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PROPERTY, WRONGFULNESS AND THE DUTY TO COMPENSATE

JULES L. COLEMAN*

Professor Weinrib's *Causation and Wrongdoing*¹ is a very complicated and difficult paper, rich in ideas and detailed argument. The essay has both positive and critical ambitions. Weinrib criticizes the efforts to explain the normative significance of causation advanced by Professors Judith Thomson, Richard Epstein and myself. His positive view is that causation and wrongdoing are (in some sense) conceptually connected, and, because of this connection, they constitute separately necessary and jointly sufficient conditions of a coherent and justifiable scheme of tort liability.

These comments fall into two parts. In the first, I critically analyze Weinrib's theory. In the second, I respond to Weinrib's objections to mine.

I. CAUSATION AND WRONGDOING

Suppose *A* harms *B*. Thomson's view is that *A*'s causing *B*'s loss provides *B* with a morally relevant reason for calling upon *A*'s assets to rectify whatever losses he may have incurred. Not every fact about *A* can provide *B* with a morally relevant reason for such a claim. First, not every fact about *A* *particularizes* him, that is, distinguishes *A* from the rest of the world. Second, not every distinguishing fact about *A* is *morally* relevant, that is, provides *B* with the basis of a moral claim against him. For Thomson, *A*'s causing *B*'s harm serves both to particularize *A* and to provide a moral basis for claims *B* makes against *A*'s resources. It is *A*, after all, not *C*, *D*, or *E* who causes *B*'s damage. Moreover, *A*'s harming *B* is normatively significant in the light of a complex moral theory that emphasizes free action. *B*'s claim against *A*'s resources is consistent with the value we place on agents acting freely, since liability imposes a hardship on *A* not for free action as such but only for harmful action.

There is a good deal that is puzzling about this view and Weinrib

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1. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987) (Professor Weinrib's article appears in this symposium issue.).

correctly points us to much of it. First, negligence (when present) particularizes injurers just as well as causation does. If *A* unreasonably puts *B* at risk, then this is a fact about *A* that is not true of everyone. Moreover, it is a fact about *A* that is morally relevant to *B*'s claims against *A*'s resources. For it is consistent with the value we place upon freedom of action that individuals are encouraged not *unjustifiably* to impose risks on others. One response to Thomson, then, is that both causation and negligence can particularize injurers and do so in morally relevant ways.

Professor Weinrib agrees that causation is normatively significant, but not because it particularizes injurers; after all, it does not. Rather causation particularizes *victims*:

The difficulty with Thomson's explanation is that it concentrates on the wrongdoer, the moral quality of whose act is unaffected by whether the potential for harm that it releases actually comes to pass. Accordingly, the tort requirement of causation makes no sense if we conceive of the law as passing judgment on this moral quality as such. Causation becomes pertinent only when we focus on the plaintiff's receipt from the defendant of an amount of money representing the harm suffered. This compensatory transfer shows that tort law is not concerned solely with the defendant's emission of a harmful possibility but with that possibility's coming to rest on a particular plaintiff. *Inasmuch as cause particularizes, it does so with reference to the plaintiff rather than the defendant.*²

Causation particularizes the victim in the *analytic* sense that a victim, by definition, is someone who suffers harm. Thus, the fact that *A* causes *B* harm is normatively significant because it demonstrates that *B*, not someone else, was harmed, by *A*. So if *A* must pay someone, it must be *B*, not *C*, *D*, or *E*, none of whom were harmed by *A*.

To this point in the argument Weinrib has not claimed that *A* should pay damages to anyone, only that if he is to pay, it must be *B* he pays. It was *B* who *A* injured. For Weinrib, Thomson is right to find normative significance in causation, but wrong to identify that significance with the *liability* of the injurer.

The natural question for Weinrib is: what grounds the injurer's liability? Why and when must injurers pay? One answer is: an injurer should pay damages whenever he or she causes another harm. Were this true, we would have a full theory of liability *and* recovery based entirely on causation. *A* pays whenever he causes harm, and he pays whomever he harms.

Weinrib correctly points out that, of contemporary tort theorists, only Richard Epstein holds the view that *A*'s causing harm is (*prima*

2. *Id.* at 414 (emphasis added).

facie) sufficient to warrant liability. Epstein, however, cannot (and does not) avail himself of Thomson's argument for the causal condition. He cannot because Thomson's argument establishes neither the moral necessity nor the sufficiency of causation, only its moral relevance. Thus, Thomson's argument is too weak for Epstein's purposes. Instead, on behalf of the claim that causation is sufficient for *prima facie* liability, Epstein relies upon one essentially conceptual and three normative arguments. The conceptual argument is as follows. Suppose *A* harms *B*. If *A* is made to bear *B*'s loss, then *A* is treated by law in the same way he would be were he to harm himself. By holding *A* liable whenever he harms *B*, we treat him as if he had harmed himself. Had he harmed himself, moreover, he would have no grounds for objecting to his having to cover his own losses. Therefore, he can have no greater reason for objecting to his having to cover the expenses he causes others. This point, as Weinrib eloquently points out, cuts absolutely no normative ice:

Epstein concludes that because the defendant would have borne the loss if he were identical with the plaintiff, the defendant should therefore bear the loss when the litigants are restored to their separate existences. One can equally argue, however, that because the plaintiff would have no cause of action if he were identical with the defendant, so no cause of action should be available when their individual identities are restored. Epstein assumes that the relevant feature of his hypothetical is that the superperson suffers an irrecoverable loss that should remain the actor's loss in the two-party situation. But the significant feature may be the superperson's *irrecoverable* loss, that should remain irrecoverable when transposed into the actuality of litigation. This reading allows no liability for any losses.³

The normative arguments for strict liability are also unpersuasive. At one time Epstein argued that *A* should be liable for the damage he causes on the grounds that *A* is *responsible* for what he causes, and a just theory of liability must be based on a theory of moral responsibility. The problem here as I have argued—and I have no reason to believe Weinrib would disagree—is that *causation* is neither necessary nor sufficient for moral responsibility.⁴ I am *not* justly liable for all sorts of harms I cause you—those resulting, for example, from fair competition; whereas, I *am* sometimes morally responsible for harms I ought to have prevented but did not in fact cause.

Epstein has also argued that *A* should be liable for the harms he causes *B* on grounds of *corrective justice*. A person's harming another

3. *Id.* at 422 (emphasis in original).

4. Coleman, *Moral Theories of Torts: Their Scope and Limits: Part II*, 2 J.L. & PHIL. 5 (1983).

upsets the equilibrium that existed between the parties prior to *A*'s action. Therefore, *A* is responsible for setting matters right by reestablishing the previous equilibrium. But not every departure from the status quo ought to be annulled or rectified. Only if in reducing *B*'s welfare, *A* does something wrong, ought *B*'s loss be rectified. In that case, corrective justice would require negligence or wrongdoing, not merely causation, as a condition of liability. Thus, corrective justice does not support a theory of strict liability.⁵

Epstein appears to have finally settled on a defense of strict liability in which the principle of liability falls out of a theory of property. Judging from Weinrib's paper, he too appears to maintain that a theory of liability is presupposed by the concept of property. The difference between them is that whereas Epstein believes that strict liability is presupposed by property, Weinrib claims negligence is. In fact, no substantive theory of liability is entailed by the concept of property. Let us see where both Epstein and Weinrib go astray.

Weinrib puts the question this way: "what is the liability regime correlative to the idea of property?"⁶ Epstein's argument that strict liability derives from a theory of property is the following:

[I]f you deny the plaintiff the *prima facie* right to recover against a stranger without proof of negligence, then you have *taken* a limited property interest By definition, every liability rule is tied to a correlative property interest that the law protects; to alter the one is necessarily to change the other. The linkage is not empirical, it is analytical, *a function of the way in which we do use, and must use, all legal language.*⁷

For Epstein, my property rights mark the boundaries of my moral space. Any intrusion of my space is action contrary to my right. If your intrusion results in harm, you owe me, and it does not matter whether your intrusion was wrongful or innocent. Your liability is part of what it *means* for me to have a right; it is part of the concept of a property right. If you should harm me without compensating me, then you fail to understand the concept of property.

To understand Epstein's view, we must first define the notion of

5. This is not my complete view. While I do not believe that corrective justice requires strict liability, I argue that corrective justice sometimes requires recompense even where the injurer does no wrong. For example, if *A* innocently infringes *B*'s right, *B* is entitled to repair. But in other cases, if *A* innocently sets back *B*'s legitimate interests, *B* has no grounds for repair as a matter of corrective justice. When *B*'s interests are harmed compensation is his due only if *A*'s interference is wrongful. See *infra* p. 463.

6. Weinrib, *supra* note 1, at 425.

7. R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 97-98 (1985)(emphasis altered).

“harm.” On some views, a necessary condition of harm is an invasion of a right. (This now seems to be Feinberg’s view,⁸ for example, and Epstein’s as well.) So when *A* harms *B*, *A* invades a right of his. If one has an extensive view of property, like Epstein, then the rights *A* invades are *B*’s property rights. But what does it *mean* to have a property right? For *B* and *A* it means that the latter cannot act contrary to the former’s wishes without his (*B*’s) consent. If he does, then in doing so he takes *B*’s property. He does what he has no right to do, and it does not matter whether his action was innocent, justifiable or wrongful. To show that he understands the concept of property and to respect *B*’s property right, *A* must make amends.

There are parallels between Weinrib’s criticisms of Thomson and Epstein. In the first part of his essay, Weinrib finds himself agreeing with Thomson that causation matters morally, but disagreeing with her regarding why it matters. Thomson focuses on causation and injurers; Weinrib focuses on causation and victims. In the second part of his essay he finds himself similarly situated. He agrees with Epstein that a substantive theory of liability derives from the concept of property. But he disagrees with Epstein regarding the theory of liability to which property gives rise. Epstein claims the concept of property yields strict liability. Weinrib claims it yields a theory of negligence.

If he is able to make good the claim that the concept of property presupposes a theory of negligence, Weinrib’s entire argument will be complete and coherent. Causation particularizes victims, so that if the injurer must pay, he must pay those people his conduct injures. But when should he pay? According to Weinrib, the concept of property tells us he should pay whenever his conduct is *negligent*. But he cannot be required to pay even if he is negligent if there is no one his negligence harms. Only victims can be compensated. The concept of property tells us that only negligent parties can compensate. It does not tell us that *all* negligent parties *must* compensate. Since they can only compensate people who are victims, negligent actors must compensate all and only their victims.

Can Weinrib make good on his claim that property yields negligence liability? Imagine *A* and *B* again and the concept of property. Weinrib invites us to consider three cases. In each case, *B*, not *A*, has an alleged property right. In one case, *A* asserts the right to use what is in fact *B*’s as he, *A*, sees fit. In the second, *A* asserts the right to act as he sees fit, knowing that occasionally his doing so will impose on *B* an unreasonable

8. See J. FEINBERG, HARM TO OTHERS 105-06 (1984).

risk of harm. *A* does not, however, claim the right to use *B*'s property as he sees fit. Instead, *A* claims the right to act without restrictions provided he does the best he can. If and when he fails to do as best he can, he may be subject to liability for negligence. His negligence, in other words, is measured by a *subjective* standard. In the third case, *A* claims the right to act as he sees fit provided in doing so his conduct does not fall below an *objective* standard of negligence. Weinrib argues that the first claim is logically inconsistent with the concept of property, and that the second is inconsistent with the concept of equality entailed by property. Only the objective negligence standard embodied in the third claim is consistent both with the concepts of property and equality entailed by it. Thus, property mandates negligence.

There are three separate arguments here. Common to each, however, is the alleged connection between the concepts of property and equality. "Implicit in the notion of property is the equal standing of all property owners. . . . [A]ll property holders are as property holders equal to each other."⁹ Weinrib claims that this tautology has important normative consequences. To see how Weinrib is led to this position, let us consider how this premise figures in the first case Weinrib invites us to consider: the case in which *A* asserts the right to use *B*'s property as he sees fit.

Weinrib argues first that if *A* really can assert such a claim against *B*, then the property could not really be said to be *B*'s at all. For it is *A*, not *B*, who has control over its use. To have property, on this view, is to have a domain of authority or control. Second, he argues that "[i]nasmuch as all property holders are equal,"¹⁰ *A*'s claim to the free use of *B*'s property could "equally be made by everyone with respect to everything."¹¹ Indeed, *B* could make the same claim against *A* with respect to the same property. "Such a network of crosscutting claims would not be a regime of property for all but the impossibility of property for anyone."¹² Thus, *A*'s assertion of a right to use *B*'s property is "inconsistent with the notion of property."¹³

There are two arguments here, only one of which explicitly relies on the concept of equality. The other relies on treating property as specifying a domain of autonomy. Neither argument is sound, however. Focusing first on the autonomy argument, suppose *B* owns a house. *A* claims

9. Weinrib, *supra* note 1, at 426.

10. *Id.*

11. *Id.*

12. *Id.* at 427.

13. *Id.*

to use *B*'s house at his discretion. Is recognizing the legitimacy of *A*'s claim inconsistent with the claim that *B* owns the house—i.e., that it is *B*'s, not *A*'s? Suppose *A* is free to use *B*'s house at his will, and *B* never is, but each time *A* uses *B*'s house *A* must compensate *B*, that is, pay him a rent. Imagine another case. *A* asserts no right to use *B*'s house. *B* can exclude others, but cannot himself use his house as he sees fit. In neither case does *B* have any freedom to use his house as he sees fit. In the first case, *A* has that freedom; in the second case, no one does. In neither case is it obviously false that *B* has or owns property. In the first case, for example, *B*'s property right may not entail control over his property, though it may be the basis of his claim to compensation for *A*'s use of it. Without a property right, *B* may be unable even to claim relief for *A*'s use. More generally, as I have argued elsewhere, the concept of a right need not entail any specific claims to alienate or to exclude.¹⁴ Such claims are not part of the *meaning* of property. Rather they follow from particular *normative* conceptions or theories of property. No doubt, property without alienation or autonomy may be morally unattractive, but it is hardly incoherent. The house remains *B*'s even in the face of *A*'s assertions. It is just that property in such a regime may not be worth all that much.

Weinrib's argument from the concept of equality is even more troubling. He contends that *A*'s claim to use *B*'s property makes property impossible. The basic argument is supposed to show that if we admit that everyone is equal as a property holder, then as soon as *A* claims to use *B*'s property, everyone is equally entitled to make similar claims against everyone else. Recognizing the legitimacy of these claims simultaneously makes property impossible.

Suppose we grant that it would be impossible to sustain a property regime in which each person's claim to use everyone else's property was sustainable all the time. But that is not the case Weinrib presents. In his case, *A* claims a right unqualifiedly to use *B*'s property. How can that claim when conjoined with a principle of formal equality make property impossible? Recognizing *A*'s claim to the free use of *B*'s property means that as a matter of formal equality we are committed to recognizing as valid all claims made by others that are *relevantly similar* to *A*'s. It does not mean recognizing as valid *all* claims regardless of their similarity to *A*'s. It is not *A*'s making an assertion to use *B*'s property that is problematic. What counts is the basis of his assertion and the similarity of

14. Coleman & Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1340-1352 (1986).

those grounds to the grounds others present. What is the basis of *A*'s claim to use *B*'s property? He may claim no basis at all; or he may claim his status of being equal as a property holder to *B*; or he may have some other reason, for example, need. If *A*'s claim is groundless, then, if we recognize it, we are committed to recognizing all similar—i.e., groundless—claims. Property may then be unimaginable. Also, if *A*'s claim is based merely on his status as a property holder, we are again committed to recognizing all such claims. In that case, the concept of property which forms the basis of *A*'s claim unravels. On the other hand, if *A* has a substantial basis for his claim to use *B*'s property, then, while the principle of formal equality may commit us to recognizing as valid all similar claims, it does not commit us to a set of crosscutting claims that render property impossible. No one, merely by virtue of their status as a property holder, has the same claim to *B*'s property that *A* does.

Weinrib is mistaken in claiming that property is impossible whenever we recognize a single claim to the discretionary use of another's property. The question remains whether he is correct in claiming that the concepts of equality and property yield negligence. For Weinrib, reasonable care is specified in cost-benefit terms. *A*'s conduct is negligent if and only if the costs of prevention are less than the costs of harm to *B* discounted by the probability of its occurrence. "The virtue of the negligence standard is that it regulates the relationship between the property holders on the basis of equality."¹⁵ The theory of strict liability violates this principle of equality because it entails the judgment that the victim's property is always more valuable than the injurer's free action. The theory of absolute victim liability—i.e., the principle of *nonrecovery*—violates the principle of equality because it entails the judgment that the injurer's freedom is always more valuable than the victim's property. The *subjective* theory of negligence violates the principle of equality because it gives a special status or preference to the injurer's capacities. Only negligence counts the relevant interests of injurers and victims equally. Only it is required by the concept of property.

There are two problematic facets of this argument. The first is that the actual argument for negligence never invokes the concept of property, and so it can hardly be said to be entailed by it. Second, the principle of formal equality is compatible with *every* scheme of liability—from negligence to strict liability to no liability. Let us examine these problems in turn.

Weinrib's argument for negligence never invokes, nor need it in-

15. Weinrib, *supra* note 1, at 428.

voke, the concept of property. Instead, it is an instance of the familiar argument that standard utilitarianism (cost-benefit analysis or efficiency) is not only compatible with but, in fact, embodies an ideal of equality. According to this conception of equality, each person must count for one and no more than one; this is the idea of equal standing. Utilitarianism satisfies or embodies this ideal because in determining right conduct each person's interests, preferences or desires count for one. The costs to the potential victim count no more nor less than the benefits to the potential injurer, and right conduct is determined by an objective balancing of the two. There is no need to invoke the idea of a property right in defending the negligence standard. Indeed, in ordinary normative discourse, arguments from rights are invoked precisely to *counter* the utilitarian argument, not to serve as a premise in its derivation. For the very point of appealing to property rights is to establish that considerations of utility maximization—in which each person's interests are counted equally—are inadequate to overcome certain claims. Claims of right implicitly deny that normative conclusions are to follow exclusively from balancing based on an equal consideration of interests. When *B* claims a property right against *A*, part of what he means to assert is that it does not matter whether *A*'s taking property from him can be shown to have desirable utilitarian consequences; *A* simply has no right to take. The whole point of appealing to property rights is to deny that *A*'s interests are to count equally with *B*'s.

It is possible to make property *rights* yield a utilitarian theory of negligence by advocating a utilitarian theory of rights. Those rights we have and the claims to which they give rise are those that maximize utility. In this case, the cost-benefit theory of negligence rests on a *normative* theory of property—not on the idea or concept of property itself. Moreover, while the argument for negligence based on a utilitarian theory of rights is compatible with the principle of formal equality, simply because utilitarianism is, the argument itself in no way relies upon the principle of equality. In other words, it is possible to derive a negligence standard from property directly without recourse to a principle of equality. Moreover, the negligence principle derives from a contestable *normative* theory of property, not from the concept of property itself, or from its alleged corollary, the principle of equality.

In summary, the principle of formal equality can be spelled out in such a way as to require no more than the equal consideration of interests. From the principle that everyone is entitled to an equal consideration of interests, it may be possible to derive a principle of negligence. Doing so invokes the principle of equality but not the concept of prop-

erty. On the other hand, one can invoke a particular theory of property rights in order to derive the principle of negligence liability. But the theory of property that's needed is a utilitarian one. In that case, the theory of negligence requires a contestable normative theory of property. Once again negligence does not derive from the idea of property itself, but from a theory of property that is in any case incompatible with various other *conceptions* of property—notably the Lockean one. The problem with both Epstein and Weinrib, then, is that one cannot derive a substantive theory of liability from the concept of property.

As far as I can judge from Weinrib's brief discussion of it, the principle of equality requires that we treat property right bearers equally as property right bearers. It should be obvious, then, that this principle is satisfied no matter what the liability rule is, provided it applies to all property right holders. For example, a rule of strict liability does not favor one set of property holders over another. All property owners, as property owners, will be entitled to repair whenever they are injured by the conduct of others; and all property owners (and others) who injure property owners will be required to make repair. The same can be said for a rule of no liability. (Remember property owners are given equal respect even when they are all treated with no respect at all.) In the same way that one cannot derive substantive normative conclusions from premises allegedly elucidating conceptual connections, one cannot derive substantive claims about liability rules from purely formal principles.

II. ON THE SYMMETRY BETWEEN WRONGFUL LOSS AND GAIN

Professor Weinrib's overall position is the following: Causation particularizes victims; negligence particularizes injurers. "A wrongful act that does not injure lacks impact upon a specific victim; an injury that is not the materialization of a wrong is a misfortune devoid of normative significance for its author. For tort law wrongfulness without causation is empty; causation without wrongfulness is blind."¹⁶

Professor Weinrib believes not only that negligence and causation are necessary to a coherent theory of tort liability, but that they are conceptually or analytically connected as well. That is the reason why once Weinrib has established to his satisfaction the moral necessity of both causation and negligence, he turns his attention to me. Weinrib takes me in part as advancing the view he does—i.e., that both causation and wrongdoing matter—with one major qualification. Unlike Weinrib, the central claim I make is that liability and recovery are conceptually and

16. *Id.* at 430.

normatively distinguishable.¹⁷ While Weinrib and I agree about the need for causation and negligence in a just theory of liability, we disagree about whether liability and recovery are conceptually and normatively distinguishable. If he is right that a tort law that emphasizes wrongfulness without causation and causation without wrongfulness is both empty and blind, then the apparent trouble with my theory of torts is that it is both empty and blind—even if “ingenious.”¹⁸ In what follows, let me see if I can convince you that my view may be right as well as ingenious.

What, according to Weinrib, is my view, and where do I go wrong? I draw two distinctions: one between the grounds of recovery and liability; the other between the grounds and modes of rectification. The question, “has this plaintiff suffered a loss which ought to be annulled or rectified?” is analytically distinct from the question, “has this injurer done something which justifies his being held liable?” Once we decide that a particular plaintiff has suffered a loss that ought to be annulled, we then ask, how ought this loss be annulled? I also advance the view that tort law is a matter of justice at least to the extent that the principle of corrective justice helps to determine which gains and losses ought to be annulled. A victim of another’s wrong suffers a wrongful loss which corrective justice says must be annulled. But it does not follow that the injurer must make repair. At least corrective justice does not require that injurers compensate their victims. So I deny exactly what Professor Weinrib hopes to demonstrate: namely, the normative significance of the alleged conceptual connection between wrongdoing and causation.

Weinrib claims that my view can be described as follows: “whereas causation and wrongfulness are both morally significant to the victim, causation has no normative significance for the tortfeasor.”¹⁹ The idea is that for a victim to be entitled to repair, his loss must have been caused by the negligence of an injurer. However, the injurer’s wrongful gain is the result of his negligence, not his having caused someone harm. To be negligent is to fail to take the accident precautions one ought to have taken. Those savings constitute the injurer’s wrongful gain. This is a gain he secures whether or not he injures anyone. Thus, Weinrib’s conclusion is that I sever the relationship between wrongdoing and causation, a relationship, he argues, that is conceptually necessary.

It is true that I draw a distinction between the grounds of recovery

17. Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982).

18. Weinrib, *supra* note 1, at 433.

19. *Id.* at 431.

and liability, but it is not true that I argue that causation is irrelevant to liability. Let us distinguish between three cases involving wrongful gain. In one, *A* negligently imposes unreasonable risks on *B* by, for example, driving negligently. In another, *A*'s negligent driving injures *B*. In the third case, *A*'s negligent driving injures *B*, and in so doing enables *A* to win a wager he made with *C*. In the first two cases, *A*'s wrongful gain is equivalent to his savings from failing to take adequate precautions. In both cases, that gain is secured whether or not *B* is injured. In the third case, *A* secures two distinct gains in virtue of his negligence: one is the savings in precautions; the other is the money from the wager. The latter gain depends on his causing *B* harm. Nevertheless, it is a gain corrective justice may require be eliminated. So it cannot be, and is not, part of my view that causation is *irrelevant* to wrongful gain. Rather, my view is that there is a distinction between the wrongful gains one secures independent of causing harm and the wrongful gains one secures as a consequence of causing harm. Both are wrongful gains which require annulment. In one case, these gains exist independent of resulting harm to others, and so the existence of another's loss is not the logical or causal basis of the gain. So if *A* negligently hits *B* (as in case two above), the gain he secures results from his negligence, not from his hitting *B*. *A*'s gain, in this case, is the same as it is in the case in which he drives negligently but does not hit anyone. In both cases, *A*'s causing *B* harm is irrelevant to his gain. From this it does not follow that causation never figures in the creation of wrongful gain. I have never suggested otherwise. What I have tried to do is to make two points: First, that wrongful gain can arise without resulting harm; and second, that sometimes even when negligence creates wrongful *loss*, the wrongful gain from negligence is causally independent of the loss it causes.

Causation can matter for reasons other than corrective justice as well. *A*'s causing *B* a wrongful loss, whether or not *A* gains wrongfully, is relevant to determining who should repair *B*'s loss. If *A* does not gain, then corrective justice does not require that *A* pay *B*. But I do not claim that there are no other persuasive considerations, moral or economic, for having *A* pay. Nor do I deny that these reasons for having *A* pay can sometimes have something to do with causation. For example, *A* harms *B* causing a wrongful loss but creating no wrongful gain. *A* has no gain that is the concern of corrective justice. *A*'s paying *B*, therefore, cannot be required by corrective justice. Suppose the best argument for having *A* pay *B* is an economic one. *A* is in the best position to decide whether such harms are worth their costs, and imposing the victim's loss on him gives him the proper incentive for making that decision. Suppose further

that the most reliable indicator of who is best able to decide whether accidents are worth their costs is those who *cause* accidents. Then causation is important for liability, but for economic reasons, not for reasons of corrective justice.

Weinrib mischaracterizes my view on two fronts. First, in determining an injurer's liability, causation can matter even on corrective justice grounds. Second, in determining an injurer's liability, causation can count for reasons other than corrective justice.

Maybe I should make my view more precise, because doing so will enable me to respond to several other of Professor Weinrib's objections. If a victim suffers a loss owing to the negligence of an injurer, he is entitled as a *matter of corrective justice* to recover. If an injurer invades a *right* of his (permissibly or not), the victim is likewise entitled to repair as a matter of justice. So I must (and I do) distinguish between *being harmed* and *having a right* invaded or infringed. A harm is an interference with a legitimate interest. Not every interest, however, is protected by a right. When we have rights, *justice*, not the concept of property, requires that losses resulting from their invasion be repaired. And it does not matter whether the invasion of the right is wrongful, permissible or laudatory. Interests are another matter. We are always interfering with one another's interests—unavoidably sometimes. With regard to interests, someone is entitled to repair only if the losses he suffers result from the wrongful or unjustifiable behavior of others. So much for justice and the grounds of recovery. What about liability and corrective justice?

Corrective justice requires that wrongful gains be annulled. One can secure wrongful gain without injuring another, as in negligent but not harmful driving. One can injure without securing wrongful gain. That is, one can take optimal precautions and still cause another damage. (In that case there is neither wrongful gain nor wrongful loss.) One can cause compensable loss without securing wrongful gain. If in order to save my life I take and destroy what is rightfully yours, then you have suffered a loss which justice claims should be annulled, but I have secured no *wrongful* gain. I have gained alright. I have, after all, saved my life. However, provided my doing so is justifiable, the gain I secure is not a wrongful one.

I can cause you to suffer a wrongful loss without securing any gain, wrongful or otherwise. I can gain, but not wrongfully, in causing you a wrongful loss—as when I take your property to save my life. I can secure a wrongful gain and cause you no loss at all—as when I drive negligently. I can secure a wrongful gain and cause you a wrongful loss

though my gain is not consequent upon your loss—as when my negligent driving harms you. Finally, I can secure a wrongful gain by imposing a wrongful loss upon you, in which case my gain is consequent upon your loss—as in the wager case.

What about my duty to make good your loss? First, in those cases in which I gain and my doing so results in no harm to you, I have secured a gain that needs to be annulled but you have absorbed no wrongful loss. I simply cannot have a duty to compensate you. For what loss? What about those cases in which I have secured wrongful gain and you have sustained a wrongful loss as a result, as well as those cases in which you have absorbed a wrongful loss though I have secured no wrongful gain? Here my view is surely controversial and I am not in a position to defend all aspects of it here. The key is the difference between the grounds and modes of rectification. Corrective justice specifies reasons or *grounds* for compensation, not modes of compensation. If I gain wrongfully and you lose wrongfully, corrective justice says your loss and my gain ought to be annulled. It does *not* specify that the way to annul both is by having me pay you. My paying you is compatible with corrective justice, though not required by it. Similarly, where you lose wrongfully, but I secure no wrongful gain, corrective justice maintains that your loss needs to be redressed, though I have no gain which needs to be annulled. One way of rectifying your loss is by having me pay, and doing so is compatible with corrective justice, but again not required by it. Corrective justice is satisfied whenever our wrongful gains and losses are annulled. One way of doing so is by having injurers compensate victims. That mode of rectification, I have argued, is compatible with corrective justice, but by no means required by it. Thus, corrective justice may not provide the best explanation of this key feature of the tort system: namely, the duty of injurers to compensate those whom they have caused to sustain wrongful losses.

I have been misread, notably by Richard Posner,²⁰ as claiming that when *A* injures *B* wrongfully but secures no gain in doing so, *A* has *no* duty to compensate *B*. This is not my view, as I have just made clear. My view is that *A* *may* have a duty to compensate the victims of his mischief, but the justification of that duty is not and cannot be corrective justice. My critics, like Epstein and to a lesser extent Weinrib, try to justify the duty to compensate one's victims as being a matter of corrective justice. They urge a reading of the principle of corrective justice

20. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981).

according to which those who cause harm must repair their victim's losses. Rather than solving the problem of justifying the duty to compensate, this strategy merely *renames* the problem. We still have to justify the duty to compensate, only now we are calling "the duty to compensate," the "principle of corrective justice."

These days I am inclined to the view that the duty of injurers to compensate their victims is not a matter of justice or of morality, but of utility or, broadly speaking, deterrence. Though I do not deny that injurers sometimes have a duty to compensate their victims, I deny that the duty to compensate is a matter of corrective justice.

Weinrib objects to my thesis that the injurer's wrongful gain is analytically distinct from the victim's wrongful loss. Weinrib argues that whenever there is wrongful gain there is correlative wrongful loss, and whenever there is wrongful loss there is correlative wrongful gain. Weinrib correctly notes that, in my view, when *A* imposes unjustifiable risks on *B*, *A* has secured a wrongful gain independent of *B*'s suffering a wrongful loss. But, he argues, has not *B* suffered a wrongful loss, namely the imposition of an unreasonable risk? Is not that loss in security both wrongful and correlative of *A*'s gain? Here I think Weinrib is correct. We can treat a reduction in security as a loss, and in the event it results from another's wrong, it can be a wrongful loss. The gains and losses are analytically connected, but what is the normative significance of the connection? *A* has secured a gain that ought to be annulled and *B* has suffered a loss that ought to be annulled. For insurance, monitoring and administrative reasons, tort law does not in general recognize these losses—i.e., risks—as compensable. In principle torts could permit compensation for risk. Even if tort law did identify diminution in security as a compensable loss, it would still be my view that corrective justice would not require that those who wrongfully reduce security must compensate their victims.

Weinrib takes his insight too far. He claims if *A* negligently injures *B*, and not merely puts him at risk, then *B* suffers no additional wrongful loss, that is, no wrongful loss greater than that which he suffers from *A* imposing an unreasonable risk upon him. Actual harm from negligence does not constitute a greater wrongful loss than does the loss in security from negligence. In Weinrib's words:

Just as the injury brings the defendant no accretion of gain, so it also imposes on the plaintiff no additional wrongfulness. The actual injury makes the plaintiff worse off than before, but it does not make him the victim of further wrongfulness any more than it makes the perpetrator the recipient of further gain. When the injury occurs, the same dis-

junction between risk and materialization that clears the defendant of wrongful gain precludes the plaintiff from alleging that the injury is a wrongful loss. The reasoning that limits the defendant's wrongful gain to the unreasonable creation of risk similarly limits the plaintiff's wrongful loss to the unreasonable exposure to that risk.²¹

Weinrib does not deny that *B* suffers a greater *loss* when *A*'s negligence injures him than he does when *A* merely imposes unreasonable risks upon him. He denies that *B* suffers any greater *wrongful* loss. The reason is that *A* does no further wrong in injuring *B*. The wrong he did consists in the imposition of unreasonable risk. His wrong stopped in logical space at the point he imposed unreasonable risks on *B*. In suffering injury, *B* suffers no greater "wrongfulness." Therefore, he suffers no greater wrongful loss.

This argument rests on an equivocation regarding the use of the term "wrongful." In ordinary language, a wrongful loss is a loss *resulting* from another's wrongdoing. Because the same wrong can lead to greater or lesser relative damage, the same wrongdoing can give rise to greater or lesser wrongful losses. Weinrib is obviously using a different concept of "wrongful loss," according to which a wrongful loss does not refer to the causal consequences of one's wrongdoing. Wrongful loss is the conjunction of wrong and loss. A loss is an increased wrongful loss only if it is the result of greater *wrong*, not just a greater loss from the same wrong. Frankly, I find Weinrib's usage implausible. It may be true that I do no greater wrong in harming you than I do when I impose unjustifiable risks, but I can do greater damage. You have experienced a greater loss. If the loss I caused resulted from my wrongdoing, then you have suffered a wrongful loss. The greater the loss, the greater the wrongful loss, even if the moral quality of the injurer's conduct itself does not change.

Weinrib's other objection seeks to make the same point. He writes:

Now let us move to the other side of the relationship. Coleman takes the defendant's gain to be the expenditure foregone through not eliminating the risk, with the wrongfulness consisting in the fact that the precautions against the risk were less costly than the gravity of the injury discounted by its likelihood. This conception of wrongful gain is adequate for the time of the defendant's wrongful act. However, since the judgment of wrongfulness involves a balancing of expenditure against risk, the gain can be superseded in the same way that the risk can be. Once the risk materializes into injury, the savings realized by not eliminating this risk have no greater significance than the risk does. The conception of gain must keep pace with the stage of the risk's maturation. Given the actuality of injury, the defendant's gain can no

21. Weinrib, *supra* note 1, at 436.

longer be the amount sufficient to eliminate the potential for injury but must now be the amount that would undo the injury itself. Therefore, the damage award, which is designed to restore the plaintiff to his position antecedent to the occurrence of the tort, is the equivalent in the post-injury stage of the savings foregone by the defendant at the time of his negligent action. If the savings are the defendant's wrongful gain at the time of the creation of the risk, the damages are the wrongful gain once the risk matures into injury.²²

Here the objection is that if the victim's actual damages are a measure of his wrongful loss, then the wrongful gain to the injurer is what would have been necessary to annul that loss. The strategy is clear. If I respond to Weinrib's first argument by claiming that actual injury increases a victim's wrongful loss when compared with the reduction in security created by the injurer's negligence, Weinrib counters that the injurer's wrongful gain also extends to the victim's damages. The injurer's gain is not just the savings in failing to take adequate precautions. Rather, it is the savings in failing to prevent or annul the victim's loss. Once the risk *A* creates negligently results in damage, the damages he could have prevented represent both the victim's wrongful loss and his wrongful gain. From the *ex post* perspective, the damages are a measure of what it would take for the injurer to rectify the loss. Damages, therefore, are the measure of his gain, his *wrongful gain*.

What makes my conduct wrongful? It is not that I injure you, for I can injure you without doing wrong, and I can do wrong without injuring you. The wrong consists in my failing to do what I had a duty to do, or my doing what I had no right to do. In the case of my negligence, what is the wrong I do? It is failing to take the precautions which a reasonable person would have taken. It is not my failing to prevent injury to you. For had I taken reasonable precautions, you might still have been injured, and suffered a loss but not a wrongful one. So my duty was not to prevent the harm to you. Compare three cases. In one, I have a duty to take *reasonable care*. In another, I have a duty to take *sufficient care* to prevent injury. In the third, I have no duty to take precautions, instead I have a duty to make good your losses should you suffer damages. Suppose I fail to do what I have a duty to do in each case. What is my wrongful gain in each? I submit that in the first case my wrongful gain is the difference between the precautions I should have taken and those I did take. In the second it is the difference between the precautions I took and those which would have been necessary to prevent the injury. Only in the third case, is my gain equal to your loss. Why? Only

22. *Id.* at 437-38 (footnote omitted).

in the third case is your loss equal to my benefit from failing to discharge my duty to you. In negligence law, my responsibility does not consist in annulling your loss; it consists in taking reasonable precautions. For my failure to reimburse you for your damages to constitute a wrongful gain, I first have to have a duty to make good those losses. But that is the third case above, *not* the first.

In sum, Weinrib has two related objections that seek to make the same point, namely that wrongful gain and wrongful loss are conceptually inseparable. The first objection is this: If *A*'s wrongful gain is the savings from failing to take reasonable care, then *B*'s wrongful loss is *just* the diminution in security from *A*'s failing to take reasonable care. So wherever there is wrongful gain there is wrongful loss. I believe Weinrib is right about this and I must modify my position. Therefore, I withdraw the claim that I have stood by till now that *A* can secure a *wrongful* gain, by, for example, driving negligently without imposing a wrongful loss. However, this *conceptual* point need make no normative difference. For it does not follow that corrective justice requires that these wrongful gains and losses be annulled by having those who gain from negligence compensate those whose security is diminished. Next, (and here is where Weinrib begins to go wrong), Weinrib considers the case in which the negligent actor actually injures his victim thereby creating a loss (or diminution in welfare) greater than the loss from reduced security. About this case Weinrib has two different claims to make. First, he claims that the victim who is injured by negligence sustains no greater *wrongful* loss than the person who merely has his security reduced by non-harm-causing negligence. That is because the injurer has done no greater wrong. Second, he claims that whatever a victim's wrongful loss is, the injurer's gain can always be characterized as being equal to it. Simply, the injurer's gain is just what it would cost him *ex post* to rectify his victim's loss. Taken together, these arguments are intended to undermine my claim that *normatively*, for the purposes of designing institutions to deal with the distribution of accident costs, we can separate wrongful gain from wrongful loss.

Neither of Weinrib's arguments is ultimately persuasive. The first rests on a stipulated definition of wrongful loss. But why should the wrongfulness of the loss be a function entirely of the injurer's conduct and not a function of both the injurer's conduct and the victim's loss. Weinrib nowhere defends his very implausible definition of wrongful loss.

Weinrib's second argument presupposes at one level that I might be correct in thinking that when *A* negligently injures *B* he causes *B* a greater wrongful loss than when he merely negligently imposes risks on

B. His dispute with me is that it does not follow that because *A*'s wrongful gain is the same in both cases, it can, therefore, be separated from *B*'s wrongful loss which is greater in the second than in the first case. In his view, because the benefit to *A* can be construed simply as the cost of annulling *B*'s wrongful loss, *A*'s wrongful gain equals *B*'s damages or wrongful loss.

This argument simply will not wash. If Weinrib were right he would have succeeded in destroying the entire enterprise of law and economics by linguistic fiat. Suppose wrongful gain always equals wrongful loss as Weinrib suggests it does. Then no actor would ever have an incentive for taking accident preventive measures. The gains from the accident would always equal the costs. Spending money on prevention would be irrational. The very idea of taking accident preventive measures that create net gains would be analytically impossible. Weinrib's thesis makes the economic inquiry into liability rules uninteresting by definition.

This objection needs to be amplified somewhat. Suppose that through his fault *A* injures *B* causing \$200 of damages. By Weinrib's account, *A* thereby secures a wrongful gain of \$200 because that is what it would cost *A* *ex post* to rectify *B*'s loss. But on what grounds could we claim that *A* had acted negligently in the first place? Consider: On the standard economic analysis of negligence that Weinrib endorses, *A* would be negligent only if the costs of prevention—that is, his gain if he fails to take precautions—is less than \$200, say, \$100. If *A* does not take \$100 worth of precautions to avoid a \$200 loss, he is negligent, his gain of \$100 is wrongful and the loss in which it results, namely \$200, is also wrongful. The idea of *ex ante* wrongful gain is analytically connected to the very concept of negligence. *A* is negligent *only if* his gain in not taking precautions is less than the expected cost of the harm. But if *B*'s loss is necessarily and always equivalent to *A*'s gain, by not taking precautions *A* cannot be said to have acted negligently. And if he has not acted negligently, then by Weinrib's own account, *B*'s loss is not wrongful; neither, therefore, is *A*'s gain. So there is no basis for holding him liable. More importantly, there will never be any net social gains by increased accident prevention. By always equating gains with losses, Weinrib turns the "accident prevention game" from a positive to a zero sum game.

Fortunately for both the economic analysis of law and for me, Weinrib is simply wrong. Your actual damages cannot constitute my wrongful gain unless they are the result of my wrong. But my wrong is my failing to take reasonable precautions. If I have a duty to pay you your damages which I then fail to discharge, *then* I have secured a

wrongful gain equal to your damages—otherwise not. My duty, therefore, derives from a normative theory of liability, not from the fact of my negligence having caused you harm. To see this, just imagine that I had no duty to compensate for the losses created by my negligence, but did have a duty not to be negligent. Were I negligent, I would secure the gains of having taken inadequate precautions. However, your loss which results from my gain is not equal to my wrongful gain because *ex hypothesi* I have no duty to make good your loss. Now if we change the example and impose on me a duty to compensate you, then should I fail to do so, I secure a wrongful gain equal to your damages.

Finally, Weinrib argues as if demonstrating a conceptual connection between wrongful gain and loss would undermine my position. But it would not. Even if everything Weinrib argues for were correct, it does not follow that we could not *normatively* distinguish recovery from liability. Whatever the conceptual connections between wrongful gains and losses may be, it can still turn out that it is better to annul wrongful gains one way and to rectify wrongful losses another. That surely has always been my central point, and therefore no demonstration of an alleged analytic connection between gain and loss need matter from a normative point of view.