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The Distributive Foundation of Corrective Justice

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THE DISTRIBUTIVE FOUNDATION OF CORRECTIVE JUSTICE

*Hanoch Dagan**

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INTRODUCTION

There are two, apparently conflicting, approaches to private law theorizing. One approach — by now, dare I say, the prevailing approach — analyzes private law through the lens of its social, economic, cultural, or political meanings and ramifications.¹ For the purposes of this Article, we may call the proponents of this approach the “social values school.” Other theorists, those who take a corrective justice approach, insist that the adjective “private” is significant and should be the starting point for any understanding of “private law.”² They

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1. See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980); Gregory Keating, *Freedom and Fairness in the Tort Law of Accidents* (1998) (unpublished manuscripts, on file with author).

2. See, e.g., ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); see also JULES L. COLEMAN, *RISKS AND WRONGS* (1992); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

claim that this starting point inevitably generates a radically different understanding of private law. Organized around the Aristotelian concept of corrective justice, private law, as they envision it, is a realm with its own inner intelligibility, which appear to be isolated from the social, economic, cultural, and political realms.³

This Article is an attempt to evaluate the corrective justice approach to private law by concentrating on the accounts of one area in private law — the doctrine of restitution for wrongs and especially for appropriations. In *Unjust Enrichment: A Study of Private Law and Public Values*,⁴ I offered a theory of this body of law, which clearly belongs to the first approach to private law theory. Recently, in *Restitutionary Damages as Corrective Justice*, Ernest Weinrib — the most eloquent advocate of the corrective justice approach to private law — has offered a competing account.⁵ This Article confronts these accounts (briefly presented in Parts I and II, respectively) in order to address the competing approaches to private law.

Part III of this Article attempts to isolate from Weinrib's account a valuable lesson for any attempt at private law theorizing, including my own. I find persuasive the assertion that correlation between the defendant's liability to the plaintiff's entitlement is an indispensable component of private law. I concede that by overlooking this implication of the "private" nature of private law the social values school has too frequently blurred the distinction between private law and regulation. Moreover, I acknowledge that correlativity may require a refinement of my earlier account. In particular, I counsel caution towards any measure of recovery that vindicates not only the plaintiff's claims to well-being and/or control, but also society's condemnation of antisocial behavior.

Nevertheless, I maintain in Part III that Weinrib is wrong in his claim that private law has an inner intelligibility that can be deciphered without recourse to public values. An account such as Weinrib's that attempts to explain and justify private law in isolation from its surrounding social values is question-begging at best and oppressive at worst. Correlativity is essential to private law, but it is situated on a distributive foundation.

Finally, Part IV examines the doctrinal implications of both Weinrib's and my own accounts. In particular, I look at three specific issues within the law of encroachments — joint infringements, fiduciary duties, and misappropriation of body parts — and illustrate how while correlativity is a necessary aspect of the restitutionary

3. See WEINRIB, *supra* note 2, at 11-14.

4. HANOCH DAGAN, *UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES* (1997) [hereinafter DAGAN, *UNJUST ENRICHMENT*].

5. Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 *THEORETICAL INQUIRIES IN LAW* (forthcoming 1999) [hereinafter Weinrib, *Restitutionary Damages*].

claim, it does not absolve us of the more fundamental distributive question which determines private law's initial entitlements.

I. UNJUST ENRICHMENT AS A DISTRIBUTIVE SCHEME

Unjust Enrichment studies cases in which *A* holds a resource that *B* appropriates, to her own advantage and to *A*'s harm. This paradigmatic case covers a wide variety of resources: land and chattels; copyrights, trademarks and patents; trade secrets, contractual relations and performances and precontractual expectations; individual reputation and dignity, commercial attributes of personality, and even identity and physical integrity. *Unjust Enrichment* searches for the normative underpinnings of these appropriation cases. The explanatory power of its theory is examined both intraculturally (across these resources within American law) and interculturally (through a comparative study of Jewish law and international law).⁶

The measures of recovery that are available in cases of appropriation range from requiring that *A* receive compensation for the *harm* she has suffered to awarding *A* the *profits* realized by *B* at *A*'s expense; and they also include several intermediate possibilities, most significantly, awarding *A* the *fair market value* of the resource involved. The various remedies accomplish varying degrees of protection of the plaintiff's entitlement. I claim that the legal choice among these pecuniary remedies is not a matter of legal technicality, but rather requires a choice among varying conceptions of the plaintiff's entitlement. This choice, in its turn, is a normative choice that implicates the prevailing background ethos of the society at issue and is deeply influenced by the society's complex conceptions of self and of community.⁷

For example, a *profits* remedy discourages potential invaders from circumventing the bargaining process and appropriating the protected interest without first securing its holder's consent. Thus, the measure of *profits* deters nonconsensual invasions. Entitling the resource holder to any net profit the invader may have acquired from the appropriation effectively undoes the forced transfer. Therefore, a *profits* remedy implies that transfers are legitimate only by obtaining the plaintiff's *ex ante* consent, thereby vindicating the cherished libertarian value of control over one's entitlements.

Prescribing a remedy of *fair market value* is importantly different.

6. For an application of this theory to the various restitutionary schemes in newly emerging market economies, see Michael Heller & Christopher Serkin, *Revaluing Restitution: From the Talmud to Postsocialism*, 97 MICH. L. REV. 1385 (1999) (reviewing DAGAN, UNJUST ENRICHMENT, *supra* note 4).

7. Ethos talk, to be sure, is often messy and subject to disputes. However, it is possible to identify in every society — at least on the level of generality in which the law operates — some central tendencies that substantially define its political culture.

Fair market value is what the defendant would presumably have had to pay to the plaintiff had she not circumvented the bargaining process, even if we take the plaintiff's consent to the transfer for granted. As a remedy, it does not deter appropriations (at times, it may even encourage them). Rather, *fair market value* measures — since no better proxy is available — an entitlement's (objective) level of well-being or utility to its holder. It aims at securing for the plaintiff (merely) the value of the utility that the appropriated resource embodies. Thus, an award of *fair market value* vindicates the utilitarian value of well-being.

Finally, limiting recovery to compensation for the *harm* suffered allows *B* (the appropriator) a share of the entitlement of *A* (the resource holder), as long as *B* does not actually diminish *A*'s estate. A *harm* pecuniary remedy vindicates, I maintain, the value of sharing. It is a form of limited institutionalized altruism: a legal device that calls for other-regarding action and seeks to inculcate other-regarding motives.⁸

By defining the cause of action, the law of restitution prescribes which nonconsensual resource appropriations are wrongful and thus justify monetary recovery. Conversely, it also determines which appropriations are permissible, such that the invasion does not necessarily require a remedy. Moreover, in cases of impermissible appropriations, the doctrine further allocates the appropriate measures of recovery. In all these respects, the rules of restitution affect the ability of each individual to make specific claims regarding resources, constituting a society-wide distribution of burdens and benefits, i.e., a distributive scheme.⁹

The justification for any allocation is rooted in the underlying rationales identified above — control, well-being, or sharing — which serve as the criteria according to which entitlements in resources are distributed to their holders. But once these rationales are identified, one can readily see that the distributive scheme constituted by our doctrine is far more subtle than the one sketched in the previous paragraph. It does not only assign claims regarding the use of some specific resources. Rather, it also allocates claims to certain primary social goods with respect to these same resources: individual (negative) liberty, individual security in one's wealth, and social responsibility (i.e., responsibility for other members of one's society) for one's fate. *Unjust Enrichment* claims and demonstrates that there is an important correlation between this second-order distributive scheme and the

8. I say more on limited institutional altruism, in the context of the altruistic intermeddler, in Hanoch Dagan, *In Defense of the Good Samaritan*, 97 MICH. L. REV. 1152, 1167-73 (1999).

9. A "distributive scheme" is any ratio between persons and things, or any proportionate division of benefits or burdens, among a group of potential recipients.

larger normative ethos of the society at issue: the distributive scheme underlying the law of unjust enrichment corresponds with the level of control, well-being, and sharing that the relevant legal community seeks to accord its members.

As a final refinement, my account explains (and demonstrates) that differences in the social perceptions of particular resources yield different measures of recovery. Resources are protected to differing degrees because a community regards different resources as variously constitutive of their possessor's identity. Thus, the more closely a resource is attached to its holder's identity in her society, the greater emphasis society places on negative liberty. In contrast, as resources are viewed merely as valuable assets that have no direct bearing on the identity of their holder, the focus shifts toward the other-regarding standpoint of the agent, and correspondingly, the applicable rationale is closer to the sharing pole.

II. UNJUST ENRICHMENT AS RECTIFICATION

Weinrib's *Restitutionary Damages as Corrective Justice* is the first full-blown attempt by a leading corrective justice theorist to conceptualize the law of restitution in terms of corrective justice.¹⁰ From his account, I have distilled three fundamental theses about the nature of private law: the significance of correlativity to private law, the isolation of private law from social values, and the idea of property as the doctrine's nonideological premise. Weinrib derives at least two specific (and important) doctrinal propositions from these three foundational theses: that gain-based recovery should not be available as a remedy for all torts, and that different measures of recovery should apply for unauthorized alienation and unauthorized use. *Restitutionary Damages* is a challenge worth facing for anyone who is interested in restitution law and theory.

Thesis 1: The Significance of Correlativity to Private Law

As a justificatory practice, Weinrib argues, the common law must account for "the central idea of private law" that makes it "a moral possibility."¹¹ This central idea is that a liability of the defendant is, by that very circumstance, the entitlement of the plaintiff. Hence, the logic of "nexus between the two particular parties" is an inherent fea-

10. For previous claims that restitution theory must be based on corrective justice, see Kit Barker, *Unjust Enrichment: Containing the Beast*, 15 OXFORD J. LEGAL STUD. 457, 468-74 (1995); Gregory Bordan, *The Law of Construction Privileges: Corrective Justice or Distributive Justice*, 2 CAN. J.L. & JURIS. 57, 67 (1989); Andrew S. Burrows, *Contract, Tort and Restitution — A Satisfactory Division or Not?*, 99 L.Q. REV. 217, 256 (1983).

11. Weinrib, *Restitutionary Damages*, *supra* note 5 (manuscript at 6, on file with author).

ture of private law.¹² This logic requires correlativity between the defendant's liability and the plaintiff's entitlement, as well as between the plaintiff's entitlement and the remedy. Thus, "the reasons that justify the protection of the plaintiff's right [must be] the same as the reasons that justify the existence of the defendant's duty," so that the injustice to the plaintiff is "the defendant's doing or having something that is inconsistent with a right of the plaintiff."¹³ Because "the plaintiff's suit is [conceptualized as] an attempt to vindicate a right that the defendant has unjustly infringed,"¹⁴ the remedy must also be "a vindication of that right."¹⁵ In other words, the plaintiff must be "entitled to receive the very sum that the defendant is obligated to pay" for the same reason that she has an "entitlement to be free from suffering injustice at the defendant's hands."¹⁶ As a rectification of the injustice to the plaintiff, the remedy must mirror the injustice by responding "only to the factors that are constitutive of the injustice."¹⁷ In order for such a connection "between the remedy that the plaintiff can claim and the wrong that the defendant has done" to exist, the applicable measure of recovery must be "the notional equivalent at the remedial stage of the right that has been wrongly infringed."¹⁸

Proposition: Not All Tortfeasors are Liable for Gains

Weinrib claims that the correlativity thesis invalidates the view that every tortfeasor should be liable for any gains arising from the tort.¹⁹ Under such a doctrine, the defendant would be liable for gains produced by a wrongful act. But, explains Weinrib, a mere historical connection between the wrong — the infringed right — and the gain cannot be sufficient to establish the plaintiff's entitlement to recovery.²⁰ In order to be deemed wrongful, thus triggering a restitutionary cause of action, the gain "must be . . . an incident of the entitlement"²¹ that

12. *Id.* at 3.

13. *Id.* at 4.

14. *Id.*

15. *Id.* at 5.

16. *Id.* at 6.

17. *Id.* at 5.

18. *Id.* at 3, 5.

19. Weinrib refers to the proposal that "the victim of a tort should be allowed restitution of all wrongful gains" as the Goff-Jones principle. See *id.* at 9 (citing BURROWS, *THE LAW OF RESTITUTION* 721 (1993)). Anglophiles might use the old term "waiver of tort" to describe the plaintiff's choice not to sue for compensation.

20. See Weinrib, *Restitutionary Damages*, *supra* note 5 (manuscript at 12-14, on file with author). Weinrib analogizes to tort law, where proximate cause and duty limit a defendant's liability even for harms that she caused.

21. *Id.* at 10.

has been infringed, inseparable from the reason “for considering the defendant’s conduct to have been wrongful in the first place.”²² Only then does the gain constitute “the continuing embodiment of the injustice as between the parties,”²³ carrying with it “the immediate implication of disgorgement.”²⁴ Gain-based recovery is therefore justified only when the gain realized by the defendant lies within the entitlement that the defendant has violated.²⁵ Since automatic gain-based recovery disregards the normative quality of the gain, it must be rejected.

Thesis 2: The Isolation of Private Law from Social Values

The isolation of private law from social values is an important cornerstone of Weinrib’s conception of private law in general, and of the law of restitution in particular.²⁶ It is this thesis that establishes him as the most outspoken challenger of the “social values school.” Weinrib believes that the correlativity thesis necessitates

a repudiation of the notion that restitutionary damages are occasions for the promotion of social purposes extrinsic to the relationship between the parties. Purposes such as punishment or deterrence (or broader purposes such as the promotion of economic efficiency or of other goods), even if they otherwise seem desirable, cannot be accommodated to the correlative nature of private law justifications and therefore cannot explain the most characteristic and pervasive features of private law.²⁷

Thesis 3: The Idea of Property as a Nonideological Premise

After dismissing both automatic gain-based recovery for tort victims and the social values approach, Weinrib sets out his own thesis which is again said to be derived — as a logical necessity — from the correlativity thesis. The “idea of property,” as he refers to it, is the necessary premise of restitutionary damages, because it satisfies “the need to account for the plaintiff’s entitlement to restitutionary damages as a response to the defendant’s wrongful impingement on the

22. *Id.* at 11.

23. *Id.* at 10.

24. *Id.* at 15.

25. *See id.* at 14.

26. *See* WEINRIB, *supra* note 2, at 3-14.

27. Weinrib, *Restitutionary Damages*, *supra* note 5 (manuscript at 48, on file with author). In *The Idea of Private Law*, Weinrib claims that “[w]hereas the category of distributive justice encompasses different instantiating distributions from which the distributor may choose, the category of corrective justice is a single conception whose meaning is judicially elaborated.” WEINRIB, *supra* note 2, at 212. Hence, “*qua* realization of corrective justice, private law has no political aspect”; it is “purely juridical and completely nonpolitical.” *Id.* at 212, 214.

plaintiff's right."²⁸ It responds to this need — and it does so in a way that is determinate enough — since “the idea of property includes within the proprietor's entitlement the potential gains from the property's use or alienation.”²⁹ In other words, the law's protection of proprietary rights encompasses the protection of property as a source of gain. The “right to profit,” and hence any gains actually produced, “are as much within the entitlement of the proprietor as the property itself.”³⁰ Therefore, “an unauthorized gain is an injustice [which is undone only] when the gain is restored to the owner of the object from which the gain accrued.”³¹ Property is thus both a sufficient and a necessary condition for the availability of gain-based recovery: “only the idea of property weaves the plaintiff's entitlement to gain into the fabric of the defendant's duty,” and any gains realized outside of the plaintiff's entitlement need not be restored, because they are “not an element of the duty but a benefit realized from the nonperformance of the duty.”³²

Proposition: Different Measures of Recovery Apply to Unauthorized Alienation and Unauthorized Use

This proposition is said to derive from the correlativity thesis and the property thesis. Since the measure of recovery should make good the defendant's failure to carry out her duty to the plaintiff, there is — in Weinrib's view — a necessary distinction between unauthorized alienation and unauthorized use.³³ In the case of unauthorized alienation, the plaintiff is entitled to choose either the value of the thing alienated or the price the defendant received, since “the possibility of a purchaser who is willing to pay more than the market price” is “fully within the owner's entitlement.”³⁴ In contrast, in the case of unauthorized use, the value of that use — and nothing more than that — is within the ambit of the plaintiff's entitlement. This is, explains Weinrib, why gain-based recovery is not, and should not, be available for nuisance or for negligence.³⁵

28. Weinrib, *Restitutionary Damages*, *supra* note 5 (manuscript at 8, on file with author).

29. *Id.*

30. *Id.* at 16.

31. *Id.* at 17.

32. *Id.* at 32-33.

33. *See id.* at 21-22.

34. *Id.* at 24.

35. *See id.* at 29.

III. THE BENEFITS AND COSTS OF CORRECTIVE JUSTICE

Clearly, there are substantive differences — and at some crucial points nothing short of contradictions — between the accounts of *Unjust Enrichment* and *Restitutory Damages*. But there are also jurisprudential similarities. It is important to bring those similarities into light, since they should provide the common ground from which the differences and conflicts can be assessed.

Weinrib's premise — which I share — is that the common law is a justificatory practice. This premise makes both of our accounts exercises in what may be loosely termed Dworkinian jurisprudence.³⁶ Both *Unjust Enrichment* and *Restitutory Damages* are committed to suggesting a set of underlying principles that can account for at least the bulk of the prevailing doctrine.³⁷ Furthermore, both seek to identify principles with some justificatory power. Thus, both accounts implicitly agree that a private law theory must be measured according to its success in what Ronald Dworkin labels the dimensions of *fit* and of *justification*.³⁸

I dedicated most of *Unjust Enrichment* to a detailed survey of the pertinent rules in American law, Talmudic civil law, and international law in an attempt to vindicate the success of my theoretical account in the dimension of fit. (The rest is dedicated to an attempt to vindicate the normative desirability of my account, i.e., its success in the justification dimension.³⁹) It is impossible to reproduce the doctrinal survey in this Article in order to compare my theory to Weinrib's in terms of fit.

Hence, in what follows I assess the benefits and costs of Weinrib's *Restitutory Damages* solely from the standpoint of the dimension of justification. I thus focus in this Part on Weinrib's three foundational theses. This inquiry, I believe, reveals that Weinrib's correlativity thesis is an important lesson that helps refine my earlier account of the field. The inquiry also shows, however, the deficiencies of both the isolation thesis and the property thesis. Thus, I hope to demonstrate

36. See RONALD DWORKIN, *LAW'S EMPIRE* (1986).

37. See DAGAN, *UNJUST ENRICHMENT*, *supra* note 4, at 6-8; Weinrib, *Restitutory Damages*, *supra* note 5 (manuscript at 6-7, on file with author).

38. Conceptualizing law as a dynamic justificatory practice that evolves along the lines of fit and justification has its origins in KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 36-38, 44, 60, 222-23 (1960).

39. My account has been subject to the criticism that it overlooks the explanatory force of the legal community's ethos. See Hector L. MacQueen, *Unjust Enrichment*, 47 *INTL. & COMP. L.Q.* 740, 741 (1998) (reviewing DAGAN, *UNJUST ENRICHMENT*, *supra* note 4); Craig Rotherham, *Unjust Enrichment and the Autonomy of Law: Private Law as Public Morality*, 61 *MOD. L. REV.* 580, 587, 588 (1998) (reviewing DAGAN, *UNJUST ENRICHMENT*, *supra* note 4). Although stiff legal customs, like the internal dynamics of the legal community and the self-interest of lawyers, can sometimes *explain* the law, they can rarely *justify* it. Neither Weinrib nor I consider those factors.

the impossibility of the claim that corrective justice without a distributive foundation can provide any justification for the law of restitution for wrongs. Appreciating this admittedly strong claim of impossibility is required in order to appreciate my further claim respecting the dangers of the isolation thesis.

1. *The Impossibility of a Nondistributive Private Law*

Beginning with my qualms, my most fundamental difficulty with *Restitutionary Damages* lies in the property thesis. For Weinrib, the idea of property serves as a nonideological premise of our doctrine because, for him, property rights, and only property rights, necessarily include the right to profit.⁴⁰ Accordingly, the appropriator's gain is an integral part of the relationship of injustice between the parties — and thus relevant to liability and remedy — if and only if the infringed right is proprietary.

This is too strong of a presupposition.⁴¹ The concept of property is too controversial and has too many manifestations and configurations in our own law⁴² to be able to answer the specific type of questions our

40. Cf. Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515 (1992) (arguing that the entitlement to corrective justice is created by moral rights of the individual to use what he owns and not by any scheme to distribute a common good among individuals by merit).

41. To be sure, some right to the income from property, once called "a surrogate of [the right to] use," is a prevalent incident of the liberal conception of ownership. See TONY HONORÉ, *Ownership*, in MAKING LAW BIND: ESSAYS LEGAL AND PHILOSOPHICAL 161, 169-70 (1987). However, this descriptive observation cannot yield Weinrib's proposition that the right to income is essential to property.

42. In fairness to Weinrib, his account of property, which is based on his interpretation of Hegel's theory, perceives property as the embodiment of the agent's freedom of the will. Hence, the limits of one person's embodiment are the limits of another person's freedom. See Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283, 1286-87, 1289-94, 1303 (1989); see also Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, 1163-77 (1989). The notion of a containment relation between resources and selves, from which emerges the metaphor of an absolute and uniform presence of the self in each and every resource one holds, is rather obscure. Hence, instead of following this interpretation of the Hegelian personhood theory of property, and without taking any view respecting which is the correct interpretation of Hegel, *Unjust Enrichment* follows other neo-Hegelian accounts of property, that insist that the intensity of our connection of reflection-and-attachment with resources we possess varies according to the particular resource. See MARGARET JANE RADIN, *Property and Personhood*, in REINTERPRETING PROPERTY 35 (1993); JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 343-89 (1988). In any event, my point here is not that the property theory I endorse is superior to Weinrib's. Rather, all that is required for my current purposes is the much more modest contention that Weinrib's account of property is but one possible (although, I must add, in my view not very plausible) understanding of the concept of property. Since the choice among rival conceptions of property is normative and distributive, the possibility of a non-distributive conception of property (which Weinrib et al. celebrate) does not undermine the impossibility of a nondistributive private law. Cf. Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 6-9 (1943) (discussing individualism as one possible option of public policy).

doctrine needs to resolve.⁴³ Property is an artefact, a human creation that can be, and has been, modified in accordance with human needs and values.⁴⁴ Property is an essentially contested concept⁴⁵ that is open to competing interpretations and permutations.⁴⁶ There is neither an a priori list of entitlements that the owner of a given resource inevitably enjoys,⁴⁷ nor an exhaustive list of resources that enjoys the status of property.⁴⁸ Thus, there is no reason to presuppose that *any* gains derived from property are *necessarily* within the entitlement of the property owner.⁴⁹ Likewise, it is difficult to see why the entitlement to profit cannot be an element of rights that we usually do not classify as proprietary.⁵⁰

Even if Weinrib could come up with a persuasive account as to the essentiality of the right to profit to the concept of private property, it is hard to imagine that this account could prescribe which of the various ways to measure this income (the defendant's unjust enrichment)

43. See Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 491 (1988); Kenneth J. Vandeveld, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1980); see also Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 631 (1998) (noting that "[t]he very notion of property as exclusive dominion is at most a cartoon or trope, as Blackstone himself must have known — a trope to make complex systems of rights intelligible by the Cartesian practice of division and separate analysis").

44. See JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 111-13 (R. Hildreth trans., C.K. Ogden ed., 1931); Frederick G. Whelan, *Property as Artifice: Hume and Blackstone, in PROPERTY: NOMOS XXII* 101 (J. Roland Pennock & John W. Chapman eds., 1980).

45. See W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. OF THE ARISTOTELIAN SOC'Y (New Series) 167, 169 (1956) (describing essentially contested concepts as "concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users").

46. See Roberto Mangabera Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 578 (1983).

47. See BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 9-15, 26-29, 97-100 (1977); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 746-47 (1917); Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 ARIZ. ST. L.J. 1075, 1076 (1997). Weinrib dismisses the argument that the idea of property is too indeterminate to be useful, finding it rather defeatist. See Weinrib, *Restitutionary Damages*, *supra* note 5 (manuscript at 43 n.48, on file with author). The indeterminacy of property, however, is not a complexity that will make his theory difficult to administer on the margins. Rather, an essentially contested concept like property cannot firmly justify his theory, even at the core.

48. See Hohfeld, *supra* note 47, at 720, 733-34; Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 614 (1988).

49. See JOHN CHRISTMAN, *THE MYTH OF PROPERTY: TOWARD AN EGALITARIAN THEORY OF OWNERSHIP* (1994); BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* ch. 4 (1998).

50. Weinrib concedes that certain nonproprietary rights are "property-like" enough to allow for restitution of gains. See Weinrib, *Restitutionary Damages*, *supra* note 5 (manuscript at 43, on file with author).

should apply. This is, however, the degree of specificity our doctrine requires, especially from any theory committed to *fit*. Cases apply not only net *profits*, *fair market value*, and *harm*, which I mentioned above, but also to three additional gain-based measures of recovery that are analyzed in some detail in *Unjust Enrichment* — an intermediate measure I call *proportional profits*, a measure of the greater of *fair market value* and *profits*, and a punitive measure of the invader's *proceeds*.⁵¹ The “idea of property” thus does not suffice as an explanatory and a justificatory theory of the law of restitution.

The rejection of the property thesis leads immediately to the rejection of the isolation thesis — that private law can be isolated from social values. The “idea of property” is itself value-laden and distributive: each additional stick, and any expansion of any existing stick, in the owner's bundle of rights, is ipso facto a burden on nonowners.⁵² Thus, there is no way to arbitrate amongst the different available conceptions of property without some sort of a normative apparatus or social vision. Therefore, property cannot be a solving concept that can detach private law from social values.⁵³ Property is not a uniform, sterile conception. Rather, it is an open-textured concept. The doctrinal choice among its multiple configurations is in itself implicated in — and is a construction of — social values. It is a distributive scheme. The right to profit — itself a concept that can be interpreted in various ways⁵⁴ — is not essential to property, nor is property the only type of right that can encompass this right to gain.⁵⁵ Weinrib's account simply begs the question of what is the content of the plaintiff's entitlement.⁵⁶

51. See DAGAN, UNJUST ENRICHMENT, *supra* note 4, at 12-22.

52. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975.

53. See Robert L. Rabin, *Law For Law's Sake*, 105 YALE L.J. 2261, 2270 (1996) (reviewing ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995)) (“A system of private law does not fall from the sky [I]t cannot but reflect an independent choice of external purpose.”); Kenneth W. Simons, *Justification in Private Law*, 81 CORNELL L. REV. 698, 737 (1996) (reviewing ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995)) (arguing that the use of normative factors in adjudicating private law is not necessarily consequentialist).

54. See *supra* text accompanying note 51.

55. See *supra* text accompanying notes 41-50.

56. In *The Idea of Private Law*, Weinrib concedes that corrective justice presupposes the existence of entitlements but insists that the entitlements are not the creation of distributive justice. He argues that, if private law simply remedied violations of a distributive scheme, (1) the categories of corrective and distributive justice would be collapsed, (2) there would be no explanation for private law's failure to address many disturbances to our distributive scheme, such as gifts or natural disasters, and (3) the distribution could be remedied without a direct transfer between plaintiff and defendant, which is essential to private law. See WEINRIB, *supra* note 2, at 78-80. I have no quarrel with the claim that private law adjudication does not deal with redistribution in the pursuit of distributive justice. Instead, my claim is that the entitlements which private law vindicates constitute a society-wide principled distribution of burdens and benefits. See *supra* note 9 and accompanying text.

This deficiency is worrisome. The property and the isolation theses create an illusion that we can determine what enrichments are unjust and precisely how the injustice should be reversed with no need for any further normative deliberation.⁵⁷ Using the contested concept of property as the source for resolving the difficult distributive questions that the law of restitution poses serves only to obscure the social meanings of these legal choices (and the choices between the different conceptions of property to which they correspond), as well as their broader distributive implications. Thus the property and the isolation theses inhibit the normative discourse that is required for making such choices⁵⁸ and threaten to undermine the very premise of private law as a justificatory practice.

2. *Situating Correlativity on a Distributive Foundation*

While the previous section argued that Weinrib's property and isolation theses are fundamentally flawed, Weinrib's correlativity thesis is essential for any justificatory theory of private law. Therefore, the incorporation of the correlativity thesis into my distributive account is an important lesson to be learned from *Restitutionary Damages*. Correlativity, however, requires only a marginal modification of *Unjust Enrichment* because, by and large, the theory outlined in Part I does not resort to purposes that are external to the relationship between the parties. More generally, because the social vision respecting the parties' relationship necessarily defines the parties' ex ante entitlements, correlativity must be situated on a distributive foundation.

Correlativity is crucial for private law because private law adjudication — like adjudication in general — is a coercive mechanism run by unelected officials⁵⁹ and therefore must be a justificatory practice. To be a justificatory practice, private law adjudication must be able to justify to the defendant each and every aspect of its state-mandated power.⁶⁰ In particular, given the unique characteristic of private law,

57. See generally OLIVER WENDELL HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 210, 230, 232, 238-39 (1920); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812, 820 (1935); Steven Hedley, 'Unjust Enrichment', 54 CAMBRIDGE L.J. 578, 580, 593 (1995).

58. See Robert W. Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 413, 418-21 (David Kairys ed., rev. ed. 1990); Hedley, *supra* note 57, at 592; Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 209, 211-21 (1979). In reviewing Professor Weinrib's book, *The Idea of Private Law*, one commentator warned readers that "it is important to see just how potent [Weinrib's assumptions about entitlements] can be." He went on to say that Weinrib's assumptions might explain his conclusions better than the correlativity theory itself. See Simons, *supra* note 53, at 717.

59. On the power dimension of adjudication, see ROBERT COVER, *Violence and the Word*, in NARRATIVE, VIOLENCE, AND THE LAW 203 (Martha Minow et al. eds., 1992).

60. On the dialectical relation between law's coercion and its nature as a justificatory practice, see DWORKIN, *supra* note 36, at 261-62; K. N. Llewellyn, *The Normative, the Legal*,

helpfully emphasized by Weinrib — namely, its structure as a zero-sum game between a particular plaintiff and a particular defendant — private law needs to be able to justify to the defendant both the identity of the recipient of any detriment imposed on her and the exact benefit this recipient receives. The correlativity thesis answers exactly this concern by insisting that the defendant's liability and remedy correspond to the plaintiff's entitlement. This correlativity between the two parties is what distinguishes private law from regulation, whereby individuals are penalized for harms committed against society. This distinction is too often blurred by authors of the social values school who tend to perceive civil suits as "a mechanism whereby the state authorizes private parties to enforce the law."⁶¹

To see the significance of correlativity to private law, consider the *proceeds* measure of recovery, which I analyze in *Unjust Enrichment* as a means for vindicating the resource holder's control and expressing society's condemnation of the invader's antisocial behavior. (This condemnation explains the punitive forfeiture of part of the defendant's own estate, which results from disallowing the deduction of her expenses.) Condemnation is — in most cases, at least — external to the parties' relationship.⁶² It cannot be condensed into the scope of the plaintiff's entitlement: the plaintiff is usually not entitled to society's disapproval.⁶³ Therefore, the correlativity thesis entails at least a healthy suspicion of the control and condemnation rationale, i.e., to the *proceeds* confiscatory measure of recovery.⁶⁴

and the Law-Jobs: The Problem of Juristic Method, 49 YALE L.J. 1355, 1381-86 (1940). For other views as to the relationship between law's coercion and its normativity — reductive, additive, and disjunctive — see generally Meir Dan Cohen, *In Defense of Defiance*, 23 PHIL. & PUB. AFF. 24 (1994).

61. Edward L. Rubin, *Punitive Damages: Reconceptualizing the Runcible Remedies of Common Law*, 1998 WIS. L. REV. 131, 154. The law and economics movement also tends to blur this distinction. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 401 (5th ed. 1998) (identifying two methods of public control: "the common law system of privately enforced rights and the administrative system of direct public control").

62. The qualified language of the text is deliberate. It is meant to leave space for cases in which the confiscatory portion of the damages reflects the defendant's contempt for the plaintiff's value relative to the defendant's and thus reasserts "the truth about the relative value of wrongdoer and victim by inflicting a publicly visible defeat on the wrongdoer." Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1432 (1993). A comprehensive discussion of the controversial issue of punitive damages is beyond the scope of this Article. See Hanoch Dagan & James J. White, *Citizens, Governments, and Injurious Industries*, 74 N.Y.U. L. REV. (forthcoming 2000) (manuscript at Part III.C, on file with author).

63. Weinrib reminds his reader that the defendant's duty cannot be the "analytic reflex" of the plaintiff's right or vice versa. That would "tip the equilibrium in favor of one of the parties." WEINRIB, *supra* note 2, at 124.

64. Weinrib theorizes that proceeds recovery can be consistent with correlativity, because denying a willful defendant credit for her expenses simply denies her the right to claim a protected interest in her own property, the right she herself denied the plaintiff. Weinrib finds the disgorgement of the entire proceeds correlated to the infringement of the plaintiff's rights. See Weinrib, *Restitutionary Damages*, *supra* note 5 (manuscript at 33-41, on file with

Subject to this important, but relatively marginal, lesson of caution towards the measure of *proceeds*, however, correlativity leaves *Unjust Enrichment* intact. Correlativity, in other words, is preserved even when the distributive foundation of corrective justice is acknowledged.⁶⁵ To see how, consider the two most frequently used measures of recovery available in cases of appropriations: *profits* and *fair market value*. The *profits* measure reflects and reverses a breach of the plaintiff's entitlement to control the resource, while the *fair market value* reflects and reverses a breach of her entitlement to the well-being embodied by the resource.⁶⁶ The claims to control and well-being, which I do not associate with (or dissociate from) the concept of property, are part and parcel of the plaintiff's entitlement. These claims — I called them “rationales” — entail the applicable measures of recovery in the very strict way the correlativity thesis requires.

Thus, in order for control to be respected, the resource holder must be entitled to the infringer's *profits*. (Deterrence is thus an entailment of the entitlement to control, which is intrinsic, rather than extrinsic, to the parties' relationship.) And once an infringement has occurred, nothing but the restitution of *profits* can rectify it.⁶⁷ On the other hand, where the only legitimate claim of the plaintiff respecting the resource is to the well-being which it embodies, she is entitled to the *fair market value* of its use or alienation, and even an intentional circumvention of the market should not trigger any additional recovery.

If we are not to legislate by definitions, we must acknowledge that both alternatives — as well as other possible measures of recovery and their corresponding rationales — are possible for both proprietary and nonproprietary interests alike; an open normative discussion is needed

author). He does not, however, successfully distinguish the extra liability from criminal punishment, and he bases his theory on an inaccurate description of his example cases. Cf. DAGAN, UNJUST ENRICHMENT, *supra* note 4, at 73-75.

65. Cf. Peter Cane, *Corrective Justice and Correlativity in Private Law*, 16 OXFORD J.L. STUDIES 471, 481-82 (1996) (reviewing ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995)) (arguing that the underpinnings of private law are public and distributive because they allocate entitlements, and concluding that some principles of distributive justice are consistent with Weinrib's theory of correlativity in private law).

66. See DAGAN, UNJUST ENRICHMENT, *supra* note 4, at 14-16. The idea that different types of remedies correspond to (or constitute) different types of rights was already enunciated in KARL N. LLEWELLYN, *A Realistic Jurisprudence: The Next Step*, in JURISPRUDENCE: REALISM IN THEORY AND IN PRACTICE 3, 22 (1962). For a contemporary reaffirmation of this claim, see Jeffrey J. Rachlinski & Forest Jourden, *Remedies and the Psychology of Ownership*, 51 VAND. L. REV. 1541, 1542 (1998) (presenting evidence that injunctive remedies for violations of property rights create a stronger sense of ownership than do damages remedies).

67. This is the case only if the defendant was conscious of the infringement. Otherwise, the plaintiff's control has not been infringed. An innocent infringer, in other words, does not signify a denial of the owner's right to control the resource at issue. Cf. Weinrib, *Restitutionary Damages*, *supra* note 5 (manuscript at 36, on file with author).

in order to choose amongst these options. Furthermore, insofar as these rationales of control and well-being (as well as of sharing and two rationales which I have not discussed here — well-being and control, and well-being and hypothetical consent) are concerned, Weinrib's distinction between the so-called "internal" relationship between the particular parties and the so-called "external" social purposes is misleading. The fear of imposing external social values on a defendant, who becomes an instrument for society's broader goals, is groundless because these goals — the social vision respecting the parties' relationship — *inevitably* define their initial entitlements.⁶⁸ It is only based on these distributive choices that the injunction to correlate the defendant's liability and remedy to the plaintiff's entitlement is intelligible (and normatively desirable).⁶⁹

Private law is structured as a drama between plaintiff and defendant, and Weinrib is correct to insist that if it is to retain its nature as a justificatory practice, this feature of private law must not be omitted. Hence, our mutual Dworkinian premise must judge him right on this front. However, this concession does not entail the isolation thesis, which is — I maintain — impossible and dangerous, since the *ex ante* entitlements by which correlativity must be measured must be analyzed through a distributive, i.e., public, lens.⁷⁰ Moreover, the fact that correlativity is indeed such a significant feature of private law highlights the importance of these distributive choices underlying private law. Correlativity tells us that these choices define the parties' legitimate claims and expectations of each other in their daily interactions. Thus, it emphasizes the pivotal role of private law in inculcating the public values it embodies.⁷¹

68. Insofar as the fear to which the text refers is that social values should not define the parties' *ex ante* entitlement, it is — as I argued above — inevitably true, and thus unimportant.

69. In other words, as my discussion of condemnation in the text above seeks to emphasize, I do not dispute the importance of the internal-external distinction insofar as it springs from the injunction of correlativity. I maintain, however, that the constraints it imposes — which unlike typical authors of the social values school I find to be real — are much less severe than Weinrib believes them to be. As long as — but only insofar as — the public purpose (or social value) is capable of informing the *ex ante* distribution of people's entitlements, it cannot be deemed "external" to the parties' relationships. This section maintains that while it is problematic to endow individuals with the entitlement to society's condemnation, it is perfectly sensible to endow them with entitlements to either the well-being embedded in their resource or the control over it (or both). A proper demarcation of the internal-external divide must distinguish punishment from deterrence and reconceptualize deterrence as vindication of control.

70. See Stephen A. Smith, *The Idea of Private Law*, 112 LAW Q. REV. 363, 365 (1996) (reviewing E.J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995)) ("How can one justify the law without introducing morality? What else is justification about?").

71. See Hanoach Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 791 n.177 (1999) (discussing the unique expressive role of legal doctrines that define fundamental concepts and institutions of popular use, such as ownership).

IV. RECONSIDERING ENCROACHMENTS

Thus far, I have examined Weinrib's foundational theses. I have tried to refute the isolation thesis and the property thesis. I have conceded the importance of the correlativity thesis, and I have further attempted to demonstrate how the correlativity thesis can be accommodated within my distributive account of the field.

In this Part, I want to use this improved understanding of encroachments in order to explore some specific doctrinal questions. First, I address Weinrib's own doctrinal propositions regarding the rejection of automatic gain-based recovery for torts and the distinction between unauthorized alienation and unauthorized use. Then, I analyze three doctrinal questions that I did not address in *Unjust Enrichment* — joint infringements, breach of fiduciary duties, and misappropriation of body parts. I believe that the analysis of these issues can demonstrate the pitfalls I identified in the isolation and the property theses, the importance of the correlativity thesis, and the comfortable accommodation of the correlativity thesis within my distributive analysis of the law of encroachments.

1. *Weinrib's Doctrinal Propositions*

In *Restitutionary Damages*, Weinrib advances two doctrinal propositions. First, gain-based recovery should not be available, as a matter of course, as a remedy for any tort. Second, *profits* must be available for every case of unauthorized alienation; on the other hand, in cases of unauthorized use, the only available measure of recovery must be *fair market value*. I accept the former proposition, but must reject the latter.

Consider first the proposition that different measures of recovery must apply to unauthorized alienation and unauthorized use. This is the case, Weinrib insists, because a right to *profits* from beneficial alienation is intrinsic to the concept of property, whereas when unauthorized use is at issue, only the value of the use is within the ambit of the plaintiff's entitlement.

This line of reasoning, however, is open to the same critique as the property thesis. Like the property thesis, it assumes a certain content (and meaning) of the owner's bundle of rights. As I claimed earlier, however, property is much too indeterminate and value-laden a concept to yield such precise conclusions.⁷² Different conceptualizations of the owner's entitlement would yield — still within the dictates of correlativity — other conclusions.

Furthermore, we may find good reasons why the law should adopt other conceptualizations of the owner's entitlement that yield differ-

72. See *supra* text accompanying notes 40-48.

ent conclusions. Thus, it may well be the case that with certain resources — those constitutive to their holders' identity — we would want to preserve the owner's control not only as against possible unauthorized sales, but also against possible unauthorized uses. By the same token, for other resources — of a more fungible nature — we may want to limit the owner's entitlement to the well-being embodied in her holding.

To be sure, I do not deny that Weinrib's distinction between unauthorized alienation and unauthorized use could have been reflected in the remedies available by law. However, my survey of American law in *Unjust Enrichment* demonstrates that the rule often differs according to the nature of the resource at issue (constitutive or fungible), while the distinction between unauthorized use and alienation plays (almost) no role. Thus, there are resources, such as land, with regard to which both unauthorized alienation and unauthorized use (with, admittedly, the exception of nuisance where recovery is indeed limited to *fair market value*) allow the owner to pursue the invader's *profits*.⁷³ On the other hand, for other resources, such as patents, *fair market value* is the only available recovery irrespective of the mode of encroachment.⁷⁴ Hence, not only the justification dimension, but also the fit dimension, resists Weinrib's second doctrinal proposition.

This disagreement notwithstanding, I have no difficulty subscribing to Weinrib's other doctrinal proposition. Thus, I agree that gain-based recovery is not, and should not, be available as a matter of course for any tort. Because gains are not a necessary component of the invaded party's entitlement, and given the correlativity thesis which I am happy to endorse, gain-based recovery cannot be available across the board. A much more subtle analysis is required in order to determine when gain-based recovery should apply. Neither the sheer commission of a tort, as in the "automatic gain-based liability of tortfeasors doctrine" which Weinrib criticizes, nor the distinction between unauthorized dealing with the plaintiff's resource and unauthorized use of such resource, as Weinrib suggests, can supply a rough and ready answer. Only an open normative discussion that asks whether the protected interest of holders of this type of resource should include complete control over it, can guide us in this important doctrinal quandary.

73. See DAGAN, UNJUST ENRICHMENT, *supra* note 4, at 73-78. In *Unjust Enrichment*, I suggested that this exceptional measure of recovery for nuisance is one important example with regard to which an economic explanation seems the most convincing. See *id.* at 78-89 & n.28.

74. See *id.* at 87-89.

2. Joint Infringements

At this point, I wish to turn to the first of three specific questions within the broad field of the law of encroachments: joint infringements, to be followed by discussions of breach of fiduciary duties and misappropriation of body parts. For each of these questions we have in American law a leading authority — two from the United States Supreme Court, and the other from the Supreme Court of California. In the remainder of this Article I analyze these three leading cases.

Consider first *Aro Manufacturing v. Convertible Top Replacement Co.*⁷⁵ Ford had made convertibles for two years without a license to use the top-structure, which CTR had patented. Aro, also without a license, made replacement fabric tops for the Ford convertibles during that time.⁷⁶ Aro was thus a contributory infringer of CTR's patent. In a settlement with Ford, the direct infringer, CTR recovered a sum that the Court assumed represented the royalty CTR would have received had it licensed Ford in the first place. Afterward, CTR claimed that it was still entitled to recover Aro's profits from the infringing sales before it licensed Ford. In a careful opinion, written by Justice Brennan, the Court made two important points.

First, the Court discussed the 1946 Amendment to the Patent Act,⁷⁷ which had eliminated the recovery of *profits* as such and allowed recovery of damages only. This discussion makes clear that after the Amendment, a patentee's only entitlement respecting her patent is to her "pecuniary position." Once she is made "just as well off" as she would have been had the defendant never infringed the patent, she has no legitimate complaint left.⁷⁸ Indeed, as mentioned earlier, *Aro* and subsequent cases make clear that only compensatory damages, as measured by the patentee's lost profits or by a reasonable royalty, are recoverable by the patent owner.⁷⁹ The infringer's *profits*, as such, cannot be recovered. A reasonable royalty, i.e., the *fair market value* of a license to the infringed patent, is the only gain-based recovery to which a patentee is entitled.⁸⁰ Indeed, although few would doubt the classification of the patent holder's entitlement as proprietary, this does not necessarily mean — as Weinrib's property and isolation theses maintain — that it includes the right to profit. This exclusion of the *profits* remedy is compatible with the relatively fungible nature of

75. 377 U.S. 476 (1964).

76. See *Aro*, 377 U.S. at 476.

77. Act of August 1, 1946, ch. 726, § 1, 60 Stat. 778 (codified at 35 U.S.C. § 70 (1946)).

78. See *Aro*, 377 U.S. at 509-10.

79. See *supra* text accompanying note 74.

80. For an extended discussion see DAGAN, UNJUST ENRICHMENT, *supra* note 4, at 87-89.

patents, which are utilitarian solutions to practical needs.⁸¹ Thus, it corresponds to the account suggested in *Unjust Enrichment*.

Building on this conclusion, the Court proceeded to its second point, which is the crucial one for my current purpose. The Court pointed out the fundamental difference between cases of joint infringers in which *profits* are the remedy (as was the case in patent law prior to the Amendment), and cases in which recovery is limited to *fair market value* (as was the case in patent law as of 1946).⁸² In the former case (before 1946), it held, the entitlement holder can recover from every infringer the *profits* she has derived from the infringement. However, where recovery is limited to *fair market value*, as it is in the case of patents (as of 1946), payments made by one infringer diminish ipso facto the amount of the claim against the others. Therefore, after a patentee is put in the position she would have occupied had there been a consensual transaction at the market price, she may not recover any further.⁸³

This rule, which allows recovery of *profits* from each one of the joint infringers, but caps recovery at *fair market value* when *profits*-based recovery is excluded, can be explicated and justified by the distributive account of *Unjust Enrichment*. Where the plaintiff's entitlement is limited to the preservation of her well-being, so that no *profits*-based recovery is available, the accumulative recovery from multiple defendants should not exceed *fair market value*. On the other hand, if the law is interested in vindicating control of the entitlement holder over her resource, it must secure an effective deterrence. This can be achieved only by insisting that each defendant be liable for the amount it has gained by the infringement.

In both cases, the defendant's liability is prescribed — as the correlativity thesis requires — by the content of the plaintiff's entitlement. However, contrary to the isolation and the property theses, in both cases the content of the entitlement cannot be determined without a normative choice.

3. Breach of Fiduciary Duties

*Snepp v. United States*⁸⁴ is the leading case on restitutionary damages for breach of fiduciary duties. Snepp was a CIA agent who published a book about certain CIA activities without submitting it to a prepublication review. This was an unequivocal violation of an ex-

81. See *id.* at 66-68.

82. In the Court's language, this is "the important distinction between 'damages' and 'profits'" insofar as the rules respecting joint infringement are concerned. *Aro*, 377 U.S. at 505.

83. See *Aro*, 377 U.S. at 512.

84. 444 U.S. 507 (1980).

press term of his employment agreement. The Supreme Court approved the imposition of a constructive trust on the benefits gained thereby so that the CIA received the profits from the book.⁸⁵ The premise of this remedial response was the "extremely high degree of trust" reposed in Snepp.⁸⁶ Given the fiduciary relationship between Snepp and the CIA, the Court held that there should be a remedy that "is tailored to deter those who would place sensitive information at risk."⁸⁷

Justice Stevens, joined by Justices Brennan and Marshall, dissented. The dissent expressed three major objections to the Court's holding. First, Justice Stevens insisted that restitutionary damages were misplaced because Snepp was not unjustly enriched (and constructive trusts — he added — have nothing to do with deterrence).⁸⁸ Snepp's profits did not derive in any way from his breach: they were not the product of Snepp's failure to submit the book to a prepublication review. On the contrary, had he performed this duty, the Government would have been obliged to give its clearance, and the very same profits would have been gained.

Justice Stevens's second objection was that the CIA's protected interest, namely the confidentiality of its classified information and sources, was not compromised: the Government had conceded that Snepp's book did not contain any such information. The failure to submit it to prepublication approval should not be regarded, said the dissent, as a breach of Snepp's fiduciary duty as long as no confidentiality has been breached; rather, in such circumstances, it is but a garden-variety breach of contract, which does not justify any *profits*-based recovery.⁸⁹ A breach of a covenant that supports a fiduciary duty should not be regarded as a breach of that duty.

Finally, the dissenters' last concern was that restitutionary damages would "enforce a species of prior restraint on a citizen's right to criticize his government."⁹⁰ The remedy is risky, Justice Stevens maintained, because the reviewing agency may "misuse its authority to delay the publication of a critical work or to persuade an author to modify the content of his work beyond the demands of secrecy."⁹¹

85. See *Snepp*, 444 U.S. at 515-16.

86. *Snepp*, 444 U.S. at 510. The breach of contract by itself does not trigger restitutionary damages. See Hanoch Dagan, *Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory*, in 1 THEORETICAL INQUIRIES IN LAW (forthcoming 1999)[hereinafter Dagan, *Restitutionary Damages for Breach of Contract*].

87. *Snepp*, 444 U.S. at 515.

88. See *Snepp*, 444 U.S. at 521, 523.

89. See *Snepp*, 444 U.S. at 518-19.

90. *Snepp*, 444 U.S. at 526.

91. See *Snepp*, 444 U.S. at 526.

The debate between the majority and the dissent in *Snepp* provides a good opportunity to evaluate the corrective justice and the distributive justice accounts of encroachments. In *Restitutory Damages*, Weinrib analyzes the issue of restitutory damages for breach of fiduciary duties in terms that agree with the dissent's first and second objections. Thus, he suggests that the duty of loyalty is a necessary incident of a fiduciary relationship in which one person's interests are entirely subject to another's discretion. This duty

becomes for purposes of this relationship an entitlement of the beneficiary. Since the meaning of this duty of loyalty is that the [fiduciary] cannot profit from the relationship, gains can be regarded as the material embodiment of the breach of duty. . . . Seen in this light, the fiduciary's liability to disgorge profits is not an example of a policy of deterrence impacting the relationship from the outside, but is rather the remedial consequence that reflects the nature of the obligation owed by the fiduciary on the beneficiary.⁹²

If we take this line of reasoning to its logical conclusion, we will reach the dissent's first two arguments: since no duty of loyalty was actually infringed — no confidential information disclosed — there is no gain which "embodies" such breach and must thus be disgorged; there is, in other words, no unjust enrichment.

This conclusion, I would argue, is much too fast. To be sure, I have no quarrel with Weinrib's understanding of the fiduciary's duty of loyalty as constitutive of the fiduciary relationship. However, this can only be the first step of the analysis. A necessary second step is the normative choice of the extent to which the beneficiary has control over her entitlement to the fiduciary's loyalty and, thus, of the beneficiary's capacity to deter breaches of such loyalty. Such deterrence is, again, not "impacting the relationship from the outside," as it is characterized by Weinrib.⁹³ Rather, it is just the remedial correlative of a normative judgment that no derogation from the beneficiary's entitlement to the fiduciary's loyalty should be allowed.

Therefore, the availability of a *profits*-based recovery must be a function of the deterrence issue. However, as Robert Cooter and Bradley Freedman demonstrated, deterrence in the context of fiduciary relations turns out to be intricate.⁹⁴ Two structural characteristics of the various categories of fiduciary relationships make deterrence difficult.⁹⁵ First, the beneficiary's interests are subject to the fiduciary's discretion; the fiduciary should control and manage the asset in

92. Weinrib, *Restitutory Damages*, *supra* note 5 (manuscript at 44, on file with author).

93. *Id.*

94. See Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045 (1991).

95. See *id.* at 1046-47.

the beneficiary's best interest. Second, the asset's management involves risk and uncertainty and thus requires continual recalculations to determine the most productive course of action. This need for dynamic management precludes the possibility of dictating the behavior of the fiduciary by specific and easily enforceable rules. Furthermore, the standard prescribed by the duty of loyalty — that the fiduciary should not appropriate the beneficiary's asset or some of its value — is also difficult to enforce, because profitable misappropriation is likely to be difficult to prove.

The asymmetrical information concerning acts and results inherent to the fiduciary relationship makes it difficult for the beneficiary to distinguish bad luck from the fiduciary's misappropriation.⁹⁶ Due to the hardships of detection and proof, the *profits* remedy may be insufficient to vindicate the beneficiary's control over her entitlement to loyalty.⁹⁷ The beneficiary's entitlement — and not any other reason exogenous to the parties' relationship, such as economizing on society's enforcement costs — requires some "reinforcement" of the *profits* remedy if it is to vindicate control. In response, the distributive scheme underlying fiduciary law can grant the beneficiary control over entitlements that are not as central to the fiduciary relationship as loyalty, such as reporting requirements or the appearance of propriety. The difficulties of enforcement in this context are inherent to the fiduciary relationship and thus may properly influence the normative definition of the beneficiary's entitlement.

Indeed, "[f]iduciary law creates a cluster of presumptive rules of conduct . . . [that] restrict the permissible scope of a fiduciary's behavior whenever possible conflicts of interest arise between the [beneficiary] and the fiduciary."⁹⁸ This bundle of rules — the most fundamental of which are the rule against conflict of interest and the rule against secret profits — facilitates the proof of appropriation by inferring disloyalty from its appearance, either through conclusively presuming appropriation or by requiring the fiduciary to prove that she did not misappropriate the principal's asset.⁹⁹ Thus, these rules raise the enforcement probability and help to solve the deterrence problem. In order to properly vindicate the beneficiary's entitlement in the fiduciary's loyalty, the law treats these ancillary duties as themselves fiduciary duties and gives the beneficiary the right to a strong remedy for breaches of these entitlements.¹⁰⁰

96. *See id.* at 1051.

97. *See id.* at 1052 (the reduced probability of enforcement reduces the deterrent effect of a *profits* remedy, because the probable gain from breach is always greater than the probable liability).

98. *Id.* at 1053-54.

99. *See id.* at 1054.

100. *See* R.C. Nolan, *Conflicts of Interest, Unjust Enrichment and Wrongdoing, in*

At this point we can appreciate the inadequacy of the dissent's first two objections, as well as of Weinrib's account which echoes them. If Snepp was obliged to notify the CIA before publishing information for profit, and if this obligation is to be perceived as an ancillary duty for which a *profits* remedy is appropriate, Snepp's profits did embody the breach of that duty.

Thus, once we appreciate that deterrence may be an internal entailment of the beneficiary's entitlement and that effective deterrence requires some ancillary rules of presumptive and strict liabilities governing certain aspects of fiduciaries' conduct, we can no longer dismiss out of hand the possible availability of a *profits* recovery for breaching a "merely" ancillary obligation. And once this recovery may be a required entailment of the beneficiary's entitlement, the "no unjust enrichment" argument becomes wholly question-begging. To say that the fiduciary has not been unjustly enriched is to assume that the beneficiary is not entitled to the profits gained by the breach of such ancillary obligation, thus posing the very question the "principle against unjust enrichment" purports to resolve.¹⁰¹

This does not mean that any breach of the fiduciary's obligations should trigger restitutionary damages. Deciding which obligations should be deemed ancillary to the fiduciary's duty of loyalty and whether they should be backed up by a conclusive presumption of appropriation or by shifting the balance of proof to the fiduciary requires a detailed analysis which is not necessary here.¹⁰² For our purposes, it is enough to emphasize that these are questions regarding the *initial* allocation of entitlements between fiduciaries and beneficiaries and are thus both distributive and — at the same time — internal to the relationships between each fiduciary and her beneficiary.

This conclusion can help us better understand the debate in *Snepp*, but it cannot yield a value-free resolution. The relationship of agents like Snepp with the CIA are deemed fiduciary due to the trust the agent enjoys respecting the CIA's confidential information. Because the agent's duty of loyalty is aimed, first and foremost, at preserving and vindicating the CIA's control over the dissemination of such information, it seems that the obligation to submit materials to prepublication review is a reasonable (ancillary) rule of conduct that can se-

RESTITUTION: PAST, PRESENT AND FUTURE 87, 105 (W.R. Cornish et al. eds., 1998) ("[T]he fundamental fiduciary principle of loyalty may form the basis for recognising new actions to redress new forms of wrongdoing, actions which promote loyalty by stigmatising disloyalty and conduct which may lead to disloyalty.").

101. I discuss elsewhere, in some detail, the broader claim that "unjust enrichment" is but a conclusion merely in need of supportive normative arguments. See Dagan, *Restitutionary Damages for Breach of Contract*, *supra* note 86 (manuscript at Part II, on file with author).

102. For an economic analysis of this question see Cooter & Freedman, *supra* note 94, at 1064-74.

cure this control.

This, however, does not necessarily tilt the scales in favor of restitutionary damages in cases like *Snepp*. A difficult question still remains whether the breach of this ancillary duty should lead to a conclusive presumption of appropriation (as the majority's view implies) or merely to a shift of burdens that would require the fiduciary to prove that she did not misappropriate. (If proof of misappropriation is required, no restitutionary damages seem appropriate in *Snepp* given the Government's admission that no confidential information has been revealed.) I believe that the most informative consideration for the resolution of this question lies in the dissent's third concern, namely in our normative judgment respecting prior restraint on the free speech of the CIA agents (this concern does not apply — it is important to emphasize — in many other fiduciary cases).¹⁰³

Indeed, just like in cases of the appropriation of resources such as land, patents, or copyright, correlativity cannot absolve us from the difficult distributive decisions we need to make in order to set the entitlements in the first place. These decisions necessarily rely on considerations of a clearly "public" nature. There is no way to isolate private law from public values.

4. *Misappropriation of Body Parts*

In the celebrated case of *Moore v. Regents of the University of California*,¹⁰⁴ a physician failed to inform his patient of his intent to conduct research on certain cells he had taken from the patient, and subsequently used them in lucrative medical research. A majority of the California Supreme Court held that the patient was not entitled to any portion of the generated profits and that his sole cause of action was under breach of the physician's disclosure obligation.

The majority accepted as its normative premise that patients must have the right to make informed decisions respecting their tissues. It nonetheless insisted that conversion law did not apply, but that the full disclosure doctrine would protect these interests efficiently enough.¹⁰⁵ These conclusions complement each other, because if the patients' entitlement is fully protected by the disclosure doctrine, allowing the conversion (or restitutionary) claim would result in a "windfall,"¹⁰⁶

103. A court making this normative decision might also consider the unusual situation in *Snepp*, where the beneficiary is more powerful relative to the fiduciary than in most such relationships. Perhaps such a powerful beneficiary does not need control over its fiduciaries' ancillary duties, because it is better positioned than other beneficiaries to detect and to prove breach.

104. 793 P.2d 479 (1990).

105. See *Moore*, 793 P.2d at 483-85.

106. See *Moore*, 793 P.2d at 488-96.

thus deviating from the injunction of the correlativity thesis.¹⁰⁷

The two dissents challenged both aspects of this move, respectively. Justice Mosk demonstrated that the disclosure doctrine cannot adequately vindicate a patient's entitlement to control her tissues, because it carries only a marginal prophylactic effect.¹⁰⁸ The disclosure doctrine is of little help in our context because in order to recover, the patient must prove that the physician's failure to inform caused her injury. Justice Broussard demonstrated that there is no difficulty — if we indeed agree on the patient's right to control the future use of her organ — in applying the traditional law of conversion, which protects not only improper interference with possession, but also “unauthorized use . . . or improper interference with [the] right to control the use”¹⁰⁹

These challenges seem devastating. Indeed, if we are committed to vindicating patients' right to control their bodies — to be the sole decisionmakers respecting their tissues — nothing short of a *profits* remedy is appropriate. Only *profits* — in my account — is, in language borrowed from Weinrib, “the notional equivalent at the remedial stage of the right [to control] that has been wrongly infringed.”¹¹⁰

107. Another important consideration for the majority was the concern of “hindering the socially useful activities of innocent researchers,” that — had Moore's claim been accepted — would have been subject to liability whether or not they participated in, or knew of, the infringement of the patient's right. See *Moore*, 793 P.2d at 497. In his dissent Justice Broussard accepted the need to protect such *third parties*, but insisted that it did not justify the abolition of the *appropriator*. See *Moore*, 793 P.2d at 504 (Broussard, J., concurring and dissenting). This reply is correct notwithstanding the majority's assertion that a separate defense for third parties would be impossible. See *Moore*, 793 P.2d at 494. The restitutionary defense of bona fide purchase supplies exactly such a defense. See RESTATEMENT OF RESTITUTION §§ 13, 123, 172 (1937); Menachem Mautner, “*The Eternal Triangles of the Law*”: *Toward a Theory of Priorities in Conflicts Involving Remote Parties*, 90 MICH. L. REV. 95 (1991). Similarly, the question raised by the majority, whether a victim of misappropriation can sue for the product of the appropriated asset, rather than the asset itself, is moot. See *Moore*, 793 P.2d at 489, 492. The law of unjust enrichment again supplies a convenient, although admittedly troubled, tool — the tracing doctrine — for overcoming such difficulties. See DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 594-627 (2d ed. 1994); Craig Rotherham, *The Metaphysics of Tracing: Substituted Title and Property Rhetoric*, 34 OSGOODE HALL L.J. 322 (1996); Emily L. Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. ILL. L. REV. 297.

108. See *Moore*, 793 P.2d at 519-21 (Mosk, J., dissenting).

109. *Moore*, 793 P.2d at 502 (Arabian, J., concurring).

110. Weinrib, *Restitutionary Damages*, *supra* note 4 (manuscript at 5, on file with author). Notice that even the dissents do not take the commitment to the patient's control to its logical conclusion. Thus, Justice Mosk develops “an analogy to the concept of ‘joint inventor’ ” which would prevent the researcher's unjust enrichment by giving a monetary reward to the donor proportionate to the value of his or her relative contribution. See *Moore*, 793 P.2d at 512-13, 517 (Mosk, J., dissenting); *Moore*, 793 P.2d at 505 (Arabian, J., concurring). Insofar as the enrichment is said to be unjust due to the violation of the patient's right to control, as the normative premise mentioned in the text implies, this solution — of awarding the intermediate measure I call *proportional profits* — is again inadequate. *Proportional profits* cannot secure the plaintiff's control, but merely *hypothetical consent*, which may be good enough for resources like copyright, but is not rigid enough even where infringements of entitlements in land are at hand. See DAGAN, *UNJUST ENRICHMENT*, *su-*

This (tentative) conclusion implies that if we believe that patients should indeed enjoy an unqualified control over the future use of their tissues, a *profits* measure of recovery should be available. On its face, this is an unavoidable conclusion, at least within the parameters of the distributive account of *Unjust Enrichment*. As Justice Mosk said in his dissent, “our society acknowledges a profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona.”¹¹¹ Indeed, our body is not merely the physical embodiment of our self, but is also the utmost reflection of who we are — the literally external projection of our personalities. Our body is undoubtedly a resource we are most anxious to control.¹¹²

Three objections to this conclusion were nonetheless raised by the *Moore* majority. One concern was that allowing this claim is tantamount to a recognition of the right to sell body tissues for profit, thus raising the notorious question of a “market for body parts.”¹¹³ Another objection was that the specific cells in question, as it turned out, were not at all constitutive of one’s personality. Unlike a name or a face, they have the same molecular structure in every human being; they were not at all unique to Moore. Hence, the argument goes, there is no need to sanctify the control of the holders over such cells.¹¹⁴ Finally, it seems that *Moore*’s majority justices (and also those in the dissent¹¹⁵) were reluctant to draw the logical conclusion from their commitment to the patient’s control over her tissues, due to the policy consideration not to threaten medical research and progress by restricting access (even of the direct appropriator)¹¹⁶ to necessary raw materials.¹¹⁷

The first two objections help to refine my account; the third challenges the limits of Weinrib’s correlativity thesis, which this Article endorses. Thus, it is important to clarify that the first concern, the commodification of the human body, is not compromised by a *profits* pecuniary remedy for misappropriations. On the contrary, the market

pra note 4, at 19-21, 82-85, 73-78. Hence, Justice Mosk’s analysis requires an even more rigid result than he acknowledges.

111. *Moore*, 793 P.2d at 515 (Mosk, J. dissenting).

112. See DAGAN, UNJUST ENRICHMENT, *supra* note 4, at 64; see also Stephen R. Munzer, *Human Dignity and Property Rights in Human Body Parts*, in PROPERTY PROBLEMS FROM GENES TO PENSION FUNDS 21, 28 (1997) (“[T]he body is part of the self; in its *togetherness* with the self it constitutes the person.” (quoting Kant)).

113. See *Moore*, 793 P.2d at 497-98 (Arabian, J., concurring).

114. See *Moore*, 793 P.2d at 490.

115. See *supra* note 110.

116. The suggestion that awarding *profits* in cases of misappropriation of body parts may hurt innocent third parties and is therefore inappropriate is, as may be recalled, moot. See *supra* note 107.

117. See *Moore*, 793 P.2d at 493-94.

inalienability rule, entailed by the concern of commodification,¹¹⁸ is based on the same consideration — of the body's constitutive role for people's identity — as the *profits* rule which deters infringements or invasions.¹¹⁹ To be sure, a market inalienability rule goes further than a *profits* measure of recovery for infringement since it not only deters others' violations, but also restricts the holder's control. But this does not challenge the constitutive character of the resource at issue. On the contrary, it signals that this resource is so essential to personhood that even the entitlement holder should not commodify it.

The second objection — respecting the undistinctiveness of the plaintiff's cells — similarly helps to refine our analysis. Notice that similar charges can be applied with regard to almost all of the components of most of the resources we consider as constitutive, such as a copyright or the family home. Indeed, a disaggregation of any resource into its components would deprive it of its symbolic meaning. Hence, if we think that these symbolic meanings serve important human values, as my account maintains,¹²⁰ this strategy must be unacceptable. We must look at the resource as a whole — here, the human body — to decide what should be the content of the holder's entitlement.

Finally, consider the majority's third objection. Research is a socially useful activity that we, as a society, wish to encourage. And, it may be the case that since the appropriation, as well as the misappropriation, of body parts generate such positive externalities, we may wish to reconsider — in this context only — our devotion to people's control over their tissues. This, to be sure, is a radical statement, surely difficult to swallow; but it is — or at least so I have claimed in this section — the only proposition that can explain the decision of the *Moore* majority.¹²¹

If this is indeed the ultimate rationale of *Moore*, it signals a clear departure from the correlativity thesis. The plaintiff's entitlement cannot be defined as an entitlement to control her organs except when a physician uses her tissues for research purposes without injuring her. Such a rule would define that patient's entitlement against the physician in terms of her relationship with society as a whole. This would trivialize the correlativity thesis and collapse the distinction between private law and regulation. Insofar as the California Supreme Court's

118. See MARGARET JANE RADIN, *CONTESTED COMMODITIES* 21, 125-26 (1996).

119. Cf. *Moore*, 793 P.2d at 506 (Arabian, J., concurring) (claiming that the majority's decision does not elevate the human tissues above the marketplace, but merely shifts the right to their commercial exploitation to tortfeasors).

120. See DAGAN, *UNJUST ENRICHMENT*, *supra* note 4, at 41-43 (discussing the normative value of reflection and attachment).

121. The proposition also explains the fact that the dissent did not draw the required logical conclusion from its position. See *supra* note 110.

rule seems appealing, it suggests that there may be extreme cases — here, where the interest in facilitating medical research, so vital to people's health, is at stake — in which private law, as a justificatory practice, should still accommodate larger public concerns. It suggests that although correlativity should generally guide private law, it should not be thought as an absolute side-constraint.

CONCLUSION

Private law is indeed unique, and theorists who attempt to explore its meaning should not overlook its distinctiveness. Private law is a forum in which a judge reallocates resources between two private citizens. Hence — as the correlativity thesis insists — the judge needs to be able to justify every aspect of her ruling in terms of the plaintiff's entitlement. This is the valuable lesson of Weinrib's correctivist account.

However, corrective justice theorists, such as Weinrib, tend to ignore the subtleties of the law's possibilities in assigning entitlements. Allocating entitlements with respect to resources requires normative choices that must be — if we understand law as a justificatory practice — openly defended. These choices involve social, economic, cultural, and political consequences and thus must be justified, in these very terms, not only to the directly affected parties, but also to the public as a whole. Suppressing these choices undermines the legitimacy of private law, rather than preserves its unique character.

Although private law is not just another mode of regulation, indistinguishable from a host of other public law regimes, it is by no means an isolated, alien segment of law. Accounts that inquire into the public meanings of private law must be refined, so that they can accommodate the important injunctions of the correlativity thesis. Accounts that emphasize only this thesis must be transformed in order to be able to supply credible theories of private law.