



Title: Corrective Justice and Deterrence: Can They Co-Exist?

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Abstract:

Abstract—Restitutionary justice and deterrence have completely different types of justification. Although deterrence and restitutionary justice are quite different, this does not prevent the two from sharing the same means to their different ends, namely, stripping the defendant of the gain which he has made from his breach of contract and awarding it to the claimant. But the crucial question is: how can these diverse ideas be joined in a coherent unified theory? This article aims to deliver a mixed theory of restitutionary justice and deterrence in contract law.

CORRECTIVE JUSTICE AND DETERRENCE: CAN THEY CO-EXIST?

Tareq Al-Tawil*

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1. INTRODUCTION

The measure of compensatory damages for breach of contract is limited to the claimant's direct and/or consequential loss, which may flow from the violation of his right to performance. However, in some contractual breaches, the defendant may make a gain or benefit without causing any financial loss to the claimant. Therefore, if the traditional measure of damages were applied, no compensatory damages at all would be awarded, because the claimant is no worse off than if the contract had been fulfilled and restitution for wrongs is thus the only remedy available to the claimant. This remedy is directed towards the defendant's gain and is triggered by a wrongful action. It, in other words, addresses the defendant's gain independently of any further considerations; for example the claimant suffering a financial loss. It is argued that the remedy of restitution deters deliberate and opportunistic wrongdoing.¹ Breaching a contract by the defendant in order to make profit will not be tempting idea if there is a strong possibility of him being asked to hand over his profit to the claimant. Therefore, the availability of restitution will encourage performance as it removes the temptation to breach. While the deterrent purpose can explain why the defendant should not profit from their wrong, and so why they have to be deprived of their profits, it fails to explain why profits must be assigned to the claimant, rather than to the state or someone or something else. It is true that in the case of deterrence (or punishment) there is a connection between the wrong, the perpetrator and the legal response. Nevertheless, careful consideration shows us that the innocent party — the claimant — stays strange to (or out of) this connection, given that the defendant — the wrongdoer — is punished independently of their relationship to the claimant. For this reason, awarding restitutionary damages ought not to be conceived of as serving to facilitate a deterrent or punitive purpose only, for it cannot explain why the claimant, of all people, should receive the defendant's profit. To put this differently, 'it fails to link the damages that the [claimant] receives to the normative quality of the defendant's wrong'² or fails to 'create party-related reasons to act'.³

Generally speaking, is it possible that linking the deterrent argument with the facilitative institution argument will help us in explaining why the defendant has to be deprived of their profits and why profits must be given and assigned to the claimant, rather than anyone else? The answer is 'no'.

¹ Daniel Friedmann, 'Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong' (1980) 80 *Columbia L Rev* 504, 513; Daniel Friedmann, 'Restitution of Profits Gained by a Party in Breach of Contract' (1988) 104 *LQ Rev* 383. See also Richard O'Dair, 'Remedies for Breach of Contract: A Wrong Turn' (1993) *Restitution L Rev* 31, 38; James Edelman, 'Restitutionary Damages and Disgorgement Damages for Breach of Contract' (2000) *Restitution L Rev* 129, 136; Peter Jaffey, *The Nature and Scope of Restitution* (Hart Publishing 2000) 374-76; Mark Gergen, 'What Renders Enrichment Unjust?' (2001) 79 *Texas L Rev* 1927. According to Birks, that restitution is based on deterrence and punishment, is not seen as inconsistent, because a defendant is necessarily punished to some degree by a monetary award and is likely to consider being obliged to pay considerable damages under civil law as no less burdensome and ruinous than a fine or other penalty under criminal law. Peter Birks, 'Civil Wrongs: A New World' in *Butterworths Lectures 1990-1991* (Butterworths 1992) 55, 86.

² Ernest Weinrib, 'Restitutionary damages as Corrective Justice' (2000) 1 *Theoretical Inquires in Law* 1, 6.

³ Francesco Giglio, *The Foundations of Restitution for Wrongs* (Hart Publishing 2007) 195, 202. It is also not convincing to say that awarding restitutionary damages is necessary to deter future contracting parties from committing opportunistic breaches. It may be argued that contracting parties do not know the details of the law or that remedial rules have no significant influence on how contracting parties behave, because they hope that the wrongful act which has enriched them but not impoverished the other party will not be known about, or if it is known about, that the other party will be reluctant to bring legal action against them.

Daniel Friedmann argues that the public interest requires a general right to recover profits derived from breach of contract.⁴ He also argues, with regard to the facilitative institution of contract, that institutional harm necessitates disgorging the defendant of the profits that he has made from his breach of contract. In this view, the aim of restitutionary damages is not to protect the innocent party of a wrong, but rather to preserve and protect facilitative institutions. There can be little doubt that the remedy of restitution offers excellent support to the institution of contracting, because it deters deliberate wrongdoing. In the words of Ralph Cunnington, 'Without such a remedy [*ie* restitutionary damages], the bargained-for interest in performance would be left hopelessly unprotected and society's confidence in the institution of contracting would be severely undermined'.⁵ However, the objection faced by the deterrent argument applies with equal force to the facilitative institution argument. More specifically, if it is argued that the aim of the wrong is the protection against institutional harm, one can understand why the defendant, that is, the person who has perpetrated the wrong, has an obligation on their part to pay restitutionary damages. Nevertheless, the matter that remains ambiguous is the reason why the claimant has to be the one who receives such damages, them being the one who enjoys the benefit from such an obligation. Should the aim of the restitutionary obligation imposed on the defendant be to protect an institutional harm, then this result undoubtedly can be accomplished by requiring the defendant to pay damages to the state or, as Francesco Giglio says, 'to a fund for the protection of certain legal institutions'.⁶ The facilitative institution argument does not manage to tie both the defendant to the claimant and the remedy to the wrong that has been committed between the parties.

Anyway, it is not a very convincing argument to say that awarding restitutionary damages is necessary to deter future breaching parties. The following example will elucidate this. Suppose that Britney Spears offers employees good terms of employment, but in every case, from gardener to personal assistant, extracts the same contractual promise not to make money by selling (or disclosing) stories or pictures to the media. The personal assistant, nonetheless, breaks his promise by disclosing stories and pictures about his employer's private life. He is willing to pay compensation to Britney Spears because he believes that the gain he will make from his wrongful breach of contract will far outweigh (or exceed) the monetary award. It is clear, then, that the possibility of having to pay compensatory damages will not deter this personal assistant from going ahead with his plan to disclose the stories and pictures.⁷

James Edelman argues that a restitutionary award would lead to a more appropriate result.⁸ Accordingly, in the current example, he believes that the personal assistant will be reluctant to disclose the stories and pictures, since he bears in mind the possibility that he could be obliged to disgorge his gain. Nevertheless, it is difficult to see why this would happen. This is because if the personal assistant considered the possibility of Britney Spears bringing

⁴ Daniel Friedmann, 'Restitution for Wrongs: The Basis of Liability' in William Cornish and others (eds), *Restitution—Past, Present, and Future: Essays in Honour of Gareth Jones* (Hart Publishing 1998) 133.

⁵ Ralph Cunnington, 'The Measure and Availability of Gain-Based Damages for Breach of Contract' in Djakhongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing 2008) 242. As Ian Jackman argues: 'the rationale for the right to restitution for wrongs is the protection of a variety of private legal facilities, or facilitative institutions, namely private property, relationships of trust and confidence, and (with some qualification) contracts'. Ian Jackman, 'Restitution for Wrongs' (1989) 48 CLJ 302, 302.

⁶ Giglio (n 3) 202.

⁷ *ibid* 208.

⁸ James Edelman, *Gain-based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing 2002) 83.

legal action requiring him to pay restitutionary damages, then surely he would also consider that the worse thing that could ever happen to him in the light of this legal action would be placing him in the exact financial situation in which he would have been if the stories and pictures concerned had not been disclosed in the first place. The aim of awarding restitutionary damages is not to punish the wrongdoer, but rather to deprive him of the wrongful gain.⁹

Therefore, the personal assistant may still seek to publish the stories and pictures, bearing the risk of having to pay restitutionary damages. In fact, he may even be more willing and attracted to do so, particularly if he knows that, under the current system, the issue of whether the claimant should be granted a restitutionary remedy in cases where he suffers no pecuniary loss remains unresolved, pending further discussion (i.e. disputed and left to the discretion of the judge).¹⁰ Edelman does not in fact explain why such an indifferent stance should deter the defendant from committing the wrongful breach, or indeed ensure a 'greater level of deterrence [...] than compensatory damages can produce.'¹¹ Nor does he sufficiently explain why, of all kinds of relationship problems, the legal system should award restitutionary damages only for fiduciary relationships, or why they deserve such protection.¹²

Awarding restitutionary damages should not, therefore, be seen as serving a deterrent or punitive function only. Restitution should also be seen as a way of attaining justice between the parties (ie restitutionary justice). What follows is that apart from seeking to lay down standards for individual actions and offer incentives to behave and act in accordance with those standards (i.e. the deterrence objective), courts also seek to achieve justice between the parties.

Giglio argues that restitutionary justice is a particular application of corrective justice. For him, it does not primarily seek to deter, but deterrence is one of its by-products (or parts).¹³ He apparently seems to suggest that law should be conceived and comprehended through a mixed theory that affirms both corrective justice and deterrence. One might wonder whether such a mixed theory is possible. It may initially appear, given that corrective justice accounts for restitutionary damages and deterrence are genuinely diverse ideas that such distinct principles cannot coherently exist. But this would be a mistake, as will be explained in more detail below.

Before showing how a mixed theory, combining corrective justice and deterrence, can still be unified and coherent, it is necessary to explain how corrective justice can offer an adequate explanation of why the defendant should give up to the claimant, rather than the state (or anyone else), the benefit obtained through his wrongful breach of contract.

2. CORRECTIVE JUSTICE AND RESTITUTION FOR WRONGS

The idea of corrective justice received an early formulation in Aristotle's treatment of justice in *Nicomachean Ethics*, Book V.¹⁴ For Aristotle, corrective justice is the theory of the

⁹ Giglio (n 3) 208.

¹⁰ *ibid.*

¹¹ Edelman (n 8) 83.

¹² Giglio (n 3) 209.

¹³ Francesco Giglio, 'Restitution for Wrongs: A Structural Analysis' (2007) 20 (1) *Canadian J of L and Jurisprudence* 5, 28.

¹⁴ Aristotle, *Nicomachean Ethics* (R Crisp tr, CUP 2000) V, 2-5, 1130a14-1133b28.

mean; more specifically, 'the just, or the equal, is the mean between the more and the less.'¹⁵ Once it is established that the defendant has, as a result of his wrongful act, taken and acquired more than he ought to have—that is, more than the mean—then he must surrender his surplus to the claimant, who has less than the mean, or who has less than what he would have had, had the defendant never acted wrongfully towards him.¹⁶ As a result of the wrong there is an excess (gain) for the defendant, while the claimant endures deficit (loss) as a result of an injustice at the defendant's hands.

That Aristotle refers to the gains and losses of corrective justice normatively, rather than materially or financially, is indisputable. He considers that the equality between the particular parties is disturbed whenever corrective justice is violated. In this way, he lays the complete normative weight of his theory on that equality. The question now to be examined is this: In what regard could the parties possibly be equal? Aristotle provides no clear answer to this crucial question. He simply offers corrective justice as a transactional equality, yet without saying in what respect the parties are equal. The result is that we cannot, in a dialogue, merely state that the defendant's behaviour is an 'injustice', because merely to state this does not provide an argument. We must provide an explanation of why this word arises or is applied in the first place and that requires an account of the kind of equality applicable here, and an account of why it is wrong to disturb it (without justification).

The theory of corrective justice is a philosophical explanation—first outlined by Aristotle and later allegedly incorporated by Immanuel Kant into the notion of natural right—of how justice may be done in private law for both parties.

The Kantian principle of right 'is a philosophy of freedom that starts with the operation of free will conceived as self-determining activity.'¹⁷ In Kant's account, '[t]he fundamental principle applicable to the interaction of self-determining beings is that [one party's freedom of choice to] act [...] should be consistent [or co-exist] with the freedom of whomever the action might affect.'¹⁸ According to Kant, rights—such as contractual performance—are the juridical manifestations of the freedom inherent in self-determining activity.'¹⁹ Action is thus compatible with the freedom of others so long as it is not contrary to their legal rights. If one has a right to contractual performance, the other is morally bound by a corresponding obligation to perform unless the promisee has released him from that obligation. The promisee has control over the choices available to the promisor who bears the corresponding obligation.²⁰ To put this differently, the promisee is in a moral position to determine, by his freedom of choice, the way in which the promisor should behave and in this way to limit the latter's freedom of choice.²¹ In the words of Kant, '[rights are] moral capacities for putting others under obligations.'²²

¹⁵ Giglio (n 13) 22.

¹⁶ *ibid.*

¹⁷ Ernest Weinrib, 'The Gains and Losses of Corrective Justice' (1994) *Duke LJ* 277, 290. See Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor tr, CUP 1991) 40-43.

¹⁸ Weinrib (n 17) 290-291.

¹⁹ *ibid* 291; Kant (n 17) 90-95, 101-103.

²⁰ Eduardo Rivera-López, 'Promises, Expectation, and Rights' (2006) 81 *Chicago-Kent L Rev* 21, 34.

²¹ HLA Hart, 'Are There Any Natural Rights?' (1955) 64 *The Philosophical Rev* 175, 180; Peter Vallentyne, 'Natural Rights and Two Conceptions of Promising' (2006) *Chicago-Kent L Rev* 9, 12.

²² Kant (n 17) 63.

Right and obligation are connected—and so therefore are the promisor and the promisee—by the fact that the substance of the right is the essence of the obligation. The right represents the moral position of the promisee, which is to ensure that he demands and receives just what he has been promised in the contract; the promisee cannot demand more than that. The obligation represents the moral position of the promisor, which is to ensure that he performs no less than what he consented to perform in the contract. If both positions are maintained as stipulated, then the promisor and the promisee are equal. In other words, the equality involves the promisor and the promisee being on an equal footing with respect to their rights and obligations in the contract. The promisor's freedom of action should be capable of coexisting with the freedom of the promisee, which manifests itself in the right to performance, always assuming that the two freedoms must coexist, with the two sides being equal.²³ As Weinrib states:

[T]he parties to a corrective justice transaction are equal in a very peculiar way: the equality abstracts from the particularity of the parties' social rank or moral character to the sheer relationship of wrongdoer and sufferer. Corrective justice treats the parties as equals because all self-determining beings, regardless of rank or character, have equal moral status. The conjunction of right and duty is simply this equality of self-determining beings viewed juridically, from the standpoint of the correlativity of one person's action and its effects on another.²⁴

This statement can be best explained through the following example. Suppose that an employer enters into a contract with his employee prohibiting him from selling and disclosing any confidential information during his term of employment and thereafter. The employee has an obligation, which means that there is something due or owed specifically to the employer, so a legal right arises out of this contract. If the employee breaches his contractual promise to the employer by selling and disclosing confidential information to a third party, the employer will claim that the breach represents a wrong against him, that wrong arising from the claim that he has been unequally, unjustly or harmfully treated in the sense of diminishing his status as a promisee. The employer's moral status to determine, by his freedom of choice, how the employee should use the information (and in this way to limit the latter's freedom of choice to act) has been diminished. Thus understood, the absence of coexistence between these two freedoms would simply mean that the employee will cause normative (or as I call it 'intangible') harm to the employer. In this light, the employee's breach of contract leaves the employer in a normatively disadvantaged situation. The two parties are no longer equal in their moral status.

Unless the employee can undo the wrong or injustice he has committed (in terms of breaching the primary right not to sell and disclose confidential information to a third party), the employer will never be able to re-establish or regain his condition as controller of how the information ought to be used by the employee, and, thereby, as a promisee, with respect to the past infringement of the contractual right. However, it is a foregone conclusion that the wrong committed by the employee cannot be undone. The employer cannot require the employee to refrain from doing what he has already done – 'the past cannot be undone'.²⁵ As Zakrzewski said, '[r]equiring the person owing the duty to abstain

²³ See Samuel Stoljar, 'Keeping promises: the moral and legal obligation' (1988) 14 LS 258, 269.

²⁴ Weinrib (n 17) 292. For a more complete argument of the connection between corrective justice and Kantian right, see Peter Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice, (1992) 77 Iowa LR 515, 601-624; Steven Heyman, 'Aristotle on Political Justice' (1992) 77 Iowa LR 851, 860-63; Weinrib (n 2).

²⁵ Rafal Zakrzewski, *Remedies Reclassified* (OUP 2005) 105.

from doing what he or she has already done would be a fruitless exercise.’²⁶ Therefore, regarding this past infringement, the employer cannot regain his status as a promisee. The freedom of both parties can in no way be returned to a state of coexistence. The state of equality, which involves the employee and the employer being on an equal footing with respect to their rights and obligations in the contract, can no longer be achieved (or restored).

The employer can, it is true, rely on this primary right to regulate future conduct by obtaining an injunction to prevent the employee from committing any further infringements, but this primary right will provide no protection with respect to the infringements already committed. Here, the employer can bring a claim for compensatory damages to make good his pecuniary loss concerning the past infringements – the secondary compensation interest.

Clearly, Ernest Weinrib’s work provides some valuable clues in what respect the parties are equal. His normative approach provides a background to the idea of equality. However, as will be explained shortly, Weinrib’s attempt to situate restitutionary damages within the theoretical framework of corrective justice must be rejected.

3. INTANGIBLE AND TANGIBLE HARMS

If the promisor breaches his obligation to perform—and thus the promisee’s right to performance—he has then acted unequally, unjustly or harmfully against the promisee. For example, in the sense of undermining his position as a promisee, the promisee’s moral status to determine, by his choice, how the promisor should act has been diminished (this will hereinafter be referred to as ‘intangible harm’). The concept of ‘intangible harm’, it can, therefore, be seen, arises in the absence of the coexistence of the freedoms of, or equality between, the two parties, regardless of whether or not the promisor’s breach of promise has actually caused the promisee any financial loss. Stated differently, the promisor’s breach of contract is intangibly harmful to the promisee, not because it necessarily deprives him of a financial interest (although it sometimes, perhaps often, does so), but because it leaves him in a disadvantaged situation: his situation as a promisee has been undermined.²⁷ The ‘intangible harm’ here is thus independent of any material or financial measurement. It is a normative concept, which refers to the disadvantageous position occupied by the promisee as a result of the promisor’s breach of contract.

By compelling the breaching promisor to fulfil his duty to perform, and so the promisee’s right to performance, the court seeks to undo the intangible harm or injustice that the promisor has caused to the promisee. The court also restores to the promisee the privilege of limiting the promisor’s freedom of choice of how to act, which was undermined by the promisor’s behaviour, thereby giving the promisee the performance he contracted for, and protecting his performance interest. The promisee’s interest in having the promise performed is a primary interest, which is effectuated by the recognition of the promisee’s (primary) right that the promisor should perform his side of the contract. This brings about a corresponding (primary) obligation on the promisor to perform. Correctly understood, the performance interest does not seek to prevent or remedy the financial loss that the promisee may suffer by reason of the promisor’s breach of the primary duty. After all, there are cases where, although the promisor’s performance was defective, the promisee suffered no

²⁶ *ibid.*

²⁷ See Giglio (n 13) 25.

financial loss.²⁸ The promisee's claim for compensation could not therefore be linked with his performance interest claim. The performance interest in such cases seeks to make the promisor perform what he has promised, no more, no less. This primary interest is protected if a prohibitory injunction, cost of cure award, or a specific performance remedy is available to the promisee.

There are, therefore, two distinct ways in which the promisor can cause harm to the promisee, each of which is protected in a different way and for a different purpose. The promisee has a secondary compensation interest in not being left worse off by reason of the promisor's breach of primary duty. This interest is effectuated by recognising a right in the promisee that the promisor should compensate the promisee for any financial losses resulting or flowing from failure to perform his primary duty.²⁹ It protects the promisee against another kind of harm, although this time it is tangible: direct and/or consequential loss, which may flow from the violation of the promisee's primary right (hereafter referred to as 'tangible harm'). The secondary interest, thus understood, does not seek to undo the intangible harm or injustice that the promisor has caused to the promisee, and so does not give the promisee the performance he contracted for. Rather, the remedy of compensation, unlike specific performance, cost of cure, or prohibitory injunction, responds to loss resulting from the breach and not to the breach itself.³⁰

The promisee's secondary right does not always require the promisor who infringes a primary duty to make good his pecuniary loss. In other words, it does not always seek to undo the tangible harm that the promisee may suffer by reason of the promisor's breach of contract. This is because there are cases where the promisor's breach allows him to make a gain or benefit without causing any financial loss to the promisee. This idea can also be exemplified by revisiting the example of the employee who enters into a contract with his employer promising him that he (the employee) will not sell and disclose any confidential information to a third party during the term of his employment and thereafter. In the case of an employee's breach of contract allowing him to make a benefit without causing any financial loss to the employer, then the latter can only bring a claim for restitutionary damages. The financial gain is the material embodiment of the injustice committed by the employee upon the employer in terms of violating his primary right.

²⁸ Consider the following example. Suppose that a contractor promises to build a house to certain specifications, one of which is that Brand X pipes are to be used in the plumbing. The contractor builds the house according to the specifications, save that he uses different materials, installing Brand Y pipes rather than Brand X. In order to calculate the claimant's financial loss from this breach, the court must determine what the claimant stood to gain from the performance of the contract. Inasmuch as Brand Y is equal in quality, appearance, market value and cost to Brand X, the use of Brand Y pipes does not affect the value of the building work (whether this is assessed at market rates or by reference to the value placed on the work by the claimant). Accordingly, no financial loss is suffered by the claimant. But still the claimant has not received the exact performance he contracted for. In such a case, therefore, if the claimant aims to force the defendant to deliver the promised performance, it will be difficult to argue that compensation can give effect to his interest in having the contract performed as specified. This indeed proves that compensatory damages cannot and should not be said to equate to enforced performance. This example is based on the facts of *Jacob & Youngs v Kent*, 230 NY 239, 129 NE 889 (1921).

²⁹ See Zakrzewski (n 25) 102-03, 165-66; Stephen Smith, 'The Law of Damages: Rules for Citizens or Rules for Courts?' in Djahongir Saidov and Ralph Cunnington (eds) *Contract Damages: Domestic and International Perspectives* (Hart Publishing 2008) 36-37; Charlie Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006) 26 OJLS 41, 45.

³⁰ Catherine Mitchell, 'Remedial Inadequacy in Contract and the Role of Restitutionary Damages' (1999) 15 J of Contract L 133, 150; Catherine Mitchell, 'Promise, Performance and Damages for Breach of Contract' (2003) J Obligations & Remedies 67, 69.

The employer's compensation claim cannot target the gain obtained by the employee, for there is no loss of which it can be said that the gain is a consequence. Here, the employer's secondary right may instead require the employee to surrender to the employer the profits that he has made from his wrongful infringement. In such a case, it is a secondary right to restitution rather than compensation. The employer's compensation interest is replaced by the restitution interest. Therefore, the secondary right to restitution requires the employee to surrender to the employer the profits that he has made from his wrongful breach of the primary duty to perform. Failing to undo this embodiment would be a negation of the injustice or intangible harm that the employer has suffered from the employee's breach. So, the employee has to be deprived of the financial benefit obtained through his wrongful behaviour. In such instances, the remedy of restitution is designed to undo the material embodiment of the intangible harm that the employee has caused the employer by undermining his status as a promisee, rather than to undo the intangible harm itself.

This replaced secondary interest is clearly directed towards the employee's gain and is triggered by a wrongful action. It, in other words, addresses the employee's gain independently of any further considerations, for example the employer suffering a financial loss, or value being wrongfully subtracted by the employee from the employer

The employer's claim for restitution should not, therefore, be linked with his performance interest claim. The employer will never be able to re-establish or regain his condition as controller of how the information ought to be used by the employee, and, thereby, as a promisee, with respect to the past infringement of the contractual right. However, protection of the secondary restitutionary interest can at least undo the material embodiment of that intangible harm. This part merits further clarification. If the employee had not breached the employer's primary right to performance, he would not have made any financial gain. This financial gain is the material embodiment of the employee's breach of his primary duty to perform and, therefore, the intangible harm suffered by the employer. It represents the material embodiment of the injustice committed by the employee upon the employer; the enrichment is a direct consequence of the wrong of which the employer was the sufferer.

Both compensatory and restitutionary responses are conditional on a promisor's wrongful behaviour. The distinction is that—unlike compensatory damages—the connection to the wrong is not mediated by the presence of a financially quantifiable disadvantage of the promisee, but is direct: restitution requires only that a wrong has been committed and the promisee and promisor are the sufferer and the perpetrator of the wrong respectively. This material embodiment must be undone because failing to do so is a negation of the injustice or intangible harm that the promisee has suffered from the promisor's breach. Accordingly, it would clearly be unjust if the employee in the above case could keep the financial benefit he had made from acting wrongfully or harmfully towards the promisee.

4. WEAKNESS IN WEINRIB'S THEORY

Weinrib's normative approach provides a background to the idea of equality. Yet, in my view, he fails to situate restitutionary damages within the theoretical framework of corrective justice. But there is a *prima facie* tension here with my general endorsement of Weinrib's account of corrective justice, and of corrective justice thus understood as the foundation of remedies in private law. How may one accept the general picture of corrective justice and reject the account of remedies Weinrib represents as issuing from it? Both

Weinrib and I view the financial gain as the material embodiment of the injustice (or what I refer to as ‘intangible harm’) suffered by the promisee. Weinrib observes that:

Gain-based damages are justified when the defendant’s gain is of something that lies within the right of the plaintiff and is therefore integral to the continuing relationship of the parties as the doer and sufferer of an injustice. Then the gain stands not merely as the sequel to the wrong but as its present embodiment, and the plaintiff is as entitled to the gain as he or she was to the defendant’s abstention from the wrong that produced it.³¹

This, in Weinrib’s view, is the case when a property or property-like right is violated. I agree with his statement. The distinction is that—unlike Weinrib—the injustice that the promisor has caused to the promisee cannot be undone by restitutionary damages: only specific performance can do that. Weinrib’s position is irreconcilable with my claim that restitution undoes (or nullifies) only the material embodiment of the injustice committed by the promisor upon the promise, rather than the injustice itself, thereby giving effect to a secondary restitution interest and not to a primary performance interest. The point of friction is not related to Weinrib’s normative analysis; it is the consequence of his different reading of the aim of restitutionary damages. He states that the potential for gain is part of the right violated by the wrongdoer. If ‘the defendant’s gain is of something that lies within the right of the plaintiff’, then the claimant’s action must be directed towards the reintegration of the status quo ante the wrongful event. For Weinrib, thus understood, restitutionary damages are motivated by the need to restore the integral structure of the claimant’s right to the pre-wrong position or to pristine condition. But the restoration of the integral structure of the claimant’s right is the aim of specific performance, not of restitution for wrongs. In no way can restitutionary damages place the claimant in the same position in which he would originally have been if the wrongful act had never been committed. That Weinrib’s restitutionary damages aim to re-establish the integrity of the violated right is confirmed by the following passage:

[R]estitutionary damages should be available when the defendant’s gain is the materialization of a favorable possibility—the opportunity to gain—that rightfully belonged to the plaintiff. Then the gain to be nullified by the award of restitutionary damages represents an injustice both committed by the defendant and suffered by the plaintiff.³²

I supply the legal analysis of restitutionary damages; Weinrib’s normative approach provides a background to the idea of equality. All of the above discussion can be exemplified through the following two scenarios:

Scenario A: A specific performance or cost of cure award addresses substantially the promisee’s primary performance interest, but despite that, the promisor has obtained a benefit from the breach without causing the former any financial loss.

The promisee’s primary performance interest requires the promisor to comply with his duty to perform, either specifically or through the cost of cure award. To put this differently, it seeks to undo the intangible harm that the promisee may suffer by reason of the promisor’s failure to perform the primary duty. However, although services have been delivered as

³¹ An example of an equitable principle which establishes a prohibition of enrichment to the detriment of another is the old Pomponian principle in Digest of Justinian, 50. 17. 206: ‘*Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletioem*’ (It is just according to natural law that nobody become richer to the detriment and by the injury of another). See Giglio (n 13) 23.

³² *ibid* 12.

stipulated in the contract, because the promisor took advantage of the time between the breach and the award of specific performance or cost of cure, he has still made a profit of say, for example, £10,000 which survives afterward. The promisor's entire benefit made from his breach—say, for example, £30,000 (the surviving £10,000 + £20,000)—does not all vanish with specific performance or cost of cure, because the promisee contracted both for services to be delivered and to be delivered on time, and the promisee has received only the first part of what the stipulated performance should have rendered. If the intangible harm suffered by the promisee, i.e., the undermining of his position as a promisee in terms both of the services to be delivered and to be delivered on time) has altogether been undone by specific performance or cost of cure, then it seems reasonable that the entire gain of £30,000 which represents the material embodiment of this harm should subsequently vanish along with that undoing. Yet only the promisor's breach of the first part of the obligation (viz., for delivery to be made) and, therefore, the intangible harm suffered by the promisee in the sense of his being undermined in the first instance, has been cured and undone by specific performance or cost of cure. The consequence is that only the material embodiment of this first element of the breach and the ensuing intangible harm (namely, £20,000) has vanished.

Of course, the promisor's breach of the second part of the obligation (viz., that delivery be made on time) and, as such, the intangible harm suffered by the promisee in the sense of his being undermined in the second instance, cannot be cured and undone, where the time has already passed for the delivery to be made on time. The result is that the material embodiment of that second element of the breach and the ensuing intangible harm (namely, £10,000) would not vanish. It is clear, then, that the remaining gain of £10,000 is a direct consequence of the wrong of which the promisee was the sufferer. Here, the promisee has a secondary restitutionary interest, which requires the promisor to surrender to the former the profit that he has made from his wrongful breach of the second part of the primary duty to perform. This secondary interest clearly seeks to undo the material embodiment of the intangible harm that the promisor has caused the promisee by undermining his position as a promisee in terms of the stipulated date of the delivery, a harm which itself can no longer be undone. After all, failing to undo this embodiment is a negation of that intangible harm which the promisee has suffered. Thus, it would clearly be unjust if the promisor could go scot-free with the benefit he had made from acting harmfully towards the promisee.

Scenario B: A specific performance or cost of cure award addresses substantially the promisee's primary performance interest, but despite that, the promisor has caused a loss to the promisee and obtained a profit from the breach.

The promisee's primary performance interest requires the promisor to comply with his duty to perform. The promisee's secondary compensation right requires the promisor to make good the promisee's pecuniary loss to undo the tangible harm that the promisee has also suffered from the breach. For, when the time has passed for the delivery to be made on time, only the promisor's breach of the first part of the obligation (viz., for delivery to be made) can be cured by specific performance or cost of cure. Here, the promisee's primary performance interest is substantially fulfilled, but he has still suffered financial loss for services having been delivered late. This being so, it follows that the promisor is required to protect the promisee's secondary compensation interest, which ensures that the promisee is not left worse off as a result of not having had his primary performance interest completely and fully addressed. The promisee will then be entitled to be awarded the amount of his pecuniary loss, let's say £15,000 here, as the monetary value calculated to equal the value,

to the promisee, of timely delivery. However, let's also say that the promisor has still managed to escape with a profit of £10,000, even after paying compensation of £15,000, so that the promisor profited, in total, by £25,000 from his breach. It is the case that the promisor took a huge advantage of the time between the breach and the award of specific performance or cost of cure. The promisor's surviving benefit, then, of £10,000 does not vanish with having paid the compensation, because it is not a consequence of the promisee's financial loss. Nor does it vanish with specific performance or cost of cure, because the promisee contracted both for services to be delivered and that they be delivered on time, but has received only the first part of the stipulated performance.

The surviving gain of £10,000 represents here, as in scenario A, the material embodiment of the promisor's breach of the second part of the obligation, a breach which causes the promisee intangible harm. So, to avoid unnecessary repetition, for the same reasons explained in scenario A, the promisee can bring a claim for restitutionary damages—in this example, additional secondary interest. It is clear, then, that the solution or scheme proposed in the analysis of the third scenario (for what was there called secondary interest) applies equally to this scenario, but here called additional secondary interest. The only significant difference is that in this scenario the promisor is also required to protect the promisee's secondary compensation interest.

Now, the judge in the two scenarios ought to hand the wrongful gains over to the promisee. Why can this be claimed? After all, the injustice of allowing the promisor to keep the material embodiment of the intangible harm that the promisee has suffered is avoided once the financial benefit is taken away from the promisor. To begin with, the commission of the wrong establishes an exclusive relationship between the promisee and promisor, between the sufferer and the perpetrator of the wrong. It is a matter between the two of them—i.e., other members of society are not included—and it is, therefore, appropriate that the gain be given to the promisee who has not committed the wrongful act yet suffered intangibly from it, rather than being left with the promisor, who committed the wrongful act.³³ Accordingly, by requiring the promisor to give up and surrender to the promisee the financial benefit obtained through wrongful breach of contract, the judge identifies the promisee as being the party who deserves more than the promisor (or anyone else) to have the wrongful benefit. That is to say, the promisee has a stronger moral claim³⁴ to the financial benefit than the breaching promisor. Obligating the promisor to surrender to the promisee the benefit obtained through the breach of contract avoids the injustice of not doing so, thereby giving effect to a secondary restitution interest. It is clear that the roles and aims of specific performance, compensation, and restitution for wrongs—usually described as 'gain-based recovery'—as legal responses following a breach of contract are different

5. CONCEPTUALLY SEQUENCED ARGUMENT

Corrective justice, unlike deterrence, links both the defendant to the claimant and the remedy to the injustice that has been committed between them. Because of this linkage, the judge cannot be thought of as delivering two independent and unrelated rulings, in the sense of delivering one ruling awarding something to the claimant and then another ruling removing the exact thing from the defendant. Rather, he delivers one ruling addressing both claimant and defendant.³⁵ The judge's action (of obligating the defendant to give up

³³ Giglio (n 3) 195, 225, 231.

³⁴ Giglio (n 13) 26.

³⁵ Ernest Weinrib, 'Deterrence and Corrective Justice' (2002) 50 *UCLA L Rev* 621, 626.

and surrender to the claimant the benefit) is a response to defendant's wrongdoing towards the claimant. It is the natural response to (or reflex of) the component elements of the injustice that has been committed between the parties. Restitutionary justice, thus understood, does not treat the defendant's wrongful behaviour independently of the claimant's suffering.

By contrast, deterrence does not assign any special importance to the relationship between the two parties. In fact, it treats the defendant's action independently of the claimant's suffering. This simply means that the important 'question of how the law might apply its pressure to prevent undesirable conduct has no [...] connection with the [claimant]-defendant link characteristic of a liability regime.'³⁶ Even if we assume, counterfactually, that deterrence analysis is able to create a link between the parties,³⁷ such a link is still not regarded as an essential justification of deterrence. Rather, it is just the accidental consequence of unlinked incentives.³⁸ Punitive damages are a payment of money intended first and foremost to 'punish and deter'³⁹ and to 'assuage any urge for revenge.'⁴⁰

From this viewpoint, corrective justice and deterrence have completely different types of justification – they embody different types of reason. Although deterrence and corrective justice are in this respect quite different, this does not prevent the two from sharing the same means to their different ends, namely, stripping the defendant of the gain which he has made from his breach of contract and awarding it to the claimant. But the crucial question is: how can these diverse ideas be joined in a coherent unified theory?

One way in which this might be done is by a conceptually sequenced argument.⁴¹ Such an argument invokes the distinct ideas at different times, with the result that they can be connected even though they are disparate.⁴² Such a conceptual sequence has the advantage of ensuring that the joining of these diverse ideas is not arbitrary.⁴³ The proposal here is that corrective justice comes earlier in the sequence to create the priority of the relationship between the two parties – promisee and promisor – and then deterrence is invoked to function within the binary structure already created. In what follows, I will examine Weinrib's and Gary Schwartz's efforts to deliver a mixed theory of corrective justice and deterrence in contract law. Both propose mixed theories between compensation and deterrence in tort law and this paper examines whether or not their arguments can be extended to contract law.⁴⁴

³⁶ *ibid* 627.

³⁷ Pey-Woan Lee, 'Contract Damages, Corrective Justice and Punishment' (2007) 70 (6) *MLR* 887, 887. See Jean Hampton, 'The Retributive Idea' in Jeffrie Murphy and Jean Hampton (eds), *Forgiveness and Mercy* (CUP 1988). For example, following Pey-Woan Lee's argument that punitive damages apart from being seen as a kind of state punishment and deterrence can be seen (if Jean Hampton's notion of punishment as retribution is adopted) as a kind of correlatively-structured reply which aims to repair the moral injury that the defendant has caused to the claimant.

³⁸ Weinrib (n 35) 628.

³⁹ *Rookes v Barnard* [1964] AC 1129, 1221 (HL) (Lord Devlin).

⁴⁰ *Lamb v Cotogno* (1987) 164 CLR 1 (HCA). See also Zakrzewski (n 25) 176.

⁴¹ Brus Chapman, 'Pluralism in Tort and Accident Law: Toward a Reasonable Accommodation', in Gerald Postema (ed), *Philosophy and the Law of Torts* (CUP 2001) 276, 277. For similar expositions of the role of sequence in ordering different values, see George Fletcher, 'The Right and the Reasonable' (1985) *Harvard L Rev* 949, 950-54.

⁴² Chapman (n 41) 317.

⁴³ Weinrib (n 35) 630.

⁴⁴ *ibid*; Gary Schwartz, 'Mixed Theories of Tort Law: Affirming both Deterrence and Corrective Justice' (1997) 27 *Texas L Rev* 1801. See also Jeffery O'Connell and Christopher Robinette, 'The Role of

6. FROM FREE WILL TO THE PUBLICNESS OF LAW

According to Weinrib, Kant's account of the concept of right is essential to the quest for that mixed theory, given that it offers a conspicuous example of a conceptually sequenced argument. More specifically, as has already been demonstrated, Kant's legal theory is an explanation of how self-determining beings are juridically equal and connected to one another through a right and a corresponding duty. In his legal theory, Kant sets out the conceptual development of right in three sequenced stages: from free will to public law.⁴⁵ The first stage, according to Kant, does not necessitate the existence of anyone except the promisor. Accordingly, in the first stage, the address is the single party, and 'the public aspect of action still only implicit'.⁴⁶ At the second stage, the promisee emerges. Here, the promisor and promisee face one another as embodiments of free will. This means that 'the externally oriented action of the first stage has become an interaction'.⁴⁷

Of course, the interaction of the parties brings them under the principle of right. As we have seen, this principle regulates relationships between parties and states that "the free choice of the one must be capable of coexisting with the freedom of the other in accordance with a universal law"⁴⁸, that is, in the light of rules which apply equally to both parties. The Kantian principle of right is mainly concerned with "the sequence from one person's performance of an action to another's suffering of its effects".⁴⁹ Stated differently, its concern focuses mainly on a party's external behaviour and actions and the effect thereof on the way in which others enjoy their free will.⁵⁰

Kant's principle of right addresses actions themselves, rather than their internal motivations. Similarly, freedom of action in the external world is its focus, not the effect and consequences of those actions on the internal wishes or needs of another.⁵¹ But why is the Kantian principle of right concerned only with external impingements of one person on another? Why does it ignore internal phenomena such as needs, desires and motivations? The answer is simply that free will essentially means being able to choose not to act out one's inner drives (ie internal motivations).⁵² Therefore, the principle of right cannot be invoked to condemn behaviour or actions on the grounds of the actor's internal state of mind or his failure to satisfy the wishes or needs of the other.⁵³ For Kant, wishes and needs remain internal and cannot be seen as aspects of our external relations. It follows that failing to fulfil them leaves freedom of action unaffected. Thus, the Kantian principle of right judges the interacting parties in the light of their external interactions only.

So far, we are still at the second stage. But notwithstanding this stage brings forward the existence and protection of rights and corresponding duties, their existence and securing do not become explicit until public law comes onto the scene – and thus plays its role in Kant's

Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah' (2000) 32 Connecticut L Rev 137.

⁴⁵ Kant (n 17) 62.

⁴⁶ Ernest Weinrib, *The Idea of Private Law* (Harvard UP 1995) 101.

⁴⁷ *ibid.*

⁴⁸ Peter Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 OJLS 472, 473.

⁴⁹ Weinrib (n 46) 98.

⁵⁰ Cane (n 48) 473.

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ *ibid.*

conceptually sequenced argument – to enforce (through the court) such rights and duties.⁵⁴ This, therefore, requires a third stage – the stage in which there are two reasons for requiring such an impartial and neutral party (ie the court or state). The first is that because each of the contracting parties is concerned with satisfying his own wishes and needs, there is a risk that in some situations – eg where breaching the contract turns out to be more profitable or beneficial for one party than performing it – no right to restitution will be secured, should the decision to hand over the profit resulting from the wrongful breach be left to the interactors alone.⁵⁵

The second reason is that '[i]mplicit in rights as the juridical manifestations of free will is the authorization to use coercion to counteract their infringement'.⁵⁶ Herein lies the problem: authorizing the unilateral exercise of coercion by one party upon the other, albeit to secure legitimate rights, is at odds with the equality of the contracting parties.⁵⁷ For these two reasons, the second stage does not render the parties' relationship completely and explicitly external. It does not, in other words, render the external aspect of free will fully explicit. In order to achieve this result another party is required to secure the protection of all rights.

With this we enter the third and final stage. Here, a third party is added: the state, which impartially and neutrally secures the protection of rights. The state operates as the institutionalized embodiment of the Kantian principle of right. By giving the norms of right the determinate shape of public law and by using coercion for the enforcement of those public laws, the state bestows on the principle of right a juridical standing. Furthermore, it lays down standards for individual actions and offer incentives to behave and act in accordance with those standards.⁵⁸ It is, therefore, this prospect of using coercion to force the promisor to surrender to the promisee the benefit obtained through the breach of contract that gives effect to a secondary (restitutionary) right or interest and gives future would-be contract breakers notice of the consequences that await them in case of any wrongful breach of contract. Seen in this way, coercion leads to both the protection of rights and duties (the *ex post* perspective) and the facilitating of prospective regulation (the *ex ante* perspective). It follows that considerations of deterrence do not play any role in Kant's conceptually sequenced argument until the third stage, when public law emerges to secure rights and corresponding duties.⁵⁹

From the above discussion, it becomes obvious that both the concept of right and the public law are essential building blocks of Kant's legal theory. In the absence of the concept of right, public law would be unable to 'formulate the norms that respect persons' rights', while in the absence of public law, 'those rights could not be given a determinate shape and securely enjoyed'.⁶⁰ The first, second and third stages are sequenced, since the public law emerges only after the content of the right-based norms has already been determined and defined, which means that public law presumes the existence of those norms when it comes

⁵⁴ Weinrib (n 46) 102.

⁵⁵ To put this differently, given that the second stage includes only the interactors, applying the Kantian principle of right and complying with it become completely contingent on – and therefore internal to – the subjective tendency of the parties: 'their ability to discern the significance of right and their willingness to conform to right's requirements.' *ibid* 101, 105.

⁵⁶ Weinrib (no 35) 634.

⁵⁷ *ibid*.

⁵⁸ *ibid* 633-634; Cane (n 48) 473; Schwartz (n 44) 1834.

⁵⁹ Weinrib *ibid* 634.

⁶⁰ *ibid* 637.

onto the scene to play its role.⁶¹ Inasmuch as these three stages, albeit essential, stay detached and sequenced, the factor of deterrence which is associated with public law does not define or reveal the content of the right-based norms which arises through and at the previous stages.⁶²

7. DETERRENCE AND CORRECTIVE (OR RESTITUTIONARY) JUSTICE: THE MIXED THEORY

Up to this point, it has been shown how deterrence is one of the essential components of Kant's conceptually sequenced argument. When deterrence takes its place within this sequenced argument it seeks in no way to interfere with the right-based norms established and drawn out at the previous stages. But the question now to be examined is this: How can the above discussion help us in the search for a theory that combines restitutionary (or corrective) justice and deterrence? The answer, as previously noted, is that corrective justice and Kant's theory are intimately connected: the Kantian principle of right offers a philosophical explanation of corrective justice. There can be little doubt that if the model which Kant follows includes deterrence, then one can infer that the same model is relevant and applicable to the coexistence between restitutionary justice and deterrence.

It is clear, then, that corrective justice plays a part in a conceptually ordered sequence of which the factor of deterrence can also be part. This sequence can be summarised as follows. At the first stage, the focus is on the single party. At the next, a second party emerges, which means that "the externally oriented action of the first stage has become an interaction" between parties.⁶³ Of course, this interaction between free wills requires that each party acts and behaves in a way that is compatible with the other's freedom of choice in the light of rules which apply equally to both of them. This is the Kantian principle of right. Nevertheless, should a party behave incompatibly (or wrongfully) in terms of the Kantian principle of right, then corrective justice defines the nature of that wrong through rights and corresponding duties. But, again, for the reasons explained above, the protection of these rights is a further stage in this sequence.

At the third stage, the state not only gives effect to rights, but also manifests its wish to deter wrongful behaviour. It is thus clear that corrective justice precedes deterrence, because it defines the nature of the wrongs that public law actually deters. This means that the deterrence associated with the publicness of law does not determine the norms of right appearing through and at the previous stages. Rather, it is one of the fundamental parts of this sequence which emerges 'by virtue of being implicated in the actualization of corrective justice through the legal institutions of public law'.⁶⁴ It follows that restitutionary justice is not at odds with this role of deterrence, which emerges after, and only after, the nature of the wrong has been illustrated and defined. So, within the structure of this sequenced argument, considerations of deterrence not only leave restitutionary justice untouched, but actually come after it.

⁶¹ *ibid.*

⁶² *ibid.*

⁶³ Weinrib (no 46) 101.

⁶⁴ Weinrib (n 35) 639.

8. CONCLUSION

To sum up, it can be stated that the theory of corrective justice offers an adequate explanation of why the defendant should give up to the claimant, rather than the state (or anyone else), the benefit obtained through his wrongful breach of contract. Unlike deterrence, which 'fails to link the damages that the [claimant] receives to the normative quality of the defendant's wrong'⁶⁵ or fails to 'create party-related reasons to act'.⁶⁶ In addition, the remedy of restitution helps us to achieve two important goals in contract law, namely, attaining justice between the parties and protecting the institution of contracting. Thus, contract law should be conceived and comprehended through a mixed theory that affirms both corrective justice and deterrence.

⁶⁵ Weinrib (n 2) 6.

⁶⁶ Giglio (n 3) 195, 202.