the benefit to the plaintiff is incontrovertible in light of the plaintiff's anticipated exploitation of the resource. Then the plaintiff cannot retain what the defendant did not intend to give. In both situations the law works out the circumstances under which the enrichment of one rights-holder at the expense of the other constitutes the doing and suffering of an injustice. The idea of punishment, with its one-sided focus on the defendant, is entirely absent.

The distinction between the innocent and the wilful trespasser readily can be seen to fit within the remedial framework of corrective justice, if one keeps in mind the features of corrective justice that I have emphasized throughout. First, corrective justice construes injustice as a wrong done by the defendant relative to the plaintiff as the holder of a right. Second, corrective justice insists that the remedy mirror and undo the wrong.

First, how do innocent and wilful trespasses differ as violations of right?[40] An innocent trespass is consistent with the recognition on the part of the trespasser that the owner has rights and that those rights have to be respected in the interaction between the parties. The innocent trespass merely manifests the trespasser's incorrect assumption that the owner's rights do not extend to the property in question.[41] The trespass thus raises the issue of where the border lies between the plaintiff's right and the defendant's

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38 Hugh Evander Willis, *Measure of Damages when Property is Wrongfully Taken by a Private Individual*, 22 Harv. L. Rev. 419, 425-26 (1908-09).

39 *But see* Lord Diplock's observation in *Broome v. Cassell* [1972] A.C. 1027, 1129.

40 The distinction that follows is drawn from Hegel, *supra* note 23, at §§ 84, 95.

41 In Hegel's words:

> This clash ... entails the recognition of rightness as the universal and decisive factor, so that it is common ground that the thing in dispute should belong to the party who has the right to it. The suit is concerned only with the subsumption of the thing

legitimate freedom. Innocent trespassers mistake the location of this border, but their interaction with proprietors is consistent with the acknowledgment that a domain of rights exists within which the border is drawn.

In contrast, a wilful trespass signifies a denial that the owner has rights that ought to be respected. The wilful trespasser acts in the knowledge that his or her conduct is a violation of the rights of the proprietor. Implicit in this wilfulness is the view that, so far as this interaction between the parties is concerned, the right of the proprietor to the property does not matter. Moreover, since the proprietor has a right that is not less worthy of the trespasser's respect than other rights, the trespass proceeds on the basis that the very idea of rights does not matter. Unlike the case of innocent trespass, wilful trespass raises the issue, not of the location of the border between the plaintiff's right and the defendant's legitimate freedom of action, but of the existence of the plaintiff's right, and thus of the normative significance of rights in general. Whereas the innocent trespasser acknowledges that the rights of the owner are to be respected but mistakes who the owner is, the wilful trespasser manifests contempt for rights.

Next, how is this difference in the nature of the wrong reflected in the remedy that corrects the wrong? The two kinds of trespass share the element of misappropriation, so that in both cases the fruits of the misappropriated property — in our example, the enhanced value of the resource wrongfully severed from the plaintiff's land — must be returned to the owner. However, the defendant's expenses in enhancing the value is another matter. The defendant's claim to a credit for these expenses is a claim about what is rightful within the interaction between the parties: that in the assessment of trespass damages the owner should not get the benefit of the enhancement free of the burden of the expenses that produced it. Since an innocent trespass involves the trespasser's recognition of the validity of the owner's right to the severed resource, considerations that go to rightfulness of being credited with the expenses remain available to the trespasser.[42]

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under the property of one or the other of the parties.
Id. at § 65.

42 The corrective justice explanation is not restricted to cases of severance and trespass. It also applies to fiduciary cases in which the fiduciary breaches his or her duty in a way that advances the interests of the beneficiary and, though having to disgorge the gain, is allowed recompense for services rendered in committing the breach of duty. *See* Boardman v. Phipps [1967] 2 A.C. 46 (H.L.). Compare also *Redwood Music v. Chappell* [1982] R.P.C. 107, 132 (Q.B.D.), where Goff J. indicated that in an action for an account of the profits from an innocent copyright infringement, a liberal allowance should be made for the skill and labor of the infringer.

In the case of a wilful trespasser, however, the claim to these expenses is normatively incoherent. The act of severance has the double significance of both creating enhanced value through the defendant's expenditure and expressing the defendant's disrespect for the plaintiff as owner. Thus the defendant's claim to a credit for the expenditure asserts against the plaintiff a right based on the very act through which the defendant denied the validity of the plaintiff's right. Such a claim is contradictory. The assertion of a right presupposes that rights regulate the interaction between the parties. Here the defendant's claim for the expenses of severance asserts what the severance as wilful trespass denied, that the defendant regards the interaction with the plaintiff as governed by the parties' rights.[43]

From the standpoint of corrective justice the disallowance of the credit for the defendant's expenses is a way of nullifying the wilful element in the wrong. To appreciate this, one must understand why, in view of its antipathy to punitive damages, corrective justice regards this situation differently from those implicated in the controversy about punitive damages.

Usually the wilful element of the wrong is beyond the reach of corrective justice. The defendant's wilfulness implicitly denies the normative significance, not only of the plaintiff's right, but also of rights in general. In and of itself, the wilful element of the wrong usually produces no effect particular to the plaintiff — what Hegel calls the injury's external or positive existence[44] — over and above the disrespect for rights generally. Such disrespect falls within the province of the criminal law, which has the function of responding in the name of the juridical order as a whole to challenges to the validity of rights.[45] So far as private law is concerned, the wilful element yields nothing transactionally specific to the plaintiff. No justification therefore exists for singling out the plaintiff to receive damages that represent the defendant's wilfulness. Although the defendant may have deserved punishment, the award of such damages to the plaintiff would be a windfall. For this reason, corrective justice supports the English jurisprudence

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43 As Lord Abinger commented in *Martin v. Potter* (1839) 5 M. & W. 351, where the trespasser argued that his cost in severing coal should be deduced from the owner's damages:"If the plaintiff had demanded the coals from the defendant, no lien could have been set up in respect of the expense of getting them. How then can he claim to deduct it? He cannot set up his own wrongs."
Id. at 354.

44 Hegel, *supra* note 23, at §§ 97-99.

45 *Id.* at § 95.

that criticizes punitive damages for giving the tort plaintiff an undue gain on the basis of considerations that properly belong to the criminal law.[46]

From the standpoint of corrective justice, this difficulty is absent when the wilfulness materializes into a particular effect.[47] Then the wilfulness takes a form that is specific to the transaction between the parties, so that the nullifying of that effect is a way of nullifying the wilful aspect of the wrong. In the case of a value-enhancing trespass, the improvement through severing the resource is an expression of the trespasser's wilfulness, and the expenditure is the means for carrying out that wilfulness. The trespasser's wilfulness then has, as Hegel would put it, positive existence in the improvement and in the expenditure that that improvement generated. In contrast to the usual punitive damages situation where the wilful element produces no effect particular to the plaintiff, here the wilfulness has produced a costly improvement in the plaintiff's property for which the defendant is claiming a credit. The law annuls the defendant's wilfulness by treating as a nullity the claim grounded in its exercise.

Such a correction of the wrong makes the wilfulness of the trespass recoil against the trespasser. The law answers the trespasser's refusal to recognize the owner's right in the property with a corresponding refusal to recognize the trespasser's right to the expenditure that improved the property. Just as the wrong is the appropriation by the trespasser of the advantages of nullifying the owner's rights, so the disallowance of the credit brings home to the trespasser the disadvantages of that nullification. In doing this the law draws out the normative implications of the wrong by holding the defendant to what the wrongful conduct implies. That conduct implicitly denied the significance of the owner's right to the resource. The consequence of this denial is that the owner can be under no obligation to the trespasser for the improvement, because only for the owner does that improvement constitute an enrichment. The denial of the validity of the owner's right undermines the basis of the trespasser's claim to the restitution of the enrichment. In this respect, the contrast with the innocent trespasser is clear: because the innocent trespasser does not deny that the resource belongs to whoever owns it, the claim that the owner ought not to retain the benefit of the value-enhancing expenditure remains available.

This account of the difference between innocent and wilful trespass lies

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46 Weinrib, *supra* note 5, at 135.

47 As in the case of aggravated damages, which compensate for the insult resulting from a wilful trespass to the person, or in the instance of profiteering from a tort, as discussed *infra* Section VI.

entirely within the metes and bounds of corrective justice. It views the disallowance of the credit as a transactionally specific response to the defendant's wrong: the defendant's wilful disrespect of a right particular to the plaintiff disentitles the defendant from taking advantage of the legal argument that otherwise would qualify the plaintiff's vindication of that right. In this context the defendant's wilfulness is not considered an affront to the legal order generally that gives rise to punishment. Rather, the wilfulness is an element in the wrong that the defendant has done specifically to the plaintiff's right, with the result that the expenditure through which the defendant's wrongful purpose was executed does not work in favor of the defendant when the plaintiff seeks to undo that wrong. In this account of the remedy appropriate to the injustice done by the defendant to the plaintiff, no role is played by the one-sided normative considerations of punishment or deterrence.

Indeed, from an explanatory standpoint the corrective justice account is superior to the invocation of punishment or deterrence with respect to the treatment of the expenditures of the wilful trespasser. A notable feature of the treatment of wilful trespass is that the trespasser is disqualified from deducting the expenses, whatever they are. No attempt is made to calibrate the unrecouped costs to the trespasser's desert. From a punitive standpoint, this is odd, since the amount of the supposed punishment is not necessarily related to the trespasser's culpability.[48] From a deterrence perspective also, this appears difficult, though perhaps some elaborate economic story could be told of why, despite the overall gain in utility through the creation of enhanced value, neither disgorgement of the net gain nor the imposition of an additional penalty greater or less than the amount of the expense would create the proper incentives. Corrective justice avoids these difficulties because it looks to the normative implications of the parties' interaction without orienting that interaction to any external end that might be forwarded by punishment or deterrence. Corrective justice calls for no assessment of culpability apart from the fact of wilfulness, because that fact in itself allows the implication that the defendant's conduct evinced a denial of the significance of the plaintiff's right. Similarly, corrective justice is not concerned with deterring potential trespassers, but with making the remedy correspond to the wrong. For corrective justice the expenses as such, regardless of their relationship to any other policy, pertain to the interaction of the parties, and so the remedial consequence of the wrong — the absence of the trespasser's entitlement to recoup them — can attach to the expenses as such.

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48 Dan B. Dobbs, Law of Remedies 511 (2d ed. 1993).

VI. PROPERTY-LIKE RIGHTS

So far I have emphasized the significance of property for a corrective justice approach to restitutionary damages for tort. Since such an approach highlights the correlativity of the injustice done by the defendant and the injustice suffered by the plaintiff, it conditions liability on the requirement that the defendant's conduct be wrongful with respect to the plaintiff's right. If the plaintiff is to recover gain-based damages, that right must include an entitlement to the profit from whatever embodies the right. Proprietary rights contain this entitlement.

Strictly speaking, a proprietary right has two features. First, a proprietary right can be asserted against the world, and therefore the right carries with it a correlative duty, incumbent on everyone else, not to interfere. The proprietor's entitlement to the profit from what is owned derives from the power to determine the object's use, including the conditions under which it can be alienated, to the exclusion of everyone else. Since the proprietor must agree to the terms on which the object can enter the stream of commerce, the proprietor also owns whatever can be realized through use or alienation.

Second, the subject matter of a proprietary right has to be morally capable of being acquired and alienated. For example an incident of a person's bodily integrity is not the subject of a proprietary right. One's body is not what one owns but what one is; it is the organism through which humans as self-conscious and purposive beings express themselves in the world. One does not come to be entitled to one's body by any act of acquisition, and one cannot morally alienate it to someone else. The right to one's body is so intimately connected to the person whose body it is that it lacks the moral possibility of being externalized and passing into the possession of someone else. Similar considerations apply to other aspects of one's dignity — to what Hegel compendiously termed "those goods, or rather substantive characteristics, which constitute my own private personality and the universal essence of my self-consciousness."[49] Such interests in physical integrity and dignity are, of course, legally protected with the status of rights, but they are not considered to be rights of a proprietary kind.

Under certain circumstances, restitutionary damages are justified even if either or both of these features are absent. Although restitutionary damages

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49 Hegel, *supra* note 23, at § 66. *Cf.* Immanuel Kant, The Metaphysics of Morals 63 (Gregor trans., 1991)(describing innate right as something "belonging to every man by virtue of his humanity").

do not then respond to the violation of what is strictly speaking a proprietary right, the relationship between the parties can give rise to an interest sufficiently property-like to allow this kind of award.[50] These relational property-like wrongs can be grouped into two broad categories. In the first category, a gain-based remedy emerges from the pre-existing relationship between the parties, so that the remedy is available only against the defendant and not against the whole world. In the second, the remedy emerges as a response to the defendant's particular conduct.

The violation of a fiduciary duty is the paradigmatic example of the situation in which a gain-based remedy can emerge from the objective nature of the relationship. From the perspective of corrective justice, a fiduciary relationship reflects the Kantian idea that private law as a system of rights supposes persons to be ends in themselves rather than means to the ends of others.[51] Accordingly, a relationship such as that between fiduciary and beneficiary, the legal structure of which makes one person's interests entirely subject to another's discretion, must have as one of its incidents the duty of loyalty owed by the latter to the former. The fiduciary's duty of loyalty then becomes for purposes of this relationship an entitlement of the beneficiary. Since the meaning of this duty of loyalty is that the fiduciary cannot profit from the relationship, gains can be regarded as the material embodiment of the breach of duty — what the fiduciary has, as it were, sold out the duty for — and the beneficiary is as entitled to these profits as he or she was to the duty for which they were exchanged. Courts occasionally refer to the opportunity to profit from the relationship as the beneficiary's "property"[52] though, since

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50 The danger, of course, is that the possibility of calling something "property-like" may appear to provide a convenient black box into which to stuff the residual instances that do not fit what a property-based approach requires. However, I think that the property-like aspects of these situations are salient enough to bring them within the approach I have suggested. Peter Birks writes that "[i]t is not helpful ... to say that restitutionary damages should always be available for a 'proprietary' tort. The difficult questions will merely be transferred to the definition of property." Civil Wrongs: A New World 98 (Butterworth Lectures 1990-1). While the fear is well-founded, the truth is that, as with every interesting legal issue, difficult questions are unavoidable. The basic issue is whether property is the appropriate concept, not whether the concept is completely determinate in its application. *See* Weinrib, *supra* note 5, at 222-27. In any case, property seems to be a more manageable criterion than the one Birks proposes, namely that one ask whether there is sufficient justification for giving the plaintiff a windfall and for tolerating the suppression of economic activity.

51 Kant, *supra* note 49, at 62.

52 *See, e.g.*, Boardman v. Phipps [1967] 2 A.C. 46, 107, 115 (H.L.).

it entails the right to exclude only the fiduciary and not the whole world, it "is not property in the strict sense."[53] Seen in this light, the fiduciary's liability to disgorge profits is not an example of a policy of deterrence impacting the relationship from the outside, but is rather the remedial consequence that reflects the nature of the obligation owed by the fiduciary to the beneficiary.

The other property-like wrongs are those characterized by action of the defendant that implicitly or explicitly treats the plaintiff's right as an asset whose value the defendant can appropriate.[54] For things that can be acquired and alienated, value belongs to the owner as an aspect of property; as noted above in Section III, the wrongdoer who deals with such things can be liable for the market value or for the realized gains. In the case of property-like wrongs, the same liability is available for wrongs done with respect to things, like physical integrity, that cannot be acquired and alienated. Compared to the victim of a true proprietary wrong, the plaintiff is not placed in a worse position by virtue of the fact that the right was too intimately connected with the plaintiff's being and dignity even to rank as proprietary. Because the defendant acted with knowledge of the plaintiff's right and with the intent to appropriate its value, the law ascribes a proprietary quality to the right so far as the relationship between the defendant and the plaintiff is concerned. In doing this, the law merely holds the defendant to the implications of his or her own conduct. Since the plaintiff's right was treated as a commodity whose value was available to the defendant, the plaintiff is allowed to recapture the gain that was realized through it. Thus, once the wrong is construed as a property-like one for purposes of the parties' relationship, the plaintiff has available the restitutionary damages that attend a dealing with another's property.

Consider the example posed by Professor Birks of the thug hired to beat someone up.[55] The thug cannot resist a claim by the victim of the beating for restitutionary damages on the basis that the wrong was a bodily injury and thus too closely connected to the victim to count as property. In these circumstances the battery is part of a process of illegitimate commodification. Having treated the plaintiff's bodily integrity as an item that the thug was in effect selling for a price, the thug cannot take refuge in the argument that bodily integrity is really an inalienable pearl beyond price. Although bodily integrity is not in itself property, the thug's relationship to the defendant's bodily integrity has become property-like through the thug's conduct. Consequently, the thug is

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53 *Id.* at 102.

54 *See* Peter Benson, *The Basis for Excluding Liability for Economic Loss in Tort Law, in* David Owen, Philosophical Founations of Tort Law 427, 457 (1995).

55 Birks, *supra* note 36, at 319.

liable for restitutionary damages, as he would be for any dealing with another's property.

The idea that special remedial consequences attend the defendant's profiteering from another's right finds its most general expression in Lord Devlin's second category of punitive damages, which applies to conduct calculated by the defendant to make a profit that may exceed the compensation payable to the plaintiff.[56] Lord Devlin ascribed to this category of damages the admonitory function of teaching the wrongdoer that tort does not pay, rather than the restitutionary function of causing the disgorgement of the gain. Nonetheless, given that disgorgement is a way of preventing the wrongdoer from profiting, the two functions are not easily kept separate.[57] Indeed, restitutionary damages have been recommended as a way of introducing greater specificity into the punitive idea.[58] And even in jurisdictions that do not follow the English approach to punitive damages, courts may factor restitutionary considerations into their punitive awards.[59]

The conduct that for Lord Devlin gives rise to punitive damages within this category resembles the conduct on which restitutionary damages generally are based. I observed above in Section III that, since restitutionary damages nullify the assertion of dominion implicit in the wrong, they presuppose advertence through use or purported alienation. Lord Devlin's formulations in terms of the defendant's "cynical disregard of the plaintiff's rights" and "conduct calculated to make a profit"[60] point in a similar direction. The underlying idea is that wrongdoers cannot treat as a source of gain that to which they have no right. Lord Devlin himself notes the connection between this category of punitive damages and the misappropriation of property when, instancing defamation, he remarks that "no man should be allowed to sell another man's reputation for profit."[61]

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56 Rookes v. Barnard, [1964] A.C. 1129, 1227 (H.L.).

57 In *Broome v. Cassell*, [1972] A.C.1027, 1129 (H.L.), Lord Diplock notes the analogy of this category of punitive damages to the restitution of an enrichment.

58 Jeff Berryman, *The Case for Restitutionary Damages over Punitive Damages: Teaching the Wrongdoer that Tort does not Pay*, 73 Canadian Bar Rev. 320 (1994); John Glover, *Restitutionary Principles in Tort: Wrongful User of Property and the Exemplary Measure of Damages*, 18 Monash U. L. Rev. 169 (1992).

59 Austin v. Rescon Construction (1989) 57 D.L.R. (4th) 591 (B.C.C.A.); Huff v. Price (1990) 76 D.L.R. (4th) 138 (B.C.C.A.).

60 Rookes v. Barnard [1964] A.C. at 1227.

61 *Id.* If Lord Devlin's description of the conduct leading to punitive damages can be assimilated to restitutionary damages, an extension of the latter beyond intentional wrongdoing may be justified. For example, a negligent defendant who failed to take precautions against imposing an unreasonable risk out of a calculation that the cost of precautions would be less than the cost of liability could be assessed the amount

Despite their similarity, restitutionary damages differ from punitive damages in their conception of the plaintiff's role. Commenting on this category of punitive damages, Lord Diplock once observed that, because their purpose is merely to prevent the wrongdoer from obtaining a reward for his wrongdoing, "the plaintiff is the accidental beneficiary of a rule of law based on public policy rather than on the reparation of private wrongs."[62] Punitive damages are oriented toward striking the gain from the hand of the defendant; the plaintiff is nothing but the contingent recipient of a windfall. Restitutionary damages, in contrast, allow us to focus on the juridical relationship between the parties. Even in the property-like cases, we can work through the implications of the defendant's wrongful treatment of the plaintiff to a remedy that reverses that wrong. Just as the plaintiff has a right not to be wronged, so the plaintiff has an entitlement to the damages that undo that wrong.

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saved. The basis for this is not that the defendant owed the plaintiff the specific precautions that were not taken (*see infra* Section IV), but that the unreasonable risk was imposed in an advertent disregard of the plaintiff's rights. In *Grimshaw v. Ford Motor Co.*, 174 Cal. Repr. 358 (Ct. App. 1981), the defendant failed to recall cars fitted with unsafe gas tanks because the cost of recall outweighed the benefits of recall by $100 million. The jury award of $125 million in punitive damages was reduced on appeal to $3.5 million. For a defense of the jury award, see Marc Galanter and David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U. L. Rev. 1393, 1436-37 (1992-93):

> Ford had displayed a certain kind of contempt for Grimshaw's value. To use Kant's famous distinction, Ford treated Grimshaw as possessing merely a price not a dignity.... The jury ... chose to inflict a monetary defeat on Ford that incorporated within it a reference to Ford's own analysis, a defeat that Ford could not help but understand because the jury held up the cost-benefit analysis as a mirror in which all would recognize the moral truth of the situation. (emphasis in original)

However, even if restitutionary damages could be justified in the *Grimshaw* case on the grounds that the defendant advertently disregarded the plaintiff's rights, the possibility of multiple plaintiffs creates the difficulty of distributing the defendant's gain among them. Accordingly, even Professor Jones, despite his expansive view of restitutionary damages, has asserted that in some situations, where there may well be multiple plaintiffs who suffer from a tortious act, a restitutionary claim should be denied." Goff and Jones, *supra* note 7, at 786.

62 McCarey v. Associated Newspapers Ltd. (No. 2) [1965] 2 Q.B. 86, 107 (C.A.) (Diplock L. J.).

CONCLUSION

The reawakening of interest in restitution has given restitutionary damages a new salience. Now that the significance of restitution is widely recognized, the question arises: what is the conceptual framework within which gain-based damages are to be understood?

To this question, corrective justice supplies an old answer. Corrective justice treats the defendant as the doer and the plaintiff as the sufferer of the same injustice. Corrective justice therefore highlights the correlativity of right and duty that characterizes the norms connecting the parties. From the perspective of corrective justice, the point of a legal remedy is to undo that injustice, and so the remedy must mirror the structure of the injustice. Corrective justice thereby ties both the defendant to the plaintiff and the remedy to the injustice. Under this approach, restitutionary damages are available when the potential for gain is an incident of the right that the wrongdoer violated. Hence the availability of restitutionary damages depends on the defendant's violation of a property (or property-like) right held by the plaintiff.

In offering this answer, corrective justice draws on a venerable tradition of legal theory, whose insights are seen as immanent in any sophisticated system of private law. Through its institutions and central doctrines, private law directly connects the parties and attempts a coherent elaboration of the juridical norms applicable to their interaction. Drawing on Aristotle, the theory of corrective justice locates the structure of these norms in the correlativity of doing and suffering. Drawing on Kant and Hegel, the theory locates the normative grounding of private law in the idea of self-determining agency that is contained in the law's ascriptions of responsibility.

With this understanding of restitutionary damages comes a repudiation of the notion that restitutionary damages are occasions for the promotion of social purposes extrinsic to the relationship between the parties. Purposes such as punishment or deterrence (or broader purposes such as the promotion of economic efficiency or of other goods), even if they otherwise seem desirable, cannot be accommodated to the correlative nature of private law justifications and therefore cannot explain the most characteristic and pervasive features of private law. Thus, in this context as in others, corrective justice breaks free of the instrumentalist modes of explanation that over the last decades have so brilliantly obscured private law.