Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong

Daniel Friedmann*

The law of restitution aims at preventing unjust enrichment. The law of torts deals with the reparation of damage wrongfully inflicted. Overlap between these two fields is not uncommon: it often happens that an act tortiously injuring another benefits the tortfeasor. In such cases, the law has long recognized the right of the injured party to "waive the tort," foregoing his claim for damages and seeking instead restitution of the tortfeasor's gain. While this concept has proved useful in relatively simple cases, such as conversion, it no longer provides an adequate basis for determining when invasions of another's interests should give rise to a choice between damages and restitution.

This Article argues that restitutionary claims should be recognized in a wide variety of cases in which one person's interests have been "appropriated" by another, whether or not the appropriation was tortious. Based largely on modern notions of property and of quasi-property interests, this approach looks to the nature of the interest infringed rather than the character of the infringement in determining whether an unjust enrichment has occurred. After a review of the principles underlying this area of the law, the Article examines the range of interests, from traditional in rem property rights to contractual rights and even opportunities and expectancies, that should be protected by a right of restitution. It then considers the types of infringement of these interests that constitute an "appropriation" from which unjust benefits may be derived. Finally, in section III, the Article turns to the role of deterrence in supporting claims of restitution in exceptional circumstances not covered by the principal property-based approach.

I. Underlying Principles

The concept of unjust enrichment is notoriously difficult to define.[1] It has on occasion been regarded as too indefinite and vague to be recognized as a general legal principle,[2] with concern expressed that its adoption might undermine legal stability, confuse legal thinking, and jeopardize clear, sys-

---

* Professor of Law, Tel-Aviv University; Visiting Professor, Harvard Law School (1978-1979). The author is greatly indebted to Professors Robert E. Keeton, Arthur T. von Mehren, and Charles Donahue for the many discussions he had with them on the subject and for their comments on an earlier draft. The author also wishes to thank Professors Leon Lipson and Charles Fried for their comments on a draft of this paper.

1. See, e.g., 1 G. Palmer, The Law of Restitution 5 (1978) ("Unjust enrichment is an indefinable idea in the same way that justice is indefinable.").

2. A. Denning, The Changing Law 65 (1953). See also R. Goff & G. Jones, The Law of Restitution 11-13 (2d ed. 1978).

tematic organization of the law.[3] And though the general principle has been adopted in the United States,[4] as well as many other countries,[5] difficulties continue to arise in its application. To some extent, these difficulties are legacies of early English cases that, in shaping the remedy of restitution, relied on the concept of waiver of tort and on notions of property that are very narrow by today's standards.

The waiver of tort concept has provided a useful, if limited, approach to determining when restitution is appropriate, for when one person has benefited at the expense of another as the result of a tortious act, it is almost axiomatic that his enrichment was "unjust." By viewing restitution as an alternative to tort damages, courts were able to rest on developed principles of tort law to define cases in which a defendant might be made to disgorge wrongful profits. English cases developed along these lines, working from analogies to specific torts. Thus, early decisions permitted recovery, in the form of an action of *indebitatus assumpsit,* of fees that a defendant had collected while usurping an office to which the plaintiff was entitled.[6] This remedy was later extended to cases in which a defendant converted and sold the plaintiff's personal property.[7]

The waiver of tort concept reached its furthest development in an 1808 decision, *Lightly v. Clouston,*[8] in which Lord Mansfield, drawing an analogy to the tort of conversion, upheld an action in the form of assumpsit for work and labor where the defendant wrongfully enticed the plaintiff's apprentice into his own employ.[9] *Lightly* was later criticized on the ground that it did not meet the requirement of "money had and received"—though the defendant had benefited from the apprentice's labor he had received no sum of money to which the plaintiff could lay claim. But beyond this technical issue, which can no longer be of real concern, the decision has been criticized even in modern times as "push[ing] [waiver] to extreme lengths."[10]

---

3. One commentator has observed "that a general principle prohibiting enrichment through another's loss appears first as a convenient explanation of specific results . . . . Yet once the idea has been formulated as a generalization, it has the peculiar faculty of inducing quite sober citizens to jump right off the dock." J. Dawson, Unjust Enrichment 8 (1951). Misgivings voiced in France regarding the adoption of the principle are discussed in G. Ripert, La Règle Morale dans les Obligations Civiles 244-69 (4th ed. 1949).

4. Restatement of Restitution § 1 (1937).

5. The principle is embodied in § 812 of the West German Bürgerliches Gesetzbuch (BGB). In France it was adopted in the 1892 case of *Patureau-Miran v. Boudier,* discussed in J. Dawson, supra note 3, at 100-03. English law still does not recognize the principle, although it has been suggested "that the law is now sufficiently mature for the courts to recognize a generalised right to restitution." R. Goff & G. Jones, supra note 2, at 13.

6. Arris v. Stukely, 2 Mod. 260, 86 Eng. Rep. 1060 (Ex. 1677); Howard v. Wood, 2 Lev. 245, 83 Eng. Rep. 540 (K.B. 1679). In *Arris v. Stukely* an analogy was drawn to the liability for rents "by one who pretends a title." Indeed, the liability to account of a person who wrongfully collects another's rent preceded the rise of *indebitatus assumpsit,* though it seems that account did not lie against a disseisor. See B. Jackson, The History of Quasi-Contract in English Law 12-13 (1936).

7. Lamine v. Dorrell, 2 Ld. Raym. 1216, 92 Eng. Rep. 303 (K.B. 1705).

8. 1 Taunt. 112, 127 Eng. Rep. 774 (C.P. 1808).

9. *Lightly* was followed, somewhat reluctantly, in Foster v. Stewart, 3 M. & S. 191, 105 Eng. Rep. 582 (K.B. 1814).

10. P. Winfield, The Law of Quasi-Contracts 98 (1952).

Nonetheless, the decision in *Lightly v. Clouston* is of continuing significance, for it brings to the fore the fundamental question in this area: should restitution indeed be allowed whenever a tortfeasor has acquired a benefit that he would not have obtained but for the tort, irrespective of the nature of the tort or the type of interest infringed?

One approach to this question has been given a clear exposition by the West German scholar Ernst von Cæmmerer. In a well-known article,[11] von Cæmmerer argned that liability for unjust enrichment should be imposed whenever one person appropriates, uses, or consumes the property of another.[12] In such a case, the defendant acquires a benefit that belongs, under principles of property law, to the owner; he is, therefore, unjustly enriched at the owner's expense. Under this approach, no claim for unjust enrichment should be allowed where there has merely been a breach of duty, without exploitation or appropriation of property belonging exclusively to another. An example commonly given is breach of a fair competition law (*Wettbewerbsverstoss*), which does not amount to "appropriation" of a competitor's exclusive right.[13] According to von Cæmmerer, the fact that the wrongdoer in such cases may benefit from his breach does not provide ground for restitution of his profits, since he appropriated nothing that belonged exclusively to anyone else.[14] Thus, it is not the commission of a wrong but rather the appropriation of an exclusive property interest upon which liability is founded.

This approach finds some apparent support in *Phillips v. Homfray*,[15] an influential English case[16] decided in 1883. The case involved a claim against the estate of a decedent who had committed a trespass by mining coal from and using roads and underground passages on the plaintiff's land. The court allowed the claim for the coal but dismissed the claim for the use of the passages on the ground that this type of benefit did not "consist in the acquisition of property, or its proceeds or value."[17] There was a mere saving of expense, and recovery for such "indirect benefit" could not be had. In

---

11. E. von Cæmmerer; Bereicherung und unerlaubte Handlung, in 1 Gesammelte Schriften 209 (1968), originally published in 1 Festschrift für Ernst Rabel 333 (1954).

12. Id. at 228.

13. Id. at 271, 272-73. A misleading advertisement relating to the quality of goods would also probably be included in this category. It may attract clients and thus affect the market, but none of the competitors has exclusive rights to this market. On the other hand, restitution should be allowed under this theory where the unfair competition involves patent or trademark infringement, since this amounts to appropriation of "property" to which the owner had exclusive rights, id. at 230, 275.

14. In a common law environment, S. J. Stoljar has developed a somewhat similar theory, taking the view that "only such torts were waivable as could be regarded as purely acquisitive." S. J. Stoljar, The Law of Quasi-Contracts 91-92 (1964).

15. 24 Ch. D. 439 (1883).

16. *Phillips* has generally been followed in the United States, see, e.g., Restatement of Restitution § 129 (1937); 1 G. Palmer, supra note 1, at 74, but not uniformly, see Restatement of Restitution § 129, reporter's notes to the comment (1937); Raven Red Ash Coal Co. v. Ball, 185 Va. 534, 39 S.E.2d 231, 167 A.L.R. 785 (1946).

17. 24 Ch. D. at 455.

his opinion, Lord Bowen thus appeared to support a narrow property-based approach to restitution, reasoning that

> [t]he only case in which, apart from questions of breach of contract, . . . a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys.[18]

The court's application of this rule to the facts of the *Phillips* case itself has been much criticized[19] and the decision may perhaps best be explained as a strict application of the traditional requirement of "money had and received." More modern concepts of property would probably have compelled a different outcome, since today it would generally be agreed that by using passages on the plaintiff's land, the defendant was deriving a benefit from the use of property to which the plaintiff was exclusively entitled. He was, to that extent, enriched at the plaintiff's expense.[20] Whether or not the plaintiff could at the time have exploited his property or was interested in doing so is for this purpose irrelevant.[21]

The property approach has obvious appeal. The essential attribute of property has traditionally been the existence of a right of exclusive enjoyment, so exploitation of property by another gives rise to an enrichment that is necessarily at the expense of the owner's right. The property theory thus provides a sound basis for recognizing a right of restitution. But as notions of property have become more sophisticated, an approach that limits the availability of restitution to traditional, "exclusive" property rights becomes unduly restrictive. Today a wide range of interests are recognized as forms

---

18. Id. at 454.

19. See, e.g., R. Goff & G. Jones, supra note 2, at 476; 1 G. Palmer, supra note 1, at 73-79.

20. See also R. Goff & G. Jones, supra note 2, at 476. In the United States, restitution has been allowed where the defendant did not merely use the land himself but collected rent for its use by a third party. King County v. Odman, 8 Wash. 2d 32, 111 P.2d 228, 133 A.L.R. 1440 (1941). In a similar vein see 4 G. Palmer, supra note 1, at 303.

21. Paradoxically, in both the United States and England a *tort* action of mesne profits may permit recovery from a trespasser of the value of the use of the land, see F. Woodward, The Law of Quasi Contracts § 284 (1913), at least when the defendant has wrongfully kept the owner out of possession, 1 G. Palmer, supra note 1, at 77. When, as sometimes happens, an award of damages in such actions is based not upon the plaintiff's loss but on the benefit derived by the defendant, liability is in effect based on unjust enrichment. For example, where the plaintiff was unable or unwilling to use or rent the land, courts may look to the defendant's actual benefit to calculate the reasonable rental value in order to provide the measure of recovery. In such cases, the reward is restitutionary in substance though delictual in form. See, e.g., Whitwham v. Westminister Brymbo Coal & Coke Co., [1896] 2 Ch. 538 (Ch. App.), in which the damages granted for use of the plaintiff's land were clearly based on unjust enrichment. See also Jegon v. Vivian, L.R. 6 Ch. 742 (Ch. App. 1871). Professor McCormick has pointed out that mesne profits include "the reasonable rental value during the period of the defendant's occupancy, with the proviso, that, if the defendant has caused the land to yield more than its reasonable rental value, he is liable for the value of the yield." C. McCormick, Handbook on the Law of Damages 481-82 (1935). The mesne profits action is a good example of the tendency of the Anglo-American legal system to resort to the law of torts to overcome or circumvent difficulties encountered in other branches of the law. Other examples are discussed in notes 39 & 247 infra.

of property to which a person has no exclusive right but which are nevertheless protected against certain types of interference or invasion. When such interests—which may be conveniently denominated quasi-property—are wrongfully appropriated, any resulting enrichment may well be regarded as unjust. In addition, many cases can be found in which restitution may be granted even though no property interests, even in the broadest sense, are involved. For example, under certain circumstances a fiduciary may be required to disgorge profits obtained through the breach of his duty even if the breach involved no appropriation of the beneficiary's property.[22]

While the property theory, at least if confined to traditional concepts of exclusive rights, creates a relatively limited basis of liability in restitution, at the other end of the spectrum is an approach that advocates a broad right to restitution, regardless of the nature of the interest infringed or appropriated. This approach is based on the view that there is "no reason why quasi contract should not be an alternative to any action for any tort whenever the defendant has enriched himself in consequence at the plaintiff's expense."[23] The use of the qualifying term "at the plaintiff's expense" may seem to raise anew the question that the property theory seeks to answer; namely, how to determine whether profits derived by the tortfeasor in consequence of the tort are "at the plaintiff's expense."[24] But proponents of this theory would clearly not confine the term to circumstances in which recovery is allowed under the property theory. In fact, the very purpose of the broader approach is to allow recovery whenever a tortfeasor derived a benefit from his wrong, provided that a causal connection between the wrong and the benefit is established.[25] Hence, under this view the defendant's benefit is regarded as being "at the plaintiff's expense" because it resulted from a wrong committed against him. In effect, the proposition that the plaintiff should be entitled to any benefit derived through breach of duty owed to him renders the words "at the plaintiff's expense" superfluous.

By focusing on the wrongful character of the defendant's conduct in each case, this approach accounts for a number of situations not explained by the property theory, including, perhaps, breach of fiduciary duty.[26] But

---

22. See 1 G. Palmer, supra note 1, at 141 (fiduciary who profits through breach of fiduciary duty is "accountable to his principal without regard to whether or not the profit is at the expense of the principal").

In a somewhat different context, Reading v. Attorney-General, [1951] A.C. 507, furnishes a striking example of a case in which restitution is appropriate but would not be justified under a property theory. The *Reading* case arose out of the actions of a British sergeant stationed in Egypt during World War II, who helped smuggle goods into Cairo by riding in uniform on the truck carrying them, enabling the truck to pass without inspection. For these services he received some £20,000, which the court ordered paid over to the Crown. The case does not appear to be strictly based on breach of fiduciary duty, see R. Goff & G. Jones, supra note 2, at 508-09; note 294 and accompanying text infra.

23. H. Street, Principles of the Law of Damages 254 (1962).

24. For a thorough discussion of the concept of "enrichment at the plaintiff's expense" in this context, see 1 G. Palmer supra note 1, at 133.

25. See H. Street, supra note 23, at 254-57 (giving examples in which recovery of the benefit should in his view be granted).

26. Although breach of fiduciary duty is not in the strict sense a tort, see J. Salmond, The Law of Torts 12 (17th ed. 1977), it constitutes an equitable wrong that, for these purposes, should be accorded similar treatment. Indeed, the subject is treated in the Restatement (Second) of Torts, § 874 (1979).

not all duties rank as high as the fiduciary's duty of loyalty, and there are limits to the penalties that the law is willing to impose on some forms of wrongful conduct. Indeed, in some situations the legal system deliberately refrains from specifically enforcing certain duties or from taking strong measures to prevent their breach.[27] This approach makes no allowance for such cases, in which broader considerations of public good may require that a plaintiff's remedy be limited to actual damages, or that only a qualified measure of restitution be applied.[28] Moreover, this approach provides no basis for a claim of restitution in cases in which the defendant has benefited at the plaintiff's expense through conduct that was either not wrongful or was legally excused or justified.[29]

To overcome the limitations of these two approaches, it is submitted here that the availability of restitution in this area be determined in the light of two complementary principles. First, in the great majority of cases, restitution may be justified on the general principle that a person who obtains—though not necessarily tortiously—a benefit at the expense of another through appropriation of a property or quasi-property interest held by the other person is unjustly enriched and should be liable to the other for any benefit attributable to the appropriation. This principle draws its strength from fundamental concepts of property that prohibit exploitation of another's right—even if the other is unable or unwilling to exploit the right himself—without his consent. But unlike an approach based on traditional property concepts, it permits restitution in cases involving "nonexclusive" interests—quasi-property—and may even be extended, as will be argued below, to certain kinds of contract rights that may, for purposes of this analysis, be considered to be proprietary. In addition, the principle abandons the waiver-of-tort concept altogether, permitting restitution even if the defendant's act is not a tort or, if prima facie a tort, excused or justified.

Second, in exceptional cases of wrongdoing in which the property approach does not apply, a general principle of deterrence provides an

27. See, e.g., Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970), in which atmospheric emissions from the defendant's cement plant were found to create a nuisance. Damage to the plaintiff's nearby properties was, however, relatively small in comparison to the economic consequences of an order of abatement, which might have required closing the plant. Consequently, the majority ordered payment of "permauent damages" in lieu of an injunction.

Similar considerations were at work in a contemporaneous English decision, Woollerton & Wilson Ltd. v. Richard Costain Ltd., [1970] 1 W.L.R. 411 (Ch.) in which the defendants, engaged in a building operation, had to swing the jib of a crane through the plaintiff's air space. The plaintiffs refused an offer of £250 a week to allow this but suffered no inconvenience. An injunction was denied. Doubts were cast upon this case in Charrington v. Simons & Co., [1971] 1 W.L.R. 598, 603 (C.A.), but it has been defended as a proper exercise of discretion, P. Winfield & J. Jolowicz, Tort 305 (10th ed. 1975).

28. In both *Boomer* and *Woollerton*, discussed in note 27 supra, there was an invasion of the plaintiff's property rights, so that restitution would be appropriate, at least under the approach advocated in this Article. See text accompanying notes 141-45 infra. But there are sound reasons to conclude that restitution should be confined to the value of the servitude imposed in *Boomer* and the value of the use in *Woolerton*. It ought not to extend either to the profits of the defendant or to the saving of expenditure that resulted from the invasion, since such recovery would have economic consequences similar to those of an injunction, which the courts denied.

29. See generally text accompanying notes 146-263 infra.

alternative basis for restitution. This principle justifies, for example, the award of restitution in cases involving breach of fiduciary duty.[30] It may also permit restitution in cases involving illegal conduct, and even situations involving breach of contract and the creation of risk that are beyond the reach of the property approach.[31]

In the next two sections of this Article, I will explore the meaning, operation, and implications of these two principles.

II. The Property Principle as a Basis for Restitution

The starting point for a modern property approach to restitution is the same fundamental proposition that has underlain traditional notions of unjust enrichment: the appropriation by one person of another's property ought to give rise to a right of restitution. Recognition of this right is not dependent upon a showing that the appropriation was tortious; rather, the right derives from the nature of the interest "belonging" to the plaintiff. As a general rule, restitution should be granted in any case in which a property interest has been appropriated without the interest-holder's consent to the ensuing transfer of wealth. Two basic questions are thus presented: what is the scope of "property" for purposes of this principle, and what constitutes "appropriation"?

A. *The Ambit of "Property"*

1. *Traditional Property Interests.* The property approach is most obviously applicable to those interests that a person is entitled to exploit and has a right to exclude others from enjoying.[32] Such interests include rights in rem to realty and other tangibles, as well as rights in such intangibles as patents,[33] copyrights, and trademarks.

2. *Salable and Nonsalable Interests.* Other, nontraditional interests should also be included within the scope of property for purposes of restitution. The right of publicity, for example, has acquired the attributes of property in modern times.[34] Once it is recognized that each person has an ex-

30. See text accompanying notes 278-80 infra.

31. See generally section III infra.

32. The right to exclude others is often regarded as a major characteristic of property, see International News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting). However, even those types of property interests that may once have been considered as creating an "absolute" right to exclude, such as fee ownership of realty, are subject to some limitations, see C. Donahue, T. Kauper & P. Martin, Cases and Materials on Property 218-23 (1974). It is, nonetheless, a feature of such interests that when their taking is permissible—for example, in the exercise of eminent domain or of a privilege—the owner is entitled to compensation.

33. However, the prevailing view seems to be that the wording of United States patent legislation precludes recovery of profits made as a result of patent infringement. See Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476 (1964); 1 G. Palmer, supra note 1, at 90.

34. See, e.g., Cepeda v. Swift & Co., 415 F.2d 1205 (8th Cir. 1969); 1 G. Palmer, supra note 1, at 125; W. Prosser, The Law of Torts 804-07 (4th ed. 1971).

clusive right to authorize commercial use of his name or likeness, the interest involved can readily be regarded as a form of property.[35] Accordingly, where one person has benefited from the use of another person's name or photograph for commercial purposes and without permission, the question of restitution ought to present no problem. Moreover, since the exploited interest has a determinable market value, calculation of the defendant's benefit should not pose serious difficulties.[36]

Even interests that are not usually marketable or ordinarily regarded as property may, it is submitted, be encompassed within the property approach, where such interests have been exploited as if they were property. This view, however, has not been prevalent in the past. Courts in the United States have generally been unwilling to permit recovery of profits obtained through invasion of the right to privacy[37] or through libel,[38] limiting a plaintiff in such cases to compensation for damages suffered. In such cases, courts appear to feel that the defendant's gain from an invasion of privacy or a libel derives not from exploitation of a property interest in the ordinary sense but rather from the harm inflicted on the plaintiff's reputation or personality. Unlike the right-to-publicity cases, the essence of the injury in these cases is that the plaintiff's reputation was tarnished by the defendant's publication or that facts were disclosed that he did not want to make public, rather than that he was unpaid for a publication that he would otherwise have authorized.

But the plaintiff in such a case is entitled to his good name, even if this interest is one that he is unlikely to market. Where a defendant profits from a libel, he in effect "sells" it and thus makes the interest a salable one. He should thus be liable in restitution.[39] Similar reasoning could be used in

---

35. See generally Gordon, Right of Property in Name, Likeness, Personality and History, 55 Nw. U. L. Rev. 553 (1960).

36. Objections to the possibility of unjust enrichment provided a major stimulus to recognition of the right to publicity. See, e.g., Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575-76 (1977); Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 Law & Contemp. Prob. 326, 331 (1966). Similar reasoning has been advanced for the protection of ideas, Matarese v. Moore-McCormack Lines, Inc., 158 F.2d 631 (2d Cir. 1946), news gathered by a news agency, International News Serv. v. Associated Press, 248 U.S. 215 (1918), and artistic performance, Capitol Records, Inc. v. Erickson, 2 Cal. App. 3d 526, 82 Cal. Rptr. 798 (1969). Thus, it may be argued that there is a certain circularity in reasoning in finding a right of restitution on the ground that the right of publicity is a property interest: enrichment from the use of another's name, ideas, or reputation is "unjust" if the name, ideas, or reputation "belonged" to that person, but the basis for regarding these as "property," which other persons may be excluded from enjoying, is that otherwise unjust enrichment would be permitted. Nonetheless, once the interest is accorded recognition as a form of property, it should no longer be necessary to inquire into the nature of its origins as such.

37. See, e.g., Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1944) (en banc).

38. See, e.g., Hart v. E. P. Dutton & Co., 197 Misc. 274, 93 N.Y.S. 871 (1949), aff'd, 277 A.D. 935, 98 N.Y.S. 773, reargument denied, 277 A.D. 962, 99 N.Y.S. 1014 (1950). See also York, Extension of Restitutional Remedies in the Tort Field, 4 U.C.L.A. L. Rev. 499 (1957).

39. Under English law, an act of defamation calculated to make profits exceeding the defamed party's loss may provide ground for the award of exemplary damages. In the leading case of Rookes v. Barnard, [1964] A.C. 1129, 1226-27, Lord Devlin stated:

> Cases [in which exemplary damages can be awarded] are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff . . . . It is a factor also

cases where the defendant derives a benefit from "appropriating" another's body, as where one person profits from the prostitution of another or even where *A,* who is being shot at, grabs *B* and uses his body as a shield.[40] It is arguable that the sacrifice of *B* in such a case is closely analogous to the sacrifice of one person's property to save that of another—a situation in which the property theory clearly supports a right to restitution.[41]

3. *Quasi-property.* Anglo-American case law provides ample support for the extension of restitutionary rights also to interests that have gained recognition as "quasi-property," including interests in ideas, information, trade secrets, and opportunity.[42] In a sense these interests are not property at all, since they lack the element of exclusiveness—the right to exclude all others from enjoying them.[43] They are, however, protected against certain types of interference. Indeed, quasi-property may be regarded as any interest that is protected against some kinds of invasion but does not give rise to an exclusive right of enjoyment.[44] Under this view a great many interests would qualify as quasi-property that are rarely regarded as such, including the interest of forming a contract, the interest of maintaining one's clients, and even the expectancy of receiving a gift or an inheritance. But the degree of protection granted to these interests may vary considerably. The protection granted to expectancies is so meager that it may hardly be apposite to denominate them as "property." On the other hand, the protection granted

---

that is taken into account in damages for libel; one man should not be allowed to sell another man's reputation for profit.

For an application of this approach, see Cassel & Co. v. Broome, [1972] A.C. 1027. Cf. Broadway Approvals Ltd. v. Odhams Press Ltd., [1965] 1 W.L.R. 805, 819 (C.A.) ("[E]xemplary damages should only be awarded in the case of a defendant who profited from his own wrongdoing in publishing the defamation.").

Thus, instead of openly recognizing the right to restitution, English courts have used the law of torts to deprive the defendant of wrongfully acquired profits and to transfer them, in the form of exemplary damages, to the plaintiff. This is another situation in which the law of torts has served to circumvent obstacles that arose in the development of the law of restitution.

40. Cf. Laidlaw v. Sage, 158 N.Y. 73, 52 N.E. 679 (1899) (plaintiff claimed that defendant placed plaintiff between himself and explosion). See Keeton, Conditional Fault in the Law of Torts, 72 Harv. L. Rev. 401, 416 (1959).

41. See text accompanying notes 134 & 135 infra.

42. See, e.g., Ward v. Taggart, 51 Cal. 2d 736, 336 P.2d 534 (1959); Ferry v. McNeil, 214 Cal. App. 2d 411, 415-16, 29 Cal. Rptr. 577 (1963); Harper v. Adametz, 142 Conn. 218, 113 A.2d 136, 55 A.L.R.2d 334 (1955), discussed in notes 257-62 and accompanying text infra. See also Restatement of Restitution §§ 127, 133 (1937).

The status of interests of this kind is often not clear. In Boardman v. Phipps, [1967] 2 A.C. 46, [1966] 3 W.L.R. 1009, for example, Lord Cohen considered the opportunity and information interests at issue are "not property in the strict sense," id. at 102, [1966] 3 W.L.R. at 1049, but Lord Hudson and Lord Guest regarded the information as property. Id. at 107, 115, [1966] 3 W.L.R. at 1053, 1060.

43. The right to exclude others is, however, subject to limitations, even with regard to "absolute" property. See note 32 supra.

It is worth noting that this extension of the property theory to "quasi-property" would not be possible under the theory developed by von Caemmerer, which founds restitution upon the right of the owner to exclude all others from enjoying the same interest. See notes 11-14 and accompanying text supra.

44. Most of the interests that Professor Charles Reich termed "the new property" in his article of the same title, 73 Yale L.J. 733 (1964), would be either choses in action or quasi-property under this approach.

to some quasi-property interests may be so extensive as to blur the line between them and "absolute" property.

There is, however, a major distinction between the right to restitution in cases of "absolute" property and in cases of quasi-property. In the former, the mere fact of appropriation of an owner's right, however innocent, against his will or without his consent generally entails liability in restitution. In the case of quasi-property, however, because the owner lacks the right of exclusive enjoyment, an additional element is required. Thus, if *A* simply loses clients to competitor *B*, he has no right of action either in tort or in restitution—his interest in maintaining his business and his clients is subordinate to the interest in free competition, which favors *B*'s interest in opening a business of his own. But where *A* is wrongfully deprived of his clients, or where he is fraudulently deprived of prospects to acquire property, he may be entitled to restitution.[45] The additional element required as a condition to restitution need not consist of wrongful conduct by the defendant; it may consist of other factors that make the appropriation unjust,[46] as suggested in section III below.

4. *Contract Rights.* Contract relations may also give rise to interests that come within the ambit of "property" for purposes of restitution. Of course, claims for the restoration of performance (or its value) rendered by one party to the other arise routinely in connection with contracts that have been rescinded or that have not been fully performed; such cases are not of concern here. The property approach is, however, relevant in situations where one person, in breach of a contract, acquires a benefit not through the other party's performance but by the use of his own labor or property, or by saving the expenses that performance would require. The question of restitution arises when such a person could not have derived this benefit but for his breach of the contract.

A typical case of this kind would arise where the defendant contracts to provide certain goods or services but, in breach, offers the same goods or services at higher prices to a third party. The argument has been made that there is no right in such circumstances to recover profits made by the defendant as a result of the breach of the contract.[47] This argument rests on

---

45. See, e.g. Ward v. Taggart, 51 Cal. 2d 736, 336 P.2d 534 (1959); Harper v. Adametz, 142 Conn. 218, 113 A.2d 136, 55 A.L.R.2d 334 (1955).

46. See Restatement of Restitution § 127 (1937).

47. See Treitel, Remedies for Breach of Contract, in 7 International Encyclopedia of Comparative Law, ch. 16, at 24-25 (A. von Mehren ed. 1976). But cf. R. Goff & G. Jones, supra note 2, at 370-71 (advocating extension of restitutionary claims to this field).

Among the cases denying restitution in these circumstances are Amerada Petroleum Corp. v. Burline, 231 F.2d 862 (10th Cir. 1956); Acme Mills & Elevator Co. v. Johnson, 141 Ky. 718, 133 S.W. 784 (1911), discussed in 1 G. Palmer, supra note 1, at 442; City of New Orleans v. Firemen's Charitable Ass'n, 43 La. Ann. 447, 9 So. 486 (1891); and Salter v. Beal, 321 Mass. 105, 71 N.E.2d 872 (1947), discussed in 1 G. Palmer, supra note 1, at 449-50.

When a contractual duty is classified as fiduciary, a wholly different result is reached, and recovery of profits is allowed as a matter of course. Sec, e.g., United States v. Drisko, 303 F. Supp. 858 (E.D. Va. 1969); notes 278-80 and accompanying text infra.

the view that parties to a contract should retain an option either to perform or to pay damages, and that therefore the renunciation of performance of disadvantageous or economically inefficient contracts should not be unduly penalized. At the heart of this view is the concept that the common law "is not directed at *compulsion* of *promisors* to *prevent* breach; rather, it is aimed at *relief* to *promisees* to *redress* breach."[48] In accordance with this view, contractual rights have on the whole enjoyed relatively limited protection. Specific performance of contracts has been ordered only in the discretion of the court,[49] and punitive damages are rarely awarded.[50]

Allowing an alternative claim for restitution of profits realized in consequence of a breach of contract is fundamentally incompatible with this "option" concept. Ordinarily, it would be more advantageous for the promisor to pay damages than to perform where he finds a better use for his resources, provided, of course, that the factors that make nonperformance more advantageous are not reflected in the measure of damages.[51] To deprive him of the extra profit would run counter to the very essence of the option concept that the promisor should be allowed to take advantage of a more attractive opportunity.

Nonetheless, the proposition that a person is free to break a contract subject ouly to liability for damages cannot be accepted as an unqualified

---

48. Farnsworth, Legal Remedies for Breach of Contract, 70 Colum. L. Rev. 1145, 1147 (1970). See also A. von Mehren, A General View of Contract 182-84 (1979) (unpublished multilithed materials).

Perhaps the most vigorous exponent of this view was Justice Holmes, who argued that the promisor in a contract merely "takes the risk of the event, within certain defined limits, as between himself and the promisee." O.W. Holmes, The Common Law 300 (1909). In Holmes's view, "[t]he only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass." Id. at 301.

49. Specific performance is sometimes referred to as an "extraordinary" remedy, see J. Calamari & J. Perillo, Contracts 581, 584 (2d ed. 1977). Although there is ample historical grounding for this characterization, see Farnsworth, supra note 48, at 1154, it seems today to be too strong. For example, in contracts for the conveyance of an interest in land, specific performance is granted as a matter of course even if the contract relates to property that is not unique, see J. Calamari & J. Perillo, supra, at 581-82. Section 2-716 of the U.C.C. has broadened the possibility of specific performance in contracts for the purchase of goods, see J. Calamari & J. Perillo, supra, at 582-84. Moreover, traditional restrictions upon the availability of specific performance have been very much attenuated, notably the requirement that the legal remedy be inadequate. The term "inadequate" often receives a very liberal interpretation, see 5A A. Corbin, Corbin on Contracts § 1142 (1964), and there is considerable support for the proposition that "[t]he fact that there is a remedy at law does not preclude the equitable remedy," 11 S. Williston, A Treatise on the Law of Contracts § 1418, at 653 (3d ed. 1968). It has also been observed that "[t]here is . . . a distinct tendency in modern times to extend the remedy where justice requires it . . . ." Id. at 654. See also 5A A. Corbin, supra, § 1136, at 96.

50. See A. von Mehren, supra note 48, at 183; Farnsworth, supra note 48, at 1146; Simpson, Punitive Damages for Breach of Contract, 20 Ohio St. L.J. 284 (1959). Professor Simpson, however, suggests that punitive damages, though still uncommon, are becoming less rare. See also note 287 and accompanying text infra.

51. See A. von Mehren, supra note 48, at 183-84; Birmingham, Breach of Contract, Damage Measures, and Economic Efficiency, 24 Rutgers L. Rev. 273 (1970).

general principle,[52] although it may be applicable in certain circumstances.[53] While there is merit in the underlying concern to avoid compelling the performance of socially or economically inefficient agreements, limitation of a plaintiff's remedy to damages tends to trivialize the importance of contractual obligations, undermining faith in their seriousness and confidence in each party's ability to rely on full performance. Moreover, a damage award may frequently undervalue the full scope of a loss, particularly in that damages may not adequately account for loss of opportunity as reflected in the defendant's gain.

Under the approach advocated here, the central issue in evaluating a claim for restitution of benefits obtained through a breach of contract can be presented as follows: When performance is promised under a contract, is the promisee "entitled" to it in such a way that if this performance is withheld, appropriated, or otherwise "taken," the promisee can be regarded as having been deprived of an interest that "belonged" to him?[54] This basic question arises in two distinct contexts: first, when the promisee's interest has been appropriated by the promisor, and second, when his interest has been appropriated by a third party. We will consider six types of situations in which the issue arises.

---

52. The proposition is incompatible with the modern tendency toward liberalization of the remedy of specific performance, see note 49 supra. It is also incompatible with the notion that contractual rights are in the nature of property. See note 54 infra and cases cited therein, which speak of "the right to performance." See also note 102 infra. The recent development of a tort of breach of contract, for which punitive damages may be awarded, see note 287 infra, also suggests that there are instances in which breach of contract will not be tolerated. See also Note, The "Right" to Break a Contract, 16 Mich. L. Rev. 106 (1917),

53. See, e.g., the discussion of employment contracts in text accompanying notes 80-90 infra. But even in those cases the party has a power rather than a right to break the contract, exposing himself merely to liability for damages. See Note, supra note 52, at 109.

54. There is substantial support for the view that contractual rights are a form of property. See, e.g., Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Rep. 749 (K.B. 1853). As Dean Prosser observed, "Lumley v. Gye and the succeeding cases laid emphasis upon the existence of the contract, as something in the nature of a property interest in the plaintiff, or a right in rem good against the world." W. Prosser, supra note 34, at 930-31. See also S.C. Posner Co. v. Jackson, 223 N.Y. 325, 332, 119 N.E. 573, 574 (1918) (finding that a contract of service in which the employee's work was unique and extraordinary was "a property right"); Raymond v. Yarrington, 96 Tex. 443, 451, 73 S.W. 800, 803 (1903) ("It seems to us that, where a party has entered into a contract with another to do or not to do a particular act or acts, he has as clear a right to its performance as he has to his property either real or personal . . . ."); C.R. Noyes, The Institution of Property 326-30 (1936); Ames, Purchase for Value Without Notice, 1 Harv. L. Rev. 1, 9-10 (1887). See also S. Ginossar, Droit Réel, Propriété et Créance 37-86 (1960).

This view has been strengthened by the development of the tort of interference with contractual relations, which protects parties to a contract from actions by third parties. In this context, see, in addition to *Lumley v. Gye*, Carolina Overall Corp. v. East Carolina Linen Supply, 8 N.C. App. 528, 531, 174 S.E.2d 659, 661 (1970) ("[t]he theory of the doctrine which permits recovery for tortious interference with a contract is that the right to the performance of a contract and to reap the profits therefrom are property rights"); Munchak Corp. v. Riko Enterprises, 368 F. Supp. 1366, 1372 (M.D.N.C. 1973).

a. *Infringement of the Promisee's Contract Rights by the Promisor.*

Illustration 1. A *undertakes to sell certain property to* B, *but breaks the contract and sells the same property at a higher price to* C.

In this type of case there would usually be no need to resort to restitution, since the award of damages should reflect the value of the property (indeed, the amount paid by *C* may serve as evidence of its value). Nevertheless, the benefit obtained by *A* may exceed the amount of damages to *B* if, for example, the property was sold at a price higher than its market value, attributable to such additional factors as the seller's negotiating skill, misrepresentation, or improvement of the property prior to its new sale, or the purchaser's special needs or tastes.[55] The question of who is entitled to the benefit attributable to any of these additional factors arises, of course, only if the right of *B*, the innocent party, to claim restitution in lieu of damages is recognized.[56]

It is submitted here that this right should, in principle, be recognized. *A*, the vendor, sold to a third party the same performance that he promised to the plaintiff,[57] and the price obtained may be regarded as a "product" or mere "substitute"[58] for performance to which the plaintiff was entitled.[59] That this entitlement can be regarded as a property interest is especially clear where the object of the contract was the transfer of realty.[60] In such cases, the purchaser has traditionally been regarded as the equitable owner, and as such entitled to specific performance of the contract of sale.[61] But even

55. 1 G. Palmer, supra note 1, at 442-43, discusses the case in which the vendor sells the property to a third party before the date of delivery and the market price on this date is higher than on the date of delivery. Restitution would obviously be preferable from the plaintiff's point of view if damages are calculated on the basis of the market price on the date of delivery. Restitution may also be sought when some rule limits the amount of damages that may be recovered. See, e.g., Gassner v. Lockett, 101 So. 2d 33 (Fla. 1958), discussed in Dawson, Restitution or Damages?, 20 Ohio St. L.J. 175, 187 (1959).

56. Whether the contract-breaking party should be permitted to retain at least some portion of the benefits attributable to his actions will frequently depend on the applicability of principles of deterrence to the case at issue. See section III infra.

57. See Dawson, supra note 55, at 187; 1 G. Palmer, supra note 1, at 437-44.

58. The concept of "substitute" embodied in § 281 of the West German civil code is discussed in notes 67-69 and accompanying text infra.

59. This reasoning need not be limited strictly to contracts of sale. It would, for example, also apply to a contractual arrangement under which *A* grants *B* exclusive rights to supply services or sell goods in a certain area. If *A* breaches the contract by selling such rights to others, his action entails an exploitation of rights exclusively reserved to *B*. Restitution ought therefore to be allowed. See Automatic Laundry Serv. v. Demas, 216 Md. 544, 141 A.2d 497 (1958); 1 G. Palmer, supra note 1, at 448.

60. Timko v. Useful Homes Corp., 114 N.J. Eq. 433, 168 A. 824 (1933), 1 G. Palmer, supra note 1, at 439.

61. The right to specific performance is closely tied to equitable ownership in Anglo-American law. See, e.g., Restatement (Second) of Trusts § 13, comment A (1959). The precise nature of the relationship, however, is somewhat obscure. The right to specific performance is sometimes predicated on the plaintiff's equitable ownership; conversely, the plaintiff may be considered an equitable owner because he is entitled to specific performance. Cf. Stone, Equitable Conversion by Contract, 13 Colum. L. Rev. 369, 386 (1913) ("It is . . . apparent that the theory of equitable ownership of land, subject to a contract of sale, is literally an incident of the right of specific performance and cannot exist apart from it."). See also Skelly Oil Co. v. Ashmore, 365 S.W.2d 582 (Mo. 1963)

where the object of the contract is a sale of goods, specific performance may be available under certain conditions.[62] When these conditions exist, it is reasonable to regard the purchaser as the equitable owner of the goods[63] and to protect his proprietary interest with a right of restitution as an alternative to damages.[64] The same policy that supports the availability of specific performance should permit recovery of profits obtained through infringement of the purchaser's interest.

The converse does not necessarily follow, however—that is, the fact that specific performance would not be granted or that the purchaser could not be deemed the equitable owner should not invariably preclude a right of restitution, even though it may indicate a lower degree of protection of the plaintiff's interest.[65] In some cases, specific performance may be denied for reasons of historical accident or procedural inconvenience[66]—considerations that should not preclude recognition of an alternative right of restitution. In other cases, however, the unavailability of specific performance may be based on considerations that would also justify a denial of restitution beyond damages—considerations such as whether the plaintiff actually merits equitable relief or whether an award would conflict with basic social and economic policies against the compulsion of performance by the defendant.

It is worth noting in this context the broad right of substitution accorded under West German law to a creditor who has, under a contract, a right to specific property.[67] If performance of the contract becomes impossible (whether or not the debtor is responsible for the impossibility), but the debtor acquires either a substitute or a claim for compensation, the creditor is entitled to delivery of the substitute or assignment of the claim for compensation. Thus, if the debtor sells the property to a third party, the creditor may

---

(en banc). It is, however, not necessary to restrict enforcement of contractual rights to cases involving equitable ownership. Under West German law, for example, a creditor is generally entitled to enforcement without regard to equitable ownership concepts. See BGB § 241; Treitel, supra note 47, at 10.

62. Section 2-716 of the U.C.C. sets out the circumstances in which a buyer is entitled to specific performance of a contract for the sale of goods. See also Treitel, supra note 47, at 18.

63. Holroyd v. Marshall, 10 H.L. Cas. 191, 209-10, 11 Eng. Rep. 999, 1006 (H.L. 1862). See also R. Oerton, Underhill's The Law Relating to Trusts and Trustees 237-38 (12th ed. 1976).

64. See note 54 supra. Obviously, no problem would arise if ownership had passed to the plaintiff. In such a case, the second sale by the vendor would constitute a conversion, which could be "waived" in favor of a claim for restitution even under traditional principles.

65. See 1 G. Palmer, supra note 1, at 443-44.

66. Thus, specific performance, which is an in personam order, may be denied if the defendant resides outside the jurisdiction. See D. Dobbs, Handbook on the Law of Remedies 62-65 (1973). This consideration, however, should have no effect on a claim for a money judgment based on restitution.

67. Section 281 of the civil code provides in part: "If, because of the circumstance that makes the performance impossible, the debtor acquires a substitute or a claim for compensation for the object owed, the creditor may demand delivery of the substitute or assignment of the claim for compensation." BGB § 281. This provision applies whether or not the debtor is responsible for the impossibility of performance. It would not ordinarily apply where the object involved is fungible, unless for some extraordinary reason, such as confiscation of the whole supply of the type of object, replacement would not be possible. See 2 H. Soergel & W. Siebert, Kommentar Zum Bürgerliches Gesetzbuch 313 (10th ed. 1967).

recover the price the debtor received, as a "substitute" for the object itself.[68] The debtor's liability is not limited to the creditor's damages; the creditor receives the debtor's entire profit.[69] Anglo-American law has not yet developed so broad and general a principle, although application of similar ideas can occasionally be found.[70]

> Illustration 2. A *undertakes to transfer certain property to* B *on a certain date. In breach of the contract* A *transfers the property six months late and in the meantime derives profit from its use.*

In this situation the rental value of the property may generally be recovered in the form of damages resulting from the breach,[71] even where the purchaser had no intention of using the property during the period of delay. In some instances, however, the rent and profits that *A* derived from the property may exceed the amount of *B*'s damages.[72] Moreover, *A* may have an excuse for the delay,[73] and in some exceptional circumstances damages may

---

68. See 1 K. Larenz, Schuldrecht 252 (11th ed. 1976). Similarly, where the object was destroyed by a third party, the creditor would be entitled to an assignment of the debtor's claim against that party.

69. See id.; 2 H. Soergel & W. Siebert, supra note 67, at 314.

70. See, e.g., The Winkfield, [1902] P.D. 42 (C.A.) (bailee's liability to account to the bailor for tort damages recovered from a third party); Hepburn v. Tomlinson, [1966] A.C. 451 (assuming bailee's liability to account to bailor for insurance proceeds).

In In re Future Mfg. Co-op., 165 F. Supp. 111 (N.D. Cal. 1958), the court held the purchaser under a conditional sale agreement entitled to the proceeds of the seller's insurance. A similar approach was adopted in Skelly Oil Co. v. Ashmore, 365 S.W.2d 582 (Mo. 1963) (en banc), which dealt with realty. Other cases, however, have denied the purchaser such a right. See, e.g., Rayner v. Preston, 18 Ch. D. 1 (1881). The general problem is discussed in R. Keeton, Basic Text on Insurance Law 186, 198-205 (1971), and 4 G. Palmer, supra note 1, at 345.

Absence of a general principle of substitution also proved fatal to the plaintiff in The Isle of Mull, 278 F. 131 (4th Cir. 1921), cert. denied, 257 U.S. 662 (1922). In that case a ship was requisitioned by the British government, which paid the owner a price per month higher than that payable by the plaintiff, the charterer of the ship. The court held that the charter was frustrated and the charterer not entitled to the government's payments for the remaining period of the charter. The decision is criticized in 2 G. Palmer, supra note 1, at 110-12.

71. In Ellis v. Mihelis, 60 Cal. 2d 206, 219-20, 384 P.2d 7, 15, 32 Cal. Rptr. 415, 423 (1963), the court said that where rents or profits are awarded incidental to a decree of specific performance "[t]he compensation awarded . . . is not for breach of contract and is therefore not legal damages. The complainant affirms the contract as still being in force . . . . If the court orders it to be performed . . . [t]he result is more like an accounting between the parties than like an assessment of damages." The court relied in part on Annot., 7 A.L.R.2d 1204, 1206 (1949), which reasoned that the plaintiff "cannot have it both ways, performed and broken." Obviously the plaintiff cannot have both specific performance and damages *for nonperformance*, but there is no contradiction in the award of damages *for delay* in addition to specific performance. The amount awarded may, however, represent either damages or restitution.

72. Compare notes 55 & 56 and accompanying text supra.

73. In Herrmann v. Gleason, 126 F.2d 936 (6th Cir. 1942), property was leased for 99 years. The lease provided for a fixed rent until 1927; thereafter the rent was to be agreed by the parties, and if they failed to agree, it was to be determined by referees. The parties were unable to agree on rentals for the period beginning in April 1937. Referees were appointed, but their decision was rendered only after 20 months. Thereupon the lessee paid the rent, but the court, basing its decision on unjust enrichment, held that he must also pay interest. During the period prior to the referees' decision the lessor was "deprived of the receipt of rental" while the lessee "had the use of the premises, as well as the use

not be recoverable at all.[74] Restitution ought in principle to be allowed in these cases.[75] The purchaser was entitled to the use of the property as of the date when performance was due. By the delay in performance the party in breach retained rights to which he was not entitled and should be liable in restitution to the extent of his gain. The innocent party in such cases has, in fact, often been allowed to elect between damages and restitution.[76] In some instances, notably in contracts for the purchase of land, recovery is predicated upon the theory that the purchaser was the equitable owner.[77] Although this theory strengthens the case for recognizing a right of restitution, as pointed out earlier it is not essential; recovery in restitution may be permitted even when the equitable ownership concept would be wholly inapplicable.[78]

> Illustration 3. A *is employed by* B *under a three-year contract. In breach of his contract,* A *leaves* B *to work for* C, *who pays him a higher salary.*[79]

Courts considering claims for restitution in cases involving breach of an employment contract have on occasion drawn analogies to contracts involving property.[80] Indeed, it was once the rule that a master was entitled to earnings made by his apprentice in breach of an apprenticeship contract.[81] But

---

of money representing the fair rental value." Id. at 940. But see Crown Indus., Inc. v. Boyertown Burial Casket Co., 300 F.2d 809 (6th Cir. 1962). On the award of interest on the basis of unjust enrichment, see D. Dobbs, supra note 66, at 170.

74. A number of jurisdictions have adopted the rule that a vendor of real estate who acts in good faith is not liable in damages for loss of the bargain when his failure to perform is due to a defect in title. See 11 S. Williston, supra note 49, § 1399. It has been stated that there is "no reason to doubt that a similar rule ought to be applied where delay has taken place for similar reasons," Jones v. Gardiner, [1902] 1 Ch. 191, 195.

75. Restitution would be inappropriate, of course, where the plaintiff was not entitled to performance on time, as, for example, where for lack of the required purchase price he himself requested a delay.

76. See, e.g., Abrahamson v. Lamberson, 79 Minn. 135, 81 N.W. 768 (1900); Sweeney v. Brow, 40 R.I. 281, 100 A. 593 (1917); Annot., 7 A.L.R.2d 1204, 1211-17 (1949) (citing cases). Where, however, the purchase price (or any portion thereof) remained unpaid, its use by the purchaser is to be taken into account in reduction of either damages or restitution. See D. Dobbs, supra note 66, at 841; Annot., supra, at 1218-22.

77. Bostwick v. Beach, 105 N.Y. 661 (1887) (vendor regarded as trustee of the land and vendee as trustee of the purchase money); Worrall v. Munn, 38 N.Y. 137, 142 (1868). See note 61 and accompanying text supra. There is however, no trust relationship between the parties. Restatement (Second) of Trusts § 13 (1959).

78. See, e.g., Herrmann v. Gleason, 126 F.2d 936 (6th Cir. 1942), discussed in note 73 supra.

79. Implicit in this illustration is the assumption that *B* renders to *C* the same performance due to *A* under his original contract, although even if he is engaged in similar work his performance under the new contract is likely to be somewhat different. Where the work for *C* is of a completely different character the issue of restitution of the value of such performance does not arise under the property approach.

80. See, e.g., Lightly v. Clouston, 1 Taunt. 112, 127 Eng. Rep. 774 (C.P. 1808).

81. Barber v. Dennis, 1 Salkeld 68, 91 Eng. Rep. 63 (K.B. 1703); S.J. Stoljar, supra note 14, at 92. See also F. Batt, The Law of Master and Servant 212 (5th ed. G. Webber 1967).

The old case of Hill v. Allen, 1 Ves. Sen. 82, 27 Eng. Rep. 906 (Ch. 1747), concerned an apprentice whose "roving disposition" led him to quit his master before his time was up and go on a privateer, which subsequently gained a large prize. The apprentice brought a

it is unlikely that such an approach would be adopted today. Although labor may still be regarded as "property" for some purposes,[82] courts are generally disinclined to consider the rights of an employer to the labor of his employee as a property interest. They are thus usually unwilling to order specific performance of a contract of employment, and reluctant to enjoin an employee who left his work in breach of contract from taking other employment, which would indirectly force him back to his former employer.[83] Such measures would conflict with the basic concern that persons not be compelled to perform contracts for personal services against their will. This same concern may also protect the employee from any claim by his former employer to the additional income he receives from his new work,[84] at least where recognition of such claims would create undesirable impediments to social and economic mobility. However, the higher amount received by the employee at his new job may sometimes provide evidence of the loss suffered by the old employer and thus establish the basis for a damage claim.[85]

In exceptional circumstances, where the employee's services are unique or extraordinary or where the employer is otherwise likely to suffer an irreparable injury, an injunction may be warranted.[86] Restitution of the employee's profits may also be appropriate in such situations, although no modern case to this effect has been found. Restitution would be less drastic in

---

bill to be relieved from the master's right to his share in the prize. The Chancellor was of the opinion, however, that "in general the master is intitled to all that the apprentice shall earn; consequently if he runs away and goes to a different business, the master is intitled at law to all his earnings . . . ." Id. at 82, 27 Eng. Rep. at 906. By the time of Carsan v. Watts, 3 Dougl. 350, 99 Eng. Rep. 691 (K.B. 1784), some forty years later, this rule had weakened somewhat. Lord Mansfield acknowledged the general principle that "whatever an apprentice who runs away gains in another service *eo nomine* belongs to the master, and is earned for him; and . . . if it is anything specific, the master may bring trover for it," id. at 352, 99 Eng. Rep. at 692, but he cited the development of a usage relating to prize money, according to which the apprentice was permitted to keep the gain from his privateering adventure.

82. The question has, for example, arisen in the field of constitutional law, see Dillon v. United States, 230 F. Supp. 487 (D. Or. 1964), rev'd, 346 F.2d 633 (9th Cir. 1965), cert. denied, 382 U.S. 978 (1966); Bradshaw v. Ball, 487 S.W.2d 294 (Ky. Ct. App. 1972). See also Note, The Draft: A Taking without Just Compensation. 45 S. Cal. L. Rev. 313 (1972).

83. See Warner Bros. Pictures, Ltd. v. Nelson, [1937] 1 K.B. 209; 5A A. Corbin, supra note 49, § 206, at 408; Restatement (Second) of Contracts § 381(2) (Tent. Draft No. 14, 1979).

84. 1 G. Palmer, supra note 1, at 445. Compare Restatement (Second) of Agency § 404 (1958), discussed in text accompanying note 88 infra.

85. Thus, suppose *A*, who receives $2,000 per month from *B*, accepts new employment in which he earns $3,000 per month doing the same type of work. It is arguable that this evidences the value of *A*'s performance, and that *B* has thus lost $1,000 a month for the remaining period of the contract. (Indeed, he may well have to pay $3,000 to an employee to replace *A*). Cf. Roth v. Speck, 126 A.2d 153, 61 A.L.R.2d 1004 (D.C. 1956) (employee's new salary presumptively value of services lost by former employer).

86. E.g., Central New York Basketball, Inc. v. Barnett, 181 N.E.2d 506 (Ct. C.P. Ohio 1961); Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 A. 973 (1902). See generally Brennan, Injunction Against Professional Athletes Breaching Their Contracts, 34 Brooklyn L. Rev. 61 (1967).

A negative covenant aimed at preventing an employee from undertaking employment with a direct competitor of the employer is more likely to be enforced, especially when there is a risk of disclosure of trade secrets. See Restatement (Second) of Contracts § 381, illustrations 4 & 5 (Tent. Draft No. 14, 1979); D. Dobbs, supra note 66, at 933-34.

effect than an injunction,[87] and while it might impede mobility it would not amount to involuntary servitude and would draw its justification from compelling facts in a particular case.

A somewhat different question arises where the employee does not leave his employer but merely works for his own benefit during hours that, according to the contract, should be devoted to his employer. The question of subjecting the employee to a certain master against his will does not arise, since the employee is apparently still desirous of retaining his employment. The Restatement (Second) of Agency adopts the position that, absent a breach of fiduciary duty, an employer should not have a restitutionary claim on the employee's extra earnings.[88] The assertion of such a claim may indeed suffer from unsavory association with the idea of one person reaping the benefit of another's labor. Nonetheless, it is submitted that in extreme cases restitution may be appropriate, notably where the employee's breach was malicious or fraudulent, and where his work for the third party was similar to the work required under the contract with his employer.[89] In this type of case, a restitutionary award may be justified by considerations of deterrence even though property concepts are not readily applicable.[90]

> Illustration 4. A *undertakes to lend a certain amount of money to* B. A *breaches the contract and invests a similar amount in what seems to him a more attractive venture.*[91]

In this example there is not necessarily a conflict between the contract and the new investment, since the promise under the contract did not relate to a specific piece of property. The money used for the new investment can generally not be "identified" as the very sum to which *B* was entitled,[92] and

87. Consider, for example, the following case: An actor is employed by *B* under a one-year contract in which he is promised $200,000. In breach of the contract the actor contracts to participate in a film produced by *C*. Under the new contract he is to receive, during the same period, $350,000. An injunction may force him to return to his former employer. An award requiring him to hand over the extra $150,000 does not. He can remain with his new employer if he dislikes his former employment or prefers the new role offered to him.

88. § 404 (1958). See also 1 G. Palmer, supra note 1, at 445. On the other hand, in a modern edition of an English textbook it is still suggested that "a master is entitled to any wage or remuneration earned by the servant who works for another in 'his master's time.'" F. Batt, supra note 81, at 212. But the proposition is supported only by fairly old authorities.

89. Suppose that an employee, while he was supposed to work for his employer, used the machines and tools of the employer to provide services to a third party. Payment for the use of the employer's assets is clearly recoverable, and it is submitted that in extreme cases payment for labor should be recovered as well. Cf. Amatrudi v. Watson, 19 N.J. Super. 67, 88 A.2d 7 (1952), in which such a claim was brought against the third party.

90. See generally section III infra.

91. This example is discussed by Treitel, supra note 47, at 24-25. A somewhat similar problem is presented by Farnsworth, supra note 48, at 1177, who discusses a hypothetical case of a builder who breaches his contract with the plaintiff in order to make a more profitable contract with a third person.

92. Circumstances are, however, conceivable in which the money used could be sufficiently "identified" as constituting the debt owed to the plaintiff, so as to permit recovery of profits derived from its use. Thus, suppose *B* deposited money in a bank, which later

it is clearly conceivable for both the loan contract to be performed and the other investment to be made. Assume, however, that *A*'s new investment does prevent performance of the loan contract. Property concepts, unless very much extended, do not easily provide a basis for recovering profits made on the new investment or treating them as a "substitute" for the performance to which *B* was entitled.[93] Moreover, a variety of policy questions surface in this context, including the degree of protection that should be granted to the plaintiff's contract rights, the type of measures appropriate for purposes of deterrence, and the extent to which the plaintiff should be permitted to recover, as a windfall, the benefit resulting from the defendant's ingenuity in finding the better investment and assuming the risk of its failure. Other obstacles to recognition of a restitutionary claim lie in the difficulty of establishing a causal connection between the new investment and the nonperformance of the loan contract,[94] and the possibility that *A* acted in good faith and without realizing that a new contract would prevent him from fulfilling the previous commitment. It thus seems that in this type of situation restitution would not generally be granted,[95] although considerations of deterrence may prevail where the seriousness of the breach warrants an award of restitution as a penalty.

> Illustration 5. A, *in breach of his contract with* B, *does not perform, renders deficient performance, or contrary to the provisions of the contract chooses a less expensive mode of performance, thus saving himself the costs of fulfilling his obligation as required by the contract.*

This example embraces a variety of situations. In some of them *B*, the innocent party, would be entitled to restitution of his own performance, as where *B* paid a sum of money for performance that *A* never renders (total failure of consideration) or where *B*, having partly performed, terminates the contract in response to *A*'s serious breach.[96]

---

wrongfully debited his account and used the money drawn from it to purchase property. The existence of an account from which the money was drawn may suffice to "identify" it and to enable *B* to trace the property. See also notes 126-28 and accompanying text infra.

93. This situation would not come within the ambit of § 281 of the West German civil code, discussed in note 67 supra, because the inability to perform is a "subjective" rather than "objective" impossibility. See A. von Mehren & J. Gordley, The Civil Law System 1099-1100 (2d ed. 1977).

94. Thus, *A* might have reneged on his first contract for reasons unrelated to the new investment, such as a change of mind regarding the advisability of the loan to *B*. Moreover, if *A* made three other investments, each of the same magnitude as the loan he failed to perform, which would be considered the "substitute" on which recovery should be based?

95. But see 1 G. Palmer, supra note 1, at 446, arguing that in the case of the builder, discussed in note 91 supra, restitution should be granted even though the making of a contract with a third party was presumably not prohibited under the first contract.

96. See 1 G. Palmer, supra note 1, at 409. Under these circumstances, *B* would also ordinarily be required to restore the value of what he received under the contract. Id. at 482.

Of concern here, however, is a different question: whether there should be restitution of the benefit obtained by the party in breach as a result of his nonperformance or deficient performance. Suppose *B* paid $1,000 for an article that *A* never delivered and that was worth $1,200 on the date performance was due. *B* is no doubt entitled to restitution of his $1,000, but can he instead claim $1,200? *B* can often recover this amount by way of damages,[97] but where the benefit to *A* is greater than the loss of *B* should an alternative right to restitution be recognized? Such a claim may be based on the argument that, on the date of performance, *A* owed *B* something worth $1,200, which he consumed, sold to a third party, or simply failed to obtain, thus saving himself its cost. In any event *A* is enriched at *B*'s expense to the extent of $1,200 (the value of the performance due).

The question is similar to that raised in connection with "waiver" of the tort of conversion: where the defendant sells to a third party a chattel belonging to the plaintiff, the right to restitution of the sale price seems obvious. Early decisions permitted restitution in cases involving a sale of the plaintiff's property, but they denied recovery where the defendant simply benefited from its use or consumption.[98] The modern tendency, however, has been to disregard this distinction.[99] Thus, while the basis for restitution is perhaps more conspicuous in cases (such as illustration 1) in which the defendant sells property promised to another, there is no compelling reason to distinguish the case in which the defendant's benefit takes the form of consumption or retention of the promised performance, or a saving of expenses.

Restitution should similarly be permitted as an alternative claim in cases involving deficient performance. For example, where *A*, having contracted to build a house for *B*, uses less expensive pipes than those stipulated in the contract,[100] *B* should be permitted to claim restitution (i.e., the benefit *A* derived by using less expensive pipes) in lieu of damages, which may only be nominal.[101] This alternative is, admittedly, rarely needed in practice, since rules relating to damages are often flexible enough to take account of the enrichment. Thus, even if the less expensive pipes are as good as those stipulated in the contract it can be assumed that the difference in price reflects the value to the plaintiff of the more expensive pipes for which he bargained and therefore provides a measure of his loss.[102] It is submitted, how-

97. Under the Uniform Commercial Code, § 2-713(1), a buyer of goods may recover damages for nondelivery or repudiation based on the difference between the market price at the time he learned of the breach and the contract price, together with certain incidental damages. Alternatively, he may "cover" by a reasonable purchase of substitute goods, id. § 2-712(1), and recover the differential as damages, id. § 2-712(2).

98. See, e.g., Jones v. Hoar, 22 Mass. 285 (1827); W. Prosser, supra note 34, at 629.

99. See 1 G. Palmer, supra note 1, at 55; W. Prosser, supra note 34, at 629 n.94. (citing cases).

100. See Restatement (Second) of Contracts § 387, illustration 2 (Tent. Draft No. 14, 1979).

101. But see National Contracting Co. v. Sewerage & Water Bd., 141 F. 325 (5th Cir. 1905).

102. In a leading case, Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 244, 129 N.E. 889, 891 (1921), Judge Cardozo held that when the cost of completion of a construction contract as stipulated is "grossly and unfairly out of proportion to the good to be attained,"

ever, that the concept of unjust enrichment—based on the defendant's retention or "consumption" of the plaintiff's contract right—often provides a better and more direct basis for the calculation of an appropriate recovery. This view is implicit in a number of cases involving building or land-use contracts that were either not performed or abandoned after part performance, in which courts have held the plaintiff entitled to the value of the performance that was not rendered, even if the cost of performance exceeds the value that would be added to the property by the performance.[103]

Determination of damages is particularly troublesome where the defaulting party fails to provide protective measures against certain risks as required by a contract, but where no loss has occurred. A security agency, for example, promises to provide five guards but actually provides only four, and no loss occurs; or a hospital undertakes to perform certain tests and treatments and fails to do so, but the patient recovers, suffering no harm. The question whether the innocent party may claim the expenses that the other party saved by his deficient performance[104] arose in *New Orleans v. Firemen's Charitable Association,*[105] in which the plaintiff paid for a firefighting service but discovered later that the defendant did not have men, horses, and equipment available in the quantities stipulated in the contract. It was not argued that the shortage had caused any damage (i.e., by failure to extinguish a fire), and the court held that there was no cause of action. This result is clearly correct if the provisions relating to the mode of performance were mere guidelines that allowed the party some discretion, but the court appears to have regarded the provisions in this case as an actual contractual obligation. A possible explanation is that the party in default simply assumed the risk of paying damages should a loss occur, but this seems un-

---

the proper measure of damages is not the cost of replacement or reconstruction but the difference in value between the building as contracted for and as constructed. In that case there was evidence that the deficient performance—use of a brand of pipe that was "the same in quality, in appearance, in market value and in cost," id. at 241, 129 N.E. at 890, as the brand called for in the contract—had no substantial effect on the value of the building, so that damages would be either "nominal or nothing." Id. at 244, 129 N.E. at 891. Approaching the question as suggested here from the point of view of the defendant's enrichment would, in this case, lead directly to the same result, since there was apparently no saving on his part.

103. E.g., Groves v. John Wunder Co., 205 Minn. 163, 286 N.W. 235, 123 A.L.R. 502 (1939); Sassen v. Haegle; 125 Minn. 441, 147 N.W. 445 (1914); Chamberlain v. Parker, 45 N.Y. 569 (1871). See also Annot., 76 A.L.R.2d 792, §§ 8-9, at 829-34 (1958). Contra, Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okl. 1962). *Peevyhouse,* however, can be explained on the ground that the provision that was not performed was not the main purpose of the contract.

Where the issue is not nonperformance but rather deficient performance that can be remedied only through destruction and rebuilding, policies against promoting economic waste may preclude an award of the full cost of correcting the deficiency, especially if it is relatively trivial. See Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 129 N.E. 889 (1921), discussed in note 102 supra.

104. The innocent party may have other remedies. In some instances, the contract may be regarded as divisible so that consideration for the part was not performed could be regarded as having failed. In others, the breach may be so essential—as, for example, where the party in breach provided no protective measures at all—that the other party should be able to recover his payment on the ground of total failure of consideration.

105. 43 La. Ann. 447, 9 So. 486 (1891), discussed in R. Goff & G. Jones, supra note 2, at 370-71.

satisfactory. The innocent party did not contract for insurance or the transfer of risk but rather for specified protective measures, which were not provided. A preferable solution would thus have been to allow restitution of the defendant's savings on the ground that the plaintiff was entitled to the difference in value between what was promised and what was rendered.

> Illustration 6. B *undertakes to build a four-story building on a plot owned by* A. *Shortly afterwards, a change in the zoning law makes it possible to build up to thirty stories on this plot.* A *offers to rescind the contract and compensate* B *for his expenses and lost profits on the contract.* B *declines and insists on performance.* A *breaks the contract and hires* C *to build a thirty-story building.*

In this example, the four-story building, if built, may well have to be pulled down to permit construction of the higher building. Sound policy against economic waste would require that performance of such a contract not be compelled and that the owner's liability be limited to compensating the other party for his expenses and loss of profits. Some legal systems expressly recognize a unilateral right to terminate a contract under these circumstances, subject to payment for work done, expenses, and lost profits.[106] Although American law has not gone so far as to give explicit recognition to a "right" of termination, courts have often reached a similar result in practice through the law of remedies,[107] exercising judicial discretion to deny specific performance or to apply damage mitigation rules to preclude recovery of expenses incurred after it is learned that performance is no longer needed.[108]

A more direct approach to the problem might be based on either of two theories. One theory would be an analogy to the concept of incomplete privilege developed by Professor Bohlen in the law of torts.[109] This

---

106. See art. 1794 of the French civil code, which provides: "The master may terminate, at will, an agreement for work to be done (*marché à forfait*) although the work had already begun, by compensating the contractor for all his expenses, all his work, and all that he would have gained in this enterprise." A similar provision appears in the West German civil code, BGB § 649.

107. But cf. White & Carter, Ltd. v. McGregor, [1962] A.C. 413, in which the rule denying a right of unilateral termination of a contract was carried to its ultimate conclusion. In this case the House of Lords held by a majority that the party who completed performance after learning that the other party was not interested in it was entitled to the full contract price. Courts in the United States have adopted a different approach. See note 108 infra.

108. See Note, supra note 52. See also Rockingham County v. Luten Bridge Co., 35 F.2d 301 (4th Cir. 1929); Clark v. Marsiglia, 1 Denio 317 (N.Y. 1845). These courts used damage-mitigation principles to preclude recovery of a full contract price or expenses incurred after the contractor learned that the other party no longer needed his performance. In these cases it was clearly assumed that the defendant had no unilateral right to terminate the contract and therefore committed a breach. As the court said in *Rockingham County*, 35 F.2d at 307, the defendant in that case "had no right to rescind the contract, and the notice given plaintiff [cancelling the construction project] amounted to a breach on its part."

109. Bohlen, Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personalty, 39 Harv. L. Rev. Rev. 307 (1926).

concept asserts that a person has a privilege to infringe another's property rights in order to avert bodily injury or more serious damage to other property. He is, however, required to compensate the party whose rights were infringed for any loss. Application of a similar principle to contract rights would lead to recognition of a limited privilege to terminate subject to payment of compensation.[110]

The other possible theory, based purely on principles of contract law, would embody the view that the contractor's insistence upon performance under the circumstances of the illustration is incompatible with the requirement of good faith.[111] The contractor's interests are limited to his expenditures and other actual losses (including expected profits from his work)—he has no cognizable interest in compelling performance under circumstances that would deprive the owner of gains from a more profitable use of his property. By the same token, he has no claim to those additional gains by the owner.

Under either theory, the contractor in the situation presented in illustration 6 has no basis for asserting a restitutionary right to profits realized by the owner as the result of his breach. In accordance with the property approach, it can be said that the contract did not grant the builder an interest in the land, and he is accordingly not entitled to profits attributable to an increment in its value, even though the profits could not have been realized but for the repudiation of the contract.

* * *

In sum, where contract rights are concerned, we are faced with three basic situations. The first encompasses cases in which the legal system places paramount importance upon performance of duties, regardless of the gains and advantages that might be derived by their nonperformance. These duties are likely to be specifically enforced, and other measures, such as punitive damages[112] or restitution of profits, may also be considered to deter breach. At the other end of the spectrum are cases in which the enforcement interest is subordinate to other social and economic considerations, so that recovery in case of breach will not exceed either the loss by the innocent party or the value of his performance. In its most extreme

---

110. The illustration given is, of course, distinguishable from the incomplete privilege situation in that the owner is not trying to avoid a loss but rather to realize a larger profit by erecting a taller building. But the line between averting a loss and failing to realize a gain is not always easy to draw.

111. The good faith principle has gained recognition not only as a matter of the general common law of contracts, see Restatement (Second) of Contracts § 231 (Tent. Draft No. 5, 1970), but also as a statutory requirement, see U.C.C. § 1-203 ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."). The principle has been highly developed in West German law, based on BGB § 242. See J. Dawson, The Oracles of the Law 465-79 (1968); F. Kessler & G. Gilmore, Contracts: Cases and Materials 912-90 (2d ed. 1970).

112. On the award of punitive damages for breach of contract, see note 287 and accompanying text infra.

form this category may include cases in which the legal system expressly recognizes a right not to perform a duty or even to rescind the other party's right, subject to payment of damages or restitution of the other party's performance. The third situation occupies an intermediate position, where the legal system neither recognizes a power to terminate the other party's right nor dictates that a particular contractual duty be enforced whenever possible. Instead, it is left to the discretion of the court to treat the case as belonging either to the first or the second category. The court may thus determine that there is room for specific performance or for an award of restitution of the breaching party's profits, which would make the breach economically unattractive. In other cases, however, the court may properly decide to confine the injured party's remedies to compensatory damages, leaving the other party to enjoy any advantages gained by the breach exceeding the amount of damages.

This analysis applies not only to contract rights but to other choses in action as well. Thus, illustration 1, which deals with a promise by *A* to sell property to *B*, may be extended to situations where *A* is under a noncontractual duty to transfer to *B* a specific piece of property.[113] Similarly, illustration 4, which deals with a promise to lend money, could be extended to any case in which a person owes a sum of money to another, even if the source of the debt is noncontractual.[114]

b. *Appropriation of the Promisee's Contract Rights by a Third Party.* When a third party appropriates performance to which the plaintiff is entitled under a contract he ought, in principle, to be liable in restitution.[115] This is clearly the case where the appropriation constituted interference with the contract and was thus tortious,[116] but liability may also extend to nontortious appropriation.[117] Let us reexamine illustrations 1-4 and 6, assuming that in each case *A*'s breach of the contract was induced by *C*.

In illustration 1 it was submitted that *A*, who undertook to sell property to *B* but sold it to *C*, would be liable for restitution. If *A*'s breach was wrongfully induced by *C*, who received the property from *A*, *B* is a fortiori entitled to restitution from *C*. *C* appropriated the very performance to which *B* was entitled and therefore should be required to restore its value to *B*. An examination of illustration 2, which dealt with delay in the transfer of property, leads to a similar conclusion. If the breach was wrongfully induced by *C*, who enjoyed the property in the interim pe-

113. See, e.g., the cases covered by Restatement of Restitution § 123 (1937).

114. As indicated earlier, see text accompanying note 90 supra, the property approach would be unlikely to support a restitutionary claim in the ordinary case in which the debtor, instead of paying his debt, finds a profitable investment for his money.

115. For a similar approach in West German law, see E. von Cæmmerer, supra note 11, at 231-32.

116. Cf. Federal Sugar Ref. Co. v. United States Sugar Equalization Bd., 268 F. 575 (S.D. N.Y. 1920), in which there was actually no appropriation of the performance to which the plaintiff was entitled. See text accompanying notes 281-84 infra.

117. See text accompanying notes 146-263 infra.

riod, then *C* should be liable in restitution to *B*.[118] The property theory does not apply where the benefit that the third party derived from the breach is not the performance to which the plaintiff was entitled, though in such a case application of the deterrence approach may be considered. Indeed, the intervention by the third party may be viewed more severely than the act of the party who was induced to commit the breach.[119]

In illustration 3 it was suggested that *A*, who went to work at a higher salary for *C* in breach of his employment contract with *B*, should not be liable to *B*, in restitution. Early support for a claim for restitution against *C*, where he wrongfully induced the breach, may be found in Lord Mansfield's opinion in *Lightly v. Clouston*,[120] but this view has not gained universal acceptance. Leading commentators have expressed differing views on the question;[121] the Restatement of Restitution took no position.[122]

For purposes of the property approach the question is whether the employee's labor still "belongs" to the employer after the employee has broken his contract of employment. Ordinarily it seems clear that it does not. As indicated earlier,[123] policies against compulsion of personal services have led courts to reject the remedy of specific performance in the employment context. Although these policies do not apply with the same force to the issue of restitution by another employer of profits derived from his successful enticement of the employee, broader interests of avoiding waste and promoting mobility and the full personal development of the employee may be sufficient to require that the other employer not be deprived of his profits and that the initial employer be limited to recovery of damages.[124] However, in exceptional cases the employee's breach may

---

118. This view conflicts with the holding in *Phillips v. Homfray*, see text accompanying notes 15-18 supra, in which restitution for the use of real property owned by the plaintiff was denied. In the present example *B* has at most a claim of equitable ownership.

119. Damages awarded for inducing breach of contract may exceed those awarded against the party in breach, since causing the breach is a tort subject to tort damages standards, including punitive damages. But the award appropriate in any given case must be determined in light of all the circumstances, taking into account whether the one who caused the breach acted more wrongfully than the party in breach and the extent to which the liability of the party in breach was limited by the terms of the contract.

120. 1 Taunt. 112, 127 Eng. Rep. 774 (C.P. 1808). See text accompanying notes 8 & 9 supra.

121. Professor Woodward argued that "the action for damages is the only remedy" where the defendant has induced another's servant to break his contract, because "from the moment the contract is broken the master is not entitled to the labor of the servant, as against another employer." F. Woodward, supra note 21, at 458. Professor Palmer, on the other hand, took the position that "[w]hen the defendant wrongfully induces a third party to break off [employment contract] relation[s] with the plaintiff, it is fair to hold him accountable for the ensuing profit." 1 G. Palmer, supra note 1, at 86-87.

122. Restatement of Restitution § 133, caveat (1937).

123. *See* notes 83 & 84 and accompanying text supra.

124. For example, suppose *A* was employed by *B* as a clerk. *C*, discovering that *A* has unique artistic gifts, induces him to break his contract with *B* and work as an artist for him. Assume also that the discovery of *A*'s artistic talent provides no justification for *C*'s inducement, so that he is liable to *B* in tort. We have already noted that *B*'s contractual rights enjoy only limited protection and that *B* is not entitled to recover the additional income earned by *A* in his new occupation. Under these circumstances,

be treated as not terminating the employer's right to his labor, and an award of restitution against the third party may be proper. In addition, policies of deterrence may warrant imposition of liability in restitution in some instances.[125]

As indicated earlier, the property approach would ordinarily not justify restitution in situations covered by illustration 4, in which *A*, instead of lending money to *B*, invests it in another enterprise. Even if *C* induced *A*'s breach in order to obtain the money himself, it is unlikely that the amount he received would be viewed as the same sum of money promised to *B*. Nevertheless, circumstances are conceivable in which money paid to one person would be "identified" as the money due to another.[126] Thus, suppose *C* wrongfully draws money from *B*'s bank account; or that *B* rents his property to *A*, and *C*, without being entitled to it, collects the rent owed to *B*;[127] or even that *A* mistakenly pays to *C* a debt he owed to *B*.[128] Although these cases deal with payment of a fungible good (money), there is in each an element that permits identification of the payment as "belonging" to *B* and thus brings each within the scope of the property approach in its broad sense.

Illustration 6 deals with a situation in which *A* hires *C* to build a thirty-story building instead of the four-story building that *B* had been hired to build. In this case, it is submitted that *C*'s liability, even if he induced the breach, should be confined to *B*'s actual damages, with no recovery of *C*'s profits in erecting the thirty-story building. *C*'s profits do not derive from the appropriation of the performance to which *B* was entitled,[129] and there is no basis on these facts alone for imposition of greater liability as a matter of deterrence.[130]

C's liability should be limited to tort damages.

If restitution were allowed, a question would arise regarding the appropriate measure of recovery. If *C* is required to pay the value to him of *A*'s work—i.e., as an artist—*B* will receive the value of services to which he was not entitled under the contract, giving him a windfall that would be justifiable, if at all, only as a matter of deterrence.

125. For example, deterrence may be a relevant factor where *C* has induced *A*, in breach of *A*'s employment contract with *B*, to perform for *C* the same type of work *A* is supposed to perform for *B*, during the same hours and using *B*'s equipment and materials. See text accompanying note 89 supra.

126. See generally 4 G. Palmer, supra note 1, at 298-315. See also Simonds v. Simonds, 45 N.Y.2d 233, 408 N.Y.S.2d 359, 380 N.E.2d 189 (1978).

127. Compare the old cases in which the defendant received fees from an office to which the plaintiff was entitled, note 6 supra.

128. In Sergeant v. Stryker, 16 N.J.L. 464 (1838), the defendant received from a sheriff a reward due to the plaintiff. Recovery was denied on the ground that there was no privity between them. Goff and Jones support this conclusion, though not on the same grounds. See R. Goff & G. Jones, supra note 2, at 20. Recovery in this type of case was allowed, however, in Claxton v. Kay, 101 Ark. 350, 142 S.W. 517 (1912). The Restatement of Restitution would also allow recovery and cites ample support for it. See Restatement of Restitution § 126, reporter's notes (1937); 4 G. Palmer, supra note 1, at 298-315.

129. Although *C* was able to enter into his contract only by destroying *B*'s contract, his profits derive from his own contract. See text accompanying notes 281-83 infra.

130. Application of the deterrent approach to interference with contract relations is discussed further in text accompanying note 284 infra.

B. *The Meaning of "Appropriation"*

1. *Appropriation Generally.* It has been suggested in the constitutional law context that a layman would ordinarily have no difficulty in recognizing when a "taking" of property takes place.[131] This is certainly true with respect to the physical taking of another's tangibles or to the sale, rental, consumption, or even use of another's property. The concept of appropriation encompasses such takings, but it applies also to situations in which one person's property is used or sacrificed for the benefit or protection of another, as, for example, where cargo is jettisoned to save a ship. The owners of cargo thus sacrificed are entitled under the maritime principle of general average to contribution from those whose interests were saved by the act.[132] Although it has often been asserted that this principle has no application to events occurring on land,[133] it is submitted that any intentional sacrifice of another's property amounts to an appropriation that should give rise to a right to restitution.[134] However, the particular measure of the benefit obtained by the sacrifice may vary with the circumstances of the case.[135]

---

131. See B. Ackerman, Private Property and the Constitution 100-01 (1977); L. Tribe, American Constitutional Law 459 (1978).

132. G. H. Robinson, Handbook of Admiralty Law in the United States 764 (1939).

133. See, e.g., R. Goff & G. Jones, supra note 2, at 238.

134. French law has reached this result. See, e.g., Judgment of July 26, 1927, tribunal de paix, Vanves, [1927] D.H. Jur. 535, allowing recovery where a wall on the property of one person was broken in order to facilitate the extinguishing of a fire on the property of another. The decision is discussed in text accompanying notes 224 & 225 infra.

135. See 1 G. Palmer, supra note 1, at 44-47. When property of one person is used or sacrificed to save that of another, one of the following measures of recovery may be considered: (1) the value of what was sacrificed; (2) the value of what was sacrificed plus consequential damages to the owner (e.g., where property used for production is sacrificed the loss comprises its value and the loss of income until its replacement); (3) a certain part of the value of the salvaged property; or (4) the value of the salvaged property. The fact that recovery is predicated upon a theory or restitution does not necessarily mean that measure (3) or (4) must be adopted.

The award of value of the property lost (measure 1) is usually included in tort damages but is also compatible with principles of restitution. The benefit to *A* is the value of the property appropriated from *B*. This is also the price that *A* would have been required to pay had he negotiated for the purchase of such property as was required to save his own. This measure is essentially the same as that used to determine recovery for services given in an emergency. See Cotnam v. Wisdom, 83 Ark. 601, 104 S.W. 164 (1907) (doctor performing emergency services receives value of services, not value of life if saved). Recovery under the principle of general average is also calculated on this basis, though the owner of the sacrificed property is entitled only to proportionate contribution from each benefiting party. See G.H. Robinson, supra note 132, at 103-06, 764-92.

The second measure is in essence based upon the loss to the plaintiff and thus sounds in tort, though it too may be based upon a somewhat strained theory of restitution. To save *A*'s property it was necessary to sacrifice that of *B*. Had *A* been able to negotiate for *B*'s consent to the sacrifice he would at least have been required to pay for the loss —the value of the sacrificed property and consequential losses. This is also a fair price and would provide the measure of the benefit to *A*. Section 122 of the Restatement of Restitution, imposing a "duty of restitution for the amount of harm done," implicitly adopts this measure since the "harm done" may exceed the value of the property sacrificed.

The third method can be predicated on the theory that the benefit derived by a person whose property was about to be lost exceeds the "ordinary" value of the property sacrificed or the service rendered, if either had occurred in other circumstances. This measure is similar to that used in determining recovery for marine salvage, see M.J. Norris, The Law of Salvage §§ 258-264, 400-407 (1958). It is also reflected in the West German law

The concept of appropriation does not extend to acts that increase the risk of harm to others' property or that accidentally cause actual damage. For example, where a manufacturer saves expenses necessary to assure the safety of a product it increases the risk to consumers and obtains a benefit in the process.[136] However, the heightening of this risk does not amount to the appropriation of a property interest;[137] it thus does not establish a basis for restitution to the consumer of the value of the benefit. Similarly, where a ship at sea discharges oil that drifts onto a person's property,[138] or where a truck causes dust or stones to be thrown onto a person's property,[139] there is no appropriation of the injured interest and hence no basis for a restitutionary claim.[140]

On the other hand, where the activity is such that injury to the interests of others is continuous or systematic, it may be characterized as an "acquisitive" nuisance,[141] constituting an appropriation of others' interests. Thus, when a person's activities recurrently diminish another's enjoyment of his property (for example, through the constant emission of smoke, gas, or noise), the activities amount to an involuntary easement or servitude on

---

awarding to a finder a certain percentage of the value of the property. BGB § 971(1). See also Dawson, Negotiorum Gestio: The Altruistic Intermeddler, 74 Harv. L. Rev. 817, 1073, 1083 (1961).

The fourth method, looking to the value of the salvaged property, might be regarded as the most apt measure of the benefit obtained by the other party, but it does not provide a workable or fair rule. Suppose *A*, to save his property worth $20,000, sacrifices a chattel worth $100 that belongs to *B*. In a sense, by the sacrifice *A* gained $20,000. However, the existence of the property preserved cannot be attributed solely to the property sacrificed. To do so would disregard a major factor contributing to *A*'s "enrichment," i.e., his pre-existing ownership of the property. To allow *B* to recover on the basis of this method would give *B* a windfall and thus be punitive. See also text accompanying notes 271-76 infra.

136. See Keeton, supra note 40, at 412, asserting that "[m]aking a less safe product in order to economize on cost is . . . a combination involving enrichment to the detriment of another in this broad sense."

137. Obviously, an increased risk resulting from certain types of activity, as well as the fact that the defendant benefits from it, may affect liability in tort. Cf. Rylands v Fletcher, L.R. 3 H.L. 330 (1868) (strict liability for "non-natural" use of land; later extended to other instances of abnormally dangerous activities). But this liability does not rest on the appropriation of property interests involved here.

The greater the risk, the more probable it becomes that the plaintiff's interest will be sacrificed. When probability is so high as to reach certainty, liability under the property theory would ensue. The distinction between certainty and high probability not amounting to certainty may become a very fine one. See Keeton, supra note 40, at 416.

138. See Esso Petroleum Co. v. Southport Corp., [1956] A.C. 218.

139. See Randall v. Shelton, 293 S.W. 559 (Ky. 1956).

140. Liability may, of course, be imposed in tort, although an award of damages will require a showing of fault unless the activity is one subject to strict liability. See Goldman v. Hargrave, [1967] 1 A.C. 645; W. Prosser, supra note 34, at 63-65.

141. The point at which an ordinary nuisance becomes a "taking" of another's property is not always clear, but courts have frequently dealt with the question in the constitutional law context. In United States v. Causby, 328 U.S. 256 (1946), for example, the Supreme Court found that recurrent noise from airplanes following an approach path to an airport was a lasting nuisance amounting to a taking of property. See also Richards v. Washington Terminal Co., 233 U.S. 546 (1914). In contrast, clouds of dust created by temporary construction work were held to cause mere damage, not amounting to a "taking," in Wenderoth v. Baker, 238 Ark. 464, 382 S.W.2d 578 (1964). See Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1186-90 (1967).

the property. In such cases, regardless of the defendant's fault or lack thereof,[142] the injured party should be able to claim either damages or restitution of the benefit obtained by the defendant at his expense.[143] The distinction between actions that increase risk or cause accidental damage on the one hand and those that constitute actual use or appropriation on the other is admittedly not altogether satisfactory and in borderline cases becomes extremely difficult.[144] Nonetheless, it serves an essential purpose in permitting the vindication of injured property interests without unduly extending the remedy of restitution to cases in which appropriations of such interests are not involved.[145]

2. *Nontortious Appropriation.* Appropriation of another's property often constitutes a tort, such as trespass or conversion. In such cases, the plaintiff usually may, in the old terminology, "waive" the tort and claim instead the benefit obtained by the defendant. The question examined in the remainder of this section is whether, when an appropriation does not constitute a tort, the plaintiff can in effect "waive the non-tort" to claim restitution.[146] It is often maintained that proof of liability in tort is an essential element of a claim for restitution in cases involving waiver of

---

142. While a showing of negligence is generally required in ordinary nuisance situations, see W. Prosser, supra note 34, at 573-83, liability for an acquisitive nuisance tends to be strict. See, e.g., Jost v. Dairyland Power Corp., 45 Wis. 2d 164, 172 N.W.2d 647 (1969); Pennoyer v. Allen, 56 Wis. 502, 512, 14 N.W. 609, 613 (1883) ("no defense to show that [the] business [creating the nuisance] was conducted in a reasonable and proper manner").

143. But see Kirk v. Todd, 21 Ch. D. 484 (1882), an action for an injunction and damages against a manufacturer whose mill discharged waste into a stream above the plaintiff's premises. To establish the survival of his action after the defendant's death, the plaintiff argued that the defendant's estate "has been the gainer by the acts done, and the Plaintiff is entitled to damages against the executors." Id. at 488. The court disagreed, finding that the suit "was an action on a simple tort. It did not appear that the defendant had gotten any benefit by fouling the Plaintiff's stream; he had only injured the Plaintiff." Id. This case, which is far from convincing on this point, can perhaps be explained as involving, like *Phillips v. Homfray*, a mere saving of expenditure. See text accompanying notes 15-18 supra.

144. Suppose, for example, that *A* and *B* each own one of the only two specimens of a particular stamp. *A*, without fault, accidentally causes *B's* stamp to be lost, and as a result the value of the sole remaining stamp, in *A's* possession, appreciates from $50,000 to $85,000. Should *A* be permitted to retain his enrichment on the ground that he did not "appropriate" *B's* property? Plainly *B* would have no claim against *A* had *A* not been responsible for the loss, even though *A* would have enjoyed the same gain, but the question is a close one in the situation described.

145. Thus, in the case of the manufacturer who benefits by saving the cost of making safer products, while increasing the risk to the public, it is unlikely that the increased risk would be regarded as depriving members of the public of "something" they possessed. Even if it were, the "value" taken by the increased risk would have to be measured and the enrichment—the manufacturer's savings—somehow allocated among those actually injured and those merely exposed to a heightened risk of injury. See 1 G. Palmer, supra note 1, at 137-38. The idea that the manufacturer should be liable to each consumer for the hypothetical price of consent to the increased risk seems excessively speculative and impracticable.

146. There are, of course, many instances in which restitution is granted without any question of liability for a wrong, as, for example, when a plaintiff unofficiously supplies services in order to save another from death or bodily injury. See Cotnam v. Wisdom, 83 Ark. 601, 104 S.W. 164 (1907). Of concern here, however, are situations in which a benefit is acquired by exploiting or using something that "belongs" to the plaintiff, without his express or implied consent.

tort.[147] A different answer, however, may be more plausible if the notion of waiver of tort is abandoned and the issue recast as whether a defendant may be liable to restore benefits obtained from the plaintiff's property even though his acts did not constitute a tort (or, for that matter, even a breach of contract or equitable wrong).

A basic concern of the law of torts is the identification of grounds justifying the transfer of a loss from one person to another. While instances of strict liability can be found, liability generally involves a showing of negligence or intent on the part of the person causing the loss. The law of restitution, on the other hand, is concerned with whether there are considerations justifying retention of a benefit obtained at another's expense. That the acts giving rise to this benefit are not regarded as wrongful under prevailing criteria of tort law is not conclusive; the concept of "unjust" in the law of restitution is not equivalent to "wrongful" in tort law.

The material that follows examines four situations in which acts that do not constitute torts may nonetheless give rise to valid claims of restitution: cases in which no tort was committed because of the absence of the required state of mind; cases involving immunity or privilege; cases in which no damage was inflicted; and cases in which the defendant benefited from an act committed against the plaintiff by a third party.

a. *Where No Tort Was Committed Because of the Absence of the Required State of Mind.* The degree of protection granted by the law of torts varies with the interest involved and the manner of its infringement. Some interests are protected against only willful infliction of harm,[148] while others, including interests such as property rights in tangibles, are protected by such torts as conversion and trespass, for which liability is often strict. Between these extremes liability in tort is predicated upon deviation from a specific standard of conduct, most often that of the "reasonable person."

To the extent that it is possible to generalize in this area, I would suggest that liability in tort as well as restitution[149] tends to be strict whenever a person uses or appropriates "absolute" property belonging to another.[150] Consequently, where "absolute" property is appropriated

147. See, e.g., R. Goff & G. Jones, supra note 2, at 469; P. Winfield, supra note 10, at 91-92; Corbin, Waiver of Tort and Suit in Assumpsit, 19 Yale L.J. 221, 235 (1910); Hill, Damages for Innocent Misrepresentation, 73 Colum. L. Rev. 679, 725 (1973).

148. This "minimum" protection has been greatly expanded over the years, notably through the development of the prima facie tort doctrine. See Aikens v. Wisconsin, 195 U.S. 194 (1904); W. Prosser, supra note 34, at 96.

149. But see *Phillips v. Homfray*, discussed in text accompanying notes 15-18 supra, and *Kirk v. Todd*, discussed in note 143 supra, both denying claims in restitution. These decisions cannot be justified today.

150. Conversion is perhaps the most obvious example of a tort in which absence of fault provides no defense. See Restatement (Second) of Torts § 229 (1965); W. Prosser, supra note 34, at 84. Trespass, which applies to widely disparate situations, was once considered a strict-liability tort, see Weaver v. Ward, Hobart 134, 80 Eng. Rep. 284 (K.B. 1616), and continues to be so treated in instances of trespass to land, see Restatement (Second) of § 164 (1965); W. Prosser, supra note 34, at 74. Modern notions of fault have, however, been applied in some types of trespass, notably trespass to persons, see, e.g., Randall v. Shelton, 293 S.W.2d 559 (Ky. 1956); Letang v. Cooper, [1965] 1

claims in tort and restitution often overlap. Tort liability is not strict, however, for acts constituting an appropriation of either contractual rights or quasi-property interests. The appropriation of these interests may also give rise to a claim for restitution, but the principles upon which liability in restitution is based differ from those relating to liability in tort.[151] As a result, when these interests are appropriated restitution often provides the sole remedy. Moreover, where damage is inflicted but the damaging act does not involve an appropriation of the interest injured, liability in tort tends to be conditional upon a showing of fault,[152] and restitution is appropriate only when warranted by considerations of deterrence.

The law of misrepresentation provides a notable example of the confusion that may result from the application of tort standards to situations that essentially involve unjust enrichment. Traditionally, deceit was recognized as a tort that could be "waived"[153] in favor of a claim in restitution, but to establish deceit it was necessary to show intent.[154] A tort claim of negligent misrepresentation was eventually also given recognition. But concern that unjust enrichment may occur even without fault led to the development of the new "tort" of "nonfraudulent deceit," [155] under which "any representations which are false in fact and actually deceive the other . . . are actionable, irrespective of whether the person making them knew them to be false or acted in good faith in making them, *when the loss of the party deceived inured to the benefit of the other.*" [156] This principle was

Q.B. 232; Fowler v. Lanning, [1959] 1 Q.B. 426.

It is submitted that the issue of appropriation lies at the root of these different rules of liability. When the trespass consists of use or appropriation of another's property, liability tends to be strict; but where mere damage is caused, as in the ordinary case of trespass to persons, liability is conditional upon fault. A similar explanation can be offered with respect to the basis of liability in nuisance, see note 142 supra.

151. See text accompanying notes 163-71 infra.

152. Exceptions may be found, as in situations involving abnormal or ultrahazardous activities. See note 137 supra.

153. P. Winfield, supra note 10, at 95.

154. See, e.g., Brown v. Underwriters at Lloyd's 53 Wash. 2d 142, 146, 332 P.2d 228, 231 (1958) (quoting Tilghman v. West, 43 N.C. 183, 184 (1851) ("Fraud cannot exist... where the intent to deceive does not exist.")) See also F. Harper & F. James, Jr., The Law of Torts 533 (1956).

In its earliest form, deceit could be established only where the defendant's actions were shown to have been motivated by interest in a gain. This burden was dropped when deceit was recognized as an independent tort. In a leading early case, Pasley v. Freeman, 3 T.R. 51, 62, 100 Eng. Rep. 450, 456 (K.B. 1789), the court held that "the gist of the action is the injury done to the plaintiff, and not whether the defendant meant to be a gainer by it."

155. The tort was first recognized in the courts of Michigan. See, e.g., Rosenberg v. Cyrowski, 227 Mich. 508, 198 N.W. 905 (1924); Aldrich v. Scribner, 154 Mich. 23, 117 N.W. 581 (1908). There is some disagreement as to the extent of its acceptance. Dean Prosser claimed (as of 1971) that the rule had been adopted in "some eighteen courts, with the number increasing every year," W. Prosser, supra note 34, at 711-12, while Professor Hill has concluded that there was no trend toward general approval of the rule, Hill, supra note 147, at 689 n.37.

156. Rosenberg v. Cyrowski, 227 Mich. 508, 511, 198 N.W. 905, 905 (1924) (emphasis added). In Aldrich v. Scribner, 154 Mich. 23, 28, 117 N.W. 581, 583 (1908), the court recognized the difficulties created by this tort, noting that "[i]t may seem somewhat unjust to characterize such conduct as fraudulent, but the court was apparently placed in the dilemma of either so characterizing it or of altogether denying compensation, and it chose the least objectionable of these two alternatives." The court apparently did not consider grounding an award in restitution.

given partial recognition, as a tort of "innocent misrepresentation," in the Restatement (Second) of Torts: section 552C imposes strict liability for misrepresentation of a material fact in a sale, rental, or exchange transaction.[157] It seems clear, however, that liability for innocent misrepresentation has nothing to do with the infliction of a wrong or the breach of a duty or standard of conduct; it is justified purely as a matter of preventing unjust enrichment. The Restatement (Second) indirectly recognizes this anomaly, limiting the measure of recovery to the defendant's gain[158] and acknowledging that this recovery, though called "damages," is really "restitutionary in nature."[159]

There is, of course, no reason to limit recovery to misrepresentation in sale, rental, or exchange transactions,[160] or indeed to any type of business transaction. Suppose, for example, that *A* entertains doubts regarding his title to a plot of land that he possesses. He consults with *B*, who after proper examination advises *A* that he can build on this plot, which *A* does. If it is later discovered that the land belongs to *C* and that *B*'s advice was neither fraudulent nor negligent, *A* may be left without a remedy.[161] But suppose it transpires that the land actually belongs to *B* himself. Would he not be required to make restitution? The misrepresentation was not tortious, absent the required mental state upon which tort liability is conditioned. This does not, however, mean that *B* is entitled to retain the benefit at the expense of *A*. A remedy will therefore in all probability be provided, based on unjust enrichment even though it may be characterized in other terms.

While strict liability is often imposed for appropriation of "absolute" rights in tangible property,[162] a wholly different situation obtains with regard to choses in action. The law of torts affords only modest protection to the interest in the performance of an obligation (usually but not necessarily a contractual obligation) that is unsupported by a property right. The protection granted to choses in action and even to expectancies has been considerably extended over the years, notably through the tort of

157. For a detailed discussion and criticism of the tentative draft of this provision, see Hill, supra note 147, at 706-08.

158. Recovery is "limited to the difference between the value of what the other has parted with and the value of what he has received in the transaction." Restatement (Second) of Torts § 552C(2) (1977).

159. Id. § 552C(2), comment f. See also James, Jr. & Gray, Misrepresentation (pt. 1), 37 U. Md. L. Rev. 286, 315-79 (1977).

160. The Restatement (Second) expresses no opinion as to whether this kind of strict liability may be imposed in other types of business transactions. Id. § 552C(2), caveat.

161. Recovery for the mistaken improvement of another's property was traditionally denied, see Restatement of Restitution § 42 (1937). But legislation allowing recovery by the innocent improver has been adopted in many states. See Merryman, Improving the Lot of the Trespassing Improver, 11 Stan. L. Rev. 456, 466-48 (1959). In addition, where the owner seeks equitable relief it may be made conditional upon his payment for the improvements. Improvements will also be taken into account if a trespasser is sued for mesne profits. See 2 G. Palmer, supra note 1, at 444-45, indicating that a number of modern cases tend to grant affirmative relief to the innocent improver of land.

162. Similarly, strict liability has often been extended to cases involving the appropriation of "absolute" rights in certain types of intangibles, such as copyright. See Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304 (2d Cir. 1963).

wrongful interference,[163] but liability generally depends upon intention to interfere or at least knowledge that interference would inevitably result from the act. Mere "negligent interference" does not usually suffice to found liability.[164] Hence, the protection granted to choses in action falls far short of that granted to "absolute" property. Thus, if *A*, without authority, donates or sells to *C* a chattel belonging to *B*, *C* may be liable to *B* in conversion, no matter how innocently he acted. But where *C* innocently collects from *A* a debt owed to *B*, or even receives from *A* a chattel that *A* promised to sell *B*,[165] he will not be liable in tort because the state of mind required for wrongful interference is absent. Thus, *B* will be unable to shift to *C* the loss he has suffered as a result of *A*'s wrong.

However, different questions arise if these same transactions are considered in terms of *C*'s enrichment as a result of the appropriation of *B*'s right, rather than in terms of *B*'s loss. Whether *C* ought to be allowed to retain the benefit depends on the nature and social utility of the activity through which it was obtained and whether its retention would be unjust. In this connection, one distinction that is drawn is between the case in which *C* receives property promised to *B* for value[166] and that in which he receives it as a donation. In the first case, the social and economic interest in exchange transactions[167] calls for allowing *C*, assuming he acted in good faith, to retain whatever benefits he obtained. Thus, even if *C* paid $18,000 for property worth $20,000, he is required to restore neither the property itself nor his $2,000 profit. If, however, *C* received the property as a gift he would be liable in restitution. "Donative contracts are economically sterile transactions," [168] and neither a sense of equity nor the social utility of the donative transaction would justify permitting enrichment from an interest belonging to *B*. The fact that the transfer to *C* was not tortious, because he did not have the necessary state of mind, does

163. W. Prosser, supra note 34, at 949-51.

164. Id. at 938, 952-53. But cf. Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) (recognizing in principle that lawyer may be liable to intended beneficiary for negligent drafting of will).

165. There is, of course, a major difference between an obligation to sell specific property and that of paying a debt or supplying goods designated merely by species. The latter category raises the problem of "identification" discussed at notes 126-28 and accompanying text supra. In cases involving money or fungible goods, the obligor can still perform the contract, while in the case of a specific chattel he cannot do so once he has transferred it to a third party.

166. It is important to note the difference in the treatment of property rights and contractual obligations in this area. One who acquires a tangible, or even its use, from an unauthorized person may be liable to the owner even though he gave value in good faith. In this respect the law of restitution follows the law of property, as does the law of torts. However, no liability will ensue when a person receives in good faith and for value the performance of an obligation due to another. Restatement of Restitution § 172 (1937). See also id. §§ 126(1), 123.

167. See A. von Mehren, supra note 48, § 20.

168. Id. § 23.

not bar recovery.[169] It is only where *C* gave value in good faith that his enrichment is not regarded as unjust and restitution is precluded.

Even where quasi-property expectancies are involved, and even if the defendant committed no actual wrong,[170] circumstances may arise that justify restitution of benefits obtained through appropriation. Thus, while a donor is entitled to change his mind before making a gift, if he is led by mistake or duress to give it to the defendant instead of the plaintiff, the latter ought to be entitled to restitution. Retention of the benefit by the defendant would be unjust whether or not he acted wrongfully or was responsible for the donor's mistake or for the duress applied against him.[171]

Litigation gives rise to a rather narrow area of tort liability for expenses, inconvenience, and often other losses. The liability of the unsuccessful plaintiff generally depends on the absence of probable cause as well as upon the existence of an improper purpose;[172] unless these conditions are fulfilled, the successful defendant may not recover. But should the unsuccessful plaintiff retain benefits derived from an unfounded lawsuit even if the tort requirements are not met? There is no doubt that restoration of benefit is proper when one party received money or property from the other pursuant to a decision that was later reversed or vacated.[173] Difficult problems arise, however, when the benefit was "indirect"—not by receipt of something directly from the other party but rather through the appropriation of his interest in relations with third parties.

A question relating to this little-explored field was decided by the Supreme Court of Israel in *Palimport, Ltd. v. Ciba-Geigy, Ltd.* [174] The defendant in this case was the plaintiff in a previous action in which it claimed that a certain chemical product of the plaintiff in the present action (the defendant in the former litigation) infringed its patent. In the first action the district court granted an order, which was later reversed on appeal, restraining the plaintiff in the present case from selling its product. The plaintiff had no cause of action in tort to recover losses suffered between the date of the district court judgment and its reversal, during which time it was unable to sell its product. Instead, it brought an action based on unjust enrichment for the profits realized by the defendant as a result of the injunction. It was claimed that the parties were the only major sellers of this type of product, so that while the injunction was in force the plaintiff's customers had to turn to the defendant and purchase its product. The Israeli Supreme Court, declining

169. Simonds v. Simonds, 45 N.Y.2d 233, 242, 408 N.Y.S.2d 359, 364, 380 N.E.2d 189, 190 (1978). See also notes 126-28 and accompanying text supra.

170. Since quasi-property rights are not "exclusive," mere receipt by one person of a benefit to which another had an expectancy is insufficient to found liability. See notes 42-46 and accompanying text supra.

171. Restatement of Restitution § 127 (1937); Pope v. Garrett, 147 Tex. 18, 211 S.W. 2d 559 (1948), discussed in 1 G. Palmer, supra note 1, at 224.

172. See generally W. Prosser, supra note 34, at 834-56.

173. Restatement of Restitution § 74 (1937).

174. 29 (1) P.D. 597 (1975).

to follow the United States decisions of *United Motors Service, Inc. v. Tropic-Aire, Inc.*[175] and *Greenwood County v. Duke Power Co.*,[176] held that the claim disclosed a cause of action based on unjust enrichment. The absence of a cause of action in tort was no ground, the court found, for denying restitution. There was a causal connection "between the closing of the market [to the plaintiff in the present action] and the resulting monopoly to which the [other party] had no right."[177] The plaintiff was therefore entitled to restitution even if the profits were received from third parties and did not derive from the plaintiff's property.

This reasoning is convincing. The absence of a claim in tort may be justified on the ground that a person should not be deterred from seeking aid in court by the risk of being subject to liability for damages if he loses.[178] But this consideration does not justify allowing retention of gains made at the expense of the party that eventually won.[179] The plaintiff's interest in doing business with his clients, though clearly not a traditional property right, can be regarded as quasi-property.[180] The plaintiff could be deprived of his clients through competition, but when the other party appropriated this interest by a court decision that was later reversed, his enrichment was unjust even if his suit was not tortious.

b. *Where Tort Liability Does Not Arise Because of Immunity or Privilege.* An act that ordinarily constitutes a tort may not be actionable if the actor is either immune from liability in tort or acted within a privilege. When, in such cases, the actor or a third party derives a benefit from the act, the question arises whether the defense against tort liability will also defeat a claim for restitution. The answer depends on the grounds for granting the defense and the policies underlying it. Where the main purpose of the defense is to protect a person from suffering a loss by shielding him from the consequences of his deed, there is no reason to allow him to retain a benefit derived from otherwise actionable conduct. But when the defense serves not merely to enable a person to act with impunity but also to encourage a certain type of activity, it may also extend to permit retention of incidental benefits.

(1) *Immunity.* Immunity is conferred "because of the status or position of the favored defendant"[181] or because of his relation to the

175. 57 F.2d 479, 484 (8th Cir. 1932).
176. 107 F.2d 484, 487 (4th Cir. 1939).
177. 29 (1) P.D. at 606 (per Sussman, J.).
178. P. Keeton & R. Keeton; Cases and Materials on the Law of Torts 1104 (2d ed. 1977).
179. In the Israeli decision, Judge Cahn said:
> Regarding consideration of legal policy, I see no reason why we should limit the law of restitution to property rights . . . . [I]t is unjustified that one who was enriched at the expense of the other party as a result of a judgment which was reversed, will retain the profits he made in that way, profits which without that judgment would never had reached him but would have enured to the other party.

29 (1) P.D. at 607.
180. See text preceding note 45 supra.
181. Restatement (Second) of Torts, introductory note to Ch. 45A, at 392 (1979).

plaintiff.[182] It is thus distinguishable from privilege, which is granted because of the nature of the activity involved or the circumstances surrounding it.[183] Some traditional immunities, such as that of the sovereign, have, despite deep historical roots, come under widespread criticism and are on the retreat.[184] Those that still survive, it has been said, "have been conferred for reasons of policy, involving protection of the interests of the defendant or other interests of social importance that he represents."[185]

A particular immunity may be so broad as to preclude any type of action against the protected defendant. But when it is confined to tortious acts, and where its main purpose is to protect the tortfeasor from loss, an immunity should not generally preclude restitution of benefits unjustly acquired.[186]

This applies to immunities granted to governments, public officers, municipal corporations, and charities.[187] Governmental immunity is predicated upon the "reluctance to divert public funds to compensate for private injuries"[188] and that of charitable trusts on the somewhat similar ground that "the funds of the charity are not to be diverted from the purposes intended by their donors."[189] But these rationales, even if accepted, do not justify retention of a profit unjustly acquired at the expense of another. Indeed, a considerable body of case law supports the recovery of benefits tortiously obtained by a state or municipality.[190] The decisions are sometimes based on the waiver of tort concept, even though the plaintiff would not have been able to sue in tort.[191] The constitutional prohibition against the taking of property without compensation has also provided a ground for recovery when property was taken or used by a public authority.[192]

Immunities based on family relations, notably those between husband

---

182. See notes 193-98 and accompanying text infra.

183. W. Prosser, supra note 34, at 970.

184. Restatement (Second) of Torts, introductory note to ch. 45A, at 393 (1979).

185. Id. at 392.

186. A different approach was adopted in the English case of Brocklebank, Ltd. v. R., [1925] 1 K.B. 52, followed in Hardie & Lane, Ltd. v. Chiltern, [1928] 1 K.B. 663. The dissenting opinion of Scrutton, L.J., in *Brocklebank* is, however, convincing.

187. Very little remains of the charities' immunity. See Restatement (Second) of Torts § 895E (1979).

188. W. Prosser, supra note 34, at 975.

189. Restatement (Second) of Torts § 895E, comment c, at 422 (1979).

190. See 1 G. Palmer, supra note 1, at 66 & n.23 (citing cases).

A different approach has been taken, however, with regard to claims against the United States, which until 1946 enjoyed immunity from tort actions. Although claims against the federal government could be brought on "any express or implied contract . . . in cases not sounding in tort," 28 U.S.C. § 1346 (1976), the Supreme Court held that this did not open the door to quasi-contractual claims based upon waiver of tort. See Schillinger v. United States, 155 U.S. 163 (1894). *Schillinger* is aptly criticized in Developments in the Law—Remedies Against the United States and its Officials, 70 Harv. L. Rev. 827, 881-82 (1957).

191. Board of Comm'rs v. Trees, 12 Ind. App. 479, 40 N.E. 535, 536 (1895).

192. 1 G. Palmer, supra note 1, at 66.

and wife[193] and parent and child,[194] are rapidly losing ground, although they have by no means completely disappeared.[195] The prevalent modern justification, that tort actions would disrupt peace at home,[196] is unconvincing, and indeed has not barred actions based on torts relating to property, for which claims are generally allowed.[197] The immunity should similarly not apply to a claim for restitution based upon the unjust enrichment of one member of the family at the expense of the other.[198]

The strongest case for immunity, at least where liability is conditional upon fault, can be made with regard to minors and persons of unsound mind, although in keeping with the illogical development of this field, immunity has generally been denied in such cases.[199] Where minors or the mentally incompetent are liable in tort they should of course also be liable for any benefit derived at another's expense. Even in the rare cases in which they may be absolved from liability, the availability of restitution for benefits derived should remain unaffected. A situation of this kind arises in cases where an infant is privileged to disaffirm a contractual obligation.[200] Since this privilege is intended to protect rather than enrich the infant,[201] he should not be permitted to retain benefits unjustly received at another's expense.

(2) *Privilege.* Necessity makes legal, permissible, and sometimes even obligatory conduct that otherwise would be actionable. In this respect privilege differs from immunity, which, though it also protects from liability, can hardly be regarded as making the wrongful conduct permissible and certainly not obligatory. It does, however, share with immunity the aim of protecting the defendant against the shift of loss to him. Like immunity also, privilege is not designed to enable the person acting under necessity to derive a benefit at the expense of another. Hence,

---

193. W. Prosser, supra note 34, at 859-64.

194. Id. at 864-68.

195. The Restatement (Second) of Torts takes the position that no such immunity should be recognized, but admits that this view is not yet universal, § 895F, comment f; § 895G, comment j (1979).

196. Id. § 895F, comment d; § 895G, comment c.

197. W. Prosser, supra note 34, at 861, 865.

198. In Barnet v. Barnet, 12 P.D. 565 (1958), the Israeli Supreme Court recognized a wife's claim against her husband for ownership of a car even though the husband was immune under the Civil Wrongs Ordinance, resting its decision on a property-based claim of title. Moreover, the court assumed that had the car been sold, the wife could have waived the tort claim (for conversion) and claimed instead the price, despite the immunity. Id. at 585. See also G. Williams, Joint Torts and Contributory Negligence 102 (1952), to which the court referred.

An Australian court reached a different result in a comparable situation, holding that spousal tort immunity could not be circumvented by waiver of tort: Chandler v. Chandler, [1951] Q.W.N. 27; R. Goff & G. Jones, supra note 2, at 484.

199. W. Prosser, supra note 34, at 996 (infants), 1000 (persons of sound mind), Where, however, a tort requires a specific state of mind, such as intent or malice, which the minor or lunatic is incapable of forming, liability will not be imposed. Id. at 997, 1001.

200. 2 S. Williston, supra note 49, § 238 (3d ed. 1959).

201. The privilege may also affect his liability in tort. See Restatement (Second) of Torts § 895I, comment c (1979). But the infant will be liable if the tort can be regarded as "a distinct and independent one." See W. Prosser, supra note 34, at 948, pointing to the difficulty of applying this distinction.

it might be thought as a general proposition that necessity is a complete defense to an action in tort, but does not affect liability based on unjust enrichment.[202] For example, a person lawfully in possession of perishable goods belonging to another who is unable to get in touch with the owner is privileged to sell or even consume them. It is inconceivable that he would be liable in tort for that which he was probably not only privileged but even obligated to do. He is, nevertheless, liable in restitution for the benefit derived.[203] The maritime principle of general average provides another example: the peril justifies and may even impose a duty upon the master to make the sacrifice, but the owner is entitled to contribution from the interests saved. In other circumstances, however, the effect of a privilege is less clear. In acting under necessity a person may often lose or damage another's property by putting it to other than its ordinary use, and a claim for the injury seems to sound in tort.[204] In addition, where the benefit inured to a third party rather than the actor, the traditional common law reluctance to allow recovery for unsolicited benefit might preclude recovery against the party who benefits from the salvage.[205]

In the typical case of private necessity, in which *A* sacrifices *B*'s property in order to save his (*A*'s) life or property, it is obviously fair that *A* should pay for the loss, and it may not matter in most cases whether his liability is classified in terms of torts or unjust enrichment.[206] The question is different, however, where *A* sacrifices *B*'s property to save *C*'s life or *C*'s more valuable property. If liability on the part of *C* is excluded on the ground that the benefit was unsolicited, there remains the difficult choice, for which no satisfactory guidance can be offered, between placing

---

202. See P. Winfield & J. Jolowicz, supra note 27, at 637.

203. Restatement of Restitution § 121 (1937).

204. This, however, is by no means always the case. See the example discussed in Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 460, 124 N.W. 221, 222 (1910), of a starving man who takes "what is necessary to sustain life," or the example cited in P. Winfield & J. Jolowicz, supra note 27, at 638, of "using a neighbour's fire extinguisher to put out a fire."

205. Traditionally, English common law denied recovery of expenses incurred by a stranger who acted without request to protect or salvage the property of another. See, e.g., Falcke v. Scottish Imperial Ins. Co., 34 Ch. D. 234, 248 (1886); Nicholson v. Chapman, 2 H. Bl. 254, 126 Eng. Rep. 536 (C.P. 1793); R. Goff & G. Jones, supra note 2, at 267-72. The modern tendency in the United States, however, has been much more favorable toward a person in lawful possession (including a finder) who incurs expenditures necessary to preserve the property of another. See, e.g., Hartford Fire Ins. Co. v. Albertson, 59 Misc. 2d 207, 298 N.Y.S.2d 321 (1969); Restatement of Restitution § 117 (1937); 2 G. Palmer, supra note 1, at 369-74. Moreover, in the case of preservation of life and health recovery for necessary services may be had, even if unsuccessful. See Cotnam v. Wisdom, 83 Ark. 601, 104 S.W. 164 (1907). In this respect the "land rule" became more liberal than the marine rule, under which recovery is conditional upon the success of the salvage. Cf. Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc., 553 F.2d 830 (2d Cir. 1977), involving the rescue of a sailor stricken with illness aboard the defendant's vessel. The court held that the admiralty doctrine under which no reward can be had for rescue of life at sea unless property is simultaneously salvaged does not bar recovery of expenses granted in accordance with the land rule. See also Friedell, Compensation and Reward for Saving Life at Sea, 77 Mich. L. Rev. 1218, 1275-87 (1979).

206. Nonetheless, even if the liability is deemed to be in tort, it is in fact based on notions of unjust enrichment. See generally Keeton, supra note 40. For other instances in which liability in tort is imposed to prevent unjust enrichment, see notes 155-60 and accompanying text supra.

the loss on *A* or *B*. The old *Mouse's Case*[207] represents one approach to this problem. In that case, a passenger on a barge jettisoned the plaintiff's casket in order to save the barge, which had been caught in a great tempest. The possibility of applying a maritime general average principle and requiring those who benefited from the sacrifice to share the loss was not considered.[208] Left with the choice of placing the loss on the plaintiff or on the passenger who jettisoned the goods, the court held that if the act was necessary to save the lives on board "everyone ought to bear his loss."[209] The Restatement of Restitution, on the other hand, has taken the opposite approach in cases of private necessity.[210]

The decision in *Vincent v. Lake Erie Transportation Co.*[211] did much to stimulate interest in this subject. In that case the defendant's vessel unloaded cargo at the plaintiff's dock. When unloading was completed a storm grew so violent that it would have been highly imprudent to allow the vessel to leave the dock. The master decided to keep the vessel moored, and the wind and waves threw it repeatedly against the dock. The court held the shipowners liable for the $500 damage caused to the dock since "those in charge of the vessel deliberately . . . held her in such a position that the damage to the dock resulted, and thus preserved the ship at the expense of the dock." The court recognized the defense of necessity but held that "where the defendant prudently . . . avails itself of the plaintiff's property for the purpose of preserving its own more valuable property, . . . the plaintiffs are entitled to compensation for the injury done."[212]

Based to a large extent on this case, Professor Charles Bohlen developed the theory of incomplete privilege, under which "an act may be so far privileged as to deprive the person whose interest is invaded . . . of the privilege which he would otherwise have to terminate or prevent the invasion . . . but not so far privileged as to relieve [the actor] from liability to pay for any material harm he does thereby."[213] This concept was later adopted by the Restatement.[214] Neither *Vincent* nor Professor Bohlen's article stated explicitly whether the liability to pay for the harm was in tort or in restitution, although both include passages suggesting that liability is based upon unjust enrichment. Professor Keeton has strongly supported the unjust enrichment theory,[215] while Professor Palmer has criticized it on the ground that liability in a *Vincent*-type case should be imposed even

---

207. 12 Co. Rep. 63, 77 Eng. Rep. 1341 (K.B. 1608).

208. Presumably because the event occurred in an inland waterway. See P. Winfield & J. Jolowicz, supra note 27, at 636 n.46.

209. 12 Co. Rep. at 64, 77 Eng. Rep. at 1342.

210. See notes 221-23 and accompanying text infra.

211. 109 Minn. 456, 124 N.W. 221 (1910).

212. Id. at 460, 124 N.W. at 222.

213. Bohlen, supra note 109, at 313.

214. Restatement (Second) of Torts § 197(2), comment j (1965). See also Restatement of Restitution § 122 (1937).

215. Keeton, supra note 40.

if the actor was unsuccessful in saving himself from the loss and thus obtained no benefit.[216]

I find the unjust enrichment explanation more satisfactory than the absence-of-benefit argument. The meaning of "benefit" in the law of restitution often depends on the circumstances:[217] in cases of marine salvage recovery may be conditional upon success, but in other instances mere performance of a service in an emergency, even if unsuccessful, should be regarded as creating a benefit that warrants recovery.[218] Medical treatment rendered to an unconscious patient belongs to this category.[219]

The Restatement of Restitution adopted the position that liability to pay for the harm done in the *Vincent*-type case is in restitution. Section 122, which deals with "Benefits Derived from the Exercise of Incomplete Privilege," speaks of "a duty of restitution for the amount of harm done."[220] Indeed, the words "benefits derived" in the title of the section indicate that the liability is based upon unjust enrichment. The Restatement, however, lacks consistency, in that liability is imposed even where an actor, acting solely for the protection of a third party, "derives no benefit except the satisfaction of having aided a third person."[221] The ground for this liability is that a "person is not entitled to be a good Samaritan at the expense of another."[222] This, it will be recalled, is the opposite of the conclusion in *Mouse's Case* that "everyone ought to bear his loss for the safeguard and life of a man."[223] Moreover, the good Samaritan argument is not persuasive. It is valid only when in order to avert a danger the actor has a choice of sacrificing either his own property or that of the plaintiff. If he chooses to sacrifice the plaintiff's property it is fair that as between himself and the plaintiff he should bear the loss, for he has no right to impose upon the plaintiff a loss that he himself was unwilling to suffer.

In this context, a French decision is of interest.[224] In order to extinguish a fire on the defendant's property firemen entered the adjoining property of the plaintiff and broke a wall separating the two properties. The defendant argued that liability was conditional upon fault, but the court held that an action for unjust enrichment could be brought in the absence of a cause of action in contract or tort whenever "the property (*patri-*

---

216. 1 G. Palmer, supra note 1, at 139-40.

217. See note 135 supra.

218. See note 205 supra.

219. Cotnam v. Wisdom, 83 Ark. 601, 104 N.W. 164 (1907); In re Crisan's Estate, 362 Mich. 569, 107 N.W.2d 907 (1961). See also Matteson v. Smiley, 40 Man. 247, [1939] 2 D.L.R. 787.

220. Section 197 of the Restatement (Second) of Torts (1965) speaks simply of "liability for any harm done."

221. Restatement of Restitution § 122, comment b (1937).

222. Id.

223. 12 Co. Rep. at 64; 77 Eng. Rep. at 1342. Admittedly, however, the situation in the Restatement differs from that of *Mouse's Case*, in that the defendant in the latter acted not only for the benefit of third parties but also for himself as well as for the plaintiff.

224. Judgment of July 26, 1927, tribunal de paix, Vanves, [1927] D.H. Jur. 535, discussed in F. Goré, L'Enrichissement aux Dépens d'Autrui 244 (1949).

moine) of one person gains an advantage at the expense of the other."[225] Recovery was therefore allowed against the owner of the salvaged property, even though the damage was inflicted by third parties.

In West Germany, this issue is governed by section 904 of the civil code, which provides that a property owner "may require compensation for the damage caused to him" by one acting to avert danger to himself or another, but it does not state from whom compensation is to be demanded.[226] No problem arises when the person who interfered acted for his own benefit. But even when the interference was aimed at protecting a third party the prevailing opinion is that the claim would be against the actor.[227] The actor would, in many cases, be entitled to indemnity from the party whose interest he was trying to protect, in accordance with rules relating to *negotiorum gestio*.[228] It has been suggested that this approach has certain advantages, in that it is easier for the owner to sue the actor and that both the owner and the third party will have to deal only with one person—the one who intervened for the benefit of the third party.[229] On the other hand, however, a strong argument can be made for absolving the actor from liability and allowing the owner to claim directly from the one who benefited from the act.[230]

The approach taken in the Restatement imposes liability on the party who acted for the benefit of another, but it also recognizes the possibility that the actor would be entitled to restitution from the person who benefited from the act, in accordance with rules relating to preservation of life and property in an emergency.[231] But this restitutionary right is presumably narrower than that recognized under West German law, because in the United States the right to recover in cases of unsolicited intervention is more limited.[232] Under the Restatement, where the third party is liable to indemnify the actor, he is also liable directly to the owner,[233] but this liability does not absolve the actor. Where, however, the benefited party is not just one person but the public, the Restatement leaves the actor free from liability even if he, as a member of the public, benefited from the act.[234]

---

225. [1927] D.H. Jur. at 536.

226. BGB § 904 ("Der Eigentümer kann Ersatz des ihm entstehenden Schadens verlangen.").

227. 5 H. Soergel & W. Siebert, supra note 67, at 186 (11th ed. 1978).

228. See Dawson, supra note 135, at 1073.

229. See E. von Cæmmerer, supra note 11, at 252.

230. 2 K. Larenz, supra note 68, at 649-50.

231. Restatement of Restitution §§ 116, 117; § 122, comment b (1937).

232. See Dawson, supra note 135, at 863-64.

233. Restatement of Restitution § 122, illustration 3 (1937).

234. It has been maintained that where the public benefited from one person's sacrifice of his own or another's property, there is no public liability to pay, see W. Prosser, supra note 34, at 126 & n.5. However, the cases cited by Prosser, Field v. City of Des Moines, 39 Iowa 575 (1874), and Bowditch v. Boston, 101 U.S. 16 (1879), do not seem to prove this point. They concern the destruction of property to prevent the spreading of fire. The question of restitution where *A*'s property is sacrificed to save *B*'s arises only when the property sacrificed was not subject to the same risk (*Vincent*) or, if it was subject to the same

This distinction between public and private necessity is unsatisfactory, especially given the lack of definition of "public."[235] Moreover, to the extent that the distinction purports to allocate the risk between the actor and the injured party according to the number of persons whose life or property was endangered, it is unsupported by the authorities. Thus, while the Restatement classified *Mouse's Case,* in which the defendant jettisoned the plaintiff's property to save the barge, as an example of public necessity,[236] nothing in the decision indicates that the number of passengers aboard (forty-seven) was deemed relevant.[237] On the other hand, the court that imposed liability in *Vincent,* an instance of private necessity, relied on an analogy to public necessity, suggesting that it saw no reason to distinguish the two types of situations.[238]

There is some support for another, more useful distinction; namely, between cases in which the actor tries to protect his own interest or an interest for which he is responsible and those in which he acts to protect either the interest of third parties or that of the injured party himself. Both categories encompass public as well as private cases of necessity. In both situations the act is privileged, but in the first category the actor is liable on the principle of unjust enrichment while in the second he is not, since he derives no benefit.[239] In this latter situation, liability should instead be imposed directly on those who benefited from the act. The main obstacle to such a principle is the traditional common law reluctance to allow recovery for unsolicited intervention.[240] But the modern tendency in the law of sal-

---

risk, when a choice existed between sacrificing *A*'s property or *C*'s (*Mouse's Case* and general average cases). No such question arises regarding a house destroyed either after catching fire or because it is in the path of a spreading conflagration. Similarly, no question of restitution arises when a person shoots a mad dog or burns clothing infected with smallpox germs—situations discussed by W. Prosser, supra note 34, at 125.

235. Prosser observed that "[t]he number of persons who must be endangered in order to create a public necessity has not been determined by the courts." W. Prosser, supra note 34, at 126.

236. Restatement (Second) of Torts, § 196, reporter's notes (1966). Another old case of "public necessity" referred to in the reporter's note is Respublica v. Sparhawk, 1 U.S. (1 Dall.) 357 (1788). In that case, however, the property was not appropriate for a public purpose but rather seized by the enemy, a point emphasized in the argument. Id. at 359.

237. Indeed, the court stated that "everyone ought to bear his loss for the safeguard and life of a man" (in the singular), 12 Co. Rep. at 64, 77 Eng. Rep. at 1342. The terms "public" and "state" appear in the Latin maxims *"interest reipublicae quod homines conserventur"* and *"conservatio vitae hominis est bonum publicum,"* which were quoted by the court. But these just mean that the state or the public has an interest in the preservation of life.

238. 109 Minn. at 460, 124 N.W. at 222.

239. It is submitted that in *Vincent* liability was imposed not because it was an instance of private rather than public necessity but because the act was done by those responsible for the ship they tried to protect. See also the Saltpetre Case, 12 Co. Rep. 12, 77 Eng. Rep. 1294 (K.B. 1607), which involved an instance of public necessity. Under the Restatement no liability ought to be imposed in such a case. However, the court assumed that "the ministers of the King who dig for the Saltpetre are bound to leave the inheritance of the subject in so good plight as they found it," id. at 12, 77 Eng. Rep. at 1295. Again it is submitted that liability was imposed on the ministers because they were in charge of the public interest that benefited from their action. Hence, in the ordinary case of public necessity the ground for absolving the actor from liability lies not in the fact that the necessity is "public" but in the fact that he is not the beneficiary of the act.

240. See note 205 and accompanying text supra.

vage has been more flexible, especially where acts to save life or health are involved. This tendency may lead to development of a more general rule permitting a person whose property has been sacrificed in an emergency to recover from those benefited by the act.

c. *Where No Tort Was Committed Because No Damage Was Suffered.* In torts that are not actionable per se, proof of actual damage is an essential element of the claim.[241] If no damage was suffered, then by definition no tort was committed, whether or not the conduct complained of was morally reprehensible. If restitution is regarded merely as an alternative remedy for the tortious act, then absence of damage would be fatal to restitution whenever it is fatal to a claim in tort. Such an approach cannot, however, be accepted. Where a benefit was derived from an unauthorized use or exploitation of the plaintiff's property, restitution ought to be granted even if the plaintiff was unable or unwilling to use the property. In such a case, the enrichment is "at the plaintiff's expense" even if he suffered no loss other than not being paid for the use of his property.[242] Whether the defendant's conduct was actionable per se ought in this instance to be irrelevant for the purpose of restitution.

This problem was given brief consideration in *Zacchini v. Scripps-Howard Broadcasting Co.*,[243] in which the plaintiff's performance of a "human cannonball" act was videotaped without his consent. The entire performance, which lasted about fifteen seconds, was later shown on a television news program with a favorable commentary. In an action for appropriation of the plaintiff's "professional property," the Supreme Court held that the broadcast was not privileged under the first and fourteenth amendments and that under Ohio law the plaintiff could base his action upon the "right to publicity value of his performance."[244] In such a case damages might ensue, since "[t]he broadcast of a film of the petitioner's entire act poses a substantial threat to the economic value of that performance. . . . [I]f the public can see the act free on television, it will be less willing to pay to see it at the fair."[245] By way of a footnote, however, the Court added that "[i]t is possible, of course, that respondent's news broadcast increased the value of petitioner's performance by stimulating the public's interest in seeing the act live. In these circumstances, petitioner would not be able to prove damages and thus would not recover."[246] This may

241. C. McCormick, supra note 21, at 87.

242. Compare Edwards v. Lee's Adm'r, 265 Ky. 418, 96 S.W.2d 1028 (1936), in which the defendant charged tourists for admission to a cave, one-third of which extended beneath the plaintiff's property. Restitution was allowed even though the plaintiff had no access to the cave. But in this case the defendant's act was regarded as trespass and was, therefore, actionable per se.

243. 433 U.S. 562 (1977).

244. Id. at 565.

245. Id. at 575.

246. Id. at 575 n.12.

be the case if the claim is confined to torts, which is often done in practice.[247]

However, it is submitted that once an interest such as that in publicity is recognized as a kind of property, restitution for its unauthorized exploitation ought to be allowed, irrespective of whether the use of the interest caused a loss to the plaintiff and irrespective of whether under tort law such an invasion is actionable per se.[248] A celebrity whose name, picture, or likeness is appropriated for commercial purposes may suffer no loss;[249] it is even conceivable that the publicity will enhance his reputation. This, however, should not affect his right to claim the value of the exploitation of his right to publicity. Indeed, it is often the enrichment to others that provides the very reason for recognizing the plaintiff's interest as worthy of protection,[250] and it makes no sense to defeat that interest on the ground that he suffered no loss. Moreover, the benefit to a plaintiff whose reputation was enhanced should not be deducted from an award calculated on the basis of the value of the use of the right to publicity. Since such an award is based solely on the defendant's enrichment, benefits to the plaintiff ought to be disregarded except to the extent that they affect the value of the defendant's use.[251]

Problems concerning the relation between damage to the plaintiff and the right to restitution have arisen in a number of other contexts as well. In *Schein v. Chasen*,[252] for example, a corporate officer divulged to outsiders (tippees) that the corporation's profits would be less than had previously been estimated. A stockholder's derivative suit to recover the profits made by the tippees by selling shares before this information became generally known was dismissed on the ground that no damage was

---

247. Although unjust enrichment may have been the historical ground for recognizing such an interest as worthy of protection, once the interest is considered a kind of property it comes within the ambit of protections granted by tort law. Restitution is, of course, also available, though the plaintiff cannot recover both his damages and the benefit that the defendant obtained. But in many cases the claim and the award deal solely with damages, even where the defendant's enrichment is recognized. See, e.g., Bunnell v. Keystone Varnish Co., 254 A.D. 885, 5 N.Y.S.2d 415 (1938), discussed in 1 G. Palmer, supra note 1, at 127; Spahn v. Julian Messner, Inc., 43 Misc. 2d 219, 250 N.Y.S.2d 529 (1964), aff'd, 23 A.D.2d 216, 260 N.Y.S.2d 451 (1965), aff'd, 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966), on rehearing, 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967), appeal dismissed, 393 U.S. 1046 (1969). In the *Zacchini* case, the claim was also confined to damages.

248. The Restatement (Second) of Torts states with regard to invasion of privacy that "[w]hether in the absence of proof of actual harm an action might be maintained for nominal damages remains uncertain." § 652H, comment c (1977).

249. In fact, the question of whether the plaintiff suffered a loss may often depend on whether his interest is regarded as worthy of legal protection. If it is, then any unauthorized use of it causes him a loss by depriving him of the price that he could otherwise charge. See Note, Human Cannonballs and the First Amendment: *Zacchini v. Scripps-Howard Broadcasting Co.*, 30 Stan. L. Rev. 1185, 1190-91 (1978).

250. See note 36 supra.

251. Thus, if the value is appraised at the theoretical price that the parties would have agreed to if permission to use the plaintiff's name had been requested, it is conceivable that the plaintiff might have accepted a lower price in view of other possible gains from the publicity.

252. 313 So. 2d 739 (Fla. 1975).

caused to the corporation.[253] In cases of this kind a denial of restitution may be warranted, since the information appropriated by the tippees could not have been exploited by the corporation itself[254] and hence could not be regarded as an asset or quasi-property interest.[255] A determination of whether damage resulted thus serves as a means of ascertaining whether use of the information was an appropriation of the corporation's property. In this connection, it is necessary only that damage *might have been* caused; if so, the appropriated interest must be regarded as property and the appropriating party may be held liable to restore his gains, whether or not damage was actually sustained.[256]

Fraud provides an example of a tort in which liability is conditional upon proof of "substantial damage."[257] Whether a showing of damage is also necessary to a claim for recovery of benefits fraudulently obtained was considered in *Harper v. Adametz*.[258] In that case an estate agent, acting for an owner of land, received from the plaintiff an offer to buy the property for $7,000. The agent did not transmit the offer to the owner, whom he knew was willing to sell it for $6,500. Instead, he told the plaintiff that his offer had been rejected because the owner wished to keep a major part of the property, but added that he could arrange for the plaintiff to buy the building and the part of the land that the owner did not want. The plaintiff offered $6,000 and the agent accepted the offer. The agent then arranged for sale of the whole property by the owner to go-betweens for $6,500, after which the plaintiff received the part of the property agreed upon while the rest was transferred to the agent's son. The trial court concluded that as the estate agent was an agent for the owner and not for the plaintiff, the fact that the plaintiff sustained no loss as a result of the fraudulent misrepresentation was fatal to his claim.[259] The majority in the state supreme court, however, using the constructive

253. Similar reasoning was more recently adopted in Freeman v. Decio, 584 F.2d 186 (7th Cir. 1978), involving a claim against corporate directors.

The New York Court of Appeals, however, reached a different result in the influential case of Diamond v. Oreamuno, 24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969) In *Diamond*, the court did find a possibility of damage to the corporation in an insider's misuse of adverse information, reasoning that "[w]hen officers and directors abuse their position in order to gain personal profits, the effect may be to cast a cloud on the corporation's name." Id. at 499, 248 N.E.2d at 912, 301 N.Y.S.2d at 82.

254. Securities laws governing disclosure of material information would preclude corporate sales of shares without revealing the information.

255. This line of reasoning appears clearly in *Freeman v. Decio*, discussed in note 253 supra, in which the court stated that "to start from the premise that all inside information should be considered a corporate asset may presuppose an answer to the inquiry at hand. It might be better to ask whether there is any potential loss to the corporation from the use of such information . . . ." 584 F.2d 186, 193 (7th Cir. 1978).

256. Even if it is concluded that no property interest was appropriated, where the defendant is an insider in breach of his fiduciary duties restitution of his gains may still be warranted as a matter of deterrence. See note 278 and accompanying text infra.

257. See W. Prosser, supra note 34, at 731.

258. 142 Conn. 218, 113 A.2d 136, 55 A.L.R.2d 334 (1955).

259. Id. at 221, 113 A.2d at 138, 55 A.L.R.2d at 338.

trust device, held that the plaintiff was entitled to receive all of the property.[260]

In *Harper,* absence of a loss, though fatal to a deceit action in tort, did not preclude restitution. The plaintiff did suffer a detriment by the defendant's misrepresentation, as he was deprived of the possibility of concluding a contract with the owner for the purchase of the whole lot,[261] but the court apparently viewed the loss of this interest, which can be regarded as quasi-property, as insufficient to sustain an action for deceit.[262]

The question thus remains whether restitution will be granted where the plaintiff suffered no loss at all. A final example suggests that it will not. Suppose *A* and *B* are interested in buying a certain work of art at auction. *A* fraudulently misrepresents to *B* that the auction was cancelled and thus is able to acquire this artwork for $1,000. It can be shown that had *B* gone he would not have been able to purchase this object, as he was willing to pay only $1,500, while *A* was willing to spend up to $1,600 for it. In this case, the person who actually suffered the loss was the owner of the art, who received only $1,000 instead of the more than $1,500 that he would have obtained had *B* participated in the auction. Indeed, the owner may have a claim against *A* based upon wrongful interference and perhaps also in restitution. But it is unlikely that *B* would have a cognizable claim for restitution against *A*, since here it cannot be said that *A*, in addition to gaining by his own fraud, deprived *B* of an interest or a chattel that he might otherwise have obtained. While principles of deterrence might be relevant in extreme cases,[263] the property theory would not support restitution in this case.

d. *Where the Defendant Benefited from an Act Committed by a Third Party Against the Plaintiff.* Where the mere receipt of something that belongs to another, coupled with refusal or inability to restore it, constitutes a wrong, as in the case of conversion, the fact that it was received from a third party will not shield the defendant from liability. In this situation tort and restitution claims usually overlap. But liability in tort is not always so extensive, and where the mere receipt of a benefit is not wrongful and the recipient is not responsible in tort for the act of the

260. Id. at 225, 113 A.2d at 139, 55 A.L.R.2d at 340. See also Ward v. Taggart, 51 Cal. 2d 736, 336 P.2d 534 (1959). Contra, Gilfillen v. Moorhead, 73 Conn. 710, 49 A. 196 (1901). The cases are discussed in 1 G. Palmer, supra note 1, at 340-46.

261. Indeed, wrongful interference in the formation of a contract may give rise to a separate tort, see id. at 346. However, damage is required as a condition for liability, see W. Prosser, supra note 34, at 94. Thus, unless a different test of damage were adopted for the purpose of this tort, a claim based upon wrongful interference might fail in the *Harper* case for the same reason that a claim for deceit could not be established.

262. The court reasoned that the "plaintiff did receive what he paid for" even though "he did not . . . obtain what he was seeking." 142 Conn. at 222, 113 A.2d at 138, 55 A.L.R.2d at 338.

263. Even if restitution were to be based on deterrence, there would have to be a demonstrated causal connection between the benefit and the wrong. Thus, in this example deterrence would not justify restitution if *B* had been willing to pay no more than $999; since *A* would in any event have obtained the object for $1,000, he did not benefit from his wrong.

third party, unjust enrichment may provide the only ground for recovery.[264] Thus, suppose *A*, in breach of his promise to sell certain property to *B*, transfers it to *C*; or that *A* wrongfully uses *B*'s money to discharge *C*'s debt. No wrong was committed by *C*, assuming he knew nothing of the breach committed by *A*, and yet in both cases, *C*, unless he gave value without notice, will be required to make restitution.[265] We have already discussed many of the situations included in this category, and seen how the extension of tort liability to protect contractual rights and even expectations has increased the overlap between these branches of the law.

Tort liability in this field is generally conditional upon the defendant's intention to interfere in another's rights or expectations, or at least upon his knowledge that interference would inevitably result from his act.[266] Liability based on unjust enrichment is not so restricted. Where *A* transfers to *C* property that he was obligated to transfer to *B*, the enrichment of *C* (unless he gave value without notice) is unjust. Though the wrong was committed by *A*, and *C* is not chargeable with it, he may not retain the benefit thus conferred upon him. This broad and important area in which restitution provides the sole ground for recovery demonstrates its independence of tort law. The basis of recovery is that the transfer to the defendant of property or rights to which the plaintiff was entitled was against the plaintiff's will and, to use the continental term, "without legal ground."[267] The same reasoning applies when the act of the third party was not wrongful because of a privilege, as when a shipmaster jettisons cargo to save the ship. But, as we have seen, the privilege that justifies an otherwise wrongful act provides no ground for the transfer of wealth forced upon the cargo owner for the benefit of the other participants in the voyage.

The great variety of situations included in this category may be embraced by the general principle that restitution is available whenever a third party transfers to the defendant property or rights that belong to the plaintiff or to which the plaintiff is entitled if the transfer is against the plaintiff's will[268] and unless the defendant gave value without notice.[269]

264. See 1 G. Palmer, supra note 1, at 221-25, and sources cited in note 171 supra.

265. Where *A* wrongfully uses *B*'s money to discharge *C*'s debts, the remedy of subrogation is likely to be available. The same result will ensue where *B* gave *A* the money used to discharge the debt, under mistake or because of duress or misrepresentation. See generally Restatement of Restitution § 162 (1937); 1 G. Palmer, supra note 1, at 29.

266. See notes 164-69 and accompanying text supra.

267. See J. Dawson, supra note 3, at 119-22. But as Dawson points out, recovery in West German law is restricted to cases of "direct" enrichment. No such limitation has been adopted in the United States.

268. This principle is subject to some exceptions, the most important of which probably relates to the denial of recovery for unsolicited benefits. Thus, suppose *A* wrongfully takes *B*'s property and uses it to improve a piece of land belonging to *C*. This clearly constitutes a forced transfer of property from *B* to *C*, but as the benefit to *C* was unsolicited the right of *B* to restitution from *C* becomes highly problematical. Restatement of Restitution §§ 42 & 120 (1937). A wholly different approach is, however, adopted in § 208(2). For an attempt to reconcile these sections see 5A Scott, Trusts § 514.2, at 3607 n.4 (3d ed. 1967). See also 2 G. Palmer, supra note 1, at 416-18, 435-41; note 205 and accompanying text supra.

269. In some instances (e.g., conversion) where the plaintiff can rely upon legal owner-

The same principle is also applicable to quasi-property interests, although in this case the mere fact that the plaintiff did not receive what he expected is insufficient to found liability.[270]

III. Deterrence as a Basis for Restitution

In some instances a wrongdoer's profits may have been derived not from the plaintiff's property (even in the broadest sense) but from the property, labor, or skill, of the wrongdoer himself, even though it was the perpetrating of a wrong that enabled him to use his property, labor, or skill to obtain those profits. Because the gains were not derived from the plaintiff's property, the plaintiff cannot be regarded as "entitled" to them, and restitution cannot be founded upon the property theory elaborated in the previous section. Nevertheless, where the property approach falls short, considerations of deterrence and punishment, coupled with the basic idea that a man ought not to profit from his own wrong, have led to the development of rules governing forfeiture of ill-gotten gains.[271]

Application of the deterrent approach to justify restitution depends upon a number of considerations, including the reprehensibility of the defendant's conduct[272] and the importance of the duty he breached. Other considerations that should be taken into account are the extent of the defendant's contribution and the justification for granting the plaintiff a windfall in the amount involved.[273]

---

ship, the defendant may be liable in tort or restitution even if he gave value without notice. See note 166 supra.

270. See text accompanying notes 172-78 supra.

271. Though the theoretical distinction between the property approach and the deterrent approach is clear, the line between them may in some cases become blurred. Application of the property approach may have some deterring effect; indeed, property concepts themselves have been influenced by punitive and deterrent theories. For instance, it was once the rule that when a person mixed his own property with that of another ownership of the mixed property would depend on whether the act was done "willfully and wrongfully" or innocently. In the former case, "to prevent fraud" the plaintiff often received the whole of the mixed property. See, e.g., Rust Land & Lumber Co. v. Isom, 70 Ark. 99 (1902). It is unlikely, however, that this harsh rule would be applied today. See Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390 (1940); R. Brown, Personal Property 67 (3d ed. 1975).

272. The distinction between the willful wrongdoer and one who is no more at fault than the plaintiff permeates the discussion of the Restatement of Restitution on the measure of recovery. See §§ 150-159, introductory note at 596 (1937).

273. These considerations were disregarded in Olwell v. Nye & Nissen Co., 26 Wash. 2d 282, 173 P.2d 652 (1946), and Edwards v. Lee's Adm'r, 265 Ky. 418, 96 S.W.2d 1028 (1936), both dealing with "willful" wrongdoers. In the latter case a cave was discovered, about one-third of which was below the plaintiff's land. The entrance to the cave was on property of the defendant, who developed a tourist business and charged a fee for admission. The court granted the plaintiff one-third of his profits. The whole profit was thus attributed to the land and apportioned in accordance with its size; the defendant's contribution in developing the business was disregarded. It was pointed out that some of the chief scenic attractions were located under the plaintiff's land, but this was surely more than offset by the fact that access to the cave was only from defendant's land. Allowing the plaintiff a reasonable amount for the use of his land (which would be less than a proportionate share in the profits) would have been a more appropriate solution. Absence of a market for such use is an obstacle, but not an insurmountable one. Cf. Sheldon v. Metro-Goldwyn Pictures Corp., discussed in note 276 infra.

In general, whenever the forfeiture of the defendant's gains is unwarranted by the property theory or exceeds that required under the property theory, recovery will result in a windfall to the plaintiff. Such forfeiture is the counterpart in the law of restitution of punitive damages in torts.[274] In both cases, the award aims at punishing the wrongdoer and protecting the plaintiff's right. The major distinction between the two remedies is that the amount of a punitive damage award is left to the discretion of the court, while forfeiture is measured by the defendant's gain. Thus, in many instances the restitutionary remedy may be less harsh: the defendant is required to hand over his profits, even though the profits may have been to a large extent due to his efforts and investment risk, but his capital usually remains intact, whereas punitive damages may be awarded even though the defendant made no gain that would offset the award. On the other hand, however, the results of "punitive restitution" may often seem fortuitous, exacting punishment in proportion to the relative success of the defendant. The very existence of a criterion for recovery (i.e., the defendant's profits) limits the flexibility of the award, and in extreme cases the amount confiscated may have little relation to the severity of the breach.[275] The possibility of forfeiting only a part of gains not derived from the plaintiff's property has hardly ever been considered, but it should be recognized.[276] With these general considerations in mind, we may examine the applicability of the deterrent approach to four types of situations in which the property approach alone may not sustain a restitutionary award: situations involving breach of fiduciary duty, breach of contract or wrongful interference with contract relations, creation of risk, and criminal or illegal conduct.

> Illustration 1. A *is trustee of trust property consisting of shares in a privately held corporation. The trust is unable and unwilling to buy the other shares of the corporation.* A *in his capacity as trustee receives nonpublic information about the corporation and purchases the other shares for himself.*

In this case, even if *A* acted in good faith and even if the trust bene-

274. Weinrib, The Fiduciary Obligation, 25 U. Toronto L.J. 1, 14 (1975).

275. Cf. Boardman v. Phipps, [1967] 2 A.C. 46, [1966] 3 W.L.R. 1009, in which the court mitigated a restitutionary award by allowing the defendants a payment "on a liberal scale" for their efforts. No attempt was made to apportion the profits in accordance with the relative contribution of the "property" taken (information and opportunity) and the defendants' labors. See also R. Goff & G. Jones, supra note 2, at 506-07.

276. The technique would be to attribute to the plaintiff's property a larger or smaller share of the profits, according to the circumstances. In Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390 (1940), the defendants negotiated the acquisition of motion picture rights held by the plaintiffs for $30,000. The negotiations fell through, but the defendants produced a motion picture that infringed the plaintiffs' rights, earning a profit of nearly $600,000. The court rejected the claim for the entire profit on the ground that it was partially attributable to factors paid for by the defendants, including actors and producers, and ordered an apportionment, allowing the plaintiffs 20% of the profits. By using an estimate that "will favor the plaintiffs in every reasonable chance of error," the Court reached a figure nearly four times that fixed in the negotiation but falling far short of forfeiture of the entire profit. The case is discussed in 1 G. Palmer, supra note 1, at 171.

fited from the purchase, *A* may be liable in restitution.[277] Breach of fiduciary duty constitutes perhaps the most conspicuous area of application of deterrent principles to restitution. It generally entails liability in restitution even if the fiduciary did not appropriate any "property" belonging to the beneficiary.[278] The fiduciary's contributions by way of labor, ingenuity, and investment risk will not usually entitle him to a share in the profits.[279] Moreover, liability may be imposed even if the fiduciary was not aware of the breach or if his act was in no way reprehensible.[280] The windfall granted to the beneficiary in such cases is justified as a means of eliminating any economic incentive to violate the trust relationship and the trustee's important duty of loyalty. This is thus an area of strict liability, based not upon damage done but upon gain acquired.

> Illustration 2. A *contracts to purchase from* B *50,000 units of a certain article manufactured by* B, *at $10 per unit, for a total of $500,000.* B*'s cost of production is $9 per unit; his expected profit is therefore $50,000.* C *induces* A *to break his contract with* B *and buy the same article at the same price from him.* C*'s cost of production is $8 per unit.* B *is able to mitigate the loss and sell the goods at $9.60 per unit, for a total of $480,000.*[281] *The reduction in profit to* B *is thus $20,000, while* C *has gained $100,000.*

As we have seen, where one appropriates performance under a contract to which another is entitled, a claim for restitution may be made under the property approach.[282] In this case, however, there are two different contracts. *C*'s profits from his contract result from his own re-

---

277. Boardman v. Phipps, [1967] 2 A.C. 46, [1966] 3 W.L.R. 1009. In that case two of the justices regarded the information as "property," although it was of no use to the trust. See note 42 supra. Even if this view is correct, the property approach warrants restitution only of the value of the property appropriated—here the value of the information. The profits made by the defendants, resulting to a large extent from their own efforts, ingenuity, and investment, greatly exceeded the value that could be attributed to the information. The forfeiture of profits exceeding the value of the information is explicable ouly by the deterrent approach, which was applied in this case notwithstanding the defendants' good faith. (They were, however, awarded compensation for their efforts. See note 275 supra.) The court in Freeman v. Decio, 584 F.2d 186 (7th Cir. 1978), adopted a more lenient approach. See notes 253 & 255 supra.

278. 1 G. Palmer, supra note 1, at 141.

279. A fiduciary may sometimes be entitled to remuneration for his services, even though not entitled to a share in profits arising from breach of his duty. See Boardman v. Phipps, [1967] 2 A.C. 46, [1966] 3 W.L.R. 1009; Brooks v. Conston, 364 Pa. 256, 72 A.2d 75 (1950).

280. Restatement (Second) of Trusts §203 (1959), providing expressly that "[t]he trustee is accountable for any profit made by him through or arising out of the administration of the trust, although the profit does not result from a breach of trust."

281. Actually, mitigation of the plaintiff's damages is irrelevant where the issue is not the plaintiff's loss but the defendant's gain. (Restitution may be allowed even if no damage was suffered). A different type of "mitigation" might be developed within the field of restitution—a "mitigation of gain" relating to profits that the defendant would have made had he not committed the acts for which he is being sued. This possibility is, however, beyond the scope of this Article.

282. See text accompanying note 130 supra.

sources and ability and are not derived from the appropriation of *B*'s contract rights. At most it can be said that only by the destruction of *B*'s contract was *C* able to form his own.[283] Under these circumstances the property approach would not warrant *B*'s recovery of profits *C* made over and above *B*'s potential gain.

Nonetheless, should considerations of deterrence permit recovery of the additional $80,000 earned by *C*? That is, should *B* be permitted to "waive" the tort and seek restitution of all profits derived by *C* from his action? On balance, a negative answer seems proper. Allowing *B* to recover, beyond damages, the profit that *C* was able to reap would give *B* the benefit of *C*'s greater efficiency in production. In view of the broader economic and social implications of this approach, concern for the deterrence of interference with contractual relations would not justify a restitutionary award in this type of case.[284]

It is conceivable that in exceptional circumstances deterrent considerations may justify restitution not only against the third party who induced the breach but also against the other party to the contract. Traditionally, contractual rights were accorded modest protection. But modern courts show greater sensitivity to contractual discipline,[285] as evidenced by the liberalization of the remedy of specific performance[286] and the development of the breach of contract tort, for which punitive damages may sometimes be awarded.[287] Recognition of a right of restitution would be consistent with the same trend and make possible forfeiture of benefits unjustly obtained through breach of contract, even when the breach did not involve appropriation of the other party's right to performance.

> Illustration 3. A *manufactures a product whose use entails a slight risk of minor injury, so that even if injury does occur damage is likely to be minimal. An investment of $5 million would be required to eliminate that risk.* B, *who purchases the product, suffers this type of minor injury, and damage is estimated at $50.*

As indicated earlier, the property theory is also inapplicable in this situation involving the creation of risk, because the manufacturer's inaction,

---

283. Sacrifice or destruction of another's property to preserve one's own amounts to appropriation, see text accompanying notes 132-35 supra, but recovery is measured by the value of the property sacrificed (in this instance, the net value of *B*'s contract, or $20,000) rather than by the value of the property saved (or gain achieved). See note 135 supra.

284. But see Federal Sugar Ref. Co. v. United States Sugar Equalization Bd., 268 F. 575 (S.D.N.Y. 1920).

285. See A. von Mehren, supra note 48, at 183.

286. See note 49 supra.

287. See, e.g., Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974); Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973); Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970). See Sullivan, Punitive Damages in the Law of Contract: The Reality and the Illusion of Social Change, 61 Minn. L. Rev. 207 (1977).

The Restatement (Second) of Contracts § 369 (Tent. Draft No. 14, 1979) takes the position that "[p]unitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."

though increasing the danger to consumers, does not amount to appropriation of a property interest.[288] Disallowance of a restitutionary claim to the defendant's enrichment is based partly on the formidable practical difficulty of allocating the enrichment among the people injured[289] or exposed to risk of injury by the manufacturer's inaction. But at a more basic level, so long as the manufacturer's inaction does not create an unreasonable or socially unacceptable risk, restitution will not be allowed because it will deprive the manufacturer of savings that are regarded as acceptable. In general, restitution would be justified by deterrent policies, if at all, only when the risk to the public was increased to a degree deemed unacceptable. In other circumstances, damages for actual injury remain the exclusive remedy.

> Illustration 4. A, *in order to take revenge on* B, *pays $1,000 to* C, *who undertakes to injure* B *or to damage his property.* C *does not carry out his part of the agreement, so that* B *suffers no loss.*

In the last two examples the defendant's act, though arguably wrongful, served an otherwise useful economic purpose. In this example, however, the agreement made by the defendant is not only reprehensible but serves no such compensating purpose. Principles of deterrence are accordingly relevant to a claim for restitution.

As between *A* and *C*, since their agreement to injure *B* is clearly unlawful and since they are in pari delicto, *C* will be permitted to keep the amount paid to him even though he did not perform his part of the bargain.[290] This rule is one of the major exceptions to the general principle that "no one may profit by his own wrong."[291] In the absence of a rule providing that profits wrongfully obtained shall inure to the state, the wrongdoer in such a case will not be deprived of his gain unless a third party can assert a right to it. Of course, if the gain was wrongfully obtained at the expense of an innocent party, that party may "waive" his tort claim in favor of an action in restitution. Moreover, courts may even properly recognize a right in *B*, the potential victim, to restitution of the benefit gained by *C*. The basis for recovery would be clearer had *C* caused some injury to *B*: in that case a wrong would have been committed and, although there seems to be no precedent allowing the waiver of such a wrong, the injured party would presumably be allowed to claim the benefit obtained by the tortfeasor instead of damages. But *B*'s right to restitution under these circumstances should not depend on a showing of damages. In order to maximize the effectiveness of deterrent policies, his claim ought

---

288. See text accompanying notes 136-40 supra.
289. See 1 G. Palmer, supra note 1, at 137-38.
290. May v. Harron, 127 Cal. App. 2d 707, 274 P.2d 484 (1954); Bigos v. Bousted, [1951] 1 All E.R. 92 (K.B.).
291. Beck v. West Coast Life Ins. Co., 38 Cal. 2d 643, 645, 241 P.2d 544, 545 (1952).

to be allowed even if no action in tort was available to him because he suffered no harm.

Where the intended victim himself is unable to make a claim, in extreme cases courts may recognize claims for restitution by others who are close enough to the illegal transaction. An obvious example would be a case involving disposition of benefits acquired through criminal homicide. The beneficiary under a life insurance policy who kills the insured is not thereby enriched "at the expense of" the victim's other possible heirs or alternative beneficiaries. But even though these heirs or beneficiaries would not have a tort claim against the murderer, courts will very likely look to them as the most appropriate persons to recover the murderer's gain.[292] In this type of case, therefore, considerations of deterrence—and elemental justice—provide a basis for restitution where the property approach falls short.

Other instances can be found in which there is a strongly felt need to deprive a defendant of his gain even though no direct or innocent victim can be identified. In some cases, breach of a duty may be found to give rise to a restitutionary claim by the person to whom the duty was owed, whether or not the gain was at that person's expense.[293] I would also include in this category the situation presented in *Reading v. Attorney-General*,[294] in which a British sergeant's use of his military uniform in a smuggling operation was found sufficient to render the Crown a proper party to which the wrongfully obtained gain could be transferred. Even if it had not been a soldier but rather a civilian who had stolen or made the uniform, it would still be possible to argue that by using the uniform he assumed the same duty vis-à-vis the Crown that he would have had if he actually were in military service—that he became, so to speak, a fiduciary *de son tort*. More simply, it might also be suggested that deterrence justifies depriving the defendant of his gains and that the use of a particular uniform serves as a means of identifying the appropriate recipient of these gains.

CONCLUSION

Whenever one person gains a benefit from the appropriation of an interest belonging to another or through the commission of a wrong, the availability of restitution may be determined under one of two distinct approaches, each having deep roots and based upon fundamental principles. One is founded upon concepts of property, embracing, in the broadest sense, a spectrum of interests ranging from legal ownership to expectations and opportunities. The essence of the property approach is

---

292. Id.

293. See Diamond v. Oreamuno, 24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969); note 253 supra.

294. [1951] A.C. 507. See note 22 supra.

that a person is entitled to benefits derived from that which belongs to him. The appropriation of his property often constitutes a wrong, but the ground for restitution is not that a wrong was committed but rather that the property was taken by another. The fact that a wrong was done is generally a sufficient indication that the owner did not consent to the ensuing transfer of wealth, but restitution may be granted even if the appropriation of property was permissible and even obligatory, as in the exercise of a privilege.

The property approach is also applicable to contractual rights and other choses in action, although subject to a number of limitations. The degree of protection granted to different contractual rights varies considerably. In some instances one party to a contract may have the power to terminate the other's right to performance, subject only to payment of compensation for the plaintiff's actual damages. In other cases restitution may be unavailable because it is impossible to "identify" what was appropriated as precisely the same right to which the plaintiff was entitled. Restitution may also be precluded where the benefit obtained at the plaintiff's expense has passed to a bona fide purchaser for value.

Moving down the spectrum to interests such as opportunity and expectancy, which enjoy relatively meager protection, we find that the property approach can still be utilized, but subject to more severe restrictions. The same limitations that apply to contract rights and other choses in action are also applicable to these newer, quasi-property types of interests. Moreover, because these interests are not exclusive (they are, for example, not protected against lawful competition), their mere "appropriation" by another will not be sufficient by itself to found liability in restitution. Before the enrichment can be regarded as "unjust," an additional element is required, though it need not be a "wrong" in the common tort sense.

The property approach has some inherent limitations. In the first place, while the approach is based on the assumption that certain interests qualify as "property," it does not itself provide a means of determining whether a particular interest ought to be recognized as property. Indeed, any reasoning to the effect that an interest should be deemed property in order to prevent unjust enrichment would be circular. Another major limitation of the property approach is that its applicability is conditional upon the "appropriation" of a property interest. This requirement—the private-law counterpart of the concept of "taking" in the field of constitutional law—involves a showing of use, consumption, or exploitation of another's property. Appropriation in this sense does not apply to the mere infliction of damage; thus, damage without additional acts constituting an appropriation does not give rise to liability in restitution, even if the person who inflicted the damage (or another person) benefits from the act. In such cases, the loss may be shifted to another only by operation of tort law principles or by insurance.

In cases beyond the reach of the property approach, the other basic

approach, based on principles of deterrence, may become relevant. In awarding "deterrent restitution" the emphasis is placed on the injustice and inequity of permitting the defendant to keep his gains, rather than on the concept that they "belong" to the plaintiff. The forfeiture of profits acquired through the perpetration of a wrong even though they were not derived from another's property is the counterpart in the law of restitution to punitive damages in torts. Accordingly, like punitive damages, deterrent restitution ought generally to be confined to exceptional circumstances involving breach of fiduciary duty or conduct that is morally reprehensible.