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NECESSITY AND RESTITUTION

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On November 27, 1905, the steamship Reynolds was moored to Vincent's dock for the purposes of unloading its cargo, when a violent storm arose. The captain signalled for a tug to tow the ship from the dock after the cargo had been unloaded, but none could be obtained, because the waters had become too rough. It was too dangerous to cast off, and as the lines holding the ship to the dock became frayed, the crew replaced them. The Reynolds was repeatedly thrown against the dock, causing considerable damage to it. The ship's owner, the Lake Erie Transportation Company, was held liable for the cost of the damage. Defendant's appeal against an order denying a new trial was dismissed by a two to one majority of the Supreme Court of Minnesota in an opinion that has since enjoyed considerable and consistent attention.[1]

Vincent answered one question—are imperilled trespassers liable for damage caused to the property on which they trespass?—but left unanswered another: From what principles does this liability issue? The court's affirmative answer to the first question is authority for the doctrine Francis Bohlen called the "incomplete privilege" of necessity: "privilege" because necessity permits what would otherwise be trespass; and "incomplete" because the trespasser does not get to pass on the destructive costs of his trespass to the property owner.[2] The persistence of interest in *Vincent* stems from the fact that a satisfactory answer to the question the Court left unanswered has proven surprisingly elusive.

The problem is a compelling one because the outcome of *Vincent* seems obviously just, at least to most commentators.[3] It seems to strike the right balance between the interests of the imperilled wrongdoer—who bears no re-

Thanks to Vaughan Black, Gillian Demeyere, Travis Hreno, Mitchell McInnes, and Benjamin Zipursky for helpful comments on earlier drafts of this paper. Thanks to Mitchell McInnes, as well, for many helpful discussions about the law of restitution.

1. Vincent v. Lake Erie Transportation Co., 124 N.W. 221 (Minn. Sup. Ct. 1910).

2. Francis Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interest of Property and Personality*, 39 HARV. L. REV. 307 (1926). The language of incomplete privilege was picked up by both the *Restatement of Restitution* (§ 122) and the *Restatement of Torts* (comment to subsection (2) of § 197). § 197 of the *Restatement of Torts* states both sides of the incomplete privilege. § 122 of the *Restatement of Restitution* concerns the duty of the trespasser to compensate the property owner for damage to her property.

3. The noteworthy exception is Phillip Montague. Montague argues that it follows from the fact that the imperilled trespasser does no wrong that no compensation is owed the property owner. *See* Phillip Montague, *Rights and Duties of Compensation*, 13 PHIL. & PUB. AFF. 374 (1984), and *Davis and Western on Rights and Compensation*, 14 PHIL. & PUB. AFF. 390 (1985).

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sponsibility for the fact that circumstances make it such that the only way out of the peril in which she finds herself is by way of the invasion of an innocent person's rights—and the property owner, who is, legally speaking, a stranger to the danger in which the defendant finds herself. But even if the compromise seems equitable, it is difficult to see how the two sides of the incomplete privilege can be reconciled: If the imperilled trespasser did no wrong, on what conceptual peg can we hook the plaintiff's claim to compensation?

The most obvious candidate answer is that *Vincent* is an example of strict tort liability. But to say so is to describe rather than explain the doctrine for which *Vincent* is authority, and the description sits uneasily with the facts. *Vincent* does not conform to the usual rationales of strict liability. It is not, for example, an instance of conditional liability attaching to the consequences of undertaking an ultrahazardous activity.[4] Nor do considerations of efficiency obviously support strict liability. If anything, it seems that Vincent was the cheaper cost-avoider—the dock could be strengthened against damage; what could a shipowner do?—and that the Lake Erie Transportation Co. was in no better position to spread the losses: Either party could just as easily have taken out insurance.

Thus the outcome of *Vincent* cannot be easily explained on the basis of either fault or strict liability. Its accommodation has consequently prompted reconsideration of the foundations and structure of liability in tort. It has been invoked, inter alia, in support of the claims that proof of causation of harm is (or should be) sufficient for liability in tort;[5] that between strict and fault liability lies a category of conditional fault;[6] that the category of nonreciprocal risk imposition unifies the apparently disparate grounds of liability in tort;[7] and that some justifiable or innocent conduct can be held to cause a wrong in a sense sufficient for civil liability.[8]

A promising alternative approach to *Vincent* holds that the answer to the *Vincent* question is found not in the law of tort but rather in the law of restitution.[9] This will be my focus here. The restitutionary account deserves close attention for three reasons. First, it is the closest there is to a doctrinal

4. This depends in part on what the relevant activity was. Mooring to a dock in the midst of a severe storm may be ultrahazardous, but being at sea given that storms sometimes expectedly arise is not; neither is docking a ship given that storms sometimes expectedly arise. These are all things the crew of the Reynolds did. How do we decide what "the" activity was? The question is a deep one. Almost any activity that turns out to cause an injury will on the right description turn out to have been hazardous. The doctrine of strict liability for ultrahazardous activities avoids being question begging only if the relevant activities are understood in sufficiently general terms. Here, I think, that means we should settle on either the second or third description of what the crew of the Reynolds were doing. (Furthermore, one might add, to say that "mooring during a sudden storm" was the relevant description of what they did, is effectively to empty the defense of necessity of any significance: Here that defense turns on the claim that the peril was caused by the circumstances rather than by an action or omission on the part of the defendants. But this point is trickier.)

5. Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

6. Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959).

7. George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

8. Jules Coleman, RISKS AND WRONGS 371–72 (1992).

9. We might also look to contract law. One might argue that the outcome of *Vincent* is justified by the fact that it represents what the parties would have contracted to if they had had

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answer to the *Vincent* question, insofar as it is found in the *Restatement of Restitution*. Second, it has enjoyed attention and favor among academic commentators.[10] And finally, the restitutionary account holds out the promise of solving the *Vincent* puzzle in an attractively straightforward way, namely by sidestepping entirely the problem from which it arises. The basic idea is that liability in *Vincent* proceeds from the fact that the Lake Erie Transportation Co. was unjustly enriched at Vincent's expense. The important point is that the transfer by which a defendant was unjustly enriched need not constitute a wrongdoing on the defendant's part for the plaintiff to sustain a cause of action in restitution. So the tension between the property-owner plaintiff's claim for remedy and the absence of fault on the imperilled-trespasser defendant's part is, on this account, defused. Thus the restitutionary account of the incomplete privilege of necessity has much to recommend it. But it is wrong.

Or so I will argue. I will proceed as follows. I will first outline the doctrines of necessity and restitution and, against that background, spell out the restitutionary account in a bit more detail. I will then focus on two issues raised by that account: first, the compatibility of the defendant's right to trespass and the claim that she was thereby enriched; and second, the link between the plaintiff's loss and the defendant's gain. The latter raises the question of what, exactly, the enrichment to the Lake Erie Transportation Co. consisted in. I will canvas four answers to the question. The last is Ernest Weinrib's, to whose account of *Vincent* I will devote the most attention. I will argue that no candidate account of the enrichment in *Vincent* succeeds, and so neither does the restitutionary account of necessity.

THE DOCTRINE OF NECESSITY

It is important, at the outset, to get clear on what the restitutionary account aims to explain. More than one doctrine is contained in the incomplete privilege. Let us begin by disentangling these.

The judicial history of the doctrine of necessity begins with a case that

time. Here the law and economics idea of tort liability as a response to market failure seems to hold more explanatory promise than in, for example, the context of intentional torts. But the promise is, I think, illusory. The claim is not that everyone in the position of the plaintiff and defendant would reach this outcome, but rather that rational contractors would. But "rationality" is not context independent here, and the outcome of the inquiry not a matter of simple discovery. That is, it is hard to see how the stipulation of rationality would not just built in the intuition that the outcome in *Vincent* is the right one. For a non-law-and-economics contractual account of *Vincent*, *see* Kai Devlin, *Rights, Necessity, and Tort Liability,* 28 J. SOC. PHIL. 87 (1997).

10. Robert Keeton, *supra* note 6; Daniel Friedmann, *Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 514 (1970); John P. Finan & John Ritson, *Tortious Necessity: The Privileged Defence*, 26 AKRON L. REV. 1 (1992); Ernest J. Weinrib, THE IDEA OF PRIVATE LAW 196–203 (1995). While he casts his account in different terms, Arthur Ripstein suggests that it is equivalent to the restitutionary analysis. Arthur Ripstein, EQUALITY, RESPONSIBILITY, AND THE LAW 122 (1999). Writing about the English law of tort, W.V.H. Rogers suggests that while liability in necessity cases cannot be founded on tort, it is an open question whether a claim could be made out in restitution. WINFIELD AND JOLOWICZ ON TORT 880 (15th ed. 1998).

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arose from an incident that occurred just under a year before the Reynolds damaged Vincent's dock.[11] Sylvester Ploof and his family were sailing a sloop on Lake Champlain when a violent storm suddenly arose. Ploof moored his boat at the dock of an island owned by defendant Henry Putnam. An employee of the defendant unmoored the sloop, which was then driven upon the shore by the storm. The ship was destroyed and its passengers were cast into the lake and onto the shore. Putnam was found vicariously liable for the damage to Ploof's ship and the injuries he and his family suffered. The outcome was upheld by the Supreme Court of Vermont, in a judgment no less terse than *Vincent*.[12]

Let us call the defendant's liability in Ploof v. Putnam, Ploof-liability. The existence of Ploof-liability suggests that the incomplete *privilege* of necessity is more accurately styled, in Hohfeldian terms, as an incomplete *right*.[13] That is, the best explanation of Ploof-liability is that it attaches to a breach of a duty on the part of the property owner that correlates to a right of the imperilled trespasser to the former's property. This is so even if we say that Putnam's liability follows from the fact that his employee committed trespass to Ploof's sloop (and perhaps battery to its occupants).[14] Putnam's employee's actions would not have been tortious had Ploof not enjoyed a limited right to the use of the dock in the first place. (To say that the right is limited is not to say that its exercise awaits the owner's permission; *Ploof* stands for the contrary. It is rather to say that the right is only to such trespass to, and use of, the property owner's land as the peril dictates.)[15]

The restitutionary account is not an account of Ploof-liability. It is instead an account of what I will call Vincent-liability. I will call the conjunction of Ploof-liability—which correlates to the right of necessity—and Vincent-liability—which makes that right incomplete—the doctrine of necessity. To

11. Bohlen traces the doctrinal roots of the incomplete privilege to early nineteenth century recapture of chattels cases. Bohlen, *supra* note 2, at 309–13.

12. Ploof v. Putnam, 71 A. 188 (Vt. Sup. Ct. 1908).

13. As Finan and Ritson note, *supra* note 10, at 4. The conceptualization of the "privilege" as really a right is also supported by the *Restatement of Torts*. In comment (k) to § 197, the *Restatement* tells us that "[the imperilled trespasser] is entitled to be on the land and therefore the possessor of the land is *under a duty* to permit him to come and remain there and hence is not privileged to resist his entry" (my emphasis).

14. As we might read the court holding. The plaintiff alleged a count in trespass and a count in case. Ploof-liability is in need of explanation not just because we need to translate from the old causes of action, but, more importantly, because the Court did not specify the grounds on which it supported the finding of liability at trial.

15. It is often held that the right extends only to circumstances in which the value of the property saved exceeds that of the damage inflicted. (*See*, the *Restatement of Torts* § 197, comment (c); Weinrib, *supra* note 10, at 196, 201–02.) Its not clear what this adds, practically speaking, if the quantum of damages in either case is measured by the damage inflicted. But there is an important conceptual point here: In the case in which the value of the property saved is less than the damage caused, perhaps damages are compensation for tortious wrongdoing, that is, for trespass and possibly conversion. I will set this aside here, however. My concern is with whether the restitutionary account can explain *Vincent* and similar cases, in which this proportionality condition is easily satisfied, and so the claim to the right of necessity is uncontroversially made out.

be an acceptable account of Vincent-liability, the restitutionary account must respect Ploof-liability. It must, that is, be at least consistent with all of the doctrine of necessity, even if it cannot (and does not aspire to) explain all of its elements.[16]

RESTITUTION

Restitution is, in one sense, very old. We might no less plausibly trace it roots back to Aristotle than we may, as many do, trace the roots of modern tort law to him.[17] In another sense, it is the newest of the domains of private law, coming into its doctrinal own in the United States only with the publication of the *Restatement of Restitution* in 1937, and later in other common law jurisdictions. Owing, perhaps, to its relative youthfulness on this second measure, the scope of the law of restitution remains much more of an open question than it is for other domains of private law, and is the object of lively debate. I do not wish to contribute to this debate here. On the contrary; on this point I hope to remain as noncontroversial as possible. But because so much is up in the conceptual air, I need to take a moment to outline my understanding of the relevant doctrine.

What I take to be the core principle of the law of restitution is set out in § 1 of the *Restatement:*[18] "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."[19] The paradigm example is that of an innocently received mistaken payment. A pays B $100. Both have forgotten that A's debt was discharged earlier. B has

16. There are more details to Vincent-liability. For example, § 122 (a) of the *Restatement of Restitution* exempts the imperilled trespasser from liability in the case that "the harm which he seeks to avert is threatened by the things which he destroys or by the tortious conduct or contributory fault of the owner or possessor." It is a nice question whether this exception can be accounted for from within the law of restitution. But I will not consider that question here. *Vincent* is an example of the most straightforward kind of case, and my contention is that restitutionary principles cannot account for it. If they cannot account for it, then we need not consider whether they can account for the more difficult cases.

17. On Aristotle's account, corrective justice requires giving back something gained at the expense of another. He extends the analysis to cases like physical injury, but notes that there the vocabulary of gain and loss is not really appropriate. Aristotle, *Nicomachean Ethics*, trans. D. Ross, in Richard McKeon ed., THE BASIC WORKS OF ARISTOTLE (1941). In contemporary terms, then, on Aristotle's account, restitution rather than tort is the core case of corrective justice, supposing that the gains and losses to which Aristotle was referring are material in nature. As we will see below, Ernest Weinrib reads Aristotle differently on this point.

18. For the remainder of this paper, by "*Restatement*" I mean the *Restatement of Restitution*.

19. Benjamin Zipursky pointed out to me that this may be an unduly narrow characterization of restitution. The core of my criticism of the restitutionary account is that its facts do not disclose an unjust enrichment on the defendant's part. Perhaps, however, this is not dispositive of the question whether restitution is somehow at issue, given than there *does* seem to be something equitable about the remedy in *Vincent* and given that the law of restitution has at least part of its historical and conceptual roots in equity. However, my assumption here that restitution is linked to unjust enrichment is neither stipulative nor dependant on the authority of the *Restatement*. As we will see, defenders of the restitutionary account of necessity frame their arguments in terms of unjust enrichment.

been unjustly enriched. A may bring an action in restitution against B for the $100.

Nearly all we need to know about the law of restitution to assess the restitutionary account of necessity is captured in this principle and illustrated by this example. But we need to attend to some complexities that lie just below the surface here.

1. The first point is in part terminological and taxonomic, but carries with it some important conceptual matters that, as we will see, are just those at issue here. Tort, contract, and restitution each name domains of private law. But each takes its name from a different stage or element in the conceptual structure of a civil action. Tort takes its name from the kind of civil wrong that is its object. Contract takes its name from the source of rights and duties it regulates and for whose violation it sets out the terms of remedy. Restitution, by contrast, names a domain of private law and a remedy. The former takes its name from the latter. Thus the law of restitution ranges over those civil actions for which (corrective) justice demands a particular kind of remedy, namely, a remedy measured by the defendant's gain rather than the plaintiff's loss. So we can provisionally mark out restitution from both tort and contract on the terms that the remedial principles governing the latter are compensatory rather than restitutionary. But a closer look reveals that things are rather more complex.

§ 1 of the *Restatement* links a cause of action—unjust enrichment—and a remedy—restitution. § 1 is in fact doubly ambiguous, as "unjust enrichment" and "restitution" each stand for two ideas. Both ambiguities stem from an ambiguity in the phrase "at the expense of," which, as Peter Birks pointed out, can mean either of two things.[20] B can be enriched at the expense of A in the sense that B gets something that A once had, as in mistaken payment. But suppose, for example, that D records one of C's songs without C's permission. And suppose, further, that C was not going to record the song. D has thus not taken anything from C. The money D makes comes from third parties. We could say that D has been enriched at the expense of C, but here we mean something different than in the mistaken payment case.

This points to two important differences between A v. B and C v. D. First, D committed a wrong, but B did not. "Unjust enrichment" is—sometimes with qualification[21]—often used to refer to the cause of action under which both A and C bring suit. But here I will reserve "unjust enrichment" for cases like A v. B, cases in which (as I will spell out in more detail below) "unjust enrichment" names a properly autonomous cause of action. (In accepting payment, B committed no tort and breached no contract.) I will say that cases like C v. D—in which the defendant's duty to repair issues ultimately from the fact that she breached a duty imposed in the terms of

20. Peter Birks, AN INTRODUCTION TO THE LAW OF RESTITUTION 23–4 (1985).

21. Birks calls the cause of action in cases like A v. B "unjust enrichment by subtraction," and the cause of action in cases like C v. D "unjust enrichment by a wrong." *Id.* at 25–6.

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some other domain of private law—are cases of "enrichment by wrong." Secondly, B, but not D, has something that once belonged to the plaintiff. Insofar as in both A v. B and C v. D (corrective) justice is done when the defendant gives the plaintiff what the former has gained, the remedy in both is, broadly speaking, restitutionary. But to the extent that "restitution" means to *give back*, it is best reserved for cases like A v. B. D *gives up*, rather than gives back, something to C. Following Lionel Smith, I will call the remedy in cases like C v. D "disgorgement."[22]

The appeal of the restitutionary account, I suggested, lies in the fact that it bypasses the tension—the stumbling block for the tort analysis—between the faultlessness of the imperilled defendant's actions and the plaintiff's right to remedy for the destructive costs of the defendant's use of her property. The restitutionary account bypasses this problem only to the extent that it assimilates cases like *Vincent* to cases like mistaken payment, in which the defendant is liable for what he has received from the plaintiff, despite his innocence. Thus the restitutionary account draws upon that subset of the law of restitution that concerns restitution in the narrow sense (i.e., as opposed to disgorgement) and unjust enrichment in the narrow sense (i.e., as opposed to enrichment by wrong). Thus, henceforth, when I refer to "restitution" (and its cognates, such as "restitutionary duty") and "unjust enrichment" without qualification, I mean them in their respective narrow senses.[23]

2. The *Restatement* tells us that "[a] person is unjustly enriched if the retention of the benefit would be unjust."[24] This does not mean that the injustice at issue in unjust enrichment occurs only if B keeps the $100. On this measure B would be just like a tortfeasor who refuses a court order to compensate his victim.[25] The point instead is that the injustice need not attach to anything in the defendant's conduct. Indeed, if anything it was something about A—her lack of knowledge—that forms the ground for A's claim in restitution.[26]

So where is the injustice located? Another possibility is in the transaction. On Aristotle's account, for example, A's mistake of fact would have made

22. Lionel D. Smith, *The Province of the Law of Restitution*, 71 CAN. B. REV. 672 (1992).

23. Senses that, note, preserve the correlativity implied in § 1 of the *Restatement*. That is, on their respective narrow construals, restitution is the remedy for all and only cases of unjust enrichment. I leave aside the question of what *the* proper scope of "the law of restitution" or "the law of unjust enrichment" is.

24. General comment to § 1.

25. Thanks to Mitchell McInnis for this point. Vaughan Black pointed out to me that, on this construal of the injustice, it would seem that the defendant's incapacity to form the intent to keep the enrichment (suppose she is an infant) would bar recovery, and that cannot be right.

26. It is this feature that separates restitution most clearly from other areas of private law. (It is also the feature that newcomers to the law of restitution find the hardest to accept. My students invariably think that A's money should stay with B, as a kind of private incompetence tax.) The distinctive and autonomous nature of restitution is well illustrated by the fact that in limited circumstances restitution is available to parties in default on a contract. *See* George E. Palmer, THE LAW OF RESTITUTION vol. 1, ch. 5 (1978).

the transfer involuntary, and so reversible on those grounds.[27] But without more this would be overinclusive. Suppose E improves his own property and thereby raises the value of F's house. Suppose further that E did not foresee this outcome, and so his action was, on Aristotle's measure, involuntary as to this outcome. E nevertheless has no claim in restitution against F. Part of the puzzle in this example may be in locating a loss to E that correlates to F's gain, but let us suppose that E is pathologically unneighborly, and would not have undertaken the improvements had he foreseen the gain to F. The important point is that, in any case, we need not commence the inquiry into loss and gain: The law of restitution does not recognize this kind of externality as the object of restitutionary relief.

This suggests that the injustice at issue is located in the outcome rather than in the transaction. So we can only say that B is under a restitutionary duty to give up a benefit to A if (i) B has been enriched at A's expense, where the measure of the presence of the relevant sort of enrichment is the presence of a loss to A that correlates to a gain for B, and (ii) in the language of the *Restatement*, "as between the two persons, it is unjust for [B] to retain it."[28] Of course, (ii) raises more questions than it answers, but we can set these aside here; as we will see, the restitutionary account of necessity fails at (i).

3. In the mistaken payment example, the defendant's gain correlates exactly to the plaintiff's loss (we can even imagine the same $100 bill passing back and forth between them). This will not always be the case, and it is not a requirement of the law of restitution that it be so. On the one hand, if, in good faith, the defendant spends on an exceptional purchase money innocently received by mistaken payment—spends it on a holiday she would not otherwise had taken, for example—she is liable to the plaintiff only for what is left over. On the other hand, if the plaintiff corporation has passed on to its customers some of the costs of an unconstitutional tax, the government will be liable in restitution only for the residue. The point is not to be misled by the image of the $100 bill passing between the parties. The restitutionary claim is made out if *some* of the plaintiff's loss corresponds to some of the defendant's gain.

THE IDEA

Now I can state the restitutionary account in more detail. The idea is, as John P. Finan and John Ritson put it (referring specifically to *Vincent*), that

> [t]he elements of restitution are present because (1) those in charge of the vessel have appropriated a benefit, and (2) they would be unjustly enriched

27. Aristotle, *supra* note 17, III.1 (on the distinction between voluntary and involuntary action), V.4 (on the role of this distinction in corrective justice).

28. Comment (c) to § 1.

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> if not obliged to pay for it. The measure of recovery is the benefit to the ship, measured by the damage to the dock.[29]

Let us pause to note two features of the facts of *Vincent* that do *not* pose a problem for the restitutionary account.

It is, first of all, no obstacle to the account that in keeping the Reynolds fast at the dock, the captain, in the words of the Court, exercised "ordinary prudence and care."[30] On the contrary; one strength of the restitutionary account is that this does not have to be explained away, as it does on the tort analysis. Instead we look to the outcome of the transaction to see whether, in the language of the *Restatement*, "as between the two persons, it is unjust" for the loss to remain where it fell. Second, we need not be detained by the fact that we will not be able to find a gain to the defendant in the precise amount of the loss to the plaintiff. On this point, Finan and Ritson's claim that "[t]he measure of recovery is the benefit to the ship, measured by the damage to the dock" threatens to mislead. The benefit to the ship may well have exceeded the damage to the dock. All we need to find is that the loss to the plaintiff correlates to some gain for the defendant.

FIVE CASES

Let me introduce a final bit of setup before proceeding to the analysis. In what follows I will refer to five cases. The first is *Vincent*. The second is *Vincent II*, which is like *Vincent* in all respects except that the moorings gave way and the ship was lost. The third is *Vincent III*, which is like *Vincent* in all respects except no damage was done to the dock, because the storm was not as severe as in *Vincent* (but still severe enough to imperil the ship were it unmoored). The fourth is *Vincent IV*, in which, as in *Vincent III*, no damage was done to the dock, except here that was because Vincent had recently strengthened it. The fifth is *Feinberg's hiker*, the facts of which are as follows.[31] Defendant is hiking through the woods when an unexpected, sudden, and severe storm arises. She breaks into plaintiff's cabin, and holes up for three days until the storm abates, during which time she eats the cabin owner's food and burns his furniture in the fireplace.

According to the doctrine of necessity, the defendant is liable in *Vincent*, *Vincent II*, and *Feinberg's hiker*, but not *Vincent III* or *Vincent IV*. For the purposes of this paper, I will take the intuitions that inform these holdings to be decisive authority as against any account that yields contrary outcomes. That is, I will take these outcomes of the five cases to be data whose

29. Finan & Ritson, *supra* note 10, at 7.
30. *Vincent*, 124 N.W. at 221.
31. Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. 93, 102 (1978).

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accomodation is a necessary condition of the acceptability of an account of the doctrine of necessity.

THE FIRST HURDLE

The fatal flaw in the restitutionary account, I will argue, lies in the fact that the idea that the loss suffered by Vincent correlates to a gain for the Lake Erie Transportation Co. does not withstand scrutiny. But there is a conceptually prefatory hurdle that must be crossed before we can get to this question. As we have seen, the tort analysis of *Vincent* must answer the question, How can there be liability for a loss caused without fault? The restitutionary analysis faces an analogous question: How can there be an enrichment, given that there was a right?

Without qualification, this question seems to raise no puzzle at all. In many contexts, the coexistence of a right and an enrichment occasions no conceptual tension. For example, there is nothing odd about saying that I enjoy a gain when I take possession of something I have purchased (especially if I got it at a bargain). But restitution takes notice only of gains that are in some sense gratuitous. Think of the paradigm example. If the mistaken payment stayed with the defendant, it would be a windfall. In other words, restitution ordinarily takes an interest only in transfers the assumption of title to which proceeds, on Hohfeldian terms, by the assertion of a privilege, rather than of a right.[32] Here we bring to bear on the analysis the condition I stipulated above that an acceptable account of Vincent-liability must respect Ploof-liability. Ploof-liability entails (or is entailed by) the fact that the imperilled trespasser trespasses as of right. So how could she have been enriched?

The answer lies, presumably, in the details. We can start by getting more fine grained about property rights. A promising route out of the dilemma begins with the distinction between property rules and liability rules.[33] It is best to think of these rules as transaction norms, as norms that specify the terms by which a transfer is legitimated.[34] If A's entitlement to *x* is protected by or consists in a property rule, then A's consent to the transfer of *x* to B is a necessary and sufficient condition of B's legitimate assumption of title of *x*. If A's entitlement to *x* is protected by or consists in a liability rule, then B's assumption of title to *x* is legitimated by B's compensation of A for *x's*

32. It seems to me that this idea is captured in the Canadian formulation of unjust enrichment, according to which, for the plaintiff to succeed in an action in unjust enrichment, "the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason—such as a contract or disposition of law—for the enrichment." Rathwell v. Rathwell, [1978] 2 S.C.R. 436 at 455. A "juristic reason" would be a reason, in the terms of the present analysis, that entitled A to the enrichment at issue as of right.

33. On which, *see* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Jules Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L. J. 1335 (1986).

34. Coleman & Kraus, *Supra* note 33.

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value, regardless of whether A consented or would have consented to its transfer.[35] We might then say that what necessity does is convert the status of the dockowner's property rights. Under ordinary conditions those rights are subject to property rules. In the face of the pressing needs of the imperilled trespasser, the transaction norms that govern the dockowner's property rights are downgraded to liability rules. Thus the apparent tension in the coexistence of the right and the enrichment disappears.

But note, first, that this account shifts the terms of analysis, on two counts. First, it blurs the distinction between a tort and a restitutionary analysis of necessity. The claim, that is, is that the imperilled trespasser's trespass to and/or conversion of the property owner's property is legitimated upon *compensation* for losses imposed.[36] Second, the right to trespass on this account in a sense awaits the remedy, whereas *Ploof* tells us that the right proceeds from the peril.

More importantly, the property-liability rule analysis cannot in itself explain why liability is owed only for the destructive costs of the imperilled trespasser's trespass. That is, one might expect on the property-liability rule account that Vincent would be owed something for the trespass simpliciter, say rent for the use of the dock after such time as the contract between Vincent and the Lake Erie Transportation Co. expired.[37] Drawing the line between those costs for which the imperilled trespasser is liable and those for which she is not requires attending to a different set of distinctions within property rights.[38]

35. The two formulations, "is protected by" and "consists in," correspond to the Calabresi-Melamed and Coleman-Kraus interpretations of property and liability rules, respectively, *supra* note 33. On the Calabresi and Melamed model, private law starts by assigning entitlements, and then assigns the means by which they are protected. The property/liability rule distinction applies to the latter step. Consider nuisance. We can say that I have an entitlement to clean air, and then ask whether an upstream would-be polluter may violate my entitlement only if he sought and received my permission to do so, or whether he may pollute on the condition that I be compensated for my loss. If the former, my entitlement is protected by a property rule; if the latter, it is protected by a liability rule. But, Coleman and Kraus ask, in effect, in what does the entitlement consist if not simply in enjoying the standing to demand one or the other? The question, whether property and liability rules protect rather than constitute rights, is an important one, but it can be set aside here. The puzzle to which I point is a problem under either interpretation.

36. The idea that under circumstances of necessity, the dockowner's property is protected by liability rules rather than property rules is the flip side of the idea that the imperilled trespasser is subject to what Keeton, *supra* note 6, called "conditional fault." On the idea of conditional fault *see* Judith Thomson, *Rights and Compensation*, 14 NOÛS 3 (1980); Howard Klepper, *Torts of Necessity: A Moral Theory of Compensation*, 9 LAW & PHIL. 223 (1990).

37. The Court in *Vincent* assumed that the contract had expired by the time the storm arose.

38. Benjamin Zipursky pointed out to me that the case against the properly-liability rule analysis here is weakened by the fact that ordinarily damages for trespass are measured by the destructive costs of the trespass. It follows that the outcome of *Vincent* could be reached by the ordinary application of the law of trespass. But the fact remains that the tort of trespass in principles supports recovery in the absence of proof of loss, and so reminds us that the property owner's right to exclude is protected by, or consists in, a property rule. In some cases damages serve simply to vindicate that right rather than repair the losses occasioned by its invasion. But as the existence of Ploof-liability attests, that right is trumped or limited by the right of necessity.

The distinctions I have in mind proceed from the familiar idea of property as a bundle of rights. More than one idea is contained in this image. The first is the semantico-ontological claim that "property" refers to rights not things. The second idea is the relevant one here: To claim that *x* is my property is to assert that I enjoy several rights as against others with respect to *x,* rights which can be separated and grouped in accordance with the status of my possession and title. The question of which sticks ordinarily comprise this bundle—or, less metaphorically, of what the incidents of property are—is an open one.[39] But here we can stick with the standard account, according to which there are three or three groups: the right(s) to exclusion, the right(s) to use, and the right(s) to transfer.[40] We can say that in face of the pressing needs of the imperilled trespasser, the property owner surrenders the right to exclude and some rights (or some of the right) to use, such use, that is, as it required to escape the peril. She retains the remaining rights to use and the right to transfer—the crew of the Reynolds could not have wilfully damaged Vincent's dock for no reason, or put it up for sale as the storm raged. Thus the right and the enrichment are compatible because the right was to less than was taken.

But this solution is easier to state in the abstract than it is to spell out in terms of the facts. Let us start with *Vincent.* The bundle of rights account seems to require that we say that the crew of the Reynolds did two things: remain moored to the dock, and damage the dock. This distinction might be questioned on two grounds.[41] One might argue, first of all, that such proliferation of events offends ordinary action-theoretic intuitions.[42] Friends of the bundle of rights account might respond that such intuitions have no purchase here. The line can be drawn easily enough: We can, after all, clearly distinguish between the cost to the dockowner in *Vincent III,* where the dock suffers no damage, and in *Vincent.* The difference between the two is the enrichment we are seeking, and the line will come out on a sufficiently fine-grained analysis of the bundle of rights.

39. The locus classicus is A.M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE (A.G. Guest ed., 1961). The "bundle of rights" theory of property is often characterized as a conjunction of Honoré's analysis of the incidents of property in this paper and Wesley Hohfeld's analysis of the concept of "right" in *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,* 23 YALE L. J. 16 (1913). For a recent review of the literature and issues surrounding this idea, *see* J.E. Penner, *The "Bundle of Rights" Picture of Property,* 43 UCLA L. REV. 711 (1996).

40. Richard A. Epstein, *Property and Necessity,* 13 HARV. J. L. & PUB. POL'Y 2 (1990).

41. But not on a third, that "remaining moored at the dock" is not an action. Omissions are noncontroversially causes here. The majority in *Vincent* made much of the fact that the crew replaced the lines that held the Reynolds moored, and so did *something.* But, as Lewis J. argued in dissent, this is inconsistent with the majority's own analysis. The majority rejected the idea that the captain of the Reynolds was at fault for failing to anticipate the severity of the storm and so for failing to seek a place of safety earlier. But then he could not have been at fault for not using stronger cables in the first place. Thus the actions of the crew in replacing the lines can not have the legal significance assigned to them in the majority opinion. *Vincent,* 124 N.W. at 222.

42. See Finan & Ritson, *supra* note 10, at 6.

But a deeper kind of consideration might be brought to bear on the question. Even if the line between keeping the ship moored and damaging the dock can be drawn as a matter of action-theoretic fact, it cannot, one might argue, be drawn as a matter of law. To insist on the legal relevance of the distinction between remaining moored to the dock and damaging the dock seems to amount to rejecting the substance of the defendant's claim of necessity. That claim consists, at least in part, in displacing responsibility for the fact that remaining moored to the dock meant damaging it to the circumstances in which the defendants found themselves.

I think there is something important captured in this response, but it is not without problems. First of all, it has an air of fiat about it. Second, and more importantly, it may say too much. It looks close to an argument against Vincent-liability altogether: If the circumstances bear responsibility (so to speak) for the damage, then perhaps all grounds for liability are barred. But the response is onto something. The point is more easily made in the context of cases like *Feinberg's hiker.* There the distinction between using and using up (as it were) cannot be drawn at all. The right extends, that is, to consuming—the limit of use—or to nothing at all. But the liability is for the value of the consumed goods. So we cannot set apart the stick that was inappropriately taken from the bundle.

Above I said that a condition of an acceptable account of Vincent-liability is that it accounts for the outcomes in the five cases with which I am working. On this standard, then, the bundle of rights account fails. But I think the point is stronger: What the *Feinberg's hiker* counterexample shows is that the extent to which it looks like the sticks in the bundle can be separated in *Vincent* will turn out to be illusory when we attend to the details.

IN WHAT DID THE ENRICHMENT CONSIST?

But let us suppose that a closer look at the property-theoretic details here will yield an acceptable account of the coexistence of the right and the enrichment.[43] A more serious—and, I think, intractable—problem remains, namely, identifying a gain to the Lake Erie Transportation Co. that corre-

43. For example, Arthur Ripstein draws the relevant line between uses to which the crew of the Reynolds put the dock, rather than, as I have, between things the crew did. The right of necessity, on Ripstein's account, authorized the use of the dock as a mooring in a storm, but not as an impact absorber. Ripstein, *supra* note 10, at 122. This construal avoids some of the action-theoretic problems at issue here, as it is easier to say that in one action A used a thing in two ways, one permissible and the other not, than it is to say of that action that it is at once permissible and impermissible. Perhaps this is compatible with the defendant's claim that the circumstances forced the collapse of the two uses. But it seems ad hoc: The plaintiffs *were* free, after all, to use the dock as an impact absorber inasmuch as ships ordinarily do when moored to a dock; the problem here (not obviously thereby elucidated) is that that use caused damage. Furthermore, this analysis cannot accommodate *Feinberg's hiker,* in which the authorized use of the plaintiff's chattels and the use for which the defendant is liable was the same.

lates to the loss to Vincent. More precisely, the question is: If here the gain to the defendant is measured by the loss to the plaintiff—that is, the damage to the dock—in what, exactly, did the enrichment to the defendant consist?

We have already seen one answer to this question in the bundle of rights account. That account answers the question, How can there be an enrichment, given that there was a right? by providing an analysis of property rights that permits us to limit the rights to less than was taken. The flipside of the account is thus an answer to the question, In what did the enrichment consist?, namely, in taking a stick from the bundle to which the right of necessity did not confer entitlement. We have seen that, at least on the traditional disaggregation of the bundle of rights, this will not do, as most vividly illustrated in the case of *Feinberg's hiker.* In this section I will consider two other accounts of the entitlement in *Vincent.* I will explore a third, Ernest Weinrib's, in the two sections that follow.

On the first account, the gain consists in the continued existence of the boat. There are two problems with this idea. The first is that, as Weinrib points out, the Lake Erie Transportation Co. already owned the boat, so they could not have been enriched by its continued existence.[44] The second is that were this the gain, than there would be no liability in *Vincent II,* where the boat was lost. But this cannot be right. If the gain to the shipowner correlates with the loss to Vincent, then the fate of the ship should be irrelevant to whether whatever it was that was transferred from the plaintiff to the defendant was in fact transferred, given, ex hypothesi, that that transfer (somehow) consisted in part in the damage caused to the dock.[45] The transaction at issue, we might say, was completed at the point that the dock was damaged.[46]

Alternatively, we might say that the enrichment consisted in the increased chance that the ship would survive.[47] This gain was enjoyed by the defendant in both *Vincent* and *Vincent II.* The idea seems plausible enough; as Finan and Ritson put it, "[i]f one steals a lottery ticket, he can hardly claim he took nothing of value because the ticket turned out not to be a winner."[48] The problem is that if this was the gain, it was also enjoyed by the defen-

44. Weinrib, *supra* note 10, at 198.

45. It may seem odd to say that part of the transfer consisted in the damage to the dock. But this follows from the idea that the gain to the ship can be measured by the damage to the dock.

46. Palmer argues that even though it is not explicit on this point, the *Restitution* would support restitution in both *Vincent* and *Vincent II,* in each case measured by the damage inflicted on the plaintiff. On his account, this is the end of the matter, as this "almost wholly obliterates the distinction between gain to the defendant and loss to the plaintiff, a distinction which is fundamental in the law of restitution." Palmer, *supra* note 26, at 140.

47. Finan and Ritson support this idea, *supra* note 10, at 7, n.20. Keeton, *supra* note 6, at 411, argues that this is the only way to make sense of *Vincent* as a restitutionary case. The drafters of the *Restatement* were hesitant to accept the decreased chance of injury as an enrichment—or so much is implied by their characterization of a physician's failed attempt to save someone's life as a case in which the patient was not enriched. *See* comment (e) to § 1.

48. Finan & Ritson, *id.*

dants in *Vincent III*, where the storm was that much less severe as to spare the damage to the dock (on the assumption that the fact that the dock's being damaged in *Vincent* offered no greater security to the Reynolds; if anything, the opposite seems true). But the imperilled trespasser is subject to no liability in *Vincent III*.[49]

One might respond that *Vincent* was not *Vincent III*, and here, after all, the increased chance *was* purchased at the cost to the dock. But consider *Vincent IV*, where, as in *Vincent III*, the dock was spared, but this time because Vincent had recently strengthened it. Let us say he spent $500 doing so. So ex hypothesi, in *Vincent* and *Vincent IV* the cost of having the dock in working condition after the storm was the same. One might insist that the timing of the expenditure is legally salient, but I do not see how it can be. If defendant's gain is the decreased chance that the ship will be lost, it is enjoyed by the Lake Erie Transportation Co. in either case. The increased chance account thus seems to entail that the Lake Erie Transportation Co. would be liable in *Vincent IV* for contributing to the cost Vincent absorbed in making the dock sturdy to degree *x*—where the result was as in *Vincent IV*—instead of to degree *y*—where the result was as in *Vincent*. The fact that the gain in *Vincent IV* is not cognizable in the law of restitution[50] urges the conceptualization of liability in *Vincent* as compensation for losses rather than as restitution of gains.

But perhaps I have misapprehended the nature of the gains and losses at issue here. Both the continued existence of the ship and the increased chance of the ship's survival are *material* gains, gains that is, to the defendant's holdings. The nature of the gain in the bundle of rights account is somewhat more complex. The idea there, recall, was that the gain consisted in taking a stick from the bundle for which the right of necessity did not confer entitlement. "Bundle" and "sticks" are, of course, metaphors, and thus so too is this characterization of the enrichment. In *Vincent*, the metaphor is cashed out in material terms by drawing a line between the damage to the dock and its mere use, and identifying the enrichment with the former. But perhaps we ought to interpret the metaphor differently. Taking the stick, again, is a gain to the extent that it amounts to appropri-

49. Vaughan Black suggested to me that this does not speak against the idea that the decreased chance of loss was the enrichment in *Vincent*, because the finding of no liability in *Vincent III* would follow just because there the plaintiff suffered no loss. But I think that if the gain was just the same in both cases, then so too must have been the loss. The corresponding loss could only have been the loss represented by the mere use of the dock. If that were a loss cognizable here (if the right of necessity means anything, it means that it is not), then the damage to the dock *might* be understood to correspond to the defendant's gain. But that does not quite work out either, because on those terms the defendant in *Vincent* might well owe less than the defendant in *Vincent III*, on the assumption that a damaged dock absorbs less of the ship's risk of loss than does one that is not damaged. This does not seem right, and I think that shows that the gain represented by the increased chance of the ship's survival does not correspond to the loss represented by the damage to the dock.

50. Defendant's gain in *Vincent IV* is like the gain to the value of F's house that follows upon the improvements E made to his own property.

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ating a greater entitlement than is conferred by the right of necessity. The enrichment might be thought of, then, as what Weinrib calls a *normative* rather than a material gain. It is on these terms, Weinrib argues, that we can understand *Vincent* as restitutionary. Weinrib's account of *Vincent* is embedded in his account of private law generally, an account that, in turn, is embedded in his reading of Aristotle's account of corrective justice. We will have to begin with the latter, and then work our way back to *Vincent*.

WEINRIB ON ARISTOTLE, CORRECTIVE JUSTICE, AND PRIVATE LAW

Corrective justice is justice in transactions. On Aristotle's account, "the justice in transactions between man and man is a sort of equality . . . and the injustice that sort of inequality."[51] The inequality at issue here expresses itself in a kind of arithmetical proportion, represented by that state of affairs in which one party to a transaction gains at the expense of the other. Here is a simple example. A takes *x* from B without paying for it or otherwise securing the legitimacy of the transfer. The nature of the wrong—and so that in which the inequality consists—explains the nature of the appropriate remedy, and so what it takes to restore equality as between the parties. That is, B's wrongful loss is at once A's wrongful gain; so one transaction, the return of *x*, at once repairs B's loss and undoes A's gain.

Thus, the correlativity of gain and loss in Aristotle's account both explains and justifies the bipolarity of the juridical structure of private law. It explains both why the plaintiff sues the defendant—rather than someone else—and why the defendant is liable to the plaintiff—rather than to someone else. But things are more complicated, both in private law and in Aristotle. There are three questions we need to answer.

The first arises from the fact that private law takes notice of both transactions that result in a loss to the plaintiff unaccompanied by a corresponding gain to the defendant, and transactions that result in a gain to the defendant unaccompanied by a corresponding loss to the plaintiff. Tort law provides examples of the first: If A negligently injures B, in most cases A will realize no gain despite the fact that B suffers a loss. What I above called enrichments by wrong provide examples of the second. Recall the case where C records a song that D composed and did not plan to record; C here realizes a gain despite the fact that D suffers no loss. The first question we need to answer then, is in what do gain and loss consist here such that the correlativity of gain and loss is preserved not only in the theft case, but also in the negligence and enrichment by wrong cases?

The second and third questions derive from Aristotle's own response to this problem. He focuses on cases like battery, where, as he admits, the term "gain" does not seem to capture the defendant's position. In such cases, he

51. Aristotle, *supra* note 17, at 1132a1–2.

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says, mysteriously, "the suffering and the action have been unequally distributed."[52] This suggests that there is a second correlativity at issue here, namely, that of doing and suffering. Furthermore, on Aristotle's account, this correlativity apparently maps onto the first: "[W]hen the suffering has been estimated, the one is called loss and the other gain."[53] So the second question is: In what does this correlativity consist, and how is it related to the correlativity of gain and loss? The final question concerns the baseline of equality against which gain and loss (of either or both sorts) is to be measured. In what does equality consist here?

The answers to these questions fit together in Weinrib's reading of Aristotle and his account of corrective justice in a complex and elegant way. The core of his account is the distinction between material and normative gains and losses. A material gain is a positive change in one's resources; a material loss is the opposite. Normative gains and losses refer, in Weinrib's words, "to discrepancies between what the parties have and what they should have according to the norm governing their interaction."[54] In short, to enjoy a normative gain is to have more than one's due; to suffer a normative loss is to have less than one's due. The relevant correlatively in corrective justice, Weinrib argues, is the correlativity of normative gains and losses.[55] Thus in the negligence example, while there is material loss unaccompanied by material gain, there is correlativity of normative gain and loss: Without remedy, the plaintiff has less than her due; if losses were left where they fell, the defendant would have more than his due. In the enrichment by wrong example, while there is material gain unaccompanied by material loss, there is correlativity of normative gain and loss: Without remedy, the plaintiff has less than her due; if the transaction were uncorrected, the defendant would have more than his due.

So far, this says little. We need to know what the measure of the plaintiff's and defendant's due consists in. This leads us to the second and third questions, which I will take up in inverse order. The plaintiff's and defendant's due is measured against the baseline of equality in whose interruption the wrong consists and in whose restoration the remedy consists. But what sort of equality is at issue here? Note, first, that it cannot be material equality. Even in the theft cases (where there is correlativity of material gain and loss), not only do we not know the comparative resources of the parties, more importantly, we do not need to know it to establish what justice requires. Respecting equality as between the two parties here, Aristotle tells us, requires us to be indifferent to any qualities of the parties that do not

52. *Id.* at 1132a8.

53. *Id.* at 1132a14.

54. Ernest J. Weinrib, *The Gains and Losses of Corrective Justice,* 44 DUKE L. J. 277, 282–83 (1994).

55. Correlatively properly understood entails that the link must be either between material gains and losses or between normative gains and losses. It cannot be the former, because then the domain of private law would extend to human and natural accidents. So it must be the latter. *Id.* at 283–84; Weinrib, *supra* note 10, at 116–17.

manifest themselves in the transaction at issue. As he puts it "it makes no difference whether a good man has defrauded a bad man or a bad man a good one . . . the law looks only to the distinctive character of the injury, and treats the parties as equal."[56] So, again, in what does this equality consist?

Weinrib's answer begins with the idea that on this point, "Aristotle's account of corrective justice is inchoately Kantian."[57] Kant's account of personhood abstracts from particularity in just the way that corrective justice requires on Aristotle's account. The important point here is that this sense of personhood manifests itself in a conception of equality under right that illuminates the idea of the correlativity of normative gains and losses. Let me explain.

The legally (and morally) salient aspect of personhood on Kant's account is our capacity to choose ends and the means to their realization. The doctrine of right sets out the terms under which the state may legitimately coerce persons so conceived. Right, Kant tells us, is "the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom."[58] The idea is that the boundaries of right are set at the points at which my exercise of my freedom is compatible with your exercise of yours. We respect each other as equals, and so interact on terms of equality, when we respect these boundaries. It follows—and this is the crucial point—that according to this idea of equality, duty and right are correlative. A breach of a duty I owe you (let us say the tort duty of care) correlates to an invasion of your right; as Weinrib puts it, "the content of the right is the object of the duty."[59] The Kantian idea of the correlativity of duty and right makes sense both of what Aristotle meant by the correlativity of doing and suffering *and* of Aristotle's (tacit) claim that this correlativity maps onto the correlativity of gain and loss. Consider the negligent injury: The doer (defendant) is linked to the sufferer (plaintiff) by way of the fact that the action or omission in which the wrong consists at once comprised a breach of duty on the defendant's part and an infringement of the plaintiff's right. This is linked to the gain and loss—here is the punch line—in Weinrib's idea that "[c]onsidered normatively, loss refers to the infringement of the plaintiff's right, and gain to the breach of the defendant's duty."[60]

One part of the picture remains to be drawn, namely, the link between wrong and remedy. Let us start with negligence. The important point is that the defendant's duty to the plaintiff persists after its breach. Respecting the plaintiff's right now means undoing the effects of the breach of duty. In Weinrib's words,

56. Aristotle, *supra* note 17, at 1132a 3–5.
57. Weinrib, *supra* note 10, at 83.
58. Immanuel Kant, THE METAPHYSICS OF MORALS 24 (Mary Gregor ed., 1996).
59. Weinrib, *supra* note 10, at 123.
60. *Id.* at 133.

> [j]ust as the plaintiff's right constitutes the subject matter of the defendant's duty, so the wrongful interference with the right entails the duty to repair. Thus tort law places the defendant under the obligation to restore the plaintiff, so far as possible, to the position the plaintiff would have been in had the wrong not been committed.[61]

The same considerations apply, by parity of reasoning, to the cases of enrichment by wrong. There the defendant in breach of duty realized a gain at the plaintiff's expense. Respecting that duty after the wrongful transfer means giving up that enrichment. Thus in terms of both wrong and remedy, tort and enrichment for wrong are the mirror images of each other.

WEINRIB ON VINCENT

The account so far only sets the background for understanding *Vincent*. There the defendant did no wrong, and so an account of liability for enrichment by wrong will not illuminate the problem. So one more part of the picture needs to be filled in, namely, Weinrib's account of cases of the kind for which I have reserved the term unjust enrichment. Inasmuch as such cases conform to corrective justice, their structure must conform to the correlativity of duty and right. But in cases of unjust enrichment (again, narrowly construed, and so in contrast with cases of enrichment by wrong), the defendant breaches no duty owed to the plaintiff. So the analysis must proceed, at least initially, on other terms.

On Weinrib's account liability here follows from the fact that "corrective justice, being in Aristotle's words 'towards another,' assumes the mutual externality of the parties and the consequent separateness of their interests."[62] Thus, corrective justice recognizes only self-imposed obligations of enrichment. The mistaken payer undertakes no such obligation; as I noted above, if the payment were to stay with the payee it would be a windfall. Insofar as they are not the product of a "donative intent," mistaken payments are juridically ineffective and thus their restitution can be demanded under corrective justice.

> In such circumstances [i.e., mistaken payment], the enrichment represents something that is rightfully the plaintiff's. Because its retention by the defendant is an infringement of the plaintiff's right, the defendant has a duty to restore it to the plaintiff. Liability is the juridical confirmation that, by holding on to the factual gain, the defendant breaches a duty that is correlative to the plaintiff's right.[63]

Let us go through this carefully.

61. *Id.* at 135.
62. *Id.* at 140
63. *Id.* at 141.

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Note, first, that the presence of a donative intention in the plaintiff's part is overinclusive as a criterion to sort those enrichments that attract restitutionary relief from those that do not. Consider, first, the case I discussed above of the homeowner who brings a claim in restitution against his neighbor whose property enjoyed an increase in value consequent upon the plaintiff's improvement to his house. As we saw, the law of restitution is indifferent to the conferral of such externalities, regardless of whether they were the expression of the plaintiff's donative intent. Perhaps because in this case it is difficult to see what the plaintiff has given up, this is not an example of the sort of transfer to which the donative intent criterion applies, so perhaps this is not a telling counterexample. But consider, then, the case of someone who must surrender an easement over his property to someone who claims it as of prescriptive right. The former trespasser has gained something, and the property owner has lost something, and it is the same thing, so there has been an uncontroversial transfer from one to the other. So here there has been a juridically effective transfer in the absence of the property owner's donative intent.

But let us set this to the side. The problems run more deeply, beginning with Weinrib's identification of the injustice with the retention by the defendant of the enrichment she has gained at the plaintiff's expense. As we saw above, this cannot be the locus of the injustice, because on this measure the defendant is just like a defendant who refuses to obey a court order to compensate the victim of his tortious wrongdoing. Perhaps this is merely a matter of formulation, but it points to a conceptual puzzle in the law of restitution, a puzzle that Weinrib's account glosses over. The puzzle manifests itself in Weinrib's account with his identification of the correlativity of right and duty here with the plaintiff's right to compensation and the defendant's duty to repair. The problem is, From where do these rights and duties issue?

The question is a deep one. There is an important point of disanalogy between the structure of, on the one hand, cases of unjust enrichment and, on the other, cases of negligence and enrichment by wrong. Recall Weinrib's account of the correlativity of remedial duty and right in the latter. There, as we saw, the plaintiff's right to remedy in some sense derived from the right in whose violation the defendant's breach of duty consisted. We can think of this in either of two ways. First, we can think of the plaintiff's right as somehow persisting through the event in which the defendant's breach consisted. Before that breach, that right articulated itself (in our examples) in a right either, in the context of negligence, to be treated in accordance with the standard of care, or, in the context of enrichment by wrong, inter alia to be free from the defendant's trespass to or conversion of one's property. After the breach, that right articulates itself in the remedial right to compensation for losses, or disgorgement of gains. Alternatively, we can think of the latter, remedial, right as a second order right, somehow triggered by the defendant's violation of the plaintiff's first order,

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substantive, right. Cases of unjust enrichment conform to neither of these interpretations. The point—which I have now belabored—is that in such cases the defendant has done no wrong and so breached no duty operative at the moment of the transfer at issue. Thus, there is nothing to which the remedial rights and duties can be attached.

The problem is a deep one because this category of case thus, on Weinrib's account, runs afoul of corrective justice.[64] That is because liability for unjust enrichment shares with strict liability that feature which makes the latter inconsistent with corrective justice. Strict liability is, in Weinrib's words, an instance of "right without duty."[65] That is, in cases of strict liability, the plaintiff can assert a right to compensation for a (so-called, we might say) wrong that did not consist in a breach of a duty on the defendant's part operative at the time that the defendant imposed the disputed cost on the plaintiff. Thus, strict liability violates the correlativity of duty and right at the heart of corrective justice. But on this measure, so too does liability for unjust enrichment.

But let us suppose that cases like mistaken payment can somehow be accommodated in corrective justice on Weinrib's account. There remains the question whether Weinrib's analysis—in particular, the distinction between material and normative gains and losses—can show that *Vincent* shares with such cases their legally salient features. So let us turn to Weinrib's account of *Vincent*.

Vincent is a case of unjust enrichment on Weinrib's account because the use of the dock was not a gift but was instead mandated by law, and so was not an expression of the plaintiff's donative intent. We have seen that the donative intent criterion is overinclusive. But let us proceed. In what, on Weinrib's account, did the gain to the Lake Erie Transportation Co. consist? As we saw above, Weinrib rejects the idea that the enrichment consisted in the continued existence of the boat. We are now in a better position to appreciate his argument. His point is that even if we might decidely say that the ship would have sunk had it not remained moored at the dock, and so that in some sense the continued existence of the boat represented a gain, insofar as the boat was already owned by the Lake Erie Transportation Co., the gain would have been merely material, as the Company was all along entitled to the ship. That is to say, "although the boat owner would have poorer had the boat been lost, he realized no normative gain—no excess over what was normatively his by right—by virtue of the continued existence of what already belonged to him."[66] So the locus of the (normative) gain must be in something that was not something to which the defendant already had a right, namely, the dock. While lawful, the defendant's use of

64. *See* Kenneth W. Simons, *Justification in Private Law*, 81 CORNELL L. R. 698, 732–33 (1996); Peter Cane, *Corrective Justice and Correlativity in Private Law*, 16 OXFORD J. LEGAL STUD. 471, 486–87 (1996).

65. Weinrib, *supra* note 10, at 178.

66. *Id.* at 198.

the dock was at the plaintiff's expense because of the damage the dock thereby suffered. Thus "the defendant's use of the dock is a benefit measurable by the damages that are its attendant costs."[67]

The problem is that nothing in this account explains how and why, exactly, the use (and so the gain) is measurable in terms of the damage (and so the loss); and this link is just what the restitutionary account must explain. Furthermore, this link seems all the more mysterious when the question is cast in terms of Weinrib's analysis. Even in the domain of negligence law, to which Weinrib's account of corrective justice seems best suited, the link between normative and material loss is something of a puzzle. If the plaintiff's normative loss is correlative with the defendant's normative gain, and the latter is identified with the defendant's breach of duty, then the quantification of the plaintiff's normative loss in terms of her material loss seems to throw into sharp relief the problem of, in Jeremy Waldron's words, "moments of carelessness and massive loss."[68] That is, it may seem difficult to reconcile the claim (to which Weinrib's account in the end amounts) that the real locus of liability is the defendant's wrongdoing, with the morally arbitrary effects of outcome luck.[69] This may just be the bitter pill of tort law. But the flip side is that it is difficult to see why, on Weinrib's account, the imposition of normative losses must await their materialization in material losses to be actionable. The important point here is that the extent to which the link between the material and the normative is problematic in tort (and so correlatively in cases of enrichment by wrong), it is all the more mysterious in *Vincent*, where we are asked to measure the defendant's normative gain by the plaintiff's material loss.

More problematic still is Weinrib's identification of the enrichment with the use of the dock *simpliciter*. Adopting this analysis would require redrawing the contours of the doctrine of necessity. If the (mere) use of the dock is the enrichment, then the defendant would be liable not only in *Vincent*, but in all its variations, and Putnam would have had a cause of action against Ploof. So Weinrib's account of the enrichment is overinclusive. But perhaps this is a misreading. Weinrib suggests that we can set apart the defendant's use of the dock in *Vincent* in particular because there the use of the dock "was at the plaintiff's expense *because of* the damage the dock thereby

67. *Id.* at 198.

68. Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW (David Owen ed., 1995).

69. There are other difficulties here. The plaintiff's right to *restitutio in integrum* in the context of an account that identifies the locus of liability with the wrong seems to require erasing all the effects of the wrong. But as Jules Coleman argues, this leads to a kind of remedial indeterminacy. Suppose, he suggests, on the way to the airport my taxi driver negligently gets into an accident. I miss my plane. It turns out that the plane crashes and everyone on board dies. Erasing all of the effects of the negligence seems to require my death. (Thus, Coleman suggests, "harm" must be somehow built into the definition of corrective justice.) Coleman, *supra* note 8, at 322–24; Jules Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 441 (1992).

suffered."[70] But there are two problems with this claim. First, without more—What is the force of the "because"?—this argument depends upon, rather than elucidates, the distinction between those costs that the Lake Erie Transportation Co. was permitted to impose upon Vincent as of right and those which it was not. And secondly—this is the more important point—showing that the use of the dock was at the expense of the plaintiff in some but not all cases is not yet to show that the expense correlates to a gain on the defendant's part in those cases.

The idea that the concept of normative gain will mark for us the line between permissible and impermissible material gains seems to be on to something, the same thing, perhaps, as is captured in the idea that the crew of the Reynolds grasped more of the bundle of rights than the right of necessity entitled them to. But it is not clear how calling this a normative gain does anything other than register the idea that the defendant is liable for the damage to the dock. This is especially so in cases of unjust enrichment, where, as we have seen, the defendant's remedial duty attaches to no breach of duty operative at the time and point of the transfer at issue. The identification of material losses and gains is properly the starting point of the restitutionary inquiry. But the identification of a normative gain in that transaction is only another way of stating its conclusion.

CONCLUSION

None of the accounts of the enrichment in *Vincent* I have considered succeeds in capturing the outcomes of *Ploof*, *Vincent* and its variations, and *Feinberg's hiker.* I think these accounts collectively exhaust the possibilities. Thus, I conclude, the restitutionary account of necessity fails.

There is, of course, an alternative interpretation of this result. One might argue that the doctrine of restitution forces us to reconsider the outcomes of these cases, and with them the doctrine of necessity and the intuitions that have guided this analysis. Alternatively, one might argue that the right understanding of tort doctrine, or a closer analysis or property rights, will, after all, vindicate that doctrine or those intuitions: It would be surprising if the plainly fair outcome of *Vincent* can only be explained on a sui generis doctrine of civil liability (if indeed such an account would count as an explanation). The consideration of these possibilities, however, will have to await another occasion.

70. Weinrib, *supra* note 10, at 198.

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