

## **BOOK REVIEW**

### RESTORING RESTITUTION

*Ernest J. Weinrib\**

*The Law and Ethics of Restitution.* By Hanoch Dagan. Cambridge University Press, 2004.

#### INTRODUCTION

**W**HAT ever happened to the law of restitution in the United States? Half a century after Warren Seavey and Austin Scott produced their magnificent and influential Restatement of Restitution,<sup>1</sup> the subject was more or less dead in American law schools. “It is as though a neutron bomb has hit the field—the monuments have been left standing, but the people have been killed off.”<sup>2</sup> Meanwhile, the project of developing the law of restitution was taken up by pioneering academics elsewhere in the common-law world.<sup>3</sup> In the past two decades, the leading Commonwealth courts, significantly influenced by academic writing, have recognized or elaborated the basic principle of the law of restitution—that the defendant must restore an unjust enrichment made at the plaintiff’s expense.<sup>4</sup> Outside the United States, the law of restitution is now by far the most animated field of private-law scholarship. In contrast, only recently has the corpse of restitution begun to twitch again in American law reviews.<sup>5</sup>

---

\* University Professor and Cecil A. Wright Professor of Law, University of Toronto.

<sup>1</sup> Restatement of Restitution (1937).

<sup>2</sup> John H. Langbein, *The Later History of Restitution*, in *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* 57, 61 (W.R. Cornish et al. eds., 1998).

<sup>3</sup> Especially influential were Peter Birks, *An Introduction to the Law of Restitution* (1985) and Robert Goff & Gareth Jones, *The Law of Restitution* (6th ed. 2002).

<sup>4</sup> Among the landmark decisions were: *Pettkus v. Becker*, 117 D.L.R. (3d) 257 (1980); *Pavey & Matthews Proprietary Ltd. v. Paul*, 162 C.L.R. 221 (1987); and *Lipkin Gorman v. Karpnale Ltd.*, [1992] 4 All E.R. 512.

<sup>5</sup> See Symposium, *Second Remedies Discussion Forum: Restitution*, 36 *Loy. L.A. L. Rev.* 777 (2003); Symposium, *Restitution and Unjust Enrichment*, 79 *Tex. L. Rev.* 1763 (2001); Symposium on Restitution, 67 *S. Cal. L. Rev.* 1369 (1994). A notable feature of these symposia has been the participation of an unusually large proportion of

A plausible explanation for the fate of restitution in the United States points to the instrumentalism that has been dominant since the days of the legal realists.<sup>6</sup> As an explicitly recognized area of liability, the law of restitution is in its infancy. Its development requires sensitivity to the significance of principle, to the interplay of legal concepts, to the relationship among the various bases of liability, and to the casuistical nuances of specific fact situations. In other words, the law of restitution needs to be nurtured through the traditional internal analysis of common-law doctrine. Yet that mode of analysis is precisely what the legal realists and their heirs of all varieties aimed to subvert. The academic triumph of legal realism brought into disrepute the notion that private law involves the articulation of an immanent process of legal reasoning that aspires to work itself pure. Instead, private law came to be seen in the United States as the receptacle of independently desirable goals that are to be infused from the outside. Accordingly, the juridical exercise of elaborating the law's internal normative impulses was effaced by the political exercise of identifying and reconciling the goals that are to be given official sanction. When legal concepts are regarded as "transcendental nonsense,"<sup>7</sup> and when private law is understood simply as public law in disguise,<sup>8</sup> the atmosphere is hardly conducive to the elaboration of a relatively new branch of civil liability. And so the green shoots of the Restatement of Restitution froze in the cold blasts of American legal realism.

Hanoch Dagan's important and densely argued book<sup>9</sup>—the first on restitution addressed to an American audience in decades—is dedicated to refuting this seemingly attractive explanation of resti-

---

non-American scholars. In the Texas symposium, eight of the twelve contributions came from scholars based in universities outside the United States. In the Loyola symposium, the figure was five of fourteen. The work of Andrew Kull as reporter of a proposed new Restatement of Restitution has been a significant catalyst in the revival of interest in restitution in the United States. For an attempt to apply restitution to intellectual property, see Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 Va. L. Rev. 149 (1992).

<sup>6</sup> Langbein, *supra* note 2, at 62.

<sup>7</sup> Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935).

<sup>8</sup> See, e.g., Leon Green, *Tort Law: Public Law in Disguise* (pts. 1 & 2), 38 Tex. L. Rev. 1 (1959), 38 Tex. L. Rev. 257 (1960).

<sup>9</sup> Hanoch Dagan, *The Law and Ethics of Restitution* (2004).

tution's decline. Dagan is both a devotee of the law of restitution and a self-confessed legal realist. In *The Law and Ethics of Restitution*, he analyzes the main contexts for restitution, including mistake, unrequested benefits, quasi-spousal relationships, damages for wrongs, ineffective contracts, and bankruptcy. His aim is to show how the realist attention to independently desirable goals is crucial to understanding, criticizing, and improving restitutionary liability.<sup>10</sup> In Dagan's view, the law of restitution can be revived by administering a heavy dose of what some suspect killed it in the first place.

This Review will criticize Dagan's analysis from the standpoint of corrective justice, that is, from as anti-realist a standpoint as is imaginable. My comments proceed as follows. Part I will present the novelty of Dagan's approach by contrasting it with the standard assumptions about unjust enrichment. Instead of treating unjust enrichment as a unifying principle of corrective justice, Dagan justifies liability as the contextualized promotion of the values of autonomy, utility, and community. In Part II, I will argue that Dagan's value instrumentalism cannot make sense of the fundamental feature of liability, namely that liability normatively connects the defendant to the plaintiff. Whereas this connection requires a relational analysis, as is found in corrective justice, Dagan's values are applicable only to each of the parties separately. The result is that Dagan cannot deal coherently even with such core issues as mistaken payments and unrequested benefits. Finally, in Part III, I will address Dagan's stated reason for rejecting corrective justice: that the distributive nature of property shows that corrective justice ultimately rests on a distributive foundation. I will argue that Dagan's statement of this objection is viciously circular, for he assumes that the choice between distributive and nondistributive approaches to property is itself a distributive exercise. In the Conclusion, I will offer a brief assessment of the significance of Dagan's book.

#### I. DAGAN'S "CONTEXTUAL NORMATIVE INQUIRY"

The standard approach to restitution embodies two interrelated assumptions about the principle of unjust enrichment, which, in the

---

<sup>10</sup> Id. at 4.

Restatement's formulation, holds that "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other."<sup>11</sup> The first assumption is that this principle is the unifying legal concept that underlies a variety of situations where courts traditionally granted recovery on a restitutionary basis.<sup>12</sup> Some of these situations had been covered by such common-law counts as money paid to the defendant's use, money had and received, quantum meruit, and quantum valebant. Others had been dealt with through the equitable devices of constructive trust, equitable lien, and bills of accounting. The result was a patchwork that impeded the rational development of the law, because, although plaintiffs could get restitution in a variety of specific circumstances (such as mistake, compulsion, total failure of consideration, and the supply of necessaries), the structure of reasoning common to all these situations was not apparent. The formulation of the principle of unjust enrichment had the same function as the parallel formulation of a general duty of care in the law of negligence: to exhibit a given basis of liability, not as a chaotic miscellany of disparate and independent rules, but as a coherent system whose instances exemplify a single normative idea.<sup>13</sup>

The second assumption is that the principle of unjust enrichment "is essential to dealing justly between the parties."<sup>14</sup> Putting this as-

---

<sup>11</sup> Restatement of Restitution § 1 (1937).

<sup>12</sup> Warren A. Seavey & Austin W. Scott, Restitution, 54 L.Q. Rev. 29, 31-32 (1938).

<sup>13</sup> On the unifying significance of the duty of care in negligence, see Ernest J. Weinrib, *The Disintegration of Duty*, in *Exploring Tort Law* (Stuart Madden ed., forthcoming 2005). The parallel between the principle of unjust enrichment and the general duty of care in negligence law is evident in the jurisprudence of Justice Deane of the High Court of Australia. In *Pavey & Matthews Proprietary Ltd. v. Paul*, he wrote that unjust enrichment

constitutes a unifying legal concept which explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case.

162 C.L.R. 221, 256-57 (1987). See also Justice Deane's similar remarks about the duty of care as postulating "the general conceptual determinant and the unifying theme of the categories of case in which the common law of negligence recognizes the existence of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another." *Stevens v. Brodribb Sawmilling Co.*, 160 C.L.R. 16, 53 (1986).

<sup>14</sup> Seavey & Scott, *supra* note 12, at 36.

sumption into the language of contemporary legal theory, we might say that liability for unjust enrichment embodies corrective rather than distributive justice.<sup>15</sup> Corrective justice is a theoretical idea that insists on a normatively coherent link between plaintiff and defendant within a regime of private-law liability. Such coherence can be achieved only if the parties are construed as being correlatively situated as the doer and the sufferer of the same injustice. I have argued elsewhere that, as a matter of corrective justice, the parties to a transaction can be coherently linked only through the non-instrumental reasoning of a system of rights.<sup>16</sup> Accordingly, in the context of unjust enrichment, the plaintiff's claim should be understood as an allegation that value rightfully belonging to the plaintiff has been defectively transferred to the defendant and therefore should be restored.<sup>17</sup> The corrective-justice perspective highlights issues that have engaged the law of restitution over the past decades. What counts as a transfer between the parties is reflected in the determination of whether there was an enrichment of the defendant at the plaintiff's expense.<sup>18</sup> And what makes the transfer defective is reflected in the circumstances—especially those concerning the lack of donative intent in the plaintiff or the willing acceptance of the benefit by the defendant—that lead us to regard the defendant's retention of the enrichment as unjust toward the plaintiff.<sup>19</sup>

---

<sup>15</sup> On the distinction between corrective and distributive justice, see Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 *U. Toronto L.J.* 349, 351–52 (2002).

<sup>16</sup> Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 *Theoretical Inquiries L.* 107, 113–26 (2001); Ernest J. Weinrib, *The Idea of Private Law* 114–33 (1995).

<sup>17</sup> For treatments of unjust enrichment that explicitly adopt the corrective-justice perspective, see Abraham Drassinower, *Unrequested Benefits in the Law of Unjust Enrichment*, 48 *U. Toronto L.J.* 459 (1998); Lionel Smith, *Restitution: The Heart of Corrective Justice*, 79 *Tex. L. Rev.* 2115 (2001). On corrective justice as the framework for the civil law approach, see James Gordley, *The Principle Against Unjustified Enrichment*, in *Gedächtnisschrift für Alexander Lüderitz* 213 (Haimo Schack ed., 2000); Reinhard Zimmermann, *Unjustified Enrichment: The Modern Civilian Approach*, 15 *Oxford J. Legal Stud.* 403 (1995).

<sup>18</sup> This issue arises, for example, in the controversy over whether the plaintiff's claim that the enrichment was at the plaintiff's expense is negated if the plaintiff has passed on the loss to a third party. See *Air Can. v. B.C.*, 59 *D.L.R.* (4th) 161, 193–94 (1989); *Kleinwort Benson Ltd. v. Birmingham City Council*, [1996] 4 *All E.R.* 733, 738–39.

<sup>19</sup> *Birks*, supra note 3, at 140–293.

These two assumptions are related. The first deals with coherence across different transactions, the second with coherence within each individual transaction. The first assumption is widely and explicitly acknowledged. The second, less frequently invoked but implicit within the structure of unjust enrichment and the doctrines that it has spawned, is even more fundamental. There would be little point in unifying restitutionary recovery across transactions if the unifying idea was itself merely a pastiche of different normative considerations. Only insofar as unjust enrichment is itself a coherent principle can it impart coherence to the instances that fall under it.

The peculiar feature of Dagan's book is this: On the one hand, Dagan celebrates the law of restitution, maintaining that it is as integral to the common law as property, tort, or contract;<sup>20</sup> on the other hand, however, he repudiates the idea of a general principle of unjust enrichment that works justice between the parties and provides an overarching unity to the varieties of restitutionary liability that the law historically recognized. Dagan's law of restitution is thus a radically reconceived version of what was presented in the Restatement and what is flourishing elsewhere in the common-law world.

Accordingly, Dagan rejects both of the assumptions mentioned earlier. For Dagan, the principle of unjust enrichment does not state a meaningfully normative idea at all, let alone a unifying theme for legal argument. Unjust enrichment is either so open-ended that it allows the judge an amorphous discretion bounded only by the most abstract notions of fairness and rationality, or it provides a hopelessly circular and conclusory formula that conceals the real policy grounds that are doing the work.<sup>21</sup> Nor is much to be gained by treating the principle of unjust enrichment as a generic conception that structures legal analysis, providing a stable pattern of reasoning, preventing fragmentation of the subject, and facilitating analogy between factually dissimilar cases.<sup>22</sup> The value Dagan sees in the reference to unjust enrichment is as a loose framework, "a mere placeholder for arranging and classifying legal rules that

---

<sup>20</sup> Dagan, *supra* note 9, at 3.

<sup>21</sup> *Id.* at 12–25.

<sup>22</sup> *Id.* at 26–28.

involve benefit-based liability or benefit-based recovery and that—for whatever reason—do not find a comfortable home in another legal field.”<sup>23</sup> Restitution is distinguished simply by being about benefits, not by signaling a normatively unified approach to how the law should dispose of these benefits.

Instead, Dagan proposes a “contextual normative inquiry, along the lines of the realist legacy.”<sup>24</sup> The contextual aspect is a rejection of the first assumption—that unjust enrichment has a unifying function. Dagan regards situations of benefit as irremediably heterogeneous. The benefit in having one’s property saved has to be treated differently from a mistaken payment, and these, in turn, must be treated differently from benefits given in a context of informal intimacy, and so on. Even within these categories there are important differentiations. For example, mistaken payments in private contexts should not be treated the same as mistaken payments in institutional contexts because institutions are systematically better avoiders of the costs of mistakes.<sup>25</sup> In Dagan’s view, this normative diversity should be acknowledged rather than suppressed by the homogenizing effect of analogical and conceptual reasoning.<sup>26</sup> Thus, whereas the impulse to unify across transactions was always the driving force in developing the law of restitution, Dagan proposes to fragment the law by elucidating the particular normative considerations applicable to different kinds of situations.

Dagan’s “contextual normative inquiry” also contains a conception of normative analysis that repudiates the second assumption, that unjust enrichment is to be understood noninstrumentally, on corrective-justice lines. For Dagan, the normative underpinnings of the law of restitution—and indeed of any liberal legal system—are the core values of autonomy, utility (or efficiency), and community. Law should promote<sup>27</sup> and inculcate<sup>28</sup> these values. As Dagan sees it, the goal of normative analysis is to identify the values that are brought into play by a given situation, to balance them in a

---

<sup>23</sup> Id. at 26.

<sup>24</sup> Id. at 36.

<sup>25</sup> Id. at 60–65.

<sup>26</sup> Id. at 25, 28.

<sup>27</sup> Id. at 6.

<sup>28</sup> Id. at 107.

contextually sensitive manner, and to translate them into specific rules.<sup>29</sup>

A difficulty with Dagan's exposition is that although the book contains hundreds of pages of closely packed argument about how the law of restitution might promote these values, it does not discuss the values themselves. Dagan simply treats them as obviously entailed by the law's social function to "enhance human interests."<sup>30</sup> Left unasked are such philosophically controversial questions as: Is autonomy to be conceived in terms of negative liberty, positive liberty, or something else? Of what does utility consist and how is utility related to efficiency?<sup>31</sup> What is community, and why should the coercive apparatus of the law sustain it?<sup>32</sup> Dagan presents the law of restitution as an instrument in the service of values of unspecified normative character. He exhaustively discusses the means without elucidating the ends.

The consequence of this omission is that Dagan does not explicitly address the central theoretical question for any liability regime: Why is it that the law connects a particular plaintiff with a particular defendant? The law of restitution imposes an obligation on the defendant to restore a benefit received from the plaintiff. The justification for liability must therefore embrace both parties by revealing why the plaintiff's unilateral transfer of the benefit creates an obligation in the defendant. The law of unjust enrichment is especially sensitive to the bilateral aspect of liability. Because the recipient of the benefit can be subjected to restitutionary liability without having either committed a wrong or breached a contract, courts are concerned that the plaintiff not be allowed unilaterally to impose an obligation on the defendant.<sup>33</sup> The corrective-justice approach explains this bilateral aspect by focusing on the plaintiff's

---

<sup>29</sup> Id. at 331.

<sup>30</sup> Id. at 36.

<sup>31</sup> Dagan remarks cryptically that utility is "frequently translated in law as efficiency." Id. at 330.

<sup>32</sup> "[W]hen Epicurus' friends planned to establish such an association with communal property, he prevented them from doing so for the simple reason that their plan displayed distrust, and that those who distrust one another are not friends." G.W.F. Hegel, *Elements of the Philosophy of Right* 78, § 46 (Allen W. Wood ed., 1991) (referring to Diogenes Laertius, I.X.6).

<sup>33</sup> "Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will." *Falcke v. Scottish Imperial Ins. Co.*, 34 Ch. D. 234, 248 (1886).



preexisting right, on the defectiveness of the transfer to the defendant, and on the defendant's correlative obligation to restore what has not been properly transferred and thus has remained the plaintiff's as a matter of right. Dagan, in contrast, proposes his version of value instrumentalism without adverting to whether the values he lists express the relational aspect of liability. In taking the values for granted, Dagan also takes for granted their capacity to link the parties to each other. This ignores the possibility that, however independently appealing they might turn out to be, these values may nonetheless fail to illuminate the relationship presupposed between the parties in the phenomenon of liability.

## II. THE PROBLEM OF THE PARTIES' RELATIONSHIP

The problem with Dagan's values is that they focus on the normative position of each of the parties separately rather than on the relationship between them. This difficulty is pervasive throughout the book. I present two illustrations of it that deal with issues central to the law of unjust enrichment. These illustrations have a slightly different structure but are variants of the same theme. In the first illustration, a legal doctrine is justified by values that apply to one of the parties, thus leaving unexplained why the other is affected at all. In the second illustration, a proposed legal doctrine is justified by a combination of values that each apply separately to a different party, such that both parties are in view without being connected through these values. Thus, there is no reason either to combine these values in a liability regime or, if they are so combined, to prefer any particular mixture of them to other possible mixtures.

Consider, first, the doctrine that a person making a mistaken payment is entitled to restitution unless the defendant has changed position on the faith of the payment.<sup>34</sup> Dagan adduces several considerations to explain the defendant's basic obligation (absent change of position).<sup>35</sup> Restitution promotes autonomy by reinstating the commands of the payer's will through the nullification of the unintended consequences of the payer's mistaken action.

---

<sup>34</sup> On mistaken payment as a "core case" of unjust enrichment, see Peter Birks, *Unjust Enrichment* 3 (2003).

<sup>35</sup> Dagan, *supra* note 9, at 40–45.

Moreover, it promotes both autonomy and utility by allowing payers to confer benefits without engaging in excessive precautions. Finally, it secures the integrity of the payer's self by enabling an erroneous perception to be incorporated into the payer's personal narrative, thereby bridging a discontinuity that might threaten the unity of one's perceptual experience. In Dagan's view these considerations justify burdening the recipient's autonomy by imposing a positive duty to aid the payer.<sup>36</sup>

The common feature of these considerations is that they focus on the payer alone. At best they show that the payer has a claim to our moral sympathy for having made the payment, but not that the recipient is under an obligation to restore it. Nothing said about the plaintiff alone can justify placing the defendant under a correlative obligation. Why should the recipient of the payment be under an obligation to respect the payer's will, or to spare the payer precautions, or to secure the integrity of the payer's self? Basing liability on such considerations exemplifies the fallacy that what is unilaterally applicable to the plaintiff can have bilateral significance for the relationship between the plaintiff and the defendant.

A parallel difficulty appears in Dagan's treatment of the defense of change of position. The prevailing approach to change of position is that the defendant's innocent expenditure of the money received means that one of the elements of the principle of unjust enrichment, usually identified as the enrichment element,<sup>37</sup> is no

---

<sup>36</sup> It is important that to note that Dagan conceives of the duty as a positive duty on the defendant to aid, *id.* at 45, rather than as a negative duty not to interfere with what has remained the plaintiff's as of right because of the defectiveness of the transfer. The latter alternative would exemplify the corrective-justice approach that Dagan rejects. See Smith, *supra* note 17, at 2140–41.

Even evaluated on their own terms, Dagan's considerations are questionable. The first, as just noted, can be reformulated to accord with corrective justice. The second is unconvincing, because so long as the payer's claim is subject to the defense of change of position—a defense completely dependant on the action of the recipient—the payer will in any case not be certain of recouping the payment and will have to engage in precautions. See R.J. Sutton, *Mistaken Payments: An Inner Law Infringed?*, 37 *U. Toronto L.J.* 389, 395 (1987). The third is a point about moral psychology, not law—the integrity of the self would be secured by the payer's seeing the act of payment as a mistake even if the law of restitution did nothing about it.

<sup>37</sup> Peter Birks, *Overview: Tracing, Claiming and Defences*, in *Laundering and Tracing* 289, 331 (Peter Birks ed., 1995).

longer present. This has the advantage of preserving coherence between the defense and the basis of liability. This approach, however, is unavailable to Dagan because, as we have seen, he does not think that the principle of unjust enrichment can do any work. Instead he suggests that the defendant's detrimental reliance creates an issue of the allocation of potentially avoidable harms.<sup>38</sup> In Dagan's view, responsibility for the harmful consequences of one's action is part and parcel of the autonomy value.<sup>39</sup> He accordingly suggests that where there are no significant disparities in the parties' avoidance and loss-spreading capacities, the defense should be subject to a regime of comparative fault that apportions the reliance loss according to the parties' comparative contributions to it.<sup>40</sup> In effect, what begins as a restitution problem when the plaintiff mistakenly pays is transformed into a tort problem when the defendant innocently spends the windfall.

But why should the recovery, to which the payer would otherwise be entitled for reasons that still remain intact, be affected by the recipient's detrimental reliance? The fact that the recipient was under the impression that the money was hers to spend does not refer to anything normatively significant about the payer.<sup>41</sup> Of course, in the language of tort law, the payer was the factual cause of the recipient's having the money to spend. But, as tort law itself shows, factual cause does not amount to responsibility. In other words, detrimental reliance on its own does not tie the payer into a normative relationship with the recipient; it is merely a fact about recipient's conduct. If it is to have relational significance, detrimental reliance (as the parallel tort treatment of negligent misrepresentation again shows) must be supplemented by the idea that the payer's action expressly or implicitly invited the recipient to rely for the purpose of making this kind of expenditure.<sup>42</sup> Then the pur-

---

<sup>38</sup> Dagan, *supra* note 9, at 47–49.

<sup>39</sup> *Id.* at 46.

<sup>40</sup> *Id.* at 56–60, 85.

<sup>41</sup> It is worth recalling Kant's comment that the liar does not wrong those with whom he communicates "for it is entirely up to them whether they want to believe him or not." Immanuel Kant, *The Metaphysics of Morals* 31 [6:238] (Mary Gregor ed., 1996).

<sup>42</sup> Peter Benson, *The Basis for Excluding Liability for Economic Loss in Tort*, in *Philosophical Foundations of Tort Law* 427, 450–54 (David G. Owen ed., 1995). As Justice Cardozo remarked in holding the defendant liable for detrimental reliance on a certificate of weight in *Glanzer v. Shepard*, 135 N.E. 275, 275 (N.Y. 1922), "It was a

pose to which the payer knowingly invited the recipient, and for which the recipient acted to her detriment, normatively links the parties by making the prospect of the recipient's loss the reason for considering the payer's act to have been the breach of a duty. This further condition of an express or implied invitation to rely is rarely present. That is why, before the courts recognized the change-of-position defense, they were not receptive to the argument that the payer's mistaken payment breached a duty owed to the payee with the result that, upon the payee's detrimental reliance, the payer was estopped from reclaiming the money.<sup>43</sup>

Thus, the picture that emerges from Dagan's account is that liability for mistaken payments is always determined by one-sided considerations rather than by relational ones. If the defendant has not changed position, the focus is on the mistaken payer. If the defendant has changed position, the focus is on the recipient's reliance loss. Neither for liability nor for change of position does Dagan suggest considerations whose normative force encompasses the bilaterality of the parties' interaction. The result is that Dagan's "contextual normative inquiry" allows us to understand neither why the payer's mistake creates an obligation in the recipient, nor why, given this obligation, the recipient's reliance loss should affect the payer's entitlement.

---

consequence which, to the weighers' knowledge, was the end and aim of the transaction." See also the leading English case, *Caparo Industries v. Dickman*, [1990] 1 All E.R. 568 (H.L. 1990).

<sup>43</sup> For example, in the Canadian case of *Clark v. Eckroyd*, 12 O.A.R. 425 (1886), the plaintiffs paid an invoice for goods that the defendant had shipped to them by rail. Unfortunately the goods had been misaddressed and had in fact never been received. They had been stored in the railroad's freight sheds awaiting pickup and, when unclaimed after a certain period, had been sold, as was allowed by statute, to pay the freight charges. The plaintiffs successfully sued for the recovery of the payment. The defendant argued that the plaintiffs were estopped because they had made a representation on which he had relied to his detriment: by making the payment, the plaintiffs had misled him into thinking that the goods had been received, thus preventing him from making inquiries about the goods before the railroad sold them. In dismissing this argument the court said:

The defendant believed he had sent the goods, and said so: the plaintiffs believed they had received them and, in effect, said so too. . . Both were mistaken, but the plaintiffs in saying so were neither inviting the defendant to act, nor to refrain from taking action about the goods, for nothing was then known to them, which made it their duty at their peril, to be accurate; in other words which made it their duty to take care. . .

*Id.* at 431.

The second illustration is Dagan's treatment of benefits conferred by good Samaritans. The common law is notoriously hostile to restitution for such benefits, seeing them as the product of officious intermeddling in the affairs of another.<sup>44</sup> Dagan argues that liability can be based on the combination of two values: (1) autonomy, which justifies encouraging actions that promote the personal liberty of the beneficiary by preserving his or her life or property;<sup>45</sup> and (2) community, which justifies encouraging altruism through the law's functioning as a device that institutionally "responds to and supports the other-regarding perspective of human beings."<sup>46</sup>

Unlike Dagan's treatment of mistaken payments, the values deployed in support of liability for unsolicited interventions refer to both parties. The autonomy value focuses on the beneficiary, and the altruism value on the benefactor. Because no necessary connection exists between promoting autonomy and inculcating altruism, the two values yield (as Dagan himself points out) a spectrum of doctrinal alternatives that depend on the strength of each component in the mixture of the two.<sup>47</sup> Indeed, the possibilities range beyond private law to include criminal sanctions for failing to intervene or state honors for particular meritorious interventions. Presumably, if the promotion of these values underpins the law of restitution, the adjudication of claims would have to be adjusted in accordance with the total arsenal of society's possible mechanisms. Moreover, even if one confined oneself to the determination of liability, there is no obvious definition of the measure of recovery. Dagan, for instance, objects to rewards because they would commodify—and thereby dilute the moral significance of—the altruistic act.<sup>48</sup> That, however, depends on how one balances the benefactor's altruism against the beneficiary's autonomy. Can a court, for instance, decide to award to the benefactor a certain percentage of the beneficiary's net enrichment, thus dividing the hypothetical

---

<sup>44</sup> See Edward W. Hope, *Officiousness* (pts. 1 & 2), 15 *Cornell L.Q.* 25 (1929), 15 *Cornell L.Q.* 205 (1930).

<sup>45</sup> Dagan, *supra* note 9, at 95–101. Dagan argues that for this justification to hold in these circumstances three conditions must be met: the imposed transaction mimics the assumed intention of the beneficiary, the transactions costs of direct negotiation are prohibitive, and the beneficiary has indicated no objection. *Id.* at 99.

<sup>46</sup> *Id.* at 102.

<sup>47</sup> *Id.* at 107.

<sup>48</sup> *Id.* at 116–17.

surplus produced by the benefaction according to its assessment of the importance, in the circumstances, of these two values?

The underlying problem is that autonomy and altruism, each being directed to a different party, are one-sided rather than relational. No combination of one-sided justifications can produce a relational justification. Accordingly, the two values do not establish a coherent reason for linking the plaintiff and the defendant within a regime of liability.<sup>49</sup> From this, several consequences follow. First, the promotion of these values can, in accordance with their one-sided nature, be carried on outside restitutionary liability by criminal sanctions and state honors. Second, assigning their promotion to the law of restitution produces a spectrum of liability doctrines that vary according to the concentration of each value in the mixture that they form. Third, once one settles the basis of liability, the mixture of values has to be calibrated afresh to determine the remedy. Thus, Dagan's two values fail to provide a stable basis for adjudication. Having rejected the principle of unjust enrichment as giving the judge an open-ended and discretionary power, Dagan has ironically produced an account that is no less open-ended and discretionary.

### III. DAGAN'S REJECTION OF CORRECTIVE JUSTICE

Corrective justice offers a way out of these difficulties because corrective justice renounces one-sided justifications. Corrective justice requires that the justification for liability match the institutional framework of liability. Given that the liability of a particular defendant is always a liability to a particular plaintiff, justification in the liability context is coherent only when it treats the parties as correlatively situated. Because the justifications that ground liability are constitutive of the normative relationship between the parties, those justifications must themselves have a relational structure.

Dagan explicitly rejects corrective justice as a mistaken notion because of its claim that private law does not rest on a distributive

---

<sup>49</sup> For a more extensive discussion of the problem of combining unrelated goals through liability, see Weinrib, *The Idea of Private Law*, *supra* note 16, at 32–44.

foundation. For Dagan, this is to claim the impossible.<sup>50</sup> Corrective justice itself presupposes property rights that have been wrongfully infringed and that the law consequently restores to their rightful owner. The justification of a private law that includes property rights, however, appears to involve distributive justice. Therefore, Dagan claims, corrective justice must rest on distributive foundations after all. For Dagan this is “the most fundamental difficulty” with the corrective-justice approach.<sup>51</sup>

Stated abstractly, this claim may seem appealing, but when examined more closely, Dagan’s argument crumbles. Because he knows that political philosophers of the first rank have held nondistributive conceptions of property,<sup>52</sup> Dagan acknowledges that a nondistributive conception of property is possible. Moreover, although he does not view such a conception as plausible, he also asserts that he need not claim it to be inferior to the distributive conception of property that he does endorse. Thus, he avoids the difficult task of confronting any of the philosophically sophisticated nondistributive conceptions of property on its own merits. This leads him to propose what he regards as a more modest<sup>53</sup>—but in fact paradoxical—contention: that the very possibility of a nondistributive conception of property shows that private law cannot be nondistributive.

Dagan’s argument proceeds as follows. The very fact that the nondistributive conception is but one of the possible understandings of property suffices to show that private law must have a distributive foundation. This is “[b]ecause the choice among rival conceptions of property is normative and entails distributive consequences. . . . Thus, there is no way to arbitrate amongst the different available conceptions of property without some sort of a normative apparatus or social vision.”<sup>54</sup> So, even if a nondistribu-

---

<sup>50</sup> Dagan, *supra* note 9, at 221–24. These pages and the chapter in which they appear largely reproduce Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 98 *Mich. L. Rev.* 138 (1999), which was a critique of Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 *Theoretical Inquiries L.* 1 (2000).

<sup>51</sup> Dagan, *supra* note 9, at 221.

<sup>52</sup> Dagan cites certain interpretations of Hegel’s theory of property theory. See *id.* at 222. For Kant’s nondistributive theory of property, see Ernest J. Weinrib, *Poverty and Property in Kant’s System of Rights*, 78 *Notre Dame L. Rev.* 795 (2003).

<sup>53</sup> Dagan, *supra* note 9, at 223.

<sup>54</sup> *Id.*

tive conception of property is possible, property turns out, for purposes of legal analysis, to be “a distributive scheme” because “[t]he doctrinal choice among its multiple configurations is in itself implicated in—and is a construction of—social values.”<sup>55</sup> In other words, making a normative choice between a distributive and nondistributive conception of property is itself a distributive exercise.

This odd argument sustains itself at every point by relentlessly begging its own question. Dagan asserts that a choice between conceptions of property must be distributive because it has “distributive consequences.” A consequence, however, is distributive only if it is the outcome of an argument that has a distributive structure. The characterization of the consequence as distributive applies to the reasons for the consequence not to the consequence itself.<sup>56</sup> But the nature of the reasons is precisely what is at issue. By calling the consequence “distributive,” Dagan simply assumes that the choice between a distributive and nondistributive conception of property has to be made from a distributive standpoint. The argument is viciously circular.

The same applies to Dagan’s use of “normative.” Dagan conveniently seems to think that recourse to this word guarantees the primacy of the distributive. His line of thought apparently is that because the normative is necessarily distributive, the normative choice between distributive and nondistributive conceptions of property must also be distributive. Again, the argument is viciously circular. It begins where it should end—with the assertion that the issue must be considered from a distributive standpoint. Properly understood, the normative merely refers to arguments about how the legal domain *ought* to be arranged. Thus, both the distributive conception of property and the nondistributive conception that fits into corrective justice are normative. The choice between a distributive and nondistributive conception of property is therefore indeed normative, but it cannot be distributive simply for that reason. Moreover, if it were, the whole enterprise of choosing that Dagan postulates would be self-contradictory: It would mean that the nondistributive conception was not a normative possibility to

---

<sup>55</sup> Id.

<sup>56</sup> Compare the discussion of “redistributive” in Robert Nozick, *Anarchy, State, and Utopia* 26–27 (1974) (differentiating apparently redistributive functions from redistributive reasons in describing the “night-watchman state”).



begin with, and so was not among the alternatives from which a choice was to be made.

Can Dagan's question-begging assertions really constitute "the most fundamental difficulty"<sup>57</sup> with the corrective-justice approach? Any proponent of corrective justice would hope so.

#### CONCLUSION

These criticisms of *The Law and Ethics of Restitution* should in no way be taken to diminish Dagan's achievement. Dagan's book is a significant milestone in the reawakening of the law of restitution in the legal academy of the United States. Its range and depth make it an effective protest against the marginalization of restitution. Dagan displays the intellectual richness of restitution by offering an intense and sustained analysis across the entire range of restitutionary problems. Some of the issues in the book, like mistaken payments and unrequested benefits, have long been the standard fare of restitutionary scholarship. Other issues, such as the possibility of restitution for the gains from slave labor, stretch the application of restitution in comparatively novel directions. Throughout, Dagan treats the law of restitution as a dynamic phenomenon whose every element calls for justification.

What counts as a justification is, of course, a matter of theory (or as Dagan refers to it in his title, "ethics") as well as of law. Dagan contends that the appropriate justification is instrumental in character, aimed at promoting the values of autonomy, efficiency, and community. What emerges then is a fragmented law of restitution in which different values, or the different accommodations among these values, govern different kinds of contexts.

In calling for the demarginalization of restitution in these terms, Dagan turns his back on the law of restitution that was set out in the Restatement and that now flourishes elsewhere. In the history of restitution, the great driving force has been not Dagan's contextually fragmented instrumentalism, but the achievement of justice between the parties through such unifying concepts as the principle of unjust enrichment. Corrective justice is the theoretical idea that underpins this conception of restitution. Under the corrective-justice approach, fairness between the parties depends on justifica-

---

<sup>57</sup> Dagan, *supra* note 9, at 221.

tions that are coherent within a particular transaction and that can then impart coherence across transactions. By making the structure of justification match the structure of liability, corrective justice highlights the relational nature of legal reasoning about liability, and the consequent inappropriateness of one-sided justifications such as those presented by Dagan.

The basic question raised in this Review is whether Dagan's value instrumentalism can provide coherent normative grounds for linking the parties in a regime of liability. This question implicates other issues: the nature of legal reasoning, the function of adjudication, the relation of theory to doctrine, the normative character of private law, and the meaning of justice within a system of liability. As the massive literature on tort and contract theory shows, these issues have engaged scholars in the more established areas of private law for decades. Dagan's book is a welcome invitation to extend these debates to the law of restitution.