

The Purpose of Awarding Restitutionary Damages: A Reply to Professor Weinrib

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Professor Ernest Weinrib has argued that restitutionary damages must be understood, not as a deterrent to wrongful conduct, but as a requirement of commutative justice. Professor Gordley agrees, but claims that a purposive understanding of commutative justice can shed more light on restitutionary damages than the formal understanding of Professor Weinrib. A purposive understanding enables us to distinguish appropriation of a right from mere interference; to distinguish true restitutionary damages from damages in lieu of a forced sale or hold-up; and to explain why, normally, it should not matter whether the defendant acted wilfully or innocently.

INTRODUCTION

In the *Nicomachean Ethics*, Aristotle distinguished distributive justice from corrective or commutative justice. Distributive justice ensures that each citizen gets a fair share of whatever resources a community has to divide. Corrective or commutative justice preserves each person's share. In involuntary transactions, commutative justice requires one who took or destroyed another's resources to give back an equivalent amount. In voluntary transactions, it requires the parties to exchange resources of equivalent value.¹ Professor Weinrib has suggested in his other writings that Aristotle's concept of commutative justice can teach us a great deal about tort

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1 Nicomachean Ethics V.ii 1130^b - 1131^a, in *The Basic Works of Aristotle* 1006-08 (Richard McKeon ed., 1941).

and contract law.² In this essay, he makes the same claim about the law of unjust enrichment.

He argues that the concept of commutative justice explains why the plaintiff's damages should sometimes be measured by the plaintiff's gain. Sometimes, "the opportunity to gain ... rightfully belonged to the plaintiff."³ The defendant who appropriated this gain for himself must therefore give it back. The "paradigmatic example" is the misappropriation of property rights. "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."⁴ In contrast to property-like rights are rights simply to be free from harm. If the defendant violates such a right, he is liable only for the harm to the plaintiff.⁵ Weinrib then uses this approach to explain why the determination of the defendant's liability for gain-based damages should sometimes depend on whether he intentionally violated the plaintiff's rights.

The first steps of his argument retrace an ancient path. Roman law recognized particular cases of what we now call unjust enrichment.⁶ But historically, the idea that there is a general law of unjust enrichment, coeval with contract and tort, originated in the 16th century when a group of jurists centered in Spain and known to historians as the "late scholastics" considered the implications of Aristotle's idea of commutative justice. In the 17th and 18th centuries, their conclusions were adopted and spread throughout Europe by the so-called "natural law school," founded by Hugo Grotius and Samuel Pufendorf, paradoxically, at the very time when the influence of Aristotelian philosophy waned.⁷

These earlier jurists moved from the concept of commutative justice to the principle of liability for unjust enrichment by a route similar to Weinrib's. An initial step had been taken by Thomas Aquinas, who, in the 13th century, developed a systematic moral philosophy on the basis of Aristotelian ethics.

2 *See especially*, Ernest Weinrib, *The Idea of Private Law* (1995).

3 Ernest Weinrib, *Restitutory Damages as Corrective Justice*, 1 *Theoretical Inquiries in Law* 1, 12 (1999).

4 *Id.*

5 *Id.* at 11-12.

6 Reinhard Zimmermann, *The Law of Obligations — Roman Foundations of the Civilian Tradition* 838-57 (1990).

7 On this group, see James Gordley, *The Philosophical Origins of Modern Contract Doctrine* 69-111 (1991); James Gordley, *Tort Law in the Aristotelian Tradition*, in *Philosophical Foundations of Tort Law: A Collection of Essays* 131 (David Owen ed., 1995).

Aquinas observed that, as a matter of commutative justice, a person who has another's property might be liable for two different reasons: because of the way in which he initially acquired it (*acceptio rei*) or simply because he still has it (*ipsa res acceptae*).⁸ The way in which he acquired it might have been wrongful, in which case he was liable even if he no longer had the property. It might have been rightful and with the owner's consent, in which case whether he was liable depended on the type of agreement he had with the owner. In contrast, a person who still has another's property is not liable because of the way he initially acquired it. Commutative justice requires him to give it back simply because it belongs to someone else.

The late scholastics, followed by Grotius and Pufendorf, took the argument in this last case a step further. According to them, a person who once had another's property, however he might have acquired it, should be liable if he has become richer by means of it.⁹ As Robert Feenstra has pointed out, they thus recognized a general principle of liability for unjust enrichment for the first time.¹⁰ For them as for Weinrib, the rationale was that one who owns property should have the right to the wealth that is generated by that property.

Despite this similarity, there is an underlying difference. Weinrib's approach, as he notes elsewhere, is a formal one. It does not deal with purposes. "Corrective justice," according to Weinrib, "sees internal coherence as private law's ultimate animating principle."¹¹ "Corrective justice sets its face against consequentialist understandings of private law."¹² For Weinrib, the owner has the right to a gain that the defendant made by misappropriating his property because this right is the logical correlative of the owner's right to gain from its use. He has the right to recover if the defendant harmed him because it is the logical correlative of his right not to be harmed. But the question is why should the law recognize these two kinds of rights. Might it be, not simply for the sake of logical coherence, but because some purpose is served by doing so?

8 *Summa theologiae* II-II, Q. 62, a. 6.

9 Hugo Grotius, *De iure bellis ac pacis libri tres*, II.x.5 (1646); Leonard Lessius, *De iustitia et iure ceterisque virtutibus cardinalis*, lib. 2, cap. 14, dub. 1, no. 3 (1628); Luis de Molina, *De iustitia et iure tractatus*, disp. 718, no. 2 (1614); Samuel Pufendorf, *De iure naturae et gentium libri octo* IV.xiii.9 (1688).

10 Robert Feenstra, *L'influence de la scolastique espagnole sur Grotius en droit privé: quelques expériences dans des questions de fond et de forme, concernant notamment les doctrines de l'erreur et de l'enrichissement sans cause*, in *Fata iuris Romani* 338 (1974).

11 Weinrib, *supra* note 3, at 5.

12 *Id.* at 22.

In that respect, as I have argued elsewhere,¹³ Weinrib breaks with the Aristotelian tradition. In that tradition, one cannot understand anything, whether a political institution, an organism, or an article of furniture, apart from its purpose, final cause or end. Each part of a thing has an end which is itself a means to the end of the whole. At the beginning of his commentary on the *Nicomachean Ethics*, Thomas Aquinas explained that there are two kinds of order, that of part to whole and that of means to ends, and that the second is the basis of the first.¹⁴

This difference affects Weinrib's understanding of the law of restitution. It makes it difficult for him to explain the difference between "property-like" rights and rights against interference. It distorts his conclusions about the damages to be awarded for wilful wrongdoing.

I. "PROPERTY-LIKE" RIGHTS AND RIGHTS AGAINST INTERFERENCE

Weinrib is correct that we must distinguish these two kinds of rights to make sense of the law of unjust enrichment. The plaintiff can recover restitutionary damages when the defendant appropriates his land or chattels, violates his patent or copyright, or puts his name or image to a commercial use. He generally cannot when he is the victim of battery, negligence, nuisance or defamation, even if the defendant has profited. Modern treatise writers agree that the distinction is fundamental. They nevertheless find it perplexing, since it is not clear why the law treats these rights differently or how they are to be distinguished.¹⁵ To resolve those problems, one has to ask what purpose is served by drawing the distinction.

13 Gordley, *Tort Law in the Aristotelian Tradition*, *supra* note 7, at 133.

14 Thomas Aquinas, *In decem libros ethicorum Aristoteles expositio*, lib. I, lec. i, no. 1 (A. Pirotta ed., 1934).

15 As George Palmer puts it, when the plaintiff recovers for unjust enrichment, the defendant's gain must have been "the product of the legally protected interest that was invaded." 1 George E. Palmer, *The Law of Restitution* § 2.10 (1978). The tort in question, Peter Birks says, must have "the purpose of preventing disapproved modes of enrichment." Peter Birks, *An Introduction to the Law of Restitution* 328 (1985). The question thus arises, when is a gain a product of a protected legal interest, or when does a tort have the purpose of preventing enrichment.

A. The Purpose of Property Rights

Aristotle considered the purpose of recognizing rights to private property when he criticized the theory of his teacher Plato that property should be held in common. If it were, Aristotle said, people would quarrel, and some would work little and receive much while others worked much and received little.¹⁶ Thomas Aquinas explained that private property was a legitimate institution because it avoided the disadvantages that Aristotle had mentioned.¹⁷ Nevertheless, Aristotle and Aquinas also believed that the end of external things was to meet human needs.¹⁸ Aquinas concluded that the owner's rights were not absolute but limited by the considerations that explained the institution of rights to private property. For example, a person in urgent need with no other recourse could lawfully take another's property.¹⁹

Late scholastics such as Soto, Molina, and Lessius followed Aquinas, and natural lawyers such as Grotius and Pufendorf borrowed from them. While developing these ideas in different ways, they all agreed that by nature, or originally, or in principle, all things belong to everyone. They all describe private ownership as instituted to overcome the disadvantages of common ownership, usually the ones mentioned by Aristotle and Aquinas.²⁰ They all agreed that the rights of a private owner are therefore qualified, and must yield in certain cases to the needs of another. The standard example is the taking of property by a person in urgent need.²¹ Grotius also suggested that there is a right of innocent use: one person can use another's property if he can do so without causing any loss or inconvenience.²²

In the Aristotelian tradition, then, rights to private property are a solution to the problems of allocating resources and of providing incentives to produce and care for them. When resources are shared, quarrels arise easily because there is no clear answer to the question of when one person has

16 *Politics* II.v.

17 *Summa theologiae* II-II, Q. 66, a. 2.

18 *Politics* I.viii, *cited in* *Summa theologiae* II-II, Q. 66, a. 1.

19 *Id.* at Q. 66, a. 7.

20 Grotius, *De iure belli ac pacis*, *supra* note 9, at II.ii.2; Lessius, *De iustitia et iure*, *supra* note 9, at lib. 2, cap. 5, dubs. 1-2; Molina, *De iustitia et iure*, *supra* note 9, at disp. 20; Pufendorf, *De iure naturae et gentium*, *supra* note 9, at II.vi.5; IV.iv.4-7; Domenico Soto, *De iustitia et iure libri decem* lib. 4, q. 3, a. 1 (1553).

21 Grotius, *De iure belli ac pacis* II.ii. 6-7; Lessius, *De iustitia et iure*, *supra* note 9, at lib. 2, cap. 12, dub. 12; Molina, *De iustitia et iure*, *supra* note 9, at disp. 20; Pufendorf, *De iure naturae et gentium*, *supra* note 9, at II.vi.5; Soto, *De iustitia et iure*, *supra* note 20, at lib. 5, q. 3, a. 4.

22 Grotius, *De iure bellis ac pacis*, *supra* note 9, at II.ii. 6-7, 11.

had his share or taken his turn. Incentives to produce or care for resources are weak. This explanation is like that of modern economists only more general: private property is a means of allocating resources and providing incentives, but it is not, by definition, necessary for "efficient" allocation. In any event, like the economic explanation, the Aristotelian tradition explains property rights in terms of a purpose they serve. Once such rights are recognized, then it does follow, as Weinrib says, that the benefit of using the right belongs to the right-holder and that, accordingly, he is entitled to restitutionary damages if someone else appropriates that benefit. But the purpose served by recognizing such rights ultimately explains why it should be so.

B. Interference with a Right and Appropriation of a Benefit

When we keep in mind the purpose of creating property-like rights, we can see both how it is possible and why it is sometimes difficult to distinguish them from mere rights to be free from interference by others. Property-like rights cannot be created without recognizing the right of the proprietor to be free from certain forms of interference. A private right to farmland or to living space would not be a private right if others could uproot the owner's crop or move into his home. The point of having a private right to living space may be to avoid interferences with one's own privacy and activities. Such rights would be worth much less if the owners were not also protected against intermittent trespass and the side-effects of their neighbors' activities. One might think that a property-like right is nothing more than an aggregation of rights against interference.

One cannot see the difference by making a formal analysis of the concepts of "property" and "interference." One has to think about the purposes for which rights are created. Recognition of the rights against interference is necessary to constitute a property right and to make it valuable. Nevertheless, the purpose of creating the property right, in the Aristotelian tradition at least, is to solve the problems of allocating benefits and giving people incentives to produce them. Consequently, it is one thing for the defendant merely to interfere with rights of an owner that are established so that the owner can derive a benefit. It is another thing for him to appropriate the benefit that these rights are established to allow the owner to obtain. That is so even though the same act can constitute both an appropriation of the benefit and an interference with these rights. One who uproots his neighbor's crop to plant his own both interferes with his neighbor's farming and also appropriates the benefit that goes with owning farmland. One who moves into another's house may invade his privacy or disturb his activities but,

in any case, appropriates the benefit that goes with private living space. In contrast, those who commit negligence or nuisance damage the owner's property or interfere with his ability to benefit from it. But they do not appropriate the very benefit which the owner has the right to derive from his property and which the law of negligence and nuisance are designed to protect. It is somewhat misleading to speak of rights against interference as opposed to property-like rights. It would be better to speak of mere interferences as opposed to acts of appropriation.

Borderline cases are a good example of why, to make sense of the law of restitution, one must think in terms of the purposes for which property rights are recognized. Take trespass. For Weinrib, *Phillips v. Homfray*²³ is clearly wrong. In that case, the court denied the plaintiff's claim for wayleave rent when the defendant used underground passageways to remove his own minerals. For Weinrib, "the key to the recovery of gain-based damages is that the defendant has dealt with the plaintiff's property."²⁴ The defendant is liable for violating the proprietor's "exclusive right to deal with the thing owned,"²⁵ for "treat[ing] the object as if it were his or her own."²⁶ For Weinrib, it seems to follow from the concept of property rights that the plaintiff has an exclusive right to use the underground passageways and therefore to gain-based damages if anyone else uses them.

I do not think it even follows from the concept of property rights that the owner has an exclusive right to use them. Establishing that proposition requires an argument, and one based on the reasons for recognizing property rights. Grotius, as we have seen, thought that there should be a right of innocent use: in view of the purposes for which private property rights are established, one person should be able to use another's property in ways that cause no loss or inconvenience. While modern law does not recognize such a right, at least in general terms, it will not allow an owner to complain of certain physical entries on his property that cannot cause him loss or inconvenience. He cannot complain about entry by radio or television waves unless they interfere with his own reception. He cannot complain about high flying aircraft.²⁷ By analogy, it has been held that he cannot complain about a sewer underneath his property at a depth of one hundred fifty feet.²⁸ It

23 [1883] 24 Ch.D. 439 (C.A.).

24 Weinrib, *supra* note 3, at 15-16.

25 *Id.* at 12.

26 *Id.* at 13.

27 *Smith v. New England Aircraft Co.*, 170 N.E. 385 (Mass. 1929); *United States v. Causby*, 328 U.S. 256 (1946)(dicta).

28 *Boehringer v. Montalto*, 254 N.Y.S. 276, 277 (1931)("By analogy [to airspace,] the

would seem, then, that the only reason he can complain about people coming on his property is that their presence may interfere with his privacy or his own activities. If so, it would seem that whether he can complain about use of the underground passageways should depend on whether there is sufficient potential for interference to treat the case like an ordinary entry on land rather than like an overflight.

Supposing that he can, however, one who commits a mere trespass hardly seems to have appropriated the benefit of owning the property. The rule against trespassing seems to be like the rules against interference which are designed to make the owner's right more valuable. It is a second-order rule at that, since it does not forbid an interference but rather conduct that may on occasion lead to an interference. If so, it would seem that, as in the case of nuisance, an owner should not get damages that go beyond the harm or interference he has suffered.

This conclusion is reinforced by our intuitions — partially reflected in the law — about how much it would be fair to charge for an easement allowing another person to do what otherwise would be nuisance or trespass. I think that most people would think that the fair price would be based on the inconvenience the land owner will suffer rather than the gain that the other party will reap. Suppose that a farmer will suffer from the presence of a nearby cement plant. Most people would agree that the plant should compensate him for the smoke it makes. I don't think many people would want a farmer with land worth \$25,000 to be able to demand half the profits of a multi-million dollar cement plant if the plant could not function without making the smoke. Presumably, Weinrib would agree. He would say that by committing the nuisance, the cement plant has violated the right of the farmer to be free from interference rather than a property-like right. Suppose, then, that a gold mine could not operate without laying a pipe to get water through a strip of land along a nearby river. While here a property or property-like right is surely at stake, most people would have the same intuition as in the case of the cement plant: the mine owner should compensate the owner of land for the interference caused by laying the pipe. I don't think many people would like it if the owner could demand half the profits of the mine. In contrast, no one would object if the farmer or land owner sold his land to a developer at a price that reflects its value as a housing development.

Admittedly, in the case of the cement plant and the gold mine, the farmer

title of an owner of the soil will not be extended to a depth beyond which the owner cannot reasonably make use thereof").

or land owner could not obtain such a high price unless he had a monopoly in the sense that the plant or mine owner must deal with him and him only. Most people would find monopoly prices intuitively wrong even if the owner were selling the land itself. Suppose, for example, the owner of a house knew that a developer had acquired every parcel on the block except his own and must acquire every parcel to build an office or apartment building. Legally, the owner could hold out for a large slice of the developer's profits. Nevertheless, I think that most people find that result objectionable. That insight is reflected in the law of eminent domain. If the state takes the last parcel to acquire the entire block for a public purpose, it does not need to pay the price the owner could demand from a private party by threatening to hold out. It only pays the value of the parcel "between willing buyers and sellers." When the law allows the owner to demand the hold-out value from a private party, rather than granting that party a private right of eminent domain, the reason, presumably, is not a belief that the price is fair but a reluctance to force the owner to sell at a price set by a court. It is hard to tell what the land is worth to the owner personally. Perhaps it is worth more than the price a court will set.

Still, when the farmer or land owner sells the cement plant or the gold mine an easement to make smoke or to lay a pipe, the reason most people would object to the high price is not only that he is exploiting a monopoly. It seems objectionable for him to charge a high price because the easement is of value to the plant or mine owner, of such value that the plant or mine cannot operate without it. Indeed, even in the United States, where property rights are taken to extremes not known in other countries, the law often will not allow him to charge so much. In the celebrated case of *Boomer v. Atlantic Cement Co.*,²⁹ an American court allowed a cement plant to stay and pay damages. It did not issue an injunction which, in effect, would require the plant to pay the owner's price for an easement in order to stay open. Statutes in some American states allow mine owners, home owners or farmers to condemn the right to lay pipes or utility lines across adjoining property.³⁰ Such statutes were upheld by the United States Supreme Court even in the

29 257 N.E.2d 870 (N.Y. 1970). See W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, *Prosser and Keeton on the Law of Torts* 630-32, 637-41 (5th ed. 1984). Similar results are reached in Germany, France, and, according to some commentators, in Italy. See James Gordley, *Immissionsschutz, Nuisance and Troubles de Voisinage in Comparative and Historical Perspective*, *Zeitschrift für Europäisches Privatrecht* 9 (1998).

30 John P. Dwyer & Peter S. Menell, *Property Law and Policy: A Comparative Institutional Perspective* 739 (1998).

era when it regarded private property rights as sacrosanct.³¹ Other American states help such a land owner by judicially developed rules that provide for implied easements and easements by necessity.³² It is easier for the law to force an easement upon a landowner, as in these cases, than for it to accept a private right to acquire possession by eminent domain, because the easement merely requires the land owner to put up with interference. When the law does so, it usually requires compensation but the compensation reflects the extent of the interference, not the value of the easement to the party who acquires it.

These considerations suggest that one who commits a mere trespass, like one who commits a nuisance, violates a right that is designed to protect property rights against interference but he does not appropriate the very benefit which property rights confer exclusively on the owner. Should we therefore conclude that the damages for trespass should be limited to compensation for the interference, if any, which has occurred?

C. Damages in Lieu of a Forced Sale or Holdup

There is an argument for awarding more extensive damages but it is different than Weinrib's. Sometimes, one party will gain more by violating another's property rights than he will lose if he has to pay for the interference. What should be done if he merely goes ahead, violates the owner's rights, and then proposes to pay compensation afterward? If he should not be able to do so, then the law must make him pay more than compensatory damages.

Whether he should be allowed to go ahead and merely pay compensation afterward is not an easy question to answer. It might be unfair merely to award compensatory damages afterward since then, in effect, the owner may be forced to sell his rights for less than they were worth to him. The amount the court awards as compensatory damages will be no more than a guess as to what they were worth.³³ But if he is required to obtain the owner's permission first, then the owner may charge him a price that reflects

31 *Clark v. Nash*, 198 U.S. 361 (1905)(owner of farm can condemn right of way for irrigation ditch); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906)(mine owner can condemn right of way for aerial bucket line).

32 *The American Law of Property: A Treatise on the Law of Property in the United States* §§ 8.31-8.43 (1952).

33 Our objection is that it is unjust to force the owner to part with the right for less than the price at which he would sell it. An economist would merely say the result is inefficient. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1106-07 (1972).

how much he needs the easement. To do so would be unfair. It is not surprising that solutions to this problem vary. In the case of nuisance, as we have seen, some jurisdictions allow the perpetrator merely to pay damages. In the case of easements for pipes, wires and rights of way, some allow him to condemn an easement. But in jurisdictions which reject these solutions, what should the remedy be?

There is no elegant answer. In nuisance, English law rejects the result in *Boomer v. Atlantic Cement* on the grounds that to give damages in lieu of an injunction amounts to a forced sale of a land owner's rights.³⁴ On this view, if a valuable enterprise could not function without emitting smoke, a court would have two unpleasant alternatives. It could issue an injunction which would allow the plaintiff to skim off a large part of the plant's value. Or the court could take the value of the enterprise into account in determining whether the activity was a nuisance, thereby depriving the land owner of any remedy.

In my view, the "restitutionary" damages an English court awarded in the case of *Wrotham Park Estates Ltd. v. Parkside Homes, Ltd.*³⁵ can best be understood as another way to deal with this kind of problem. The defendant had built houses in violation of a covenant that ran for the benefit of the plaintiff's land. Although a covenant is established by a private agreement, its purpose is like the rules against trespass or nuisance: to protect the plaintiff's land from interference — in this case, from the interference by neighboring buildings. The court awarded such damages as, it said, "might reasonably have been demanded by plaintiff" had the defendant sought his permission in advance. It estimated this amount at five percent of the defendant's profits.

Damages in this amount are not compensatory. They do not reflect merely the extent of the interference with plaintiff's view, light and air, which, the court noted, was minimal. But, strictly speaking, they are not restitutionary either. They do not give the plaintiff the entire benefit that the defendant reaped by violating the covenant. Nor do they give him the amount that he could have charged the defendant for releasing the covenant if the defendant had no alternative but to forgo building or to accept the plaintiff's price. That amount might have been well over five percent.³⁶ Nor are the damages

34 See *Elliott v. Islington Borough* [1991] 10 E.G. 145; *Munro v. Southern Dairies* [1955] V.L.R. 332; *Miller v. Jackson* [1977] Q.B. 966; B.F. Markesinis & S.F. Deakin, *Tort Law* 445-46 (3rd ed. 1994); W.V.H. Rogers, *Winfield and Jolowicz on Tort* 408 (14th ed. 1994).

35 (1974) 1 W.L.R. 798.

36 Nor did plaintiff receive the amount he would have charged if we could imagine

punitive. Punitive damages are supposed to deter the defendant. To do so they must be high enough to ensure that he cannot profit by noncompliance. In this case, if the defendant could not have proceeded without plaintiff's permission, plaintiff might have charged much more.

Instead, these damages are a pragmatic attempt to deal with the problem that the defendant went ahead and violated plaintiff's rights even though, as the court notes, plaintiff had served notice of its rights and served a writ seeking an injunction before any substantial construction had taken place. The court refused to grant an injunction, supposedly, because it would be wasteful to tear down the houses and to do so would aggravate a housing shortage. But since, as the court notes, the interference with the plaintiff was minimal, it is strange to think he would have insisted that the injunction be enforced rather than simply selling his rights to the defendant in return for a large share of the profit. The court's decision must be understood as an attempt to avoid that result. Yet the court disliked allowing the developer to come out ahead by violating plaintiff's rights and paying damages afterward. "[T]he fact that these houses will remain," the court insisted, "does not spell out a charter entitling others to despoil adjacent areas of land in breach of valid restrictions imposed by conveyances. A developer who tries that course may be in for a rude awakening." Or he may not if, as here, he need only pay five percent of his profits.

Inelegant as this solution may appear, however, it is a quite sensible way to deal with the alternatives of a forced sale or a hold up. The developer is not allowed to escape by paying compensatory damages. He is encouraged to ask permission first and faces the possibility of a "rude awakening" if he does not. Yet since the damages may be only the amount that a court thinks "might reasonably have been demanded by plaintiff," the land owner has to be careful about what he charges. Such damages, strictly speaking, are neither compensatory nor restitutionary nor punitive. They are "you-are-encouraged-to-contract-instead" damages.

In a case like *Phillips v. Homfray*, the case for awarding such damages is less strong. The interference with the land owner is minimal. Consequently,

that somehow, he did not enjoy a monopoly position. Admittedly such a case is hard to imagine. As a thought experiment, however, we can picture a builder who has a choice of many comparable sites, each subject to a restrictive covenant held by a nearby land owner. If these land owners were to bid competitively, the price for a release would fall to an amount slightly higher than the sum that would compensate for the interference. It would not reflect the builder's profits, and certainly not include five percent of them, any more than the long run price of steel reflects the automotive industry's profits rather than the steel industry's costs.

if the plaintiff is forced, in effect, to sell his rights, the damages are likely to compensate him adequately for the interference. Moreover, since use of the underground passageways was by far the most economical way for the defendant to remove minerals, if the defendant were required to ask permission in advance, the land owner could charge an exorbitant price based on the difficulty of moving the minerals any other way. A court might well conclude that this is the sort of case in which the defendant who does not ask permission in advance should only pay compensatory damages later.³⁷

If our analysis is correct, however, any rule a court applies must take account of two purposes which are in tension: to avoid a forced sale and to prevent a sale at an exorbitant price. These purposes must be understood in

37 I am suggesting that these distinctions can explain the difference in the measure of damages in *Phillips and Wrotham Park Estates* but not that English courts would take express account of these distinctions. Indeed, English courts seem to think that the measure of damages should be the same in all trespass cases, although that belief has not kept them from reaching sensible results. In cases in which a trespasser lived on residential property — thereby appropriating the benefits of private living space — an owner has recovered the amount for which the property would normally rent without having to prove he would have rented it to another. *Swordheath Properties, Ltd. v. Tabet* [1979] 1 W.L.R. 285; *Ministry of Defence v. Ashman* [1993] 2 E.G.L.R. 102 (although here, the Ministry recovered rent but less than the market rent when an RAF officer's wife stayed on in subsidized housing after her husband had left her; one judge cited *Phillips* but the reason seems to have been either that the property was not normally rented for its market value or that she had no choice given the shortage of housing). Similarly, a dock company recovered the fee for a berth from a trespasser who docked his "pontoon" without permission even though the dock was closed and so the berth would not have been let to another. *Penarth Dock Engineering Co., Ltd. v. Pounds* [1963] 1 Lloyd's Rep. 359 (Denning, M.R., described this fee as the amount the defendant would have to pay for a berth elsewhere). In my view these cases are consistent with a refusal to give restitutionary damages in cases such as *Phillips* where the trespasser did not appropriate the very benefit that ownership is supposed to confer on the owner. Nevertheless, it must be admitted that in most of the cases usually cited to show that *Phillips* may still be good law, the courts had some other reason for wanting to avoid restitutionary damages. In *Polly Peck International plc* [1997] 2 B.C.L.C. 630, the defendant had sold interests in its subsidiaries which allegedly had appropriated plaintiff's hotel properties. While the court cited *Phillips*, it also noted that the defendant had profited, if at all, only by charging more for its interests, and if it did, then the buyer had not discounted for the rights to the hotels which still, allegedly, were held by the plaintiff. In *Morris v. Tarrant* [1971] 2 Q.B. 143, the court cited *Phillips* but noted that the defendant was not in the normal sense a trespasser. He had lived with his wife in a home she owned and continued to do so after ordering her out because of her association with another man.

terms of others: the price might be exorbitant because the right in question is merely one against interference; rights against interference are established to protect the owner's own use of his property; his exclusive right to this use is protected to allocate the benefits among people who want them and provides an incentive to produce them. The law is not incoherent because it must be understood in terms of purposes, even when all of these purposes cannot be perfectly accommodated. It has a teleological or functional coherence, like the organs of the body or the parts of a machine. The purposes are not extraneous but explain its structure.

II. INNOCENT AND WILFUL WRONGDOING

Thus far we have been concerned with a question on which Weinrib and these earlier jurists agree: why, in principle, gain based damages are awarded. We can now turn to one on which they disagree: the significance of the distinction between innocent and wilful wrongdoing. According to Weinrib, whether the defendant acted wilfully or innocently can affect whether he was unjustly enriched. If the defendant mined the plaintiff's gold, knowing that it belonged to the plaintiff, he must give back the value of the gold without deducting the expenses of mining it. The reason is that his claim for the expenses is "normatively incoherent".³⁸ It "asserts what the severance as wilful trespass denied, that the defendant regards the interaction with the plaintiff as governed by the parties' rights."³⁹ If the defendant profits by violating his fiduciary duty to the plaintiff, the plaintiff should recover that profit, even if he could not have made it himself, because he had an "entitlement" to the duty. The "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...."⁴⁰ If the defendant is a thug paid to beat up the plaintiff, the plaintiff has a right to the defendant's fee. While the plaintiff's physical integrity is not ordinarily a resource that the defendant can appropriate, it should be so regarded when the defendant "treated the plaintiff's bodily integrity as an item that [he] was in effect selling for a price."⁴¹

In contrast, for the late scholastics and the natural lawyers, the defendant's guilt or innocence did not go to whether he was enriched at the plaintiff's expense. According to Molina, one who had to disgorge the profits he made

38 Weinrib, *supra* note 3, at 29.

39 *Id.*

40 *Id.* at 33.

41 *Id.* at 34.

by using another's property could deduct his expenses even if he had acted in bad faith.⁴² According to Lessius and Grotius, a person who took money to commit an unjust act could keep the money even though, as a matter of justice, he had no right to it.⁴³ As Lessius noted, others, such as Soto and Cajetan, thought that in certain cases he could not: for example, a judge could not keep a bribe. But they thought he had to give the money to a charitable cause or, perhaps, return it to the party who had paid it.⁴⁴ No one claimed that he owed the money to the victim on the grounds that he was unjustly enriched at the victim's expense.

This disagreement, again, seems to reflect the difference between a purposive or teleological approach and what Weinrib calls a formal analysis. For the late scholastics and natural lawyers, as for Weinrib, the paradigm case in which the plaintiff can obtain gain-based damages is the misappropriation of a property right. For these earlier jurists, however, the reason the defendant must pay is that he has taken a gain that belongs to the owner exclusively. The reason that owners have such exclusive rights is to remedy the disadvantages of common ownership. The purpose of preserving such an exclusive right is not served by prohibiting the wilful gold miner from deducting his expenses or requiring the thug to disgorge his fee. The law is not recognizing or preserving a person's right to have his gold mined for free or to charge people for beating him up.

For Weinrib, however, the misappropriation of a property right is a paradigm case, not because of what the law is trying to accomplish, but because the defendant's wrongfulness is embodied in the gain he has derived. "For the gain to take on the normative quality of wrongfulness, it must be the materialization of a possibility ... that rightfully belonged to the plaintiff."⁴⁵ "[T]he significance of the wrongfulness is not merely that it produces the gain, but that it survives into the gain and informs it."⁴⁶ What does it mean,

42 Molina, *De iustitia et iure*, *supra* note 9, at disp. 725, no. 3.

43 Grotius, *De iure belli ac pacis*, *supra* note 9, at II.x.12; Lessius, *De iustitia et iure*, *supra* note 9, at lib. 2, cap. 1, dub. 6, nos. 52, 56.

44 Tomasso di Vio (Cajetan), *Commentaria to Thomas Aquinas, Summa theologiae II-II, Q. 32 a. 7* (1698); Domenicus Soto, *De iustitia et iure*, *supra* note 20, at lib. 4, q. 7, a. 1, ad. 2, *cited in* Lessius, *De iustitia et iure*, *supra* note 9, at lib. 2, cap. 1, dub. 6, nos. 54, 61. Cajetan and Soto are following Thomas Aquinas, *Summa theologiae II-II, Q. 32 a. 7; Q. 62, a. 5, ad. 2* who said that in cases such as simony, "something is wrongfully acquired which the person who acquired it cannot retain but nevertheless is not owed to the person from whom it was acquired." It should be given in alms.

45 Weinrib, *supra* note 3, at 8.

46 *Id.*

however, for wrongfulness to survive into a gain? Or to inform it? For Weinrib, it would seem, the answer is not to be found by asking about purposes. His goal is logical coherence. But is the answer to be found by logical deduction from concepts of "gain," "survival" and "wrongfulness"? If not, what sort of coherence can there be which is neither functional, like the kind known to biologists and engineers, nor deductive, like that known to mathematicians? How do we know when we have found it?

Weinrib's explanation in the examples just mentioned is that the defendant is somehow being held to the logical implications of his conduct. The defendant who knowingly mines the plaintiff's gold has asserted, in effect, that his relationship with the plaintiff is not governed by the parties' rights, and therefore he cannot claim the right to deduct his expenses. The dishonest fiduciary or thug has treated loyalty to the plaintiff, or the plaintiff's bodily integrity, as something that can be sold, and therefore he is liable for the selling price just as if he had sold plaintiff's property. In my view, however, the impression that some logical relationship is involved is due to the way in which Weinrib characterizes the defendant's conduct and the law's response to it. These characterizations do not follow logically from what the defendant did even though they are chosen to give that impression. Granted, the gold mining defendant knew he was violating plaintiff's rights. It does not logically follow that the law should disregard his rights. Even if it did, it would not follow that the law should disregard only one of his rights: the right to deduct his expenses in computing the amount by which he has been unjustifiably enriched. Granted, the dishonest fiduciary and the thug made money by violating plaintiff's rights. It does not logically follow that they "sold" anything belonging to the plaintiff, and even if it did, it would not follow that what they "sold" is therefore a property-like right for which the plaintiff can claim gain-based damages. These characterizations are metaphors. When they are taken as more than that, they become formal fallacies. The dishonest fiduciary and the thug take money for depriving plaintiff of something to which he is entitled; so does one who sells another's property; therefore they violated a property-like right. All cats die; Socrates is dead; therefore Socrates is a cat.

Moreover, if one is entitled to proceed in this way, it is hard to see where to stop. Why doesn't everyone who gains by intentionally violating another's rights have to disgorge the gain? One could argue, as before, that because they violated the plaintiff's rights, they cannot claim a right to the gain; or that the gain is the price for which they have sold the plaintiff's rights. But at that point, all rights, when intentionally violated, would become property-like rights. One could not explain the cases described earlier in which the law does not require one who violates another's rights to disgorge

the entire gain. One could not explain why one who commits a nuisance and thereby saves the cost of some expensive smoke or noise prevention equipment can keep the profit. Perhaps one who commits battery in a fit of rage would have to pay an amount that corresponds to the satisfaction of his passions if it exceeds the harm he does. Indeed, it is hard to stop with intentional violations of rights. As Weinrib observes in a footnote, perhaps "a negligent defendant who failed to take precautions ... out of a calculation that the cost of precautions would be less than the cost of liability could be assessed the amount saved"; that amount was a gain he made "in an advertent disregard of plaintiff's rights."⁴⁷ And suppose that the defendant failed to take precautions even though he expected them to cost less than his liability but that, by chance, the liability turned out to be less because the plaintiff was injured only slightly. By the same logic, it would seem that he should pay the cost saved by not taking the precautions. Suppose then, that the cost of liability is zero because he exposed the plaintiff to a risk in "advertent disregard" of his rights but happened not to injure him. It would seem that he should still pay.

If that is truly the implication of Weinrib's theory, then it is subject to an objection which Jules Coleman once raised to the very effort to understand law in terms of corrective or commutative justice. If corrective justice is supposed to restore each party to his former position, he argued, then the defendant must be deprived of any gain he has made whether or not he has caused plaintiff a loss. But the law does not attempt to do so.⁴⁸ The answer to the objection is that the law should not try. As Thomas Aquinas said of corrective justice, "[t]he chief end ... is not that he who has more than his due may cease to have it, but that he who has less than his due may be compensated."⁴⁹ Thus the defendant did not have to pay if the plaintiff was not harmed: for example, if the plaintiff's use was unimpaired, as when the defendant took a light from the plaintiff's candle,⁵⁰ or if the plaintiff had already been compensated by another tortfeasor.⁵¹

We should conclude, as the late scholastics and natural lawyers did, that whether defendant's conduct was intentionally wrongful does not go to the

47 *Id.* at note 60.

48 Jules L. Coleman, *Property, Wrongfulness and the Duty to Compensate*, 63 Chi.-Kent L. Rev. 451, 461-62 (1987). Coleman now has "given up the view that corrective justice has anything at all to do with wrongful gains." Jules L. Coleman, *Risks and Wrongs* 369 (1992).

49 *Summa theologiae* II-II, Q. 62, a. 6, ad 2.

50 *Id.* Q. 62, a. 3.

51 *Id.* Q. 62, a. 7, ad. 2.

question of whether he deprived the plaintiff of a property-like right. But it does not follow that whether the defendant committed an intentional wrong is irrelevant. In discussing trespass and nuisance, we saw one reason why it might matter. The law might prefer that the defendant buy an easement rather than choose to commit trespass or nuisance and pay compensation afterwards. The defendant will have that choice if the law merely awards compensatory damages. Strictly speaking, however, one cannot describe damages awarded for this reason as either compensatory or restitutionary or punitive. They are "you-are-encouraged-to-contract-instead" damages. In any event, in such cases, it matters whether the defendant acted intentionally. If he did not know he was violating plaintiff's rights, he did not choose to go ahead instead of making a contract.

Similarly, if the defendant knew he was mining plaintiff's gold, it might be wrong to award him the full value of the work as distinguished from his out-of-pocket costs. To do so would be to allow him to force the plaintiff to hire him to mine the gold. This case is a bit different than those just considered because the defendant has no legitimate reason to go ahead and mine rather than making a contract first. In the cases of nuisance and trespass, he might go ahead in fear that if he asks first he will be held up. In any event, the damages should be similar: an amount that leaves the defendant somewhat worse off than if he had entered into a fair contract with the plaintiff, and generous enough so that the plaintiff is sure to be as well off as if the defendant had not intervened. Again, strictly speaking, the damages are neither compensatory nor restitutionary nor punitive. They are "you-should-have-contracted-instead-damages," a close relative of "you-are-encouraged-to-make-a-contract-instead" damages.

The same considerations come into play if the plaintiff offers some benefit contractually which the defendant appropriated without entering into a contract. In a much discussed German case, the defendant managed to take a trip to New York (and back again, when he was refused entry) without paying the plaintiff airline for his ticket. The court made him pay its purchase price.⁵² The damages were not really compensatory since they do not correspond to the harm the airline suffered. It did not suffer any since there were empty seats on the plane. Neither, strictly speaking, were they restitutionary since they do not correspond to the amount the defendant had gained by taking the trip. He was sent back immediately, and even if he had stayed in New York, the trip might have been worth less to him than the price of the ticket. Nor are the damages merely punitive. They are not based on the

52 *Neue Juristische Wochenschrift* 1971, 609 (Bundesgerichtshof 1971).

degree of the defendant's culpability or the need to deter people from stowing away on airplanes. They answer to the intuition that when the plaintiff knows that the defendant has offered something for a price, if he takes it, he owes the price to the defendant. The same principle seems to be operating in American cases that hold that a contract is formed by an assertion of dominion over an article offered for sale. According to the Second Restatement of Contracts, the offeree's "silence and inaction operate as an acceptance" where he "takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation."⁵³ For example, one who reads newspapers delivered to him without his request is deemed to have bought them even if he clearly did not intend to do so.⁵⁴ If a contract requires mutual assent, it is a fiction to say that a contract was formed in these cases. It seems better to say that while the case is one in unjust enrichment, the damages are not restitutionary, since, as in the case of the airplane, the defendant's gain may have been less than the price. They are, again, "you-should-have-contracted-instead" damages, although this time measured by the price the plaintiff had already asked. In any event, as before, it matters whether the defendant's conduct was intentionally wrongful in that he knew he was appropriating something offered for a price.

Another reason why intentional wrongdoing might matter is illustrated by a conclusion of Lessius: if the defendant learns that he has something belonging to the plaintiff and fails to return it, he is liable for its value if it is destroyed. The reason, he said, was because of the wrongful way in which he held possession, not because of any profit he made.⁵⁵ Similarly, the German Civil Code provides that a person who knows he is not entitled to another's property cannot defend on the grounds that his position has changed so that he is no longer enriched.⁵⁶ In my view, that result illustrates a more general principle, which the late scholastics discussed, that a person who commits an intentional wrong — here, not returning plaintiff's property — is liable even for the unforeseeable consequences — here, its chance destruction. Elsewhere, I have explained why I think that principle is right as a matter of corrective or commutative justice.⁵⁷ Here, all that needs to be noted is that

53 Restatement (Second) of Contracts § 69 (1981).

54 *Austin v. Burge*, 137 S.W. 618 (Mo. App. 1911).

55 Lessius, *De iustitia et iure*, *supra* note 9, at lib. 2, cap. 14, dub. 1, no. 2.

56 German Civil Code (Bürgerlichesgesetzbuch) §§ 818(3), 819.

57 James Gordley, *Responsibility in Crime, Tort, and Contract for the Unforeseeable Consequences of an Intentional Wrong: A Once and Future Rule?*, in *The Law of Obligations Essays in Celebration of John Fleming* 175 (P. Cane & J. Stapleton eds., 1988).

the damages in such a case are not gain-based. They compensate the plaintiff for a harm he suffered because the defendant did not return his property as he should have.

These considerations do not explain why a defendant who mines plaintiff's gold cannot deduct his expenses, why a dishonest fiduciary must disgorge a profit his principal could never have obtained, or why a thug should pay plaintiff money taken for beating him up. Nevertheless, such cases seem out of the mainstream of restitution law, particularly when we take account of the law of restitution of other countries. The rule that the wilful converter cannot deduct expenses incurred in improving the plaintiff's property is a peculiarity of the common law of conversion. The law of conversion took shape at a time when justice was done in a rough and ready fashion according to which writ the plaintiff had brought and with little thought about the principles on which he should recover. The extreme protection of the fiduciary relationship is also peculiar to the common law. Moreover, in the bulk of the cases, a dishonest fiduciary has been forced to disgorge a profit that the principal might have obtained for himself.⁵⁸ The remaining cases seem to me, at best, efforts at prophylaxis – which is how they are explained by Birks – and at worst, overly zealous overreactions. Then there is the thug. This case has never been decided. It is a hypothetical put by Birks. He cites in support cases in which courts have awarded punitive damages.⁵⁹

CONCLUSION

I respect the enterprise in which Professor Weinrib is engaged: to make sense of private law in terms of its ancient normative claim to do justice between the parties rather than to promote ad hoc a miscellany of social objectives external to their relationship. I also respect the skill and learning he brings to it. But I think we will find a greater degree of logical coherence in private law if we do not seek it from logic alone.

58 Birks, *supra* note 15, at 339.

59 *Id.* at 327; citing *Rookes v. Barnard* [1964] A.C. 1129; *Cassell & Co. Ltd. v. Broome* [1972] A.C. 1027.