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Ernest J. Weinrib

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ERNEST J. WEINRIB*

INTRODUCTION

For corrective justice the remedy corrects the injustice suffered by the plaintiff at the defendant's hands. In this Paper I want to examine the implications of this simple statement for contract damages. My ultimate focus, after considerable preliminaries, will be on two kinds of damage awards for breach of contract: punitive damages and damages that require the disgorgement of gains. The fact that these two kinds of damage awards have in recent years received notable elaboration by the highest courts in Canada, England, and Israel[1] attests to the continuing relevance of the issues that they raise. My intention is to discuss these issues from the standpoint of corrective justice.

Punitive damages and disgorgement stand in contrast to damages that are compensatory. Compensatory damages measure what the plaintiff has lost through the defendant's breach of contract. Punishment and disgorgement, in contrast, focus on the defendant: punishment on the outrageousness of the defendant's act, and disgorgement on what the defendant has gained through the wrong. This contrast between compensation on the one hand, and punishment and disgorgement on the other, means that the latter two cannot be considered in isolation from the function and possible inadequacies of the former. Recourse to punishment or disgorgement implies that private law has legitimate remedial purposes that compensation alone cannot

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1. Whiten v. Pilot Ins. Co., (2002) 209 D.L.R. (4th) 257 (S.C.C.); Attorney Gen. v. Blake, [2000] 4 All E.R. 385 (H.L.); C.A. 20/82, Adras Bldg. Material v. Harlow & Jones 42(1) P.D. 221, *translated in* 3 RESTITUTION L. REV. 235 (1995) (from the Supreme Court of Israel, 1988).

fulfill. Moreover, what constitutes punishment or disgorgement in a particular case may be unascertainable without determining the compensatory amount and the reason for regarding it as insufficient.

In private law, the idea that compensation is an appropriate remedy is generally accepted. The award of compensation reflects the plaintiff's entitlement to recover at least the loss that the defendant's wrongful act has caused. More problematic is the issue of whether the award should be limited to compensation. As the example of tort law indicates, damages that go beyond compensation and aim at punishment or disgorgement operate in circumscribed situations and are subject to special, often controversial, justifications.[2]

Contract law, however, poses an additional difficulty. Here the very notion of compensation is uncertain and its primacy disputed. The standard measure of damages for breach of contract is the expectation measure, which puts the plaintiff in the position in which the plaintiff would have been had the contract not been breached. In their classic article on contract damages, Fuller and Perdue denied that this measure, which reflected the value of something that the promisee did not yet have, was compensatory.[3] Expectation damages, they suggested, might better be viewed as having the quasi-criminal purpose of penalizing the promisor for breaching the contract.[4] This suggestion raises the possibility that a punitive impulse is present even in the most routine award of contract damages. On this view, truly compensatory assessments of contract damages are comparatively rare, whereas noncompensatory damages merely extend and make more explicit the noncompensatory policies already pervasive in contract damages.

2. For an assessment of the controversy about punitive damages in the torts context, see Andrew Burrows, *Reforming Exemplary Damages: Expansion or Abolition?*, *in* WRONGS AND REMEDIES IN THE TWENTY-FIRST CENTURY 153 (Peter Birks ed., 1996). On disgorgement in the torts context, see Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQUIRIES IN LAW 1 (2000), and James Gordley, *The Purpose of Awarding Restitutionary Damages: A Reply to Professor Weinrib*, 1 THEORETICAL INQUIRIES IN LAW 39 (2000).

3. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 373 (1936). For recent arguments that Fuller and Perdue were wrong to reject the compensatory nature of expectation damages see Peter Benson, *The Unity of Contract Law*, *in* THE THEORY OF CONTRACT LAW: NEW ESSAYS 118 (Peter Benson ed., 2001) [hereinafter Benson, *The Unity of Contract Law*], and James Gordley, *Contract Law in the Aristotelian Tradition*, *in* THEORY OF CONTRACT LAW: NEW ESSAYS, 265, 327–32 (Peter Benson ed., 2001). Benson's essay is particularly insistent on the centrality of the challenge to a corrective justice theory of contract law that the Fuller and Perdue account of expectation damages poses.

4. Fuller & Perdue, *supra* note 3, at 61.

Contract law thus raises basic issues about the relationship between the remedy and the wrong. Among these issues are the following: What is the nature of the contractual entitlement whose breach the promisee seeks to remedy? What constitutes compensation for this breach? Does the promisee's contractual entitlement justify the award of noncompensatory damages? Does the promisee's entitlement determine and limit the remedial possibilities that arise on breach, or are remedies the product of policies that are independent of that entitlement? Is there a conceptual boundary between punishment and civil liability? May one who breaches a contractual obligation retain the benefits resulting from the breach?

In this Paper I address these issues from the perspective of corrective justice. Corrective justice postulates an intimate connection between right and remedy.[5] The plaintiff's right and the defendant's correlative duty are the constituents of the normative relationship between the parties. An award of damages is the law's attempt to undo, so far as money can, the defendant's violation of the plaintiff's right. In corrective justice the nature of the right and its correlative duty determines the nature of the remedy; considerations of policy that are extraneous to the relationship of right and duty play no role. Hence, compensatory damages, which repair the injury to the plaintiff's right, readily fit within corrective justice. In contrast, disgorgement and punitive damages, which aim at objectives beyond the plaintiff's entitlement, are questionable.

To examine contract damages in the light of corrective justice, this Paper is organized as follows. I begin in Part I with a general treatment of the role of remedies within a corrective justice framework. This Part emphasizes that, so far as corrective justice is concerned, the remedy makes the defendant restore (to the extent the law can) what belongs to the plaintiff as a matter of right. I then in Part II turn specifically to contract damages, and to the question formulated by Fuller and Perdue[6] of whether expectation damages can be justified as compensatory in accordance with corrective justice. Because defining the plaintiff's right is crucial to determining the remedy for corrective justice, this question requires the elucidation of the right infringed by a breach of contract. Drawing in Part III on Kant's now almost forgotten discussion of this issue, I sketch the relationship between the promisee's right to contractual performance

5. ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 142–44 (1995).
6. Fuller & Perdue, *supra* note 3.

and expectation damages, which give the promisee the value of that right. The Kantian account of contractual right also casts light, as I contend in Part IV, on the inaptness of requiring the disgorgement of gains resulting from contract breach, despite the superficial attractiveness of preventing wrongdoers from profiting from their wrongs. In Part V, I turn to punitive damages, addressing first the preliminary question of how corrective justice and punishment—and the institutions devoted to them—coexist, and how they are differentiated in a legal order based on rights. Finally, I discuss the difficulties that emerge from the elaborate but ultimately unsatisfying recent attempt in Canada to work out a coherent treatment of punitive damages for contract breach.

Throughout this Paper the discussion proceeds from the standpoint of corrective justice alone. I ignore the rich and suggestive treatments of contract damages from other perspectives.[7] Of course, this will be no more convincing to adherents of these perspectives than economic analysis is to those who are skeptical of its particular premises. Whether one regards corrective justice as the appropriate framework for understanding private law depends on the assessment of arguments more comprehensive than those being presented here.[8] My purpose in this Paper is modest: to exhibit the implications of the corrective justice framework—which is already well-established in academic discussion of tort law—for a series of interconnected issues concerning contract damages.[9]

This modest purpose, however, serves larger ends. Corrective justice claims to be a normative framework for private law that is both immanent and critical.[10] It is immanent in that, by highlighting the correlative structure of the parties' relationship, it captures the

7. *See, e.g.*, Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99 (2000); Hanoch Dagan, *Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory*, 1 THEORETICAL INQUIRIES IN LAW 115 (2000); William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629 (1999).

8. *See, e.g.*, WEINRIB, *supra* note 5. For an overview of corrective justice, see Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349 (2002) [hereinafter Weinrib, *In a Nutshell*].

9. On the unsoundness of identifying corrective justice with tort law only, see Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES IN THE LAW 107, 156 (2001). The most detailed contemporary attempt to apply corrective justice to contract law is found in the work of Peter Benson. *See* Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077 (1989); Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 OSGOODE HALL L.J. 273 (1995); Benson, *The Unity of Contract Law*, *supra* note 3, at 118.

10. WEINRIB, *supra* note 5, at 8–21.

most pervasive and distinctive feature of private law. It is critical because it views this feature as crucial to the fairness and coherence of private law relationships, and therefore insists that it must inform the justifications for particular doctrines and institutions. Because fairness and coherence are themselves aspirations internal to any well-ordered system of private law, corrective justice does not exist independently of the ensemble of private law doctrines and institutions that make it a juridical reality. Theoretical argument is therefore not sufficient to establish its significance. Also required is attention to particular doctrines and institutions, to the role that corrective justice can play in reflecting or developing fair and coherent norms of private law, and to the difficulties that arise when the analysis of private law invokes considerations that are inconsistent with it. The discussion of contract damages that follows is offered in this spirit.

I. CORRECTIVE JUSTICE AND PRIVATE LAW REMEDIES

Corrective justice views the remedy imposed on the defendant as correcting the injustice suffered by the plaintiff.[11] This corrective function requires that the remedy follow in the tracks of, and undo, the injustice that calls it into being. The injustice and the remedy must have the same structure.

Given that the liability of a particular defendant is necessarily a liability to a particular plaintiff, the defining characteristic of this common structure is that the parties are correlatively situated. An award of damages evinces this correlativity by linking the defendant's obligation to pay and the plaintiff's entitlement to receive the sum awarded. This correlative treatment of the parties at the remedial stage presupposes that, in finding the defendant liable to the plaintiff, the law considers the parties not as independent monads, but as the doer and sufferer of the same injustice. The remedy is then the correlatively structured response to a correlatively structured injustice.

Liability is a fair and coherent phenomenon only to the extent that the justifications that support it in a given case simultaneously embrace both parties as correlatively situated. Then a reason for considering the defendant to have done an injustice is also a reason for considering the plaintiff to have suffered that injustice. Other-

11. *See generally* Weinrib, *In a Nutshell*, *supra* note 8.

wise, liability would reflect a congeries of considerations that apply to the parties individually without reflecting their reciprocal relationship. Such incoherently one-sided justifications favour or disfavour one of the parties relative to the other, and thereby fail to be fair from the standpoint of both.

At the heart of corrective justice's correlativity are the plaintiff's right and the defendant's corresponding duty. A right is an inherently correlative notion, since it immediately places someone else under an obligation not to interfere with it. Right and duty are correlated when the plaintiff's right is the basis of the defendant's duty and, conversely, when the scope of the duty includes the kind of right infringement that the plaintiff suffered. Under those circumstances the reasons that justify the protection of the plaintiff's right are the same as the reasons that justify the existence of the defendant's duty.

Accordingly, the injustice that liability rectifies consists of the defendant's having or doing something that is incompatible with a right of the plaintiff. The law remedies this incompatibility by requiring that the defendant restore, either specifically or by giving the equivalent value, what is rightfully the plaintiff's. The subjection of the defendant to this remedy for the plaintiff's benefit nullifies (so far as the law can do so) the injustice that that the plaintiff suffers at the defendant's hand. In this way corrective justice is a unifying notion that links both the plaintiff to the defendant and the injustice to the remedy.

The role of the remedy in corrective justice is simply to undo the injustice between the parties. When the defendant has or does something that is inconsistent with the plaintiff's right, that right does not disappear but survives in a remedial form that requires the defendant to restore what the plaintiff has been unjustly deprived of. Just as the plaintiff has an entitlement to the substantive right that the defendant has infringed, so the plaintiff has an entitlement as against the defendant to the remedy that vindicates that right. Conversely, just as the defendant has a duty not to interfere with the plaintiff's right, so the defendant, on breaching that duty, is obligated to restore the content of the right or its value to the plaintiff. The relationship of right and correlative duty at the remedial stage is therefore only

the continuation of the relationship of right and correlative duty that existed prior to the injustice.[12]

This internal connection between the right and the remedy precludes instrumental conceptions of remedial policy. From the standpoint of corrective justice the remedial issue never involves inquiring into the prospective disadvantage to be imposed on the defendant in order to achieve a desirable social goal—even if the social goal in question is the protection of the plaintiff's right or the deterrence of defendants from infringing such rights upon.[13] Questions that attend either to the deterrence of defendants or to the protection of plaintiffs focus on one or the other of the parties and thus fail to capture the correlativity of their situations. Instead, corrective justice requires only that one ask what remedy would undo the injustice to the extent that the law can. To be sure, the answer to this question requires further argumentation within the legal system (for example, should there be specific relief or damages?). However, this argumentation, far from being one-sidedly attentive as a matter of policy, merely specifies, within the repertoire of considerations at play in a particular legal system, what undoing the injustice amounts to in the circumstances. Because the injustice is correlatively structured, the remedy that undoes it follows in its tracks, reversing it for both parties. So conceived, the remedy is constitutive of the relationship between the doer and the sufferer of injustice, rather than instrumental to the promotion of specific social goals.

Accordingly, the function of the remedy within corrective justice can be formulated positively and negatively. Positively, the remedy consists of the restoration by the defendant (so far as the law can achieve it) of what rightly belongs to the plaintiff, thereby undoing the injustice suffered by the plaintiff at the defendant's hands. Negatively, determination of the remedy is not the instrumental operation of a remedial policy designed to secure particular behavior on the part of the defendant or to achieve particular protections for the plaintiff. Rather the remedy is merely the continuation at the

12. A similar notion appears in what German legal textbooks call *Rechtsfortsetzungsgedanke*, the idea that "the injured right lives on in a claim for damages." *See* WALTER VAN GERVAN ET al., COMMON LAW OF EUROPE CASEBOOKS: TORT LAW 753 (2000)

13. The fact that deterrence does not determine any particular remedy so far as corrective justice is concerned does not mean that corrective justice is indifferent to deterrence. Deterrence can nonetheless, even from the standpoint of corrective justice, be a function of the operation of the ensemble of norms and remedies as a system of positive law. For elaboration of this point, see Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621 (2002).

remedial stage of the correlativity of right and duty that defines the parties' relationship. Therefore, the first step in specifying the plaintiff's remedy against the defendant is to identify the right of the plaintiff and the correlative duty incumbent on the defendant.

II. THE PROBLEM OF EXPECTATION DAMAGES

What, then, is the nature of a contractual right and how does an award of damages undo the violation of that right? The basic rule of contract damages is that damages are awarded on the expectation measure: the plaintiff is to be put in the position that the plaintiff would have been in had the contract not been breached. Is there (as corrective justice requires) an internal connection between what the promisee has unjustly lost and what the award of expectation damages restores? In other words, do expectation damages conform to corrective justice?

This question was the starting point of the celebrated article on contract damages by Fuller and Perdue, who answered it in the negative.[14] In their view the purpose of corrective justice is "the maintenance of an equilibrium of goods among members of society."[15] This the law accomplishes by awarding compensatory damages "to heal a disturbed status quo."[16] In the contracts context, corrective justice can be seen to be at work in the protection accorded to the restitution and reliance interests; the equilibrium of goods represented by the status quo has been disturbed in the former both by a gain for the defendant and an identical loss for the plaintiff, and in the latter by a loss for the plaintiff. Expectation damages, they argue, are different. Such damages protect a future expectancy—"something [the plaintiff] never had"—rather than a loss already suffered. "This seems on the face of things a queer kind of 'compensation.'"[17] And so they contend that "[i]n passing from compensation for change of position to compensation for loss of expectancy we pass . . . from the realm of corrective justice to that of distributive justice."[18]

Having discarded corrective justice, Fuller and Perdue then locate the rationale for expectation damages in considerations of policy. They suggest that expectation damages are an effective means of

14. Fuller & Perdue, *supra* note 3.
15. *Id.* at 56.
16. *Id.*
17. *Id.* at 53.
18. *Id.* at 56.

protecting the reliance interest.[19] Expectation damages function not only as compensation for reliance losses (for reliance can consist of loss of the opportunity to enter other contracts) but also as a quasi-penal prophylaxis against breaches of contract that occasion reliance losses.[20] Moreover, expectation damages promote and facilitate business agreements, which in turn stimulate economic activity, especially within a credit economy.[21] In this way expectation damages attest, in their view, to the intertwining of legal institutions and the economic system.[22]

The Fuller-Perdue account of expectation damages stands at the confluence of two conclusions. The first is that corrective justice, although appropriate for rectifying the gains and losses associated with the restitution and reliance interests, is inapplicable to the award of expectation damages. The second is that expectation damages are to be justified in terms of remedial policies concerning the indirect protection of the reliance interest and the promotion of commerce in a credit economy. These two conclusions are related. Having rejected the applicability of corrective justice, which internally connects the injustice to the remedy, Fuller and Perdue have recourse to considerations of remedial policy that present expectation damages as instrumental to the desirable social goals of protecting reliance and facilitating business agreements.

The basic presupposition of this account is that corrective justice does not operate in the absence of a disturbance of the status quo's equilibrium of goods among members of society. Unless there is a loss (as occurs with detrimental reliance) or a gain or both (as when the restitution interest is in play), an award of damages cannot be construed as the working of corrective justice. Expectation damages, Fuller and Perdue argue, are not truly compensatory: by breaching the promise, the defendant merely withdraws a future good without inflicting a present loss.[23] Only when the plaintiff relies on the prospect of receiving this good and thereby puts the future to some present detrimental use does the plaintiff suffer a loss that grounds a claim for compensation.[24] Of course, by awarding expectation dam-

19. *Id.* at 60–61.
20. *Id.* at 61.
21. *Id.* at 61–62.
22. *Id.* at 63.
23. *Id.* at 53, 56.
24. *Id.* at 59–60.

ages the law signals its willingness to treat the promise as creating something of present value.[25] But one cannot deduce the justification of expectation damages as compensating for the loss of a present value from their mere existence. Apart from policies like the protection of reliance and the promotion of commerce (so Fuller and Perdue claim), there is no argument, independent of a circular appeal to the consequences that the law attaches to a breach, for regarding the promise as creating a present right in the expectancy.[26] In and of itself, they assume, a contractual undertaking does not suffice to do so.

Crucial to this reasoning is the idea that contract law as such does not transfer the subject matter of the contract to the promisee. If contract law did so, expectation damages would lose their mystery: given that the subject matter of the contract would belong to the promisee, its value would of course determine the level of compensation owed when the promisor withholds it through breach. Since Roman times, however, the law has distinguished between contract and conveyance.[27] At common law, only specific kinds of contracts, such as contracts of sale, effect an immediate transfer of title. Thus a mere agreement to sell (as contrasted with a contract of sale) does not give the purchaser a property interest in the object to be sold, but only the expectation of owning such an object in the future. Yet if the vendor breaches, the purchaser is nonetheless, under the rule of expectation damages, entitled to be put into the position that would have obtained had he or she secured the object's value. This seems strange. Usually one's entitlement to the value of something stems from one's ownership of the thing that has that value.[28] The rule of expectation damages thus presents a paradox. By requiring that the promisor make good the value withheld through the breach of the contract, the law treats the promisee as entitled to the object's present value even though it does not yet regard the promisee as owner of the object itself. The fact that expectation damages do not undo the deprivation of property to which the promisee is presently entitled allows Fuller and Perdue to reject the notion that such damages perform a compensatory function in accordance with corrective

25. *Id.* at 59.

26. *Id.* at 59–60.

27. BARRY NICHOLAS, AN INTRODUCTION TO THE STUDY OF ROMAN LAW 103 (1962).

28. In Hegel's succinct formulation, "[a]s the full owner of the thing, I am the owner both of its *value* and of its use." G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 63 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge University Press 1991) (1821).

justice. In effect, Fuller and Perdue argue that contract law's disjunction of value from ownership can be explained only in terms of the independent social goals that the award of value tends to serve.

III. KANT ON CONTRACTUAL ENTITLEMENT

Centuries ago Immanuel Kant provided a response to the kind of challenge posed more recently by Fuller and Perdue. From the standpoint of corrective justice, Kant's views about contractual entitlement are particularly germane. Whereas corrective justice highlights the structure of correlativity that informs the rights and duties of private law, Kant's account of law provides a philosophical exposition of the normative significance of these rights and duties.[29] More specifically, Kant's treatment of contract law suggests why contractual performance can be seen as an entitlement, for the loss of which the promisee can demand compensation.

In Kant's understanding, law as a normative phenomenon consists in the sum of conditions under which the action of one person can coexist with the freedom of another.[30] Because he conceives of freedom as the capacity for self-determining action, he views persons as being juridically related to one another through categories of private law that reflect their interaction as self-determining agents. From this standpoint a person's actions are limited only by the freedom of other self-determining agents, and rights are the juridical manifestations of that freedom. One can therefore posit a categorical difference between self-determining agents, who are the bearers of rights, those objects (Kant calls them "external objects of . . . choice")[31] on which agents can exercise their self-determining capacity and accordingly make into the subject matter of rights. Kant locates promises among these external objects of choice.[32]

Kant postulates that entitlements to external objects of choice must be possible from a juridical standpoint, because such entitlements are capable of coexisting with the freedom of everyone.[33] In view of the categorical distinction between self-determining agents

29. On the relationship of corrective justice and Kantian right, see WEINRIB, *supra* note 5, at 84–113; Weinrib, *supra* note 9, at 119–26 (2001).

30. IMMANUEL KANT, *The Metaphysics of Morals*, *in* THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT—PRACTICAL PHILOSOPHY 387 [6:230] (Mary J. Gregor ed. & trans., 1996) (1797).

31. *Id.* at 402 [6:247].

32. *Id.*

33. *Id.* at 404–06 [6:246–47] (postulate of practical reason with regard to rights).

and external objects, use of the latter cannot as such, that is, independently of a regime of rights in external objects, count as an interference with the freedom of the former. External objects must therefore be available for use by self-determining agents. However, because freedom within the juridical order refers to the *capacity* for self-determining agency, the aspect of choice that is relevant to external objects of choice is this capacity, not its actual exercise. Accordingly, the juridical possibility of using an external object of choice must consist not merely in a liberty existing at the moment of actual use or possession (such a liberty would reflect the actual exercise of choice rather than the capacity for choice), but in a right that certifies one's entitlement to the external object even when one is not using or possessing it. The consequence of this is that one can be wronged by another's use of something that one does not actually possess. This consequence is simply what having a right in an external object means. Thus, in a legal order that reflects the relations of freedom between self-determining agents, the possibility of rights to external objects of choice cannot be denied.

Included among these external objects of choice is contractual performance by another. In accordance with the very distinction between self-determining agency and objects external to it, anything can be an external object of choice. External objects of choice are categorically different from the self-determining agent who can exercise choice. As Kant puts it, "external" means "*distinct* from me," not merely "found in *another location* . . . in space or time."[34] Indeed, if this were not so, one would think—wrongly, in view of the independence of right from actual possession—that a right required actual possession at a particular time and place. Accordingly, external objects of choice are not merely corporeal things that are spatially external; they can include another's promised performance.

For Kant, this establishes contractual performance as the possible content of a right. Whether a person in fact has such a right depends on whether the rightful conditions for its creation have been observed.[35] These conditions give legal expression to the notion that the promisee's right to contractual performance is the product of the wills of both promisee and promisor. The contract effects a voluntarily assumed change in the pre-existing legal relationship between the contracting parties, creating a contractual right in the promisee and

34. *Id.* at 401[6:245].
35. *Id.* at 422–23 [6:272–73].

imposing a correlative duty on the promisor. Accordingly, both of them must participate in its creation. Doctrines of contract formation, which engage the two parties in relation to each other, are the legal categories through which this process of joint creation occurs.[36]

Kant is explicit about the nature of the right that emerges from this process. It is not a right to the subject matter of the contract. Nor is it a right to the situation that would result from the performance of the promised act. Rather, it is a right merely to the performance of that act, to what Kant calls "another's *choice* to perform a specific deed."[37] Kant formulates this important conclusion as follows:

> By a contract I acquire something external. But what is it that I acquire? Since it is only the causality of another's choice with respect to the performance he has promised me, what I acquire directly by a contract is not an external thing but rather his deed, by which that thing is brought under my control so that I make it mine. — By a contract I therefore acquire another's promise (not what he promised), and yet something is added to my external belongings; I have become *enriched (locupletior)* by acquiring an active obligation on the freedom and means of the other.[38]

Thus, Kant continues, what the promisee acquires through a contract is not a right to a thing but a right against the specific person obligated to perform the requisite act.[39]

36. For an extended account of how the common law doctrines of contract formation treat the parties as mutually related within a corrective justice framework, see Benson, *The Unity of Contract Law*, *supra* note 3, at 118.

37. KANT, *supra* note 30, at 402 [6:247].

38. *Id.* at 424 [6:273].

39. In Kant's view, the acquisition of a thing by means of a contract involves two conceptual steps: the contract that makes a certain act (delivery of the thing) obligatory, and then the delivery that accomplishes the transfer of property by putting the promisee into possession of the thing. *Id.* at 424–26 [6:274–76]. While it is true that the contract to deliver something makes the promisee's acquisition of the subject matter of the contract a "rightfully necessary *result* of it," that result is the consequence of the promisor's discharge of the obligation, not "a part of the contract," that is, not constitutive of the obligation itself. *Id.* at 432 [6:284]. Kant is following a principle of Roman law that survived in Germany, that the contract of sale (emptio venditio) does not itself transfer property; that happens only through a subsequent conveyance, such as delivery (traditio). *See* FRITZ SCHULZ, CLASSICAL ROMAN LAW 526–33 (1951). In holding this view, Kant implicitly disagreed with Grotius and Pufendorf, both of whom rejected the principle of Roman Law that contract does not convey property. *See* 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 308–09 (Francis W. Kelsey trans., 1925); SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO 610–11 (Oldfather trans., 1934). Whether a contract of sale transfers property is a question that different legal systems answer differently. *See* F. DE ZULUETA, THE ROMAN LAW OF SALE 1–2 (1945); REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 271–72 (1990). In the common law, for instance, passage of title is precisely what distinguishes a contract of sale from an agreement to sell. Of course, the fact that property can be passed through certain contracts about things means that not every contract does so.

This Kantian account of contractual entitlement provides a basis for the expectation measure of damages. By breaching the contract, the defendant unjustly deprives the plaintiff of the performance to which the plaintiff is entitled. The law undoes that injustice by restoring to the plaintiff either the specific performance that has been lost or the value of that performance. This value, in turn, reflects the value of the subject matter of the contract. Hence, the plaintiff is entitled to damages that put the plaintiff into the position that the plaintiff would have been in had the contract not been breached. This is so not because the plaintiff has acquired an entitlement to (in Kant's formulation) "what was promised,"[40] that is, the thing that was the subject matter of the contract, but rather because the plaintiff has acquired the promise itself,[41] that is, the act that the defendant is obligated to perform. The value of the thing promised is merely a way of measuring the value of the promise itself. The plaintiff has not acquired the thing promised "directly," as Kant notes,[42] but the thing figures indirectly in the plaintiff's entitlement because the entitlement's value reflects the value of the thing.

This account addresses the perplexity later raised by Fuller and Perdue, that expectation damages seem to be "a queer kind of 'compensation'" in that they give the plaintiff something that the plaintiff never had.[43] It is true that the plaintiff never had the thing promised; its loss is therefore not something for which the plaintiff can rightly claim compensation. But the plaintiff did have an entitlement to the performance itself; it is for the infringement of this entitlement that expectation damages compensate. Kant thereby answers the question of how can the law treat the plaintiff as entitled to the thing's value if the plaintiff is not entitled to the thing. The plaintiff turns out to be entitled to the thing's value because that value determines the value of the performance to which the plaintiff *is* entitled. Both the Kantian account and the Fuller-Perdue critique of expectation damages presuppose the disjunction between contractual performance and ownership of the subject matter of the contract. But this very feature of contract that is problematic for Fuller and

Accordingly, these differences in the positive law of various legal systems do not affect Kant's fundamental point, that the passage of property is not conceptually integral to the idea of contractual entitlement.

40. KANT, *supra* note 30, at 402 [6:248] (emphasis removed).

41. *Id.*

42. *Id.* at 424 [6:273].

43. Fuller & Perdue, *supra* note 3, at 53.

Perdue is what for Kant characterizes contract as creating a distinct kind of right.

In what sense does Kant provide, as Fuller and Perdue sought, a *justification* for the rule about expectation damages? For Fuller and Perdue, justification consists in identifying the social purposes that the rule serves—a conception of justification they regard as so well-established that it "would today scarcely be regarded as an exciting truth."[44] Therefore, once they dismiss the suggestion that expectation damages maintain the equilibrium of goods among members of society, they are free to rummage through the repertoire of social purposes until they alight on the protection of reliance and the promotion of commerce.[45] Kant, in contrast, working in the tradition of corrective justice, does not justify legal concepts by reference to a social purpose, because that would involve the law's treating the parties as means rather than as agents who interact as ends in themselves. Instead, Kant views justification as immanent in a system of rights. Because a system of rights requires that the action of one self-determining person be consistent with the freedom of another,[46] a rule is justified simply inasmuch as it manifests this consistency. Conversely, a restriction of self-determining activity for any reason except consistency with the freedom of others (for example, a refusal to give legal recognition to contractual entitlement) would *eo ipso* be unjustified. Thus, once a rule can be understood as the juridical manifestation of self-determining agency, no further work remains for justification to do. The rule is justified by virtue of its expressing the self-determining freedom of the interacting parties. This freedom forms the baseline from which deviations count as injustices.[47] And then the undoing of such injustices in accordance with corrective

44. *Id.* at 52.

45. *Id.* at 62.

46. KANT, *supra* note 30, at 387 [6:230].

47. Richard Craswell has claimed that "[w]hile corrective justice theory can give us a way of talking about what to do when the relevant baseline is infringed, it cannot tell us what baseline ought to be selected as relevant." Craswell, *supra* note 7, at 127. In different contexts, Hanoch Dagan and Peter Cane develop a similar criticism of corrective justice. *See* Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 98 MICH. L. REV. 138 (1999); Peter Cane, *Distributive Justice and Tort Law*, 1 N.Z.L. REV. 401 (2001). The Kantian account of contractual entitlement illustrates the unsoundness of the contention that corrective justice cannot itself supply the baseline from which to reckon unjust gains and losses. For more general treatments of entitlements in corrective justice, see Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515, 578–601 (1992); Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 DUKE L.J. 277 (1994).

justice partakes of the normativeness immanent in the system of rights and duties as a whole.

A virtue of the Kantian account of contractual entitlement is that it is consonant with the compensatory function that law itself implicitly assigns to expectation damages. In awarding the plaintiff the value of what the contract would have given, the law treats promisees as entitled to the expectancy that the breach deprives from them. In contrast, a long and complicated narrative—which Fuller and Perdue attempted to provide—is needed to divert expectation damages from their ostensibly compensatory role to the remedial policies identified by Fuller and Perdue. It is, accordingly, hardly surprising that, although the classification of interests that Fuller and Perdue offered has taken hold, their account of expectation damages and the reconceptualization of contract law that this account entails have, on the whole, had little effect on the law.[48] The interest in securing the promised performance or its equivalent remains "the only pure contractual interest."[49] This interest in performance as the distinctive feature of contractual entitlement is the focus of Kant's attention. In providing a theoretical account that allows us to understand expectation damages for what they purport to be, that is, as compensation to the plaintiff for an injustice suffered at the defendant's hands, Kant's treatment of contract exemplifies the commitment of corrective justice to understand the basic structure of private law in the law's own terms.[50]

IV. THE DISGORGEMENT OF GAINS FROM BREACH

Whereas expectation damages, whatever their proper theoretical basis, are well-established in the law, awards based on the defendant's gains are more controversial. The renewed interest in restitution throughout the common law world has brought new attention to—and controversy about the principles that should govern—gains from contract breach.[51] This topic has been called "devilishly difficult."[52]

48. Daniel Friedmann, *The Performance Interest in Contract Damages*, 111 LAW Q. REV. 628, 646–54 (1995).

49. *Id.* at 629.

50. On this commitment, see WEINRIB, *supra* note 5, at 1–21.

51. Among the leading treatments are JAMES EDELMAN, GAIN-BASED DAMAGES: CONTRACT, TORT, EQUITY AND INTELLECTUAL PROPERTY 149–89 (2002); Peter Birks, *Restitutionary Damages for Breach of Contract:* Snepp *and the Fusion of Law and Equity*, 1987 LLOYDS MAR. AND COM. L.Q. 421; Dagan, *supra* note 7; E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339

Favoring gain-based awards are strong ethical intuitions that promises should be kept and that those who breach their contracts should not profit from their wrongs. On the other hand, the difficulty in working out a coherent formulation of a new gain-based principle reinforces the suspicion that the traditional approach may be justified after all.

In many contract situations gain-based awards lie at the margins of the law's traditional compensatory framework. One such situation occurs when the defendant's gains may be used as a means of measuring the plaintiff's losses. For example, when the defendant competes with a plaintiff to whom the defendant has given an exclusive license to sell or manufacture a certain commodity, the usual approach is to treat the defendant's gain as evidence of the profit that the plaintiff lost through the breach.[53] Another such situation occurs when defective performance saves the promisor an expenditure without ultimately causing the promisee a further loss. Then the promisee can deduct what the promisor saved from the agreed price in order to bring the payment into line with what the promisee received, thus preventing what turns out to be an overpayment.[54] Yet another such situation occurs when the promisor builds in breach of a negative covenant with the promisee but without causing the promisee financial loss. The promisee's entitlement to receive, in lieu of an injunction, the amount that reasonably would have had to been paid for securing a relaxation of the covenant can be interpreted either as gain-based or as compensatory.[55] A fourth such situation occurs when

(1985); Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504 (1980) [hereinafter Friedmann, *Restitution of Benefits*]; Daniel Friedmann, *Restitution for Wrongs: The Measure of Recovery*, 79 TEX. L. REV. 1879 (2001); William Goodhart, *Restitutionary Damages for Breach of Contract: The Remedy that Dare not Speak Its Name*, 3 RESTITUTION L. REV. 3 (1995); Gareth Jones, *The Recovery of Benefits Gained from a Breach of Contract*, 99 LAW Q. REV. 443 (1983); Andrew Kull, *Restitution as a Remedy for Breach of Contract*, 67 S. CAL. L. REV. 1465 (1994); Richard O'Dair, *Restitutionary Damages for Breach of Contract and the Theory of Efficient Breach: Some Reflections*, 46 CURRENT LEGAL PROBS. 113 (1993); Lionel D. Smith, *Disgorgement of the Profits of Breach of Contract: Property, Contract and "Efficient Breach"*, 24 CAN. BUS. LAW J. 121 (1994–95); S. M. Waddams, *Profits Derived from Breach of Contract: Damages or Restitution*, 11 J. CONT. L. 115 (1997).

52. Andrew Burrows, *No Restitutionary Damages for Breach of Contract* (Surrey C.C. v. Breden Homes), 1993 LLOYD'S MAR. & COM. L.Q. 453.

53. John P. Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175, 189 (1959).

54. Samson & Samson, Ltd. v. Proctor, [1975] 1 N.Z.L.R. 655 (S.C.) (builder, in breach of building contract, puts insufficient steel reinforcing into house which is sold at a price undiminished by the defect; court holds that a deduction from the contract price is not a departure from the fundamental principle of compensation); *see also* Attorney Gen. v. Blake, [2000] 4 All E.R. 385, at 398 (H.L.).

55. Wrotham Park Estate v. Parkside Homes, [1974] 1 W.L.R. 798 (Ch.). See the different interpretations of this case in *Blake*, [2000] 4 All E.R. 385, at 395–97, 410.

the breach of contract is also the breach of a fiduciary duty. The aggrieved beneficiary can secure an accounting of the fiduciary's profits, which would have been unavailable from a mere breach of contract.[56]

Are such miscellaneous instances of gain-based recovery to be understood, not as particular applications of traditional categories, but as the scattered embers of a general conception of gain-based damages, to be collected and fanned into a new and explicit principle of disgorgement for breach of contract? For the latter possibility, an attractive analogy from the law of torts beckons. For centuries the owner of an object that the defendant converted and sold has been able, by "waiving the tort," to recover the proceeds of the sale from the defendant, even when this would give the owner more than the value of the lost object.[57] Thus, the gain-based award that is controversial for breach of contract is well-established for the misappropriation of property. This difference, one might suppose, is entirely a product of history rather than reason. For why should profiting from another's contractual right be treated less severely than profiting from another's proprietary right?

In recent years two important cases, one from Israel and the other from England, have provided the most extensive discussions favoring the disgorgement of gains from contract breach. In *Adras Building Material v. Harlow & Jones*[58] the defendant had agreed to sell steel to the plaintiff, but when the price of steel spiked, the defendant instead sold the steel stored for that purpose to a third party. Because the plaintiff did not purchase substitute steel at a higher price before the market receded to its former level, no loss was proven. The Supreme Court of Israel awarded the plaintiff the gain that the defendant realized by selling its steel to the third party above the contract price. In *Attorney General v. Blake*[59] a former employee

56. Farnsworth, *supra* note 51, at 1354–60. For an account of the fiduciary duty from the standpoint of corrective justice, see Weinrib, *supra* note 2, at 33–34.

57. Lamine v. Dorrell, 92 Eng. Rep. 303 (K.B. 1705); *see* Friedmann, *Restitution of Benefits*, *supra* note 51; GRAHAM VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 473–97 (1999).

58. C.A. 20/82, Adras Bldg. Material v. Harlow & Jones 42(1) P.D. 221 (1988), *translated in* 3 RESTITUTION L. REV. 235 (1995); *see* Daniel Friedmann, *Restitution of Profits Gained by Party in Breach of Contract*, 104 LAW Q. REV. 383 (1988).

59. [2000] 4 All E.R. 385. The parallel case in the United States, *Snepp v. United States*, 445 U.S. 507 (1980), differs in that the promisor in *Snepp* was held to be a fiduciary. On the other hand, it is hard to resist the impression that, in ordering the disgorgement, the court in *Blake* was aiming not merely at the promisor's breach of contract in publishing his memoirs, but at the traitorous activities that gave him the notoriety that made his memoirs profitable—an aspect not present in *Snepp*.

of the intelligence service, who had been convicted of spying and had escaped from prison, breached his contract of employment with the Crown by publishing his memoirs. Although he was not a fiduciary and the published information was no longer confidential, the House of Lords held that the Crown was entitled to the money owed to him by the publisher, on the ground that in the circumstances the Crown had a legitimate interest in preventing him from profiting from his breach of contract.

The basis of disgorgement in such cases is the sentiment that one should not profit from one's wrong. This sentiment has obvious moral resonance. It treats the breach of contract as a wrong, that is, as an act that the promisor was morally obliged not to commit. By striking the gains of contract breach from the hand of the promisor, disgorgement gives teeth to the long-standing principle that promises are to be observed (pacta sunt servanda).

In this respect disgorgement is at odds with the notion of efficient breach. Efficient breach, a dominant idea in the economic approach to contract theory, postulates that a contract breach from which the promisor gains more than the value of the promisee's expectancy is economically efficient.[60] By allowing the promisor to gain more than would be sufficient to redress the promisee's loss, the breach moves the subject matter of the contract to its most valued use. In this way, the self-interested preferences of the parties tend to the production of the greatest social good. From the economic point of view, therefore, no reason exists for the law to discourage such a breach. Conversely, requiring the promisor to disgorge gains made through the breach removes the incentive for the promisor to engage in this wealth-maximizing step.[61]

How do these matters stand from the perspective of corrective justice? Corrective justice of course has no more interest in the promotion of efficiency than it has in the promotion of any other goal

60. A clear formulation of this much discussed notion appears in RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 131–34 (5th ed. 1998). For a recent treatment see David W. Barnes, *The Anatomy of Contract Damages and Efficient Breach Theory*, 6 S. CAL. INTERDISC. L.J. 397 (1997–98).

61. Of course, the parties could bargain to split the gain realized through the breach. Such bargaining, however, with its attendant transaction costs, would go to the distribution of the surplus generated by the breach rather than to the breach's wealth-maximizing quality. Economic analysis would have to compare the transactions costs of bargaining with the transactions cost of litigation for breach and consider the relation between bargaining and default rules. On these issues see Barnes, *supra* note 60, at 401–03; Dodge, *supra* note 7, at 663–89.

extrinsic to the interaction of the parties as the doer and sufferer of an injustice.[62] Indeed, the theory of efficient breach conceptualizes the breach of contract not as an injustice to the promisee, but as an option available to the promisor within the system of incentives that the law makes available for the forwarding of efficiency. Under the economic approach, the breach of contract is simply a way of channeling resources to their most valued use; the normative status of a contract as creative of an obligation on the promisor plays no role. In contrast, corrective justice shares with the disgorgement principle the supposition that breach of contract is a wrong.

On the other hand, disgorgement involves the following difficulty from the standpoint of corrective justice. The fact that the promisor has profited from committing a wrong appears to supply an intuitively plausible reason for requiring the promisor to surrender the gain, but not for transferring that gain to the promisee. The taint that attaches to the promisor's gain by the wrongful manner of its acquisition does not in itself make the promisee rather than someone else the justified recipient of that gain. To be sure, the gain was realized through a breach of contract with the promisee, but the question that corrective justice raises is whether this breach establishes not merely the historical origin of the gain—its cause in fact, to use tort terminology—but also the normative connection between the gain and the promisee's entitlement to it.[63] This normative connection is present only when the gain represents something to which the promisee had a right of which he or she was deprived by the promisor's wrongful act. Only then would the gain be a constituent of the rights and correlative duties obtaining between the parties, and only then would the award of the gain render unto the promisee what was the promisee's. It is not immediately apparent, however, on what grounds the gain can be considered an entitlement of the plaintiff.

Nor does it suffice for corrective justice that disgorgement encourages promisors to abide by their contracts, which are corrective justice obligations. This instrumental consideration still contains no justification for awarding the gain specifically to the plaintiff, since the effect on defendants would be achieved regardless of who got the gain. Moreover, as noted above in Part I, corrective justice abjures all instrumentalism, including that committed in its own name. Thus, the

62. *See* discussion *supra* Part I.

63. On the difference between historical and normative connection, see Weinrib, *supra* note 2, at 7–11.

prospect that gain-based damages might reduce the incidence of contract breach and thus lead to a greater overall compliance with corrective justice does not justify such damages from a corrective justice perspective.

For an award of damages to conform to corrective justice, not only must the breach of the contract be a wrong to the promisee but the damages must be the measure of that wrong. Otherwise, there is no reason for the damages to be awarded specifically to the promisee for the injustice suffered. The Kantian account of contractual right, which highlights the promisee's entitlement to the promisor's performance, shows why a breach of contract can be viewed as a wrong to the promisee within the framework of corrective justice. That account, however, carries us no further than the promisee's entitlement to compensation for the loss of the value of the performance. Even though the gain realized by the promisor resulted from the wrong to the promisee, it does not seem to be part of that wrong.

Accordingly, from the standpoint of corrective justice, it is not enough for the proponent of disgorgement to dismiss the economic theory of efficient breach as indifferent to the normative dimension of contract law. If that normative dimension is to be fully respected, it is also necessary to indicate the positive ground for thinking that the gain is within the promisee's entitlement as quantifying the wrong that the promisee has suffered. The fact that efficient breach is incompatible with disgorgement does not entail the conclusion that disgorgement follows from the rejection of efficient breach.

Neither the Israeli nor the English disgorgement cases succeed in showing the promisee's particular entitlement to the gain that the promisor is made to disgorge. In the *Adras* case Justice Barak explicitly referred to the theory of efficient breach, rejecting it with the following observations:

> Moreover, it seems to me that the economic approach does not give enough weight to considerations which cannot be measured in economic terms. The law of contract is not only meant to increase economic efficiency but also to enable society to lead a proper life. Contracts are there to be performed, whether or not damages will be payable on breach, an approach by which we encourage people to keep their promises. Promise keeping is the basis of our life, as a society and a nation.[64]

64. C.A. 20/82, Adras Bldg. Material v. Harlow & Jones 42(1) P.D. 221 (1988), *translated in* 3 RESTITUTION L. REV. 235, at 272 (1995). Similarly Justice S. Levin, *id.* at 241, acerbically remarked that "the approach of the economic school of law ignores in cases like this the fact

With these words Justice Barak rightly emphasized that contract has a normative dimension that the economic approach ignores. However, the vindication of the morality of promise-keeping against the amorality of economically efficient breach is insufficient to ground a legal entitlement in the promisee to the promisor's gains. What is needed to sustain the decision is reference not to the social morality of promising, but to contract as a juridical regime of rights and correlative duties that renders the promisor's breach (and, in particular, the realization of profit through breach) an injustice to the promisee. Justice Barak's allusion to the role of promise-keeping in the proper life of society makes it seem that the promisor's profiting from the breach was not specifically a wrong against the promisee, but more generally a subversion of the collective effort to preserve promise-keeping as the basis on which social and national life rests. This view of the profit, in turn, leaves unexplained why the promisee is entitled to recover for what was a wrong against society as a whole.

Blake, the English case concerning the profits from the former spy's memoirs, has a parallel difficulty. In ordering disgorgement, Lord Nicholls, while acknowledging that disgorgement is an exceptional remedy not subject to fixed rules, offers as a general guide "whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit."[65] The legitimate interest included the need to preserve the trust of informants and to uphold the morale of secret service officers, apparently even with respect to information that was no longer confidential.[66] These considerations, however, do not address the question of why the plaintiff was entitled to the profits, even assuming the defendant was not. This absence of any entitlement to the gain on the part of the plaintiff is perhaps why the dissenting judge, Lord Hobhouse, pointing out that the defendant's gain was not made at the plaintiff's expense, stigmatized the claim as being of an "essentially punitive nature."[67]

The reasoning of both *Adras* and *Blake* is instrumentalist. The plaintiffs in these cases are awarded the profits realized from the defendants' breaches of contract not because the plaintiffs can show

that we are dealing with people with moral feelings and not with robots." The Supreme Court of Israel also referred to the significance of specific performance as the default remedy in Israeli law for breach of contract; on this, see *infra* note 80.

65. Attorney Gen. v. Blake, [2000] 4 All E.R. 385, at 398 (H.L.).

66. *Id.* at 399.

67. *Id.* at 407.

their respective entitlements to these profits, but because they are conveniently situated for assisting in the accomplishment of certain social goals. In *Adras* the goal is to encourage the socially important practice of keeping promises. In *Blake* the goal is to forward the effective functioning of the secret service. These considerations focus on the desirability of preventing the defendants from keeping what they might gain from breaching their contracts. The goals, as such, are indifferent to the question of who might get the profits thus struck from the defendants' hands. Instead of treating the gain as the locus of an injustice done by the defendant and suffered by the plaintiff, the reasoning points one-sidedly to the inadmissibility of the defendant's profit. The position of the plaintiffs is adventitious; they are connected to their respective defendants through their contractual entitlements even though the profits that they are awarded are not themselves constituents of those entitlements. In this respect the reasoning in the cases is incompatible with the correlative structure of corrective justice.[68]

So far as corrective justice is concerned, disgorgement is an appropriate remedy when the defendant wrongfully alienates something to which the plaintiff had a proprietary right.[69] By virtue of ownership the owner is entitled to all the profits that accrue from the alienation of what is owned. Just as the owner's exclusive right to the object implies a duty on others to abstain from it, so the owner's right to the profits that accrue from its alienation imports a correlative duty in others to abstain from such profits or, if there was a failure to abstain, to yield these profits to the owner. The profits belong to the owner as surely as the object that produced them. The correlativity of the owner's right and the wrongdoer's duty means that the wrongful gain is an injustice as between them. The injustice embodied in this gain is undone when the gain is restored to the owner of the object from which the gain accrued. The proprietary nature of what was alienated

68. Once the exercise is conceived instrumentally as the forwarding of extrinsic goals, the choice of certain goals at the expense of others becomes significant. What, for instance, makes the promotion of promissory good faith more important than the promotion of economic efficiency (as the Supreme Court of Israel assumes)? Hanoch Dagan, for example, has suggested that both are important and the profits should be split to reflect this. Dagan, *supra* note 7, at 151. This natural consequence of instrumental analysis would produce the incoherence of two considerations (efficiency and promissory good faith) each artificially limiting the reach of the other. On the problematic normative structure of such incoherence, see WEINRIB, *supra* note 5, at 32–44.

69. For a more extended treatment of this point, see Weinrib, *supra* note 2, at 12–18.

makes the realization of profits a correlatively structured wrong that accounts for the role of both parties in the remedy.

The paradigmatic example of this is the jurisprudence that originates in the old waiver of tort cases.[70] For centuries the common law has held that if property is wrongfully misappropriated and sold above market value, the owner need not restrict his or her recovery to the value of the property but can successfully sue the wrongdoer for the proceeds. In these instances, the measure of damages is gain-based rather than loss-based. The justification for moving not only the market value but the surplus above the market value from the defendant to the plaintiff is not that the defendant should not profit from a wrong; that principle would only explain why the defendant should not keep that surplus, but not why the plaintiff should receive it. The crucial point is that the owner's proprietary right carries with it an entitlement to the proceeds from the sale, whatever they are. Because the wrongful realization of the surplus was an injustice between the parties, the gain-based damage award simply requires the defendant to restore what rightfully belongs to the plaintiff. The proprietary nature of the plaintiff's right accounts for the presence of both parties at the remedial stage, thereby rendering the defendant-oriented principle against profiting from one's wrong superfluous in these circumstances.

This indicates that in the contracts context the promisee should be awarded the promisor's profits only if the breach of contract can be construed as the alienation of what belongs to the promisee. Then, under the principle evidenced in the waiver of tort cases and supported by corrective justice, the profits from the breach would rightfully belong to the promisee.

The Kantian account of contractual entitlement set out in Part I reveals the implausibility of regarding the breach as the wrongful alienation of the promisee's property. The difficulty is to identify the property alienated through breach. There are only two possibilities. However, in the first of these there is no property; in the second there may be property in some sense, but there is no alienation.

The first possibility is that the promisee owns the object promised in the contract. However, in the Kantian view the promisee is entitled to performance but does not have property in the object of

70. *See generally supra* note 56. I have presented a corrective justice analysis of the issues these cases raise in Weinrib, *supra* note 2.

the contract. In the *Adras* case, for instance, the contract to ship a certain quantity of steel to the promisee did not in itself transform any of the defendant's steel into the property of the plaintiff. The plaintiff, therefore, should have had no claim to the profits made by the sale to the third party, even if the steel would otherwise have been shipped in fulfillment of the contract. To the contrary: the defendant was simply selling its own steel and was accordingly entitled to the profits from the sale by virtue of its ownership of what it sold.

The other possibility concerns the contractual performance itself, which, in the Kantian account, constitutes the promisee's contractual entitlement and the promisor's correlative obligation. To be sure, the entitlement to contractual performance can be treated as a species of property for certain purposes (for example, classification as a chose in action, assignment, constitutional protection).[71] However, the promisor's breach cannot plausibly be regarded as a purported alienation of this entitlement, so as to give the promisee a claim to the profits in the promisor's hand. The *Adras* case is illustrative. The promisor's obligation was to perform a certain act, that is, to deliver steel to the promisee. The breach consisted in not delivering the steel, which had been sold to a third party. This breach can hardly be construed as the promisor's alienation of something that can be conceptualized as "the delivery of steel as owed to the promisee." What it sold to the third party was the steel that would have fulfilled its contract with the promisee; it did not sell the act of delivery that was owed by the promisor to the promisee. Nor did it alienate the promisee's entitlement. The third party contracted with respect to the steel, not with respect to the promisee's entitlement. Moreover, although the steel could not be delivered to the promisee because the promisor no longer had it, the promisee remained as entitled to the delivery as before. Nor, finally, did the promisor alienate the obligation correlative to the promisee's entitlement; by buying the steel, the third party did not become obligated, as the promisor was and remained, to deliver steel to the promisee.

71. For example, in a discussion of contract damages Daniel Friedmann suggests that, because contractual rights enjoy the constitutional protection of property for purposes of the takings clause of the constitution of the United States, property includes contractual rights. Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 16 (1989). However, it would be a non sequitur to argue that because the state compensates for the taking of contractual rights, the promisor should be liable to noncompensatory damages for breaching a contract. The compensatory norms of constitutional law are irrelevant to the private law's treatment of noncompensatory awards. Reference to a contract as property for constitutional purposes in no way bridges the gap in this argument.

Thus, a breach of contract is not tantamount to the alienation of a proprietary right. Because a proprietary right imposes a duty of noninterference on the whole world, it has a juridical significance that is independent of any particular wrongdoer. This independence means that the obligation has to be defined in terms of a particular object that is separate from the indefinite number of juridical relationships in which it figures. That object is therefore available for misappropriation in a transaction between one nonproprietor and another, with consequent liability to the owner for the proceeds of this transaction. The waiver of tort jurisprudence, where the defendant makes an unauthorized disposition of the plaintiff's property, illustrates such liability. Breaches of contract are different. The nature of the required performance is defined by the contract between the parties and has no juridical existence independent of their relationship. The contract imposes an obligation to perform, that is, to do or abstain from doing a particular act, which is personal to the promisor. Although the promisor can act inconsistently with the contractual obligation and breach it, the breach is not an alienation. The relationship of entitlement and obligation as between the parties remains intact. The subject matter of the promisee's entitlement—which is always the promisor's act (the delivery of steel in *Adras*) and not the thing required for the act (the steel itself)—has not been and cannot be passed on to a third party by the promisor's breach. Accordingly, the profits that the promisor has realized from the breach do not fall within the entitlement of the promisee.

In the *Blake* case, the significance of the difference between contractual and proprietary entitlement was a matter of dispute between the judges. Lord Hobhouse, dissenting, was in favor of dismissing the claim for the disgorgement of profits on the ground that "[t]hat is a remedy based on proprietary principles when the necessary proprietary rights are absent."[72] Lord Nicholls, on the other hand, remarked in allowing the claim that "it is not easy to see why, as between the parties to a contract, a violation of a party's contractual rights should attract a lesser degree of remedy than a violation of his property rights."[73] Lord Nicholls' assumption was that the only difference between a contractual and a proprietary right is a quantitative one—that the former obligates only one person whereas the latter obligates

72. Attorney Gen. v. Blake, [2000] 4 All E.R. 385, at 410 (H.L.).
73. *Id.* at 395.

an indefinite number of persons.[74] Lord Nicholls therefore concluded that "it is not clear why it should be any more permissible to expropriate personal rights than it is permissible to expropriate property rights."[75]

Lord Nicholls' conclusion is suspect for a number of reasons. First, given that breach of contract is the violation of a right, the issue is not one of the relative permissibility of the defendant's conduct, but of the remedial response appropriate to that conduct. Second, a breach of contract is not helpfully characterized as an expropriation; breach does not involve the taking of an object that can exist independently of the relationship between the parties or the extinction of an entitlement owing to the plaintiff. Moreover, Lord Nicholls' conclusion proves too much: if there were no difference between proprietary and contractual entitlement, disgorgement would be the standard remedy when the promisor profitably breaches, rather than the extraordinary one that even Lord Nicholls treats it as. Most importantly, the difference between proprietary and contractual entitlement is not merely quantitative. In *Adras*, for instance, the promisee did not have a contractual right that consisted in owning the steel with only the promisor being subject to a correlative obligation, in contrast to a proprietary interest in the steel that created a correlative obligation for the whole world. The promisee in *Adras* did not own the steel at all; all that the promisee was entitled to was a certain performance. The difference between a proprietary and a contractual right is qualitative; the former goes to an object, the latter to an action.[76] The result of this is that nothing is available for the promisor to expropriate or alienate, since these verbs are inapplicable as descriptions of what the promisor does with respect to an entitlement that consists of his own actions. Consequently, as Lord Hobhouse saw in dissent, disgorgement is an inappropriate remedy for contract breach.[77]

Is this conclusion affected by whether the remedy to which the promisee is entitled is specific performance? For instance, in con-

74. This assumption is developed in the article on which Lord Nicholls expressly draws. *See* Smith, *supra* note 51, at 130–32.

75. *Blake*, [2000] 4 All E.R. 385, at 395.

76. In Kant's terminology, proprietary and contractual obligations deal with objects of choice that come within different categories of the understanding: property deals with substance (an external thing) and contract deals with causality (another's choice to perform a specific deed). KANT, *supra* note 30, at 402 [6:247].

77. *Blake*, [2000] 4 All E.R. 385, at 410.

tracts for the sale of land, where the purchaser is entitled to specific performance, courts may describe the vendor as a trustee and the purchaser as the equitable owner, and hold the vendor liable for the profits realized from reselling the land to the third party at higher price.[78] One may be tempted to regard such instances as evidence that, even though disgorgement is not generally a remedy for contract breach, the availability of specific performance transforms the promisee's contractual entitlement into a proprietary one so as to allow the promisee to claim the promisor's profits from sale. In this way of considering the promisee's entitlement, the supposed transformation of the contractual entitlement into a proprietary one is merely a terminological shorthand for anticipating the availability of specific performance;[79] the conclusion about the property is the result of the premise about the remedy.

This approach to the entitlement is inconsistent with corrective justice's conception of the relation of right and remedy. For corrective justice the right is conceptually prior to the remedy that responds to the right's infringement. Of course, if the system of private law is well-ordered, the remedy will reflect the kind of entitlement that the plaintiff has. The remedy, however, does not determine the nature of the underlying right. Whether the entitlement is proprietary or not depends on the concepts internal to the juridical relationship between the parties (such as the connection between the alienation of property and the claim to proceeds). It does not depend on the court's response to the defendant's injustice. The remedy, therefore, cannot transform into a proprietary right that which is not already one before the remedy is fixed.[80]

78. Timko v. Useful Homes Corp., 168 A. 824 (N.J. Ch. 1933); Lake v. Bayliss, [1974] 1 W.L.R. 1073 (Ch.).

79. Dawson, *supra* note 53, at 186.

80. At common law, specific performance is available where damages are inadequate due to the real or (as in the case of land in traditional contract doctrine) deemed uniqueness of the subject matter of the contract. The consequence of this uniqueness is that the market cannot reliably determine the value of what the promisee has lost through the breach. Only by granting specific performance or by treating the promisee as equitable owner and therefore entitled to the proceeds can the law ensure that promisor is awarded what he or she has been unjustly deprived of. Accordingly, cases such as those mentioned above in note 78 need not be considered as examples of disgorgement rather than compensation.

Even the fact that in a given jurisdiction (for example, in Israel) specific performance is the default remedy should not affect the argument about disgorgement. In the *Adras* case, the Supreme Court of Israel thought that the institution of specific performance as the default remedy for contract breach in Israel marks a fundamental difference from the common law that makes disgorgement more plausible. C.A. 20/82, Adras Bldg. Material v. Harlow & Jones 42(1) P.D. 221 (1988), *translated in* 3 RESTITUTION L. REV. 235, at 241, 271 (1995). This, however, is

Thus, the general picture that emerges from the present discussion is as follows. Making the promisee disgorge his or her gains to prevent profiting from a wrong has intuitive appeal. Corrective justice, however, requires that the parties be treated as correlatively situated through the right of the plaintiff and the corresponding duty of the defendant. One-sided attention to the defendant's gains does not reflect this correlativity. If disgorgement for contract breach is to conform to corrective justice, the promisor's profit must be understood as proceeds from the alienation of the promisee's property. Given the Kantian account of contractual entitlement, an alienation of property cannot be made out. Disgorgement of the gains from contract breach awards the promisee something that the promisee was not deprived of.

To a large extent this conclusion coincides with the result favored by the theory of efficient breach. However, this convergence in result masks a fundamental divide between the two approaches. As its critics have emphasized,[81] efficient breach abstracts from the normative dimension of contract to the promotion of efficiency. In contrast, corrective justice, by exhibiting the immanently normative structure of the contract relationship as a nexus of rights and correlative duties, is normative through and through. Instead of disavowing (as the economic approach does) an interest in contractual performance as a duty, corrective justice maintains that the nature of that duty excludes the notion of disgorgement. Thus, its rejection of the disgorgement of gains from contract breach comes not in the pursuit of an external

not necessarily the case. All that the status of specific performance as the primary remedy indicates is that the Israeli system takes very seriously the idea that the promisee is, as corrective justice affirms, entitled to performance; it does not necessarily change the subject matter of the performance into a proprietary right. The temptation to slide from the former to the latter should be resisted. For example, Justice Barak writes:

> The injured party has a right not only to compensation for breach of contract, but also to specific performance.... Therefore, under Israeli law, a buyer in a contract of sale is entitled to receive the subject-matter of the sale, and an enrichment of the seller which infringes this right is an unjust enrichment at the buyer's expense.... When there is a contract for the sale of a horse, the buyer has the right to receive the horse, not damages for non-delivery. If the seller receives a benefit from selling the horse to a third party, he ... takes from the buyer a right to which the buyer is entitled.

Id. at 271. There is an equivocation here about the right to which the last sentence refers. A right to receive the horse is not the same as a right to the horse (to which the language of "taking" might be applicable). The former right is to the performance of an act, the latter is to a particular thing. The former is contractual, the latter proprietary. The enhanced role of specific performance does not change the categorical difference between what KANT, *supra* note 30, called substance and causality.

81. *See especially* Friedmann, *supra* note 71.

goal like economic efficiency, but as an internal implication of the very idea of contractual entitlement

V. PUNISHMENT AND CORRECTIVE JUSTICE

I now move to the possibility of punitive damages for breach of contract. This possibility has lurked in the background of the preceding discussion of expectation damages and disgorgement. Once one assumes that a given head of damages is not compensatory, one is tempted to ascribe to it a punitive purpose. Thus, Lord Hobhouse, dissenting in *Blake*, maintained that a claim for disgorgement had an "essentially punitive nature."[82] Similarly, Fuller and Perdue at one point suggested that, in the absence of a plausible compensatory justification for them, expectation damages might be viewed as having the implicit purpose of penalizing the promisor's breach for the sake of protecting the reliance interest.[83] Such observations about implicit purpose raise the question of whether an explicitly punitive component should be added to the damage award. The two sections that follow address this question by considering from the standpoint of corrective justice first, the theoretical relationship between punishment and liability and then, the use of punitive damages specifically for contract breach.

At the juncture of punishment and liability lies the issue of punitive damages. Such damages are encased in controversy. Formally unrecognized in the civil law jurisdictions but widely accepted in the common law world, punitive damages have been especially contentious over the last several decades. Developments in both the United States and England have contributed to this. In the United States, the relatively unstructured discretion of the jury to determine damages has led to concerns that the standards for awarding punitive damages are too vague and that the awards themselves may be excessive.[84] In England a more fundamental development occurred: the House of Lords, unequivocally repudiating punitive damages as anomalous, restricted their scope to the minimum allowed by precedent, a position in turn rejected by courts in the old Commonwealth.[85]

82. *Blake*, 4 All E.R. 385, at 407.

83. Fuller & Perdue, *supra* note 3, at 61.

84. David G. Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L. Rev. 705, 727–38 (1989).

85. The House of Lords cases are *Rookes v. Barnard*, [1964] 1 All E.R. 367 (H.L.), and *Cassel & Co. Ltd.l v. Broome*, [1972] A.C. 1027 (H.L.). The leading cases in the Commonwealth

The House of Lords was of the view that almost the only circumstance when punitive damages were available at common law in a dispute between private parties was when the wrongdoer's conduct was calculated to make a profit that would exceed the compensation payable to the victim.[86] Lord Reid termed the traditional broader conception of punitive damages a "form of palm tree justice" and he characterized the objections to it as "overwhelming."[87] He explained:

> To allow pure punishment in this way contravenes almost every principle which has been evolved for the protection of offenders. There is no definition of the offence except that the conduct punished must be oppressive, high-handed, malicious, wanton, or its like—terms far too vague to be admitted to any criminal code worthy of the name. There is no limit to punishment except that it must not be unreasonable. The punishment is not inflicted by a judge who has experience and at least tries not to be influenced by emotion: it is inflicted by a jury without experience of law or punishment and often swayed by considerations which every judge would put out of his mind. And there is no effective appeal against sentence.[88]

Critics of the English approach have responded that the institutional distinction between criminal law and private law does not dictate so exclusive an allocation of punishment to the criminal law.[89]

This controversy raises two fundamental issues. The narrower issue concerns the role of punishment, as expressed through an award of punitive damages, within private law. In dealing with this issue,

reaction are *Uren v. Fairfax & Sons Pty, Ltd.*, (1966) 117 C.L.R. 118 (Aust.); *Fogg v. McKnight*, [1968] N.Z.L.R. 330 (N.Z.); *Lamb v. Cotogno*, (1987) 164 CLR 1; *Vorvis v. Ins. Corp. of B.C.*, [1989] 1 S.C.R. 1085; and *Whiten v. Pilot Ins. Co.*, [2002] D.L.R. (4th) 257 (S.C.C.). *See also* A v. Bottrill, 2002 U.K.P.C. 44, Tr., (September 6, 2002) (Privy Council on appeal from New Zealand).

86. *Rookes*, [1964] 1 All E.R. at 410. The House of Lords also allowed punitive damages where they are authorized by statute and where there was oppressive, arbitrary or unconstitutional action by government employees. These categories are not relevant to the present theme. On the second of these, see *Kuddus v. Chief Constable of the Leicestershire Constabulary*, [2001] 2 W.L.R. 1789 (H.L.).

87. *Cassell*, [1972] A.C. at 1087.

88. *Id.*

89. PETER CANE, THE ANATOMY OF TORT LAW 118 (1997); Nicholas McBride, *Punitive Damages*, *in* WRONGS AND REMEDIES IN THE TWENTY-FIRST CENTURY 175 (Peter Birks ed., 1996). For an assessment of the controversy, see Andrew Burrows, *Reforming Exemplary Damages: Expansion or Abolition?*, *in* WRONGS AND REMEDIES IN THE TWENTY-FIRST CENTURY 153 (Peter Birks ed., 1996). In England the Law Commission under Burrows' direction has recommended the expansion of punitive damages. *See* AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES, Law Comm. No. 427 (1997). Also favoring punitive damages is EDELMAN, *supra* note 51, at 9–21. The arguments against punitive damages have now been restated by Allan Beever, *The Structure of Aggravated and Exemplary Damages*, 23 OXFORD J. LEG. ST. 87 (2003).

Lord Reid adverted to the significance of the procedural distinctions between tort law and criminal law.[90] This in turn implicates the second and broader issue of determining the nature of the demarcation between civil and criminal liability. How does corrective justice stand with respect to these two issues?

The first of these two issues can be briefly treated. That corrective justice renders punitive damages problematic is obvious on its face. Corrective justice insists that the normative considerations applicable to the relationship between plaintiff and defendant reflect the parties' correlative standing as the doer and sufferer of the same injustice.[91] Accordingly, it excludes considerations, regardless of how appealing they otherwise might be, that refer to one of the parties without encompassing the correlative situation of the other. Punishment is a one-sided consideration of this sort. Punishment focuses not relationally on the parties as doer and sufferer of the same injustice, but unilaterally on the defendant as doer. From a punitive standpoint, we do not ask what would restore to the plaintiff what he or she was deprived of by the defendant, but rather what punishment is deserved in view of the defendant's behavior. Accordingly, damages that are the vehicle of punishment are a windfall to the plaintiff because they do not represent anything that the plaintiff has been wrongfully deprived of. Instead of measuring the plaintiff's entitlement, punitive damages, in effect, function as a reward for providing the socially useful service of acting as a private prosecutor.[92]

The second and broader issue of the difference between civil and criminal liability requires more extensive consideration. Although corrective justice is a regime of rights and their correlative duties, the denial of the relevance of punishment to corrective justice is not a denial of punishment's place in a right-based legal order. Instead, the point is that from the standpoint of corrective justice, this place must be located within criminal rather than private law. Since corrective justice brings out the distinctiveness of the private law relationship, it illuminates Lord Reid's differentiation between criminal and civil liability and his insistence that punishment is the concern of the former and not the latter. From the standpoint of corrective justice, the relationship between compensation and punishment, and between

90. *Cassell*, [1972] A.C. at 1087.
91. *See* discussion, *supra* Part I.
92. Whiten v. Pilot Ins. Co., (2002) 209 D.L.R. (4th) 257, at para. 36 (S.C.C.).

the legal institutions of private law and criminal law, that correspond to them is, I suggest, as follows.[93]

Corrective justice rectifies injustices that operate on the parties in a transactionally specific way. This transactional specificity involves linking two specific parties through the infringement by one of them of a particular right held by the other. For example, the defendant may have tortiously injured the plaintiff as a result of acting inconsistently with the plaintiff's right to his or her own physical integrity or to a specific item of property that the plaintiff owns. Or the defendant may have breached a specific person's right to some particular performance under a valid contract. Or the defendant may have been unjustly enriched by gaining something of value that rightfully belongs to the plaintiff. Such injustices relate to particular rights that a specific plaintiff is entitled to vindicate against a specific defendant as a matter of corrective justice.

Additionally, however, an aspect of wrong may consist in what the defendant's action signifies, not only about a particular right belonging to some other specific person, but also about the regime of rights as such. When this aspect of wrong is present, the deliberateness of the actor's violation of the victim's right shows that implicit in that violation is the actor's rejection—at least so far as that particular action is concerned—of the very idea that rights govern the interaction of the parties.[94] Because of this deliberateness, the actor's behaviour is often described by the vituperative adjectives (instanced by Lord Reid's reference to conduct that is "oppressive, high-handed, malicious, wanton or its like"[95]) that figure in accounts of punitive damages. This element of the wrong has a transactionally nonspecific aspect because its concern is with the wrongdoer's relationship not

93. What follows draws on Hegel's treatment of wrong. HEGEL, *supra* note 28, §§ 82–103. Perspicuous presentations can be found in Peter P. Nicholson, *Hegel on Crime*, 3 HIST. POL. THOUGHT 102 (1982), and ALAN BRUDNER, THE UNITY OF THE COMMON LAW: STUDIES IN HEGELIAN JURISPRUDENCE 229–35 (1995). For an application of Hegel's treatment of wrong to punitive damages, see Bruce Chapman & Michael Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741, 779–86 (1989). I should acknowledge that, although I am drawing on Hegel's account of the distinction between civil and criminal liability, I am not adopting Hegel's view of contract liability itself. For differing Hegelian accounts of contractual obligation, see BRUDNER, *supra* at 87–152, and Benson, *The Unity of Contract Law*, *supra* note 3. For other views on the crime/tort distinction, see the Symposium, *The Intersection of Tort & Criminal Law* 76 B.U. L. REV. 1 (1996).

94. *But see* A. v. Bottrill, 2002 U.K.P.C. 44, Tr., (September 6, 2002) (a 3-2 decision of the Privy Council on appeal from New Zealand, holding that awards of punitive damages are not restricted to cases of intentional or consciously reckless wrongdoing).

95. Cassell & Co. Ltd. v. Broome, [1972] A.C. 1027, 1087 (H.L.).

merely to the particular right of a specific victim but also to the regime of rights more generally. Thus, although wrongful conduct of this sort may cause a transactionally specific injury that falls under corrective justice, its challenge to the regime of rights is, in addition, wrongful in a transactionally nonspecific way. Punishment is the legal order's response to this challenge.

This transactionally nonspecific aspect of wrong may take two forms. In the first of these the wrongdoer implicitly treats the regime of rights as a nullity, and in the second as a pretense.

The wrongdoer treats the regime of rights as a nullity by exercising willful coercion that violates another's right in property or physical integrity. The willfulness of the coercive wrong indicates that implicit in the wrongdoer's conduct is a subjective principle of action that purports to make the other, or what belongs to the other, available to the wrongdoer's use. The wrongdoing amounts to the assertion of dominion over the victim's person or property. The wrongdoer thus deals with the victim not as a locus of self-determining freedom, but as a thing whose person or property the wrongdoer can treat as his or her own. Moreover, because the wrongdoer shares with the whole world the obligation not to violate the victim's right to property or physical integrity, deliberate disregard of that obligation signals the intentional removal of oneself from the community of participants in the regime of right and correlative duty. In effect, the wrongdoer can be regarded as proceeding on the basis that the victim's rights (and the correlative duties that they impose) do not matter. In this sense, the wrongdoer treats the regime of rights as nonexistent.

The idea that deliberate wrongdoing nullifies the regime of right applies to violations of physical integrity and property, but not to breaches of contract even if such breaches are (as in fact is usually the case) themselves deliberate. This is because the considerations that justify construing deliberate violations of person and property as nullifying the regime of right are absent for breaches of contract. The breaching promisor does not coerce the promisee simply by virtue of the breach.[96] Because the promisee's right is to the causality of the

96. It would be coercive if a threatened breach were accompanied by a demand. On the issues that the combination of threatened breach and demand raise, see Rick Bigwood, *Coercion in Contract: The Theoretical Constructs of Duress*, 46 U. TORONTO L.J. 201, 238–51 (1996), and Hamish Stewart, *A Formal Approach to Contractual Duress*, 47 U. TORONTO L.J. 175 (1997).

promisor's will, the promisor who fails to carry out the obligated performance is acting with reference to his or her own will, not the promisee's. Here violation of the right is not an assertion of dominion over the promisee's person or property (recall that property in what was promised is precisely what contract does not transfer) but merely a defection by the promisor from the shared purpose that marked the contract's formation. Moreover, the breach cannot be construed as removing oneself from the community of those under a duty shared by the whole world. No such community exists, because the contractual obligation is personal to the promisor, reflecting as it does the promisor's voluntary assumption of this duty when the contract was formed. None of this denies, of course, that by breaching the contract the promisor has violated a right belonging to the promisee. The point rather is that a contract does not create the kind of right whose deliberate breach can be construed as nullifying the regime of rights.[97] In other words, even deliberate breaches of contract are always transactionally specific and therefore in themselves leave no punishable residue. This is reflected in the fact that, unlike intentional violations of physical integrity or appropriations of another's property, breaches of contract are not treated as crimes in any sophisticated legal system.

There is, however, a second form of transactionally nonspecific wrong where contract plays an essential role. This second form features the perpetration of a fraud. In the typical fraud, the perpetrator deliberately induces a false belief about what the perpetrator owns or about the value of what the perpetrator is selling and then inveigles the victim into contracting on the basis of that false belief. Here the wrongdoer implicitly treats the regime of rights not as nonexistent but as a pretense to be exploited in harming others. Unlike coercive wrongdoers, perpetrators of fraud do not treat their victims as things without rights; on the contrary, the fraud always depends on the victim's consent to the transaction. However, the respect for the victim exhibited by securing this consent turns out to be a charade, because the misinformation was deliberately put out by the perpetrator for the purpose of precluding the consent from being a genuine manifestation of the victim's self-determining agency.

97. For an argument that punishment should attach to deliberate breaches of contract in the same way that they should attach to deliberate breaches of other common law obligations, see Nicholas J. McBride, *A Case for Awarding Punitive Damages in Response to Deliberate Breaches of Contract*, 24 ANGLO-AM. L. REV. 369 (1995), and McBride, *supra* note 89, at 191–92. For an economic argument to the same conclusion, see Dodge, *supra* note 7.

Similarly, perpetrators of fraud, far from implicitly nullifying the regime of rights, require its existence, because that regime provides the mechanism of their fraudulent conduct. If I propose to sell you the Brooklyn Bridge, I require that there be a law of contract to provide a purportedly effective legal facility for executing this fraudulent transaction and a law of property to create the impression that I own the bridge now and that when I sell it the bridge will belong to you. In contrast, if I coercively take the Brooklyn Bridge from its present owner, I treat as a nullity the law recognizing proprietary rights and requiring that property transfers be consensual. Fraud thus differs from coercion in presupposing the validity rather than the nullity of the regime of rights. In fraud, however, this respect for the regime of right is also a pretense; the regime of right is being used abusively, not to secure the rights of the victim but to facilitate their violation.

In this context the significance of deliberateness, which is essential both for coercive and for fraudulent wrongdoing, is juridical, not ethical. The deliberateness of the wrong is relevant not because it permits the drawing of an inference about the wrongdoer's character so that the penalty can be commensurate with the wrongdoer's wickedness.[98] Rather, willfulness goes to the meaning, from the standpoint of the system of rights, of the wrongdoer's act in relation to another. The wrongdoer did more than intentionally inflict a wrongful injury on the victim, which could be rectified by holding the wrongdoer civilly liable to repair the victim's harm. By deliberately coercing or defrauding the victim in violation of his or her rights, the wrongdoer also treated the regime of rights as a nullity or as a pretense.

Thus the element of deliberateness in coercion and fraud plays a double role. On the one hand, the presence of deliberateness means that the defendant acts intentionally in the execution of a purpose that consists of injuring the plaintiff. Intent thereby constitutes the element of culpability linking the defendant's wrongful action to the plaintiff's wrongful injury. This role is transactionally specific and therefore within the scope of corrective justice. On the other hand, the deliberateness of the wrongful conduct also goes to nullification or abusiveness with respect to the regime of rights more generally.

98. For the contrary argument, that punishment involves an inference from the wrongful act to the actor's character, see GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 800 (1978).

This role is not transactionally specific, because, although the injustice takes place within a transactional context in which a specific person may be[99] injured, the deliberateness has significance that goes beyond that injury to what the conduct implies about the entire regime of rights. Because of this double role deliberateness can figure both as the mental element of an intentional tort and as the mens rea of a criminal act.

Only inasmuch as the deliberateness yields something transactionally specific does it become relevant to corrective justice. One instance of this is aggravated damages. These may be awarded when the injury done to the plaintiff is aggravated by malevolence that injures the plaintiff's proper feelings of dignity and self-worth.[100] These damages are simply the consequence of the transactionally specific role that intent may play in linking what the plaintiff suffered to what the defendant did. Aggravated damages are the law's acknowledgement of what Aquinas observed long ago, that "the injury of the deliberate transgressor is greater, for internal contempt is added to external damage."[101] The courts properly regard such damages as compensatory rather than punitive, since they repair a loss, albeit an intangible one.[102]

A second instance is willfulness by the defendant that leads to a gain through the usurpation and commodification of a proprietary or quasi-proprietary right belonging to the plaintiff. When the defendant, acting with knowledge of the plaintiff's right, has realized a profit by appropriating and selling it, this profit must be restored. Only the owner can rightfully realize a profit from the sale of what is owned. The transactional nexus is established through the defendant's profiteering from the plaintiff's right; the gain that results is then transactionally specific to the parties. The surviving category of punitive damages in England for conduct calculated to make a profit is a variant of this idea.[103] From the standpoint of corrective justice, this kind of award is not, properly speaking, punitive at all. Rather,

99. I say "may be" rather than "is" because the challenge to the regime of rights does not necessarily require that someone actually be injured. This, I would suggest, is why there are attempted crimes but not attempted torts.

100. Rookes v. Barnard, [1964] 1 All E.R. 367, 412 (H.L.).

101. ST. THOMAS AQUINAS, COMMENTARY ON THE NICOMACHEAN ETHICS, v. 1, 420 (C. Litzinger trans., 1964).

102. S. M. WADDAMS, THE LAW OF DAMAGES 483 (3d ed. 1997).

103. *Rookes*, [1964] 1 All E.R. at 410.

the gain represents the transactionally specific element on which corrective justice can bite.[104]

Apart from such transactionally specific consequences of deliberateness, punishment is the response by which the law coercively brings home to the wrongdoer the illegitimacy of the wrongdoer's deliberate wrongdoing. Through punishment for coercive wrong the law demonstrates that the wrongdoer's coercive will does not have the supremacy that the wrongdoer's conduct implicitly claims for it. Similarly, through punishment for fraud the law negates the notion that the regime of rights is a mere pretense that proclaims norms of justice while facilitating wrongdoing. By punishing for coercion and fraud, the law asserts that the regime of rights is not merely a speculative ideal but an effective institutional reality that can demand and enforce adherence to its norms.[105]

The fact that punishment is a response to the deliberate wrongdoer's implicit challenge to the regime of rights determines the form that this response takes. The general nature of the wrong requires a correspondingly general response. Because the wrong was an implicit nullification or abuse of the regime of rights, its vindication lies at the hand not of a particular rights holder (as would be the case with corrective justice), but of a representative of the nullified or abused regime of rights. Hence, the state, "the whole of individuals in a rightful condition in relation to its own members,"[106] acting through its public prosecutors, has the role of initiating and carrying the legal process that determines the guilt and consequent punishment of the accused wrongdoer. Moreover, because this process concerns deliberate wrongs, the intention with which the act was performed is crucial to assessment of the actor's guilt. The definition of the offence must therefore reflect the reason for the state's interest in the actor's behavior. This accounts for the salience of mens rea in the criminal law.

These observations on the twofold role of deliberateness provide the conceptual ground for regarding civil liability and punishment as distinct. This distinctiveness works in both directions. On the one hand, the punitive arrangements of criminal law are not rendered superfluous by the existence of a system of civil liability; that system deals merely with transactionally specific violations of rights rather

104. For a more extended discussion, see Weinrib, *supra* note 2, at 32–36.

105. ROBERT R. WILLIAMS, HEGEL'S ETHICS OF RECOGNITION 173–76 (1997).

106. KANT, *supra* note 30, at 455 [6:311].

than with transactionally nonspecific challenges to the regime of rights more generally. On the other hand, punishment cannot coherently be stuffed into the framework of civil liability, for then lawsuits that have a transactionally specific structure, in which a specific plaintiff sues a specific defendant to achieve reparation for the violation of a particular right, would have to deal with transactionally nonspecific wrongs. The result of this would be awards of punitive damages, which inevitably give a windfall to the plaintiff on the basis of considerations that go one-sidedly to the deliberateness of the defendant's conduct.

Lord Reid's repudiation of punitive damages, quoted above,[107] picks up the institutional implications of this incoherence. Because a deliberate challenge to the regime of rights is more serious than the infringement of a particular right, and because conviction carries the stigma of criminality, criminal law insists on the express definition of offences and of possible punishments. Criminal law also entrenches procedural safeguards (such as the benefit of a more stringent burden of proof) for those who are accused, which would be out of place in a civil trial because the advantage they would give to defendants would be incompatible with the notional equality of the parties as the alleged doer and sufferer of the same injustice. Lord Reid's criticism of punitive damages as involving a form of palm tree justice, as well as the almost complete English rejection of punitive damages, thus gives legal expression to the conceptual difference between corrective justice and punishment and to the institutional roles that each has within a rights-based approach to law.

VI. PUNITIVE DAMAGES IN CONTRACT

With these general considerations about punitive damages in hand, I want to turn more specifically to punitive damages in contract law. In contrast to the situation in tort law, where such damages have historically been well entrenched and the controversy has been whether the legal order ought to restrict them, contract law was traditionally hostile toward punitive damages. One can ascribe this hostility to the fear of disturbing the certainty of commercial dealings by introducing a damage component that floated free of the value of the contractual performance to which the parties had agreed. In England this hostility remains. In the United States, however, the

107. Cassell & Co. Ltd. v. Broome, [1972] A.C. 1027, 1087 (H.L.).

rule against awarding punitive damages for breach of contract has been eroding for the past century. Beginning with an exception that punitive damages could be allowed when the breach was accompanied by a fraudulent act,[108] the present majority position in the United States is that punitive damages can be awarded if the conduct constituting the breach of contract is also a tort for which punitive damages can be given, with some state courts allowing such damages on even more expansive grounds.[109]

Perhaps the most dramatic recent developments have occurred in Canada. In 1989 the Supreme Court of Canada, signaling its rejection of the restrictive English approach to punitive damages, recognized that punitive damages were available (though it did not in fact award them) for breach of contract.[110] There matters stood until 2002, when in *Whiten v Pilot Insurance* the Court upheld a punitive damage award against an insurer who attempted to evade honoring a fire insurance policy. [111] The plaintiff in *Whiten* had insured her house with the defendant. When her house burned down, the defendants denied her claim under the policy, alleging without basis that the plaintiff had committed arson. For two years the defendant persisted in hostile and groundless opposition to the claim. In the meantime, because the insurance claim was substantially her sole asset, the plaintiff's financial situation deteriorated. The defendant's conduct was deliberately designed (so it was found) to starve the plaintiff into an unfair settlement. The Court upheld a jury award that gave the plaintiff not only the insurance proceeds to which she was entitled under the policy, but an additional million dollars as punitive damages.

In coming to this conclusion the Court dealt comprehensively with the issue of punitive damages. The Court emphasized that both the decision to award punitive damages and the determination of the quantum had to be rational in the light of the objectives of punitive damages. The amount awarded also had to be proportionate to the

108. Welborn v. Dixon, 49 S.E. 232, 234 (S.C. 1904); *see* Laurence P. Simpson, *Punitive Damages for Breach of Contract*, 20 OHIO ST. L.J. 284 (1959).

109. Dodge, *supra* note 7, at 636–51. The majority United States position is of limited interest in a discussion of contract damages, because it merely prevents the fact that there was a breach of contract from precluding the concurrent tort remedies.

110. Vorvis v. Ins. Corp. of B.C., [1989] 1 S.C..R. 1085.

111. Whiten v. Pilot Ins. Co., (2002) 209 D.L.R. (4th) 257 (S.C.C.). At the same time the Court issued a companion judgment applying *Whiten* and concluding that, under these circumstances, an award of punitive damages for contract breach was not justified. Performance Indus. Ltd. v. Sylvan Lake Golf & Tennis Club Ltd., (2002) 209 D.L.R. (4th) 318 (S.C.C.).

accomplishment of those objectives. While punitive damages were the exception rather than the rule, they nonetheless could be employed when compensatory damages and the law's other sanctions were inadequate to achieve the retribution that the de fendant deserved, the deterrence that would prevent similar conduct in the future, and the denunciation that would mark the community's collective condemnation. Retribution, deterrence, and denunciation are the objectives of punitive damages; so long as an award was not so disproportionate as to exceed the bounds of what is rational for the achievement of these objectives, the award could stand.[112]

As a result of this development, the Canadian jurisprudence now provides one of the most extensive recent discussions in the common law world of punitive damages in contract law. Like many Commonwealth jurisdictions, Canada has definitively repudiated the idea (which corrective justice supports) that punitive damages have no place in private law. Instead the Court has affirmed that "[p]unishment is a legitimate objective not only of the criminal law but of the civil law as well."[113] The question that arises is whether, having dispensed with the coherence imparted by corrective justice, the Court has nonetheless succeeded on some other basis in working

112. In *Whiten*, the Court summed up the relevant considerations in the following eleven points:

> [I]t would be helpful if the trial judge's charge to the jury included words to convey an understanding of the following points, even at the risk of some repetition for emphasis. (1) Punitive damages are very much the exception rather than the rule, (2) imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just dessert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded *only* where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

(2002) 209 D.L.R. (4th) 257, at para. 94.

113. *Id.* at para. 37.

out a coherent role for punitive damages in relation to breach of contract.

The threshold issue is what are the circumstances in which punitive damages may be awarded for breach of contract. On the one hand, something more than a breach of contract, even if deliberate, is required. On the other hand, it would have been inappropriate simply to award the plaintiff in *Whiten* the insurance proceeds; some account had to be taken of the abusive manner in which the defendant had dealt with her claim. The defendant insurer's high-handed treatment of the plaintiff made it liable to the payment of a premium over and above the amount that would have satisfied its contractual obligation had it paid promptly. What is the legal basis of the obligation to pay this premium?

When this issue originally came up in the earlier case in 1989, the Court had been divided between two alternatives. The minority favored simply assessing whether the conduct was "deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature."[114] The majority feared that such exclusive reliance on what has been called "the whole gamut of dyslogistic judicial epithets"[115] would open the door to subjective judgments on the basis of emotive adjectives. Although the Court rejected the restrictive English approach, it was nonetheless sensitive to the institutional concerns that the House of Lords had articulated. If punitive damages were to be allowed, they had to operate within a recognizable set of legal constraints. Once it was detached from the criminal law and imposed as occasion demanded by the institutions of civil law, punishment required a legally objective form of justification.

> It must never be forgotten that when awarded by a judge or a jury, a punishment is imposed on a person by a Court by the operation of the judicial process. What is it that is punished? It surely cannot be merely conduct of which the Court disapproves, however strongly the judge may feel. Punishment may not be imposed in a civilized community without a justification in law.[116]

Unwilling to accept the sufficiency of reference to the manner of the defendant's conduct, the Court formulated an additional substantive

114. *Vorvis*, [1989] 1 S.C.R. 1085, at 1107–08.
115. Cassell v. Broome, [1972] A.C. 1027, at 1129 (H.L. 1972).
116. *Vorvis*, [1989] 1 S.C.R. 1085, at 1105–06.

requirement: to be liable for punitive damages for breach of contract, the defendant must have committed an actionable wrong.[117]

This requirement was satisfied in the *Whiten* case. The insurer had not only refused to pay the proceeds due. It had also breached the contractual duty of good faith it owed to its insured. Although the duty of good faith and the duty to pay the loss were both contractual, they were independent of each other. The breach of the duty of good faith thus constituted the actionable wrong that could trigger an award of punitive damages.[118]

This is a laudable attempt to accommodate a punitive function for private law to the ideal of legality. However, it raises a number of difficulties that are variants of the same question: why should an accumulation of actionable wrongs lead to punitive damages rather than to an accumulation of compensatory damages for the various wrongs suffered?

The Court assumed that compensation would be exhausted by payment of the insurance proceeds and that, therefore, any award above this amount that was based on the defendant's obstructionist processing of the claim had to be punitive.[119] The Court's specification of the defendant's breach of its duty of good faith as a further actionable wrong shows that this assumption was mistaken on the Court's own reasoning. For if the defendant's conduct not only breached the contractual duty to pay the proceeds, but also constituted the further actionable wrong of breaching the defendant's good faith obligation as an insurer, then there must be some sum, however notional, that would provide compensation for that actionable wrong.

Indeed, this is only one of the alternatively available ways of having compensatory assessments take care of what the defendant owed for its high-handed treatment, over and above its liability to pay the insurance proceeds. Another way flows from the Court's repeated characterization of the fire insurance policy as a homeowner's "peace of mind" contract.[120] If the defendant's obstruction of the claim breached its contractual obligation with regard to the plaintiff's peace

117. That the requirement of actionable wrong is in addition to the requirement of reprehensible and high-handed conduct is evident from *Vorvis*, *id.* at 1108, and from *Whiten*, (2002) 209 D.L.R. (4th) 257, at para. 83.

118. *Whiten*, (2002) 209 D.L.R. (4th) 257, at para. 79–83. As the Court noted, by not insisting that the actionable wrong be tortious, the Canadian position is more expansive than the parallel provision of the RESTATEMENT (SECOND) ON THE LAW OF CONTRACTS § 255.

119. *Whiten*, (2002) 209 D.L.R. (4th) 257, at para. 129.

120. *Id.*

of mind, then that could have been the subject of a compensatory assessment. A third way would have been to claim aggravated damages for the harm that the defendant's outrageous conduct caused to the plaintiff's feelings and sense of self-worth.[121] Thus, even though the defendant should have been made to pay more than the insurance proceeds it withheld, the Court's assumption that punitive damages were therefore necessary was based on its ignoring the compensatory implications of its own description of good faith and peace of mind as aspects of the contract.[122]

This failure to make a comprehensive assessment of the compensatory damages leads to another difficulty. In the Court's view, punitive damages are to be awarded only where compensatory damages are insufficient to accomplish the punitive purposes.[123] The Court regards even compensatory damages as forwarding the punitive objectives of denunciation, retribution, and deterrence,[124] so that the punitive damages are understood as residual to the compensatory ones from the standpoint of punishment itself. Punitive damages, therefore, are additional to compensatory damages without being independent of them: punitive damages are merely the continuation of the aspect of punishment already present in the award of compensation. Thus one cannot tell whether or to what extent punitive damages are needed to supplement the compensatory damages until all the compensatory damages are in view. The Court regards this sequencing, in which punitive damages are considered only after

121. In *Vorvis*, the Court recognized the possibility of awarding aggravated damages for breach of contract. [1989] 1 S.C.R. 1085, at 1103. *See* Bruce Chapman, *Punitive Damages as Aggravated Damages: The Case of Contract*, 16 CAN. BUS. L.J. 269 (1990); John Swan, *Extended Damages and* Vorvis v. Insurance Corporation of British Columbia, 16 CAN. BUS. L.J. 213, 216–24 (1990).

122. A compensatory claim along one of these lines would have yielded significantly less than the punitive damages that the plaintiff received. In the case itself the plaintiff was awarded approximately $318,000 in insurance proceeds, a similar amount in legal costs, and $1 million in punitive damages. It is inconceivable that compensation for breach of the duty of good faith or for infringing her contractual interest in peace of mind, or for the aggravated damage, would have amounted to $1 million. The insurer's duty of good faith in processing the insurance claim would presumably not have bee n assessed at more than thrice the value of the claim itself. Nor would her peace of mind about her home have been assessed at more than thrice the value of the home itself. Nor would the damage to her sense of self-worth have been evaluated at so much more than the maximum that the Canadian courts allow ($100,000 Canadian dollars in 1978) for nonpecuniary damages in personal injury cases. *See* Andrews v. Grand & Toy Alberta, [1978] 2 S.C.R. 229, 265; Lindal v. Lindal, [1981] 2 S.C.R. 629, 643–44. Of course, had the plaintiff been awarded a smaller compensatory amount rather than the large punitive one, she would not have been able to complain; from the plaintiff's standpoint the punitive award is always a windfall.

123. *Whiten*, (2002) 209 D.L.R. (4th) 257. at para. 74, 94, 123.

124. *Id.* at para. 94.

compensatory damages are seen to be insufficient, as an important device for preventing immoderate awards.[125] The consequence of the Court's insistence that punitive damages are awarded if and only if compensatory damages are insufficient should be that punitive damages are unavailable in the absence of a full compensatory reckoning.[126] Thus, the absence in *Whiten* of a comprehensive compensatory assessment undermines, according to the Court's own reasoning, the appropriateness of the award of punitive damages that the Court approved.

Furthermore, the requirement that punitive damages need to be triggered by a further actionable wrong is inconsistent with the idea that punitive damages are to be awarded only if compensatory damages are insufficient.[127] Under this idea, in seeking punitive damages the plaintiff in *Whiten* should have claimed compensatory damages for the defendant's breach of its duty of good faith. But then the breach of that duty could not have served as the further actionable wrong in accordance with the requirement that the Court lays down, for that wrong would have been something for which she was seeking compensation. She would then need to locate yet another actionable wrong. However, if that actionable wrong were another breach of contract,[128] it too would have been something for which she should have claimed the compensation that would have prevented it from being regarded as a further actionable wrong, and so on ad infinitum. The point at which this sequence stops would be the point at which punitive damages could not be awarded for lack of an independent actionable wrong to trigger them. It thus turns out that (at least so long as all the actionable wrongs are breaches of contract, as in *Whiten*) were the plaintiff to claim compensatory damages for all actionable wrongs suffered, then punitive damages

125. *Id.* at para. 74.

126. In *Whiten*, there was no consideration of aggravated damages because the plaintiff did not claim them. *Id.* at para. 91. But it is odd that the plaintiff could expose the defendant to a punitive fine simply by not claiming under a compensatory head of damages.

127. *Id.* at para. 74, 94, 123, 168.

128. Does the requirement of a further actionable wrong apply to all punitive damage awards or only to those that are consequent on a breach of contract? One would have to conclude on the basis of other cases that, despite the generality with which the requirement and its supporting reasons were stated in *Vorvis*, it does not apply to torts or breaches of fiduciary duty. *See, e.g.*, Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, at 1158, 1208–11 (punitive damages for defamation). If this is so, the infinite regress would then be broken if one could reach an independent wrong that was a tort for which punitive damages were appropriate. But this would still leave untouched the situation in *Whiten*, where the only actionable wrongs were, in the Court's analysis, contractual.

could not be awarded. In other words, the requirement of a further actionable wrong, in combination with the notion that punitive damages are given only if compensatory damages are insufficient, renders impossible the very award that the requirement is supposed to condition.

Now the idea that punitive damages are awarded only when compensatory damages are insufficient is itself part of a more comprehensive idea that punitive damages are awarded only if *all* other penalties, including criminal and regulatory sanctions, have been taken into account and found to be inadequate to accomplish the objectives of retribution, deterrence, and denunciation.[129] These other sanctions are relevant but not a bar to the award of punitive damages. The Court explains:

> The prescribed fine, for example, may be disproportionately small to the level of outrage the jury wishes to express. The misconduct in question may be broader than the misconduct proven in evidence in the criminal or regulatory proceeding. The legislative judgment fixing the amount of the potential fine may be based on policy considerations other than pure punishment.[130]

Thus, the assessment of contract damages can rank as the final determinant of the sum total of the punitive consequences visited on the defendant.

This is odd. It will be recalled that the reason for introducing the requirement of an independent actionable wrong was to prevent the decision to award punitive damages from being subjective. But on the issue of the quantum of damages, such subjectivity is allowed (provided that it is not so egregious as to violate vague notions of rationality and proportionality). Criminal and regulatory proceedings, which are devoted to punishment, have standard legal constraints on subjectivity, such as the absence of common law crimes, the procedural and evidentiary protections for the accused, and the prohibition of double jeopardy. But the judge or jury determining the quantum of punitive damages, operating free of those constraints, can impose an additional penalty out of a higher feeling of outrage, or on the basis of conclusions reached on a lower burden of proof, or through a judgment that the legislated level of punishment was inadequate. It is little wonder that the dissenting judge in *Whiten* warned against "a sort of private criminal law, devoid of all the

129. *Whiten*, (2002) 209 D.L.R. (4th) 257, at para. 123.
130. *Id.*

procedural and evidentiary constraints which have come to be associated with the criminal justice system."[131]

Moreover, the Court's own view of punishment makes this cavalier attitude toward other legal processes more questionable. The Court specifies the objectives of punishment as retribution, deterrence, and denunciation.[132] These objectives are indeterminate in two ways. First, there is an indeterminacy about what penalty would achieve any of these objectives considered individually. But, second, there is also an indeterminacy about what would achieve all of them in combination. This is because the three objectives rely on considerations that are at least partly inconsistent with each other.[133] There can be no single correct view of what penalties or ranges of penalties would achieve these three divergent objectives. All that a legal system can hope for is that its institutions of positive law make determinations that are general, transparent, authoritative, responsible, and based on the appropriate specialized expertise and institutional competence. One would think that the judge or jury in a contracts trial would be institutionally the least qualified to decide the final amount of the defendant's punishment. To have the judge or jury determine as part of a contracts case whether other institutions specifically charged with punishing have indicated the appropriate outrage, had access to adequate evidence, or have legislated the appropriate range of punishment does not seem consistent with a well-ordered legal system.

These reflections bring us back to the criticisms of punitive damages voiced by the House of Lords, that punitive damages are institutionally misplaced in private law.[134] It should be apparent that the recent Canadian developments have not satisfactorily obviated those

131. *Id.* at para. 158. A notable feature of *Whiten* is that, despite the Court's elaborate treatment of rationality and proportionality, there is little indication of what placed this specific punitive damages award of $1 million within the acceptable range. Aside from observing that the judges below thought that this sum was not unreasonable and that there had been an analogous increase in the size of the punitive damages award for defamation, the Court twice mentioned the fact—which it acknowledged to be irrelevant under the test of rationality that it was formulating—that the award was less than two times the total of compensatory damages and legal costs. *Id.* at para. 4, 132.

132. *Id.* at para. 68, 143.

133. Chapman & Trebilcock, *supra* note 93 (cited in *Whiten*, (2002) 209 D.L.R. (4th) 257, at para. 43). For example, as Chapman and Trebilcock observe, deterrence would favor and retribution would oppose grossing up the penalty to reflect the fact that the probability of its enforcement is less than one. *Id.* at 797–98. Moreover, the recent case of *A v. Botttrill* shows that denunciation can be considered a wider idea than the more purely punitive goals of deterrence and retribution. 2002 U.K.P.C. 44 (Sept. 6, 2002).

134. Cassell v. Broome, [1972] A.C. 1027, at 1087 (H.L.).

criticisms. Nor, having rejected the approach consonant with corrective justice, has the Supreme Court of Canada yet established a plausible approach for punitive damages in the contracts context. Perhaps future elaboration will alleviate the inadequacies of the Court's present jurisprudence. Or perhaps, with the passage of time, these inadequacies will be recognized as the inevitable consequence of the incoherence of introducing punitive objectives into contract law's framework of corrective justice.

CONCLUSION

Starting with the basic idea of corrective justice, that the remedy corrects the injustice suffered by the plaintiff at the defendant's hand, this Paper has examined the significance of various conceptions of contract damages. Its conclusions can be briefly stated. Despite the contentions of Fuller and Perdue, expectation damages are justified as compensation for the promisor's breach of contract in accordance with corrective justice. Expectation damages represent the value of the promisor's performance; the promisee's entitlement to this performance is illuminated by the Kantian account of contract, which construes the doing of the contractually required act as the content of the promisee's entitlement. Kant's insistence that "what I acquire directly by a contract is not an external thing but rather his deed"[135] also indicates the deficiency of requiring the promisor to disgorge the gains from the breach. The plaintiff is entitled to the disgorged gains only if the gains came from the alienation of the plaintiff's property; the alienation of property, however, is not a concept applicable to the promisor's failure to perform a contractually obligatory act. Nor does it make sense to regard disgorgement (or, as Fuller and Perdue thought, expectation damages) as punitive in nature, in view of the categorical distinction between liability and punishment. Moreover, as the Canadian experience shows, even when damages are expressly punitive, they seem incapable of being coherently integrated into the fabric of contractual liability.

At the heart of this argument lies the identification of the nature of the contractual entitlement. For corrective justice, a right and its correlative duty are the legal concepts that mark the doing and suffering of an injustice. Unless the contractual right is properly identified, the law's interest in awarding expectation damages be-

135. KANT, *supra* note 30, at 424 [6:273–74].

comes obscure, as the classic discussion by Fuller and Perdue shows. Conversely, the nature of the contractual right has implications for how disgorgement is to be viewed. In particular, the identification of the contractual entitlement with the performance of an act reveals the inappositeness of assimilating contract breach to the alienation of property, and thus also the inappositeness of disgorgement.

From the standpoint of corrective justice, private law is a distinct form of practical reason, in which justification reflects the correlative situation of the parties as doer and sufferer of the same injustice. One-sided considerations, no matter how appealing, such as that the party in breach should disgorge profits made from its wrong or should be punished for its malevolent conduct, do not conform to this correlativity. Such considerations can be incorporated only if private law is willing to countenance unfairness as between the parties and the disturbance of the law's internal coherence. Perhaps sensing this, the common law traditionally did not use damage awards to punish the breaching party or to force disgorgement of the gains from breach. In recent decades both courts and commentators have been willing to reconsider. If the argument presented here is correct, the law has to that extent become more flexible but less just.