2020

What Do We Remedy?

Nicholas B. Cornell
University of Michigan Law School, cornelln@umich.edu

Paul Miller

John Oberdiek

Publication Information & Recommended Citation

Cornell, Nicolas. "What Do We Remedy?" In *Civil Wrongs and Justice in Private Law*, edited by Paul Miller and John Oberdiek. Oxford: Oxford University Press, 2020.

Civil Wrongs and Justice in Private Law

Edited by

PAUL B. MILLER AND JOHN OBERDIEK

OXFORD
UNIVERSITY PRESS

10

What Do We Remedy?

Nicolas Cornell

What is the nature of a wrong?[1] While this question may sound impossibly abstract, many of our legal and moral practices depend on our having at least an inchoate understanding of the answer. In our moral lives, we apologize and forgive one another for what we take to be wrongs. In private law, we make complaints and receive remedies for what the law takes to be wrongs.

This suggests a different but closely related question: What is it that we remedy? What is it that victims suffer and potentially forgive, the thing for which a wrongdoer might apologize, and the thing for which private law offers a remedy? Answering this question might be a way to clarify the nature of wrong. In this chapter, I aim to pursue this strategy.

I will focus initially on a particular conception of corrective justice. A natural and widely endorsed idea is that wrongs should be understood in terms of the violation of rights. To be wronged, the thought goes, is to have one's right violated. Remedies, then, are a matter of giving the right-holder what is rightfully theirs—or as close as possible. This conception of corrective justice is elegant and alluring. But I believe that it is mistaken; this chapter's first aim is to offer a critique of this view. I think that, once we focus on remedies, it becomes hard to maintain that what we seek to remedy is always the rights violation itself.

Having criticized this conception of corrective justice, the second aim of this chapter is to offer a taxonomy of the alternatives. This second part of the chapter is architectonic rather than argumentative. I will attempt to sketch some of the considerations in favor of various positions, but I do not take these discussions to be conclusive. I aim only to show the connections and points of difference between the various alternatives. Still, I do have an agenda here. Mapping the available positions will reveal a possible view—one that I favor—that has not received much consideration. While I will not offer a defense of that view here, I hope that

[1] As a terminological point, I use the word "wrong" in its noun form to mean an instance of one person wronging another person; it is thus associated with the transitive verb "to wrong" and the past participle "wronged." This use can be contrasted with the adjectival "wrong," which would not necessarily imply a victim or recipient. Thus, I distinguish "he did a wrong" from "he did wrong."

Nicolas Cornell, *What Do We Remedy?* In: *Civil Wrongs and Justice in Private Law.* Edited by: Paul B. Miller and John Oberdiek, Oxford University Press (2020).
DOI: 10.1093/oso/9780190865269.003.0010

seeing how it is situated in relation to other views will show that it is worth further consideration.

I. Four Theses of Corrective Justice

Corrective justice theory—the dominant and best developed philosophical account of private law—understands the aim of private law to be enabling rightful relations among persons by remedying wrongs. In this section, I sketch its basic outline.

Corrective justice's basic idea is that law responds to a particular kind of normative relation between the plaintiff and the defendant—one in which one party has been wronged by the other. Wrongs, in turn, are understood in terms of rights and duties. A party is wronged when she is denied what she is owed by the other party. Ultimately, all of these concepts—rights, duties, wrongs, and remedies—are viewed as different aspects of the same normative relationship between persons. Private law—by offering remedies to those who are wronged—is realizing a relationship in which parties have rights against one another and owe duties to one another.

Consider a simple example. Suppose that I own a bicycle. To say that is to say that a relationship exists between me and everyone else such that I get to be free from their interference with regard to this bicycle. Among other things, they have a duty not take the bicycle without my permission. If anyone does steal my bicycle, then she wrongs me. And I am entitled to a remedy. The appropriate remedy will be responsive to—indeed, dictated by—the fact that I had, and continue to have, a right to the bicycle. The wrongdoer should be made to return the bicycle and compensate me for her use of it. Or, if the bicycle was destroyed, then the wrongdoer should pay for a new one. Remedies like these, the thought goes, are entailed by people having rights in the first place. They are part of what it is to say that it's my bicycle.

I will characterize this conception of corrective justice as involving four core theses. The first thesis is typically called the *correlativity thesis: B*'s right that *A* not ϕ correlates with *A*'s duty not to ϕ. This correlativity thesis is extensively discussed and defended by corrective justice theorists.[2] It can be understood as building upon Hohfeld's analysis of a claim-right.[3] My right to the bicycle correlates with others having a duty not to take the bicycle without my permission.

[2] Weinrib 2012, 48–58; Weinrib 1995, 59; Perry 2009, 81. Confusingly, "correlativity" sometimes also gets used in other ways in the corrective justice literature, for example, meaning only that the plaintiff and the defendant are, in some way, connected. *See* Coleman 1995, 66–7.

[3] Hohfeld 1917, Hohfeld 1913.

The second thesis—often just assumed—is what I will call the *wronging thesis: A* wrongs *B* by ϕ-ing precisely insofar as *A* violates *B*'s right that *A* not ϕ.[4] While this conceptual claim has not received as much explicit defense in corrective justice theory, it has drawn attention and endorsement in recent philosophical work on the relational character of morality.[5] The intuitive idea is that, as a conceptual matter, what it is to be wronged is to suffer the violation of a right. That I am wronged by the theft of my bicycle *consists in* the fact that I had a right against the theft which has been violated. Wrongs are just the photo negative of rights.

The combination of these first two theses yields a deep connection between wrongs and duties. Rights serve as the linking concept. For corrective justice, rights are correlative with duties, and rights violations constitute wrongs. So a person is wronged precisely insofar as someone violates a duty owed to that person.

Wrongs are then connected with remedies. A remedy aims to offer redress to the victim of the wrong. In both law and morality, certain responses become appropriate in light of a wrong having been committed. We might call this idea the *remedial thesis*: a remedy aims to correct a wrong.[6] Of course, truly undoing a wrong would be impossible as many victims can never even come close to being truly restored to their prior circumstances.[7] My lucky bicycle may have been forever destroyed, to say nothing of more permanently scarring physical or emotional injuries. Still, the concept of a remedy seems to imply something that is appropriate as a corrective response to the wrong. When we think about how to respond to the destruction of my bicycle, the choice is not arbitrary. Requiring payment for a new bicycle seems appropriate in a way that other possible responses—buying a cake, urinating on the wrongdoer's lawn, entering the victim in a lottery—do not. When we seek a remedy, we seek something that is, in some sense, corrective for the wrong suffered.

These three theses—the correlativity thesis, the wronging thesis, and the remedial thesis—combine to link remedies back to rights and duties. Because remedies address themselves to wrongs (remedial thesis), and wrongs consist in rights violations (wronging thesis), and rights are correlative with duties (correlativity thesis), remedies are addressed to violations of duties owed to the victims. That is, remedies must correct instances in which a party failed to do what she owed to another. Corrective justice requires that "the remedy reflect the wrong

[4] *See, e.g.*, Palsgraf v. Long Island Railroad Company, 248 N.Y. 339, 343–4 (1928) (Cardozo, J.): "What the plaintiff must show is 'a wrong' to herself, i.e., a violation of her own right . . . [T]he commission of a wrong imports the violation of a right." *See also* Ripstein 2016, 242.

[5] *See, e.g.*, Ripstein 2016; Wallace 2013; Ripstein 2009; Darwall, 2009; Thompson 2004.

[6] Weinrib 2002, 350.

[7] For a good discussion, *see* Hershovitz 2014.

and that the wrong consist in a breach of duty by the defendant with respect to the plaintiff's right."[8]

How might this be accomplished? Corrective justice answers this question by focusing again on the rights and duties that were present ex ante. The wrong consists in failing to do what was owed to the victim and, the thought goes, the victim continues to be owed that same thing. Corrective justice theorists often refer to this as the *continuity thesis*: the proper remedy is determined by the right because the victim continues to have that same right even after having suffered material injury.[9] The entitlement—the fundamental normative relationship—doesn't die or alter just because a violation has occurred. Even if someone has taken my bicycle, it's still my bicycle; I continue to have the same right to it.

One might understand the continuity thesis to be simply the logical result of combining the previous three theses. But, in a way, the continuity thesis adds something: it underscores that the normative relationship ex post does not differ importantly from the normative relationship ex ante. What it takes to remedy a wrong is determined by what was there ex ante; the remedy consists in restoring what was wrongfully taken away. In this way, the prior status quo holds a privileged position. Injustice may change the factual situation, but the normative entitlements remain unaltered.[10]

II. Remedial Ambiguity Relative to Rights

The first aim of this chapter is to challenge corrective justice's straightforward understanding of what it means to remedy a wrong. I aim to suggest that the appropriate remedy for a wrong—both legally and morally—is not determined only by the right that was violated. Rather, it will depend on certain facts that are only present ex post—facts about what resulted from the transgression and about how it appears in retrospect. These additional facts are important because, from the ex post perspective, the idea of giving someone what was taken away will often be ambiguous. This ambiguity arises, I will argue, in at least three ways. Each of these means that there is not a single apt remedy for each rights violation.

[8] Weinrib 2001, 20.

[9] Weinrib 2012, 93 ("The continuity thesis holds . . . that even after the injury the plaintiff continues to have the right to what was wrongly injured."). John Gardner has recently offered a rather different conception of continuity, where what is continuous are reasons and not the rights. *See* Gardner 2011b. I will not discuss Gardner's variation of corrective justice theory.

[10] I recognize that my presentation in the previous paragraphs is somewhat nonstandard. Corrective justice theory generally speaks only of the correlativity thesis and the continuity thesis, thus obscuring what I have called the wronging thesis and the remedial thesis. Because I want to draw attention to both of these theses, I have delineated them separately.

A. Degrees of Injury

The first point is quite simple: remedies depend on the degree of harm caused. Suppose that you punch me. This is a violation of my rights; you have breached your duty not to punch me. That's true regardless of what results. The appropriate remedy, however, will depend in part on how much damage you do. If you break my unusually brittle skull, then you owe me more than if you hit the metal plate in my head and break only your fist. In short, even knowing the right that is violated, there is still a question about how much remedy is required. At least superficially, this seems to mark a qualitative difference between rights violations and whatever it is that we remedy. What we remedy seems to come in degrees in a way that rights violations do not.[11]

This observation puts pressure on corrective justice, which its defenders might seek to relieve in one of three ways—each connected with one of the theory's core theses.

First, one might respond that, in fact, rights violations do come in degrees too. For this response to work, it must say that, holding the conduct itself constant, a worse rights violation arises when more damage results.[12] That is, one must say that the person who punches a victim with a brittle skull commits a different and greater rights violation than the person who throws the same punch into a victim with a metal plate. We could certainly say that. But describing matters this way would seem to be in tension with the idea that rights are correlative with duties, given that the same duty—not to punch—seems to apply in both cases. To go down this road appears inconsistent with the correlativity thesis.

On the other hand, if rights violations are not scalar, it would seem that we should abandon either the wronging thesis or the remedial thesis. Whatever we remedy, it would seem, must not simply be the rights violation. So, either wrongs come in degrees and are not equivalent with rights violations (rejecting the wronging thesis), or else wrongs just are rights violations and remedies are not responsive only to wrongs per se (rejecting the remedial thesis).

Third, one might conclude that the term "wrong" is ambiguous between these two meanings—one nonscalar (rights violations) and the other scalar (what it is that we remedy). That observation would offer no assistance to the

[11] Martin Stone makes something like this point in responding to Weinrib. *See* Stone 1996, 266–8. Drawing on Hegel, Stone argues that there is a deep tension between thinking of rights and wrongs in terms of formal equality and the law's practice of compensating actual, contingent losses.

[12] Of course, some rights—say, the right not to be tortured—may be more significant than others, but that is beside the point. Wrongs can be worse based on the significance of the right that was violated, but it is implausible to say that this accounts for all the degrees in which remedies come. The discussion here is about degrees based on damage caused. Even when the exact same right is violated, the appropriate remedy will be greater if greater damage has been inflicted. This is the familiar phenomenon of resultant moral luck. Nagel 1979, 29.

corrective justice theorist, however. It would instead only bring out an equivocation. Depending on which meaning we use, one thesis or the other will be false. Either (1) it is harms or injuries that we remedy, not wrongs, or (2) wrongs include within them the resultant harm or loss and are not equivalent to rights violations.

To see the difficulty, consider the following passage in which Ripstein attempts to address this issue. He writes:

> [H]arms and losses have a magnitude in a way that neither obligations nor wrongs consisting in the violation of those obligations do. . . . The *nature* of a wrong does not depend on its magnitude at all. The obligation is to avoid violating the rights of another. . . . Although the *obligation* makes no reference to a magnitude, a wrong in violation of that obligation will always have a magnitude, and can only be addressed by the transfer of powers of choice equivalent in magnitude.[13]

This passage is not easy to parse. The first sentence says that wrongs *do not* have a magnitude, the final sentence says that wrongs *always* have a magnitude, and sentences in the middle seem to suggest that wrongs have a magnitude but one that is not part of their nature, whatever that might mean. I think that the obscurity here results from the difficulty in trying to retain both the wronging thesis and the remedial thesis.

Ultimately, I interpret Ripstein to be saying that the *nature* of a wrong is determined by the obligation violated. The *magnitude* of the wrong, in contrast, figures in the appropriate way of redressing the wrong, but it doesn't figure in the nature of the wrong. This response, while coherent, does little to resolve the dilemma. Rights violations are equated with wrongs-sans-magnitude, but actual remedies are addressed to wrongs-with-magnitude. Put another way, we can say that wrongs do not have a magnitude in their nature, but then a wrong's nature will not dictate the actual remedy. There is *something* that is what we are trying to remedy (and what we blame, resent, apologize for, forgive, and so on).[14] My interest is this something, whether we call it the wrong or not. And this something seems to have as part of *its* nature that it comes in degrees, which makes it qualitatively different from rights violations.

[13] Ripstein 2016, 243–4.

[14] This something can't just be injury in the purely descriptive sense of harm, for not all harm counts as a wrong. *See* Weinrib 2012, 121–3; Ripstein 2006a, 228–9.

B. Consequences and Remedial Form

The corrective justice theorist is likely, at this point, to retreat to the idea that, even if *the actual remedy* is not determined by the nature of the wrong, *the form of the remedy* is determined by the nature of the wrong. If you destroy my bicycle, then the remedy should take the form of compensating me for a comparable bicycle—though the actual sum will depend on the how valuable my bicycle happened to be. The right in question provides the proper formula, even if the values of variables must be filled in. A gap then remains between a rights-violation and the actual remedy, but rights would at least dictate the form of the remedy. This formal idea is the heart of corrective justice.

Ernest Weinrib offers a classic articulation of the formal idea in his discussion of *Olwell v. Nye & Nisson*.[15] The case involved the wrongful use of an egg-washing machine, which was owned by Mr. E.L. Olwell but kept in a storage space adjacent to the Puget Sound Egg Packers. From 1941 to 1945, Puget Sound had the machine removed from storage and put to use, without the knowledge or consent of Olwell. Olwell brought a legal action seeking $25 per month, an amount aimed to capture the benefit that inured to the company as a result of the unauthorized use. The theory behind Olwell's suit was that he could "waive" his tort claim, and sue in "assumpsit" or quasi-contract instead. The trial court found in Olwell's favor and awarded a remedy $10 per week that the machine was used, which was calculated based on the benefit to the company—namely, the wages for hand-washing that the company avoided.

On appeal, the Supreme Court of Washington affirmed the trial court's remedy, though amending it down to the $25 per month that Olwell had requested. In particular, the court rejected the company's argument that the appropriate remedy should be based on the rental value of the machine. The court focused on the fact that the plaintiff "had an election" among possible claims to bring, including a claim for disgorgement.

According to Weinrib, the *Olwell* remedy was conceptually mistaken. The specific remedy ought to be "the notional equivalent at the remedial stage of the right that has been wrongly infringed."[16] Olwell's legal entitlement was to the machine. By using the machine without authorization, the company violated his entitlement to the exclusive use of his machine. The remedy, therefore, should reflect the value Olwell might have extracted from the machine—in particular, the value Olwell would have reaped had he rented out the machine.

By requiring the company to pay damages in the amount of wages that the company saved, Weinrib continues, the court assumed an improper framework

[15] 173 P.2d 652 (Wash. 1946).
[16] Weinrib 2001, 4–5.

for thinking about the plaintiff's entitlement. "Basing the damages in *Olwell* on the cost of hand-washing the eggs implies that the defendant was under an obligation to the plaintiff to wash the eggs by hand. This is absurd."[17] For Weinrib, disgorging the wage-savings would suggest that Olwell had a right to the efficiency of using a machine over manual labor. But, of course, he did not. As Weinrib puts it, "The plaintiff's only interest in the defendant's egg-washing operation is in the use of this particular machine, not in how the defendant would have operated his business without it."[18] The crucial idea is that the nature of the rights violation dictates the form that the remedy ought to take; it determines the formula.

I mean to question this formal idea. Not only can we not know the appropriate *actual* remedy ex ante by virtue of knowing the nature of the right violated, but we sometimes cannot know the appropriate *form* of remedy ex ante. That is, sometimes we must know about the consequences that result in order to say even the appropriate form of remedy.

There will often be competing, plausible forms of response. Even knowing the nature of the wrong, we cannot always determine a single formula. To see the point, consider a justification for disgorgement that Ripstein offers:

> [S]ometimes a wrong will be completed, and if it is, its *effects* must be hindered in order to maintain the external freedom of the aggrieved party. . . . [I]f I manage to enlist you in support of my projects without your consent, I must surrender to you any gains I make as a result. I must do so because your right to set your own ends must be treated as an embodiment of your freedom, and so given back to you. . . . Using another's person or property without his or her permission is never consistent with freedom for all. Because the property exists for the benefit of its owner, the only way to redress another's use of it is to treat that use as though it were done solely for that person's benefit.[19]

Ripstein argues here that the proper way to remedy an unauthorized use is to give gains from that use to the owner, as though the use were performed for her sake. Ripstein's thought is that, just as coercion is authorized insofar as it prevents the restriction of freedom, so too should remedies function to restrict

[17] Weinrib 2001, 20.

[18] Weinrib 2001, 20. It is worth noting that Weinrib does not claim that all disgorgement remedies are improper. Where the wrongdoer has sold the property taken, not merely used it, then disgorgement may be appropriate because there is now another way to value the thing taken. As he puts it, "In the case of unauthorized use, the measure of the damages is the value of the use; in the case of alienation, the plaintiff can choose either the value of the thing alienated or the price the defendant received." Weinrib 2001, 16. In either case, though, the remedy is still a reflection of what has been taken from the plaintiff.

[19] Ripstein 2009, 82–3.

the others' restrictions of our freedom. He writes, "The idea of the hindrance of a hindrance has a second, retrospective aspect to it. . . . What is hindered in this case is not wrongful action but its impact on the external freedom of others."[20] When someone has used property without authorization, that person has appropriated the object to serve his or her own purposes. Ripstein is suggesting that, in order to remove this external impact, whatever is acquired by unauthorized use must go to the owner. This is the retrospective response that most hinders the hindrance placed on the owner's freedom. And what this means, in practice, is that the user must disgorge the gains obtained by the unauthorized use.[21] So Ripstein's position would seem to suggest that, in *Olwell*, the plaintiff should receive the profits that Puget Sound earned from his machine.

I think that the contrast between Weinrib and Ripstein is striking. Superficially, at least, it looks like Weinrib is suggesting that corrective justice demands one remedial framework—rental value—and that Ripstein is suggesting that corrective justice demands a different framework—disgorging profits.[22] While one would expect that Weinrib's and Ripstein's recommendations would be quite harmonious, instead we find discord. So, what are we to make of their different conclusions?

[20] Ripstein 2009, 82.

[21] There is some ambiguity in how to apply Ripstein's argument. Ripstein is advocating for a disgorgement of profits. For him, whatever is done with unauthorized property should be treated as being done on the owner's behalf. That makes it sound like, in the *Olwell* case, Ripstein would have awarded the profits that the company made by selling the eggs washed with Olwell's machine. But Ripstein might say that Olwell should receive *only those profits attributable to the use of his machine* and that anything else would overcompensate him. *See* Sage 2016. This would require awarding Olwell not all the profits but whatever value was realized from the fact that the eggs were washed rather than unwashed—though how one would calculate that seems a bit of a mystery. In support of this reading, it might be noted that, in *Edwards v. Lee's Adm'r*, 96 S.W.2d 1028 (Ky. 1936), which Ripstein references approvingly, the court awarded the proportion of the profits that it attributed to the wrongfully used portion of the cave. A focus on proportional contribution brings Ripstein's view closer to Weinrib's, but they are still formally distinct.

[22] In fact, the contrast may not be quite so stark. Weinrib's explicit criticism is directed at the court's remedy—the cost of hand-washing the eggs that the company avoided—which is not the same as Ripstein's remedy— the profits from using the machine.

Weinrib does allow that an owner may seek to disgorge profits when there has been a purported alienation. Weinrib 2012, 127. So a plaintiff might, Weinrib would allow, recover the profits made by renting out property to another, even at a higher-than-market rate. In *Olwell*, Weinrib is objecting to a recovery of profits made indirectly from the wrongdoer's use of the property—in the form of cost-savings—rather than directly—in the form of rental payments from some third party. It is hard for me to see a morally important difference here. Suppose that, instead of using the egg-washing machine itself, Puget Sound had continued to pay employees for washing eggs but had rented the machine to someone else. That is, rather than use the machine to save costs itself, the company had rented (i.e., resold the use of) the machine to others who used it in the same manner. Weinrib would permit disgorgement in such a case. But why should that be different from the actual case? In both instances, the company puts the machine to unauthorized use and they realize a profit from doing so. That it occurs as a cost-saving in one case and as new revenue in the other seems irrelevant, a mere accounting issue. (Indeed, a firm with internal accounting units might even treat its own use as "rental" by one part of the firm from another.)

One might think that one framework or the other must ultimately be correct about what corrective justice requires. And one may already feel an intuitive pull one way or the other. Perhaps Weinrib's approach seems too weak insofar as the company is forced to pay only what it would have paid if it had obtained permission, essentially ignoring the fact that it did not have permission and giving the company the benefit of a contract that it never made. Or perhaps Ripstein's approach seems too punitive insofar as it would transfer the company's hard-earned profits, giving Mr. Olwell an undeserved windfall when he had done nothing.

Whatever their merits for handling *Olwell*, I want to argue that neither framework can be correct as a general matter, across all similar rights violations. Sometimes the rental value is too weak, and sometimes disgorging profits is too strong. If this is true, then a priori focus on the nature of the right will not determine a single remedial framework. We need to know more, including facts not present ex ante.

Consider two ends of the spectrum. First, imagine that, instead of a piece of heavy-duty, labor-saving equipment, the wrongfully used item had been something less significant. Suppose that someone—call him Abacus—owns a calculator that is taken without his permission by a businessman to add up the projections in a business plan. No one would seriously think that, because of this wrongful use, Abacus should be entitled to the profits that resulted from that business plan. Ripstein would not, I imagine, say that, in order to hinder the hindrance of Abacus's ownership, the law should treat the business plan as having been drawn up in his name.

At the other end of the spectrum, imagine that someone—call him Audubon—purchased and preserved a natural sanctuary where he carefully constructed a bird blind all in the hopes of photographing an exquisite and extremely rare bird that had never been photographed well before. Despite thousands of hours sitting in the blind, Audubon had still not been able to capture a good image of the bird. Suppose that someone trespassed on Audubon's bird blind for an hour, during which time the trespasser managed to capture an outstanding photograph of the rare bird, earning a massive sum from *National Geographic* and notoriety among ornithology circles. It would be very harsh, I think, to say that Audubon is only entitled to an hour's rental value of his bird blind.[23]

My argument is that different remedies are appropriate in these cases despite the nature of the right being the same. Abacus and Audubon (and Olwell, for that

[23] If this example is too fanciful for your tastes, substitute another. What is important is that the property's value is uncertain ex ante such that its actual value when put to use may significantly exceed the rental value. This might be true of anything from an unreliable machine to a gold-prospecting parcel, a risky trading algorithm to an intermittently artistic monkey. As long as a high-value output is only rarely realized, the rental value may seem an inadequate remedy.

matter) all suffered the same rights violation—namely, a violation of their right to control the use of their property. And yet, intuitively, the appropriate remedy for Abacus is rental value and the appropriate remedy for Audubon is disgorgement. The nature of the right doesn't dictate the remedial form.

One might try to reject the idea that the cases require different remedial forms by unifying them under some more complex remedial formula. What varies across these examples is the relative contribution of the wrongfully appropriated item to the appropriator's gain. Abacus's calculator contributed little, whereas Audubon's sanctuary and bird blind contributed heavily. This contrast might suggest a general principle: parties should be compensated for their comparative contribution—what they put in.

As appealing as it sounds, this suggestion ignores the fact that the inputs combine to create something new. What we have ex post cannot be cleanly resolved into parts that represent the separate contributions of each ex ante input. Consider the *Olwell* case. The company's labor combines with Olwell's machine to produce revenue. If the venture was worthwhile, the revenue will be more than the sum of the value of the inputs. So we cannot simply give the value of the machine's use back to Olwell and the value of the labor back to the company, because there will still be more left over—what was *created* by the productive activity.[24]

One might think that the surplus can also be distributed based on the relative contribution of the appropriated property and the appropriator. In this way, one might insist on disgorgement as the appropriate remedy, but modified to account for comparative contributions. Abacus would get hardly any of the ultimate value created, having contributed little, whereas Audubon would get most or all of the value created, having contributed the lion's share. And we could say ex ante that the remedy must be disgorgement.

But this too cannot provide a satisfying general principle. Suppose that the bird blind was entered wrongfully, but no photograph resulted. Should Audubon receive any compensation if he sues? Yes; his rights were violated, and he deserves something in response. He should not be denied any damages merely because the trespasser didn't profit from his crime. Insofar as a remedy is appropriate, the natural candidate is the rental value. So now it looks like Audubon should get to disgorge the profits if there are any but should get a different remedy—rental value—if there were no profits. If that's correct, then it again seems that the

[24] The court's remedy, whatever its flaws, appreciates this fact. The court measures its remedy not against a baseline in which the venture never occurs, but instead against a baseline in which the venture occurs without the wrongful use (via hand-washing). So, basically, the court is allowing the company to keep the profits that it would have made without the wrongful use, assuming that the remainder of the profits can be attributed to the use of the machine (or to their labor in using the machine, which presumably should not be compensated).

appropriate remedy for the bird-blind owner cannot be determined ex ante. It depends on what the misappropriation yields.

One might press on suggesting that there is still a principle here: Audubon gets either the profits or the rental value, whichever is greater. Although we might say this ex ante, it is not a principle that determines the remedy based only on what is present ex ante. Even knowing the right involved, we do not know ex ante the appropriate form of remedy. From the ex ante perspective, what will count as properly compensating a party like Audubon is, essentially, indeterminate. In this way, what we remedy cannot be the rights violation per se.[25]

I have focused on cases of wrongful use to illustrate that the remedial form itself can depend on what happens ex post. But I take the phenomenon to be much more general. Consider, for example, the controversial matter of how to remedy a breach of contract. A promisee generally has a right to performance. But how to remedy breach is less fixed. The remedy is not necessarily measured by how much the promisee expected to gain; sometimes, it is better viewed in terms of the injury from having been given a bad promise initially. As Kaplow and Shavell put it, "the concept of compensation is ambiguous in the case of contracts: expectation damages make the victim of a breach whole by reference to a benchmark of performance, whereas reliance damages make the victim whole by reference to the position he would have occupied if no promise had been made."[26] Which of these alternatives is appropriate typically depends on context, and it may only be clear after the fact. So, again, we cannot straightforwardly say that the remedy is dictated by the right that was violated. The remedial form itself—and not merely the remedy's magnitude—depends on something other than the content of the right.[27]

C. The Framing of the Complaint

Earlier I suggested that all we can say ex ante about whether a party like Audubon should get rental value or disgorgement of profits is that the party should receive whichever is great. But the appropriate remedy isn't actually dependent on which amount turns out to be greater. Rather, it depends on what remedy the plaintiff elects to seek—that is, it depends on how the plaintiff frames his or her

[25] *Compare* Sage 2016, 266: "[V]iewing the plaintiffs rights as sufficient to explain disgorgement elides the crucial role that is played in the explanation by the defendant's wrongful action. The disgorgement award is a response to that wrongful action, rather than a mere reinstatement of the plaintiff's initial rights."

[26] Kaplow and Shavell 2009, 166.

[27] This may be a contentious example, as some may say that there are simply two different rights at issue. But, if so, as discussed later, it's unclear why there must be an election.

complaint. Typically, a party will seek whichever is the larger sum, but that is not dictated as a matter of principle. The appropriate remedy thus depends on the perspective of the victim ex post.

This point is more readily evident when the available remedies are not both fungible, monetary values. Imagine that an employee comes up with an innovative idea while not clearly operating within the scope of her employment contract. Nonetheless, the employer promptly patents the innovation. We can imagine the employee seeking either compensation for her uncompensated labor or seeking ownership of the patent. These represent different forms of complaint against the employer. One is a complaint that one didn't get paid for one's work; the other is a complaint that one's idea was stolen. The same set of facts could be basis for either grievance, but not both.

The just remedy depends on how the employee responds to the wrong. That is, the remedy depends on the stance of the employee, which need not correspond with economic value. The employee might elect to seek lost pay rather than the patent itself, even if the latter is worth more. Perhaps she is not interested in the patent and having to license and police it herself. On the other hand, the employee might seek the patent, even where less valuable, if she was particularly attached to its being *her idea*. The appropriate remedy thus depends in part on how the victim regards what happened. This is necessarily determined ex post.[28] It is a third way in which remedies depend on something other than simply the nature of the right.

The corrective justice theorist will interpret this feature of remedies quite differently—as in fact confirming the continuity thesis. For the corrective justice theorist, the plaintiff gets to elect her remedy because she still has the right, and she therefore has a choice over how to use it. Here, for example, is Weinrib's explanation for why a property owner may elect to seek the price received for stolen goods rather than merely their market value:

> The possibility [of an above-market purchaser] is as fully within the owner's entitlement as the thing itself and its value. For such a possibility to be the owner's, the payment that happens to realize the possibility must also be the owner's . . . Of course, the recovery of the proceeds remains merely an option that the owner need not exercise when the proceeds are less than the market value. This option is the continuation of every owner's entitlement either to retain the thing owned and its value or to dispose of it for the price that a willing

[28] We may be able to speculate ex ante about how some action is likely to be regarded—what the complaint will probably look like—but it is the way that it is actually regarded—the actual complaint—that matters.

> buyer will pay. Thus, consistently with corrective justice, the option replicates at the remedial stage the content of the plaintiff's substantive right.[29]

The election of remedies is a function of the fact that the plaintiff continues to have a right, and thus continues to have a choice about how to dispose of the entitlement. The property owner is entitled to seek proceeds or market-based damages, just as the owner was entitled to decide how to use the property in the first place.

There are good reasons to reject this explanation. First, it is inconsistent with the law's self-understanding. When courts are faced with this issue, they typically explain the result in terms of estoppel, not in terms of rights. For example, the *Olwell* court justifies its decision in part by explaining, "the appellant *cannot be heard to say* that his wrongful invasion of the respondent's property right to exclusive use is not a loss compensable in law."[30] The issue is not whether the plaintiff had a right to the profits, but whether the defendant can answer the plaintiff's complaint. Weinrib's explanation does not take the estoppel formulation seriously. In the same passage quoted previously, he writes,

> A lawyer may justify this conclusion by saying that it does not lie in the mouth of the wrongdoer to deny that the owner could have made the sale. What such a formulation points to, however, is not the empirical likelihood that the owner would have made the sale, but the irrelevance of who made it given that ownership carries with it an entitlement to proceeds.[31]

I see no reason why we shouldn't take the estoppel formulation more seriously. If the law wanted to say that the owner simply has a right to the proceeds as a matter of being the owner, it could say that. But it doesn't. It adopts a formulation that explicitly attributes the result to the structure of private law as a back-and-forth conversation between plaintiff and defendant, where the remedy depends on what parties say and have standing to say.

Second, the claim that ownership simply includes an entitlement to proceeds is questionable.[32] It does not appreciate the way that profits spring derivatively

[29] Weinrib 2012, 131. I find this argument—however plausible—inconsistent with what Weinrib says about the *Olwell* case. Recall his claim that "basing the damages on the cost of hand-washing the eggs implies that the defendant was under an obligation to the plaintiff to wash the eggs by hand." Weinrib 2012, 134. But, by analogy, basing the damages on the premium price paid by a third-party purchaser would imply that the defendant was under a duty to the plaintiff not to contract with the third-party purchaser. There is no such duty, at least in a context of nonunique goods. The above-market price might even have been obtained before the misappropriation was foreseeable.

[30] 173 P.2d at 654 (emphasis added).

[31] Weinrib 2012, 131.

[32] *Compare* Sage 2016, 265: "[I]t is because proponents of the traditional account presuppose a purely rights-based understanding of the disgorgement remedy that they must posit the existence of a dubious private law right, to the fruits of one's property."

from an activity.[33] They are a new thing, resulting from the combination of inputs. There is no way to trace these contributions neatly. The profits go to the innocent party because—where there is uncertainty—the wrongdoer cannot be heard to dispute this attribution.[34] But the law is not actually aiming to give the plaintiff the surplus, which may in fact be a windfall, as a matter of right. Rather, it is doing justice between the parties where there is a new, unowned thing that springs into existence.[35]

Third and finally, Weinrib's explanation does not extend to other instances in which plaintiffs get an election of remedies. For example, a promisee may sometimes forgo a contract claim, choosing instead to pursue a claim in restitution or promissory estoppel.[36] Here, we cannot say that the election "replicates at the remedial stage the content of the plaintiff's substantive right." Whereas the property owner has a choice either to sell the property or not, the substantive right of a promisee does not involve a choice *either* to receive the thing promised *or* to rely. A more natural line for corrective justice would be that, in such cases, there are simply different substantive rights that have been violated. But then why cannot the plaintiff recover for both rights violations? Even if this problem could be explained away, Weinrib would have to offer divergent explanations for the

[33] It seems to me that there is no normatively significant distinction between simple resale and benefiting from one's own use. As pointed out above in note 22, Weinrib's rationale for disgorgement would presumably apply to rental, which is just the sale of the use. But then why think that disgorgement is available when one sells the use to another but not when one takes it for oneself—especially insofar as that distinction may only trace whether the transaction occurred inside the firm or not.

Put another way, Weinrib's justification for allowing disgorgement in the resale case is that the wrongdoer has denied the rightful owner the possibility of selling to the high-value purchaser. But, by taking the use of the machine for itself, the company denies Olwell the opportunity to rent the machine to the company itself. If the company itself was the party that would have paid above-market rates, then the appropriation denied Olwell the opportunity to rent to it. Weinrib writes, "The plaintiff's only interest in the defendant's egg-washing machine is in the use of this particular machine, not in how the defendant would have operated his business without it." Weinrib 2012, 134. But there is one way in which Olwell has an interest in how the company would operate without the machine—namely, it affects how much the company would be willing to pay to rent the machine from Olwell.

I think that Weinrib must either abandon the idea that disgorgement is appropriate for resale to an above-market purchaser or else he must accept that a plaintiff can appeal to evidence that an unauthorized user placed above-market value on the use, which is basically what he rejects in *Olwell*.

[34] *Compare* Cardozo's line in *De Cicco v. Schweizer*, 221 N.Y. 431 (1917): "The springs of conduct are subtle and varied. One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others."

[35] Where there is no uncertainty, then offering an election seems either unjustified or justified only on pragmatic grounds. We would allow the businessperson who takes Abacus's calculator to point out that the profits are not attributable to the calculator because that seems too clear for uncertainty. And, to my mind, if there is uncontroverted proof that the employee does not view the patent as his own, then the only justification for allowing him to continue to press a contrary claim would be pragmatic.

[36] *See, e.g.*, United States v. Algernon Blair, Inc., 479 F.2d 638 (4th Cir. 1973) (restitution); Weitz Co. v. Hands, Inc., 882 N.W.2d 659 (Neb. 2016) (promissory estoppel).

election of remedies in different contexts.[37] Taking the estoppel formulation seriously avoids this discontinuity; election of remedies is generally about limiting the defendant's ability to challenge the plaintiff's understanding of the wrong.

What we care about, in all these cases, is the complaint of the plaintiff and whether the defendant can answer it. Olwell may complain that the company profited from his machine for a year, the employee may complain that she has been injured by not receiving the patent, and the promisee may complain that she was even lured into this mess. And, in each case, the fact that the wronged party views his or her injury in this way matters to the appropriate remedy.

Corrective justice theorists rightly criticize noncorrective accounts of tort law for not capturing how private law involves doing justice between the parties.[38] They claim that one cannot understand the privateness of private law without appreciating the bipolarity. There is much to be said for this point. But it is not entirely true that other views have no conception of private law as private. As one writer puts it, "[p]rivate law is structured as a drama *between plaintiff and defendant*."[39] What makes private law private, on this view, is not substantive but rather the structural fact that it adjudicates complaints of private parties. One party makes a *complaint* against another; the defendant is then put in a position of *answering* this complaint. The terminology is no coincidence. The law facilitates and adjudicates an ex post conversation between plaintiff and defendant. Remedies don't respond to rights violations per se, but rather to the complaints that we make against one another.

D. Summing Up

We often think that compensation means giving back to a wronged party whatever was taken from her. We speak of making someone whole. In this picture, the wrong is a void that must be filled. It is as though a piece of a puzzle has been removed and needs to be put back. What to put back is what was there before it was removed.

But matters are not that simple. Things look different at one time than they do at another; events change the moral situation. Repairing a puzzle is not straightforward when the pieces merge and morph. One is not just trying to return

[37] Notice that, if one accepts the two-different-substantive-rights explanation for the promisee's election between reliance and expectation damages, then there may be some pressure to say something similar about the election between actual gains and market value, namely that each corresponds to different substantive rights violations.

[38] *See, e.g.*, Weinrib 1995, 63.

[39] Dagan 1999, 147.

whatever was there before. Instead, repair must now involve something new, which is based both on what was there before and also on how things look now.

What we remedy has this character of a morphing void. The need for a remedy may arise from the fact that a right has been taken from us, but its shape is not determined only by the shape of the right that was taken. It also depends on what has eventuated. That is, what we remedy depends on certain facts that only come into existence once the wrong is committed. These include facts about the losses of the wronged party, the benefits derived by the wrongdoer, and the wronged party's interpretation of his or her injury.

III. Mapping the Alternatives

In the previous section, I argued against the idea that remedies are simply responsive to the rights violation per se, instead suggesting that there are various ex post facts that go into determining the appropriate remedy. I believe that this indeterminacy poses a challenge for corrective justice theory, as described in the first section. In this final section, I aim to survey some alternatives.

A. Remedies as Policy Choices

A first alternative to corrective justice theory would be to abandon the robust conception of rights at its core. One cannot, on this view, read the appropriate remedy off the right that was violated because rights do not get that kind of priority. We do not start by taking rights as established and then determining a just remedy. The law is more fluid.

Faced with the variety of possible remedies, it is natural to think that the choice between them is a public policy question—a question about what legal institutions we, as society, should prefer. How we choose to respond to any given rights violation will be about how we weigh various societal values. Hanoch Dagan, for example, sees a variety of competing values in the *Olwell* case: a profit-based remedy will strongly deter appropriation and thereby vindicate the libertarian values of control over property; a market-value remedy vindicates the utilitarian maximization of well-being; a harm-based remedy encourages harmless sharing, thereby serving the values of altruism.[40] Whichever we choose, the thought goes, is a matter of what social order we want.

[40] Dagan's own positive account is closest to this latter view; he would encourage interpersonal trust and sharing by dividing the efficiency gains between the two parties.

And whichever we choose then determines the content of our rights and duties. The remedy is, as corrective justice theory suggests, bound up with the nature of the entitlement that was violated. But, contrary to corrective justice theory, there is a choice of remedies, which itself shapes the entitlement. In Dagan's words, the choice among remedies is a "distributive choice"[41] about what form of entitlements to give. In short, the nature of the right itself is up for debate; that's what we are deciding when we decide upon a remedy.

As appealingly pragmatic as it sounds, a public policy view comes with serious disadvantages. By their nature, public-policy-oriented views do not regard the remedial question as distinctively ex post, arising against a backdrop of established rights and a transgression thereof. Because the remedial question is tied to the ex ante content of rights and duties, our remedial choices have a quasi-legislative character.[42] Certainly it is true that we might shape our legal institutions in a variety of ways and that, prospectively, we might decide to vindicate any number of social aims. This ex ante choice, however, is traditionally a matter for a legislature, and a court is not a legislature. The judicial function, in private law, seem to be adjudicating a dispute between two private parties. Dagan's claim that the court ought to assess "the ex ante entitlements" through "a public lens" is incompatible with the idea of doing justice between private parties. It is thus incompatible with a conception of private law as fundamentally about correcting wrongs. Moreover, by regarding the content of rights and duties as fluid even at the remedial stage, public-policy-oriented views are at odds with the robust conception of rights; rights that are always open to renegotiation are hardly rights at all.

So, whatever its virtues, a public-policy-oriented explanation of remedies comes with costs. It requires that we abandon the conception of private law as distinctively about doing justice between the parties, something that presupposes, rather than delineates, an established set of rights and duties. Given these costs, I hope for a deeper understanding of private law.

B. Rejecting the Remedial Thesis

One need not abandon the idea that private law responds to rights violations in order to question the corrective justice approach. An alternative position is

[41] Dagan 1999, 153.

[42] For an example of the difficulty that arises if one maintains that the remedy traces back to the right and shapes that very right, consider the way that expectation damages are sometimes taken to impugn the rights in contract law. *See* Shiffrin 2007, 724. I think that mischief arises out of mistakenly thinking that the remedy reflects the right rather than something else, namely, the wrong suffered. *See* Cornell 2016.

available if one accepts that rights violations are the touchstone for legal liability without simultaneously accepting that the right violated dictates the form that that liability will take.

Such a position has recently been defended under the label of civil recourse theory. Civil recourse theory accepts what I emphasized in section II: legal remedies do not derive simply from the nature of the right that was violated. As I have, civil recourse theorists emphasize the complex questions involved in awarding remedies and the gap that this creates between the rights violation itself and the remedy. They also emphasize the way in which remedies depend on the particular response of the wronged party. In short, they agree that remedies are not simply a continuation of the right that was violated.[43]

Civil recourse theory rejects continuity thesis by rejecting the remedial thesis. Civil recourse theory thinks legal remedies respond to wrongs but do not necessarily correct or repair them. Instead, private law simply empowers individuals with a structured way to react against those who have wronged them. It provides a legal recourse—a constrained, legally sanctioned channel for responding when we are wronged. As one writer puts it, "The courts in tort law do not stand ready to facilitate the rectification of wrongdoing, or to restore a normative equilibrium, as corrective justice theorists maintain. Instead, they empower individuals to obtain an avenue of recourse against other private parties."[44] What recourse the state permits is shaped by various considerations, some involving compensation and others not.[45]

If civil recourse theory is correct, then legal remedies aren't exactly remedies at all. They respond to wrongs, but they don't correct them. I consider this to be a significant theoretical cost. It is a central and attractive aspect of private law that it aims at restoring justice where injustice has been done. There is something that our legal remedies are trying to redress. This can be felt in the way that we search not just for *a permissible* response, but for *the appropriate* response. Civil recourse theory abandons the idea that remedies are measured specifically to redress the wrong—and, in this way, basically gives up on the idea of remedies altogether.

There may be softer ways to reject the remedial thesis than standard civil recourse theory. In particular, one might retain the idea that remedies are *corrective in some sense*, while not thinking of them as *correcting wrongs*. There are

[43] *See, e.g.*, Zipursky 1998, 82.

[44] Zipursky 2003, 755.

[45] This feature of civil recourse theory creates some ambiguity, which has been the source of criticism. Arthur Ripstein, for example, argues that civil recourse faces a dilemma: either the recourse available is shaped by the nature of the obligation that gives rise to the action, in which case the theory collapses into corrective justice, or the recourse is not shaped by the obligation, in which case the theory defends mere revenge or instrumentalism. *See* Ripstein 2009, 203.

various possibilities here. One might say that remedies respond to wrongs by correcting the injuries or losses that result from those wrongs. Along these lines, Jules Coleman argued, "the duty of wrongdoers in corrective justice is to repair the wrongful losses for which they are responsible."[46] Another view might see remedies correcting the expressive content of the wrong. As Scott Hershovitz has recently argued, "[D]emanding that a wrongdoer repair his victim's injuries might be one way of correcting the message that his wrongdoing sends, and when it is, repair will be a way of doing corrective justice. But repair is not the only way of doing corrective justice."[47] In approaches like these, remedies are truly remedial, but they are not remedying the wrong itself, but rather its effects.

This does soften the blow, but it still abandons the idea that remedies are uniquely aimed at the wrongs themselves.[48] And, as a result, the same puzzle that plagues civil recourse theory persists: If rights violations are the touchstone for liability in private law, why is the content of that liability determined by facts beyond the rights involved? Where corrective justice theory offered a coherent picture of why and how the law is responding, abandoning the remedial thesis makes the responses that the law takes seem contingent or even haphazard.

C. Wrongs Apart from Rights

I want to close by suggesting that there is a third, underappreciated alternative. The difficulties for corrective justice arise from taking remedies to be dictated by our ex ante rights. One response might be to abandon such a fixed conception of rights. Then rights do not dictate remedies; instead, the connection between them can be understood as more fluid. A second response is to reject the remedial thesis. Remedies, on such a view, aren't aimed at correcting wrongs. They are doing something else, whether it be offering civil recourse or compensating victim's losses.

Another way to reject the continuity thesis is by rejecting the wronging thesis. That is, one might accept that remedies are aimed at correcting wrongs, but reject that wrongs are equivalent with rights violations. Wrongs, on such a view, are something else—often connected to rights violations but not equivalent to them. And it is wrongs, not rights violations, that we seek to remedy.[49] Corrective

[46] Coleman 1992, 324.

[47] Hershovitz 2017, 39.

[48] *See* Coleman 1992, 324: "[R]epairing the wrong itself, the cornerstone of the relational view, is no part of corrective justice at all."; Hershovitz 2017, 43: "[W]e should also remember that there is nothing sacrosanct about the way that tort responds to wrongs."

[49] *Compare* Sage 2016, 266–7: "[I]f the new account of disgorgement is correct, then at least some awards of this remedy must be understood as wrongs-based rather than rights-based."

justice theory is thus correct to say that remedies aim to correct wrongs, but mistaken about what constitutes a wrong.

This position—rejecting the wronging thesis—allows one to hold onto both a robust conception of rights and the remedial thesis. There are also, I believe, independent reasons to think that wrongs are conceptually distinct from rights violations, though I will not delve into those reasons here.[50] All that I would like to do is situate this position relative to the others. I believe that abandoning the wronging thesis allows one to take seriously the distinctiveness of the ex post perspective in two respects. In this way, it combines attractive features of the existing views.

On the one hand, corrective justice theory captures the idea that private law seeks to remedy wrongs. Private law is, in this sense, inherently backward looking. The remedial question is ex post in that it occurs against the backdrop of a preexisting transgression. Contrary to public-policy-oriented views, we cannot use private law as an opportunity to go back and reshape our ex ante entitlements. Nor ought we to view the remedial choice as concerning how best to move forward, untethered from the shape of the transgression that triggered it. So, it is attractive to think, as corrective justice does, that private law as aimed squarely at remedying wrongs, such that remedies reflect the character of the wrong. This is one sense in which private law is inherently ex post.

On the other hand, the arguments in section II suggest that remedies do not depend only on the right that was violated. There is a gap between rights and remedies—a gap where other factors come to bear. In this sense, I share the view of those—like civil recourse theorists—who reject the remedial thesis. But I locate this gap at a different place in conceptual space. The difference might be represented this way:

Corrective Justice	remedies	*correct*	wrongs *reflect* rights
Civil Recourse	remedies	***do not** correct*	wrongs *reflect* rights
My View	remedies	*correct*	wrongs ***do not** reflect* rights

This comparison draws out the fact that the civil recourse theory and my own view both reject the continuity thesis, but in different ways. Rejecting the remedial thesis and rejecting the wronging thesis offer different places to locate the lack of continuity. Wherever it is positioned, this discontinuity reflects an

[50] *See* Cornell 2015; Cornell 2017.

appreciation that remedial questions cannot be analyzed only in terms of ex ante entitlements or rights. As such, it represents an understanding that remedies involve an ineliminable, ex post component. This is a second sense in which private law is inherently ex post.

Rejecting the wronging thesis might be represented in relation to the other existing views in table form:

	Remedies are based on an underlying ex ante right	**Remedies are based on other factors ex post**
Remedies reflect a wrong	Corrective Justice	My view
Remedies reflect a policy choice	Public Policy Views	Civil Recourse Theory

Like corrective justice theory, I believe that remedies aim to correct a wrong. Like civil recourse theory, I believe that remedies depend on factors beyond the nature of the underlying right.

These independently plausible ideas can be maintained simultaneously by thinking that the nature of a wrong depends on more than the nature of the right violated. It depends on subsequent facts about what ended up happening—like how much harm was done, how much value or disvalue was generated, and how the victim regards the injury. To be wronged is, in this sense, to have a complaint, and a complaint is shaped by these other factors. Put another way: What are wrongs? They are what we remedy. Once we have this richer conception of wrongs, then we can accept that remedies are necessarily about correcting wrongs, while rejecting contemporary corrective justice theory's inclination to link everything all the way back to rights and duties.