

Restitution for Wrongs?

Property, Tort and Private Law Theory

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A. Introduction

In the famous American case of *Edwards v Lee's Administrator*,¹ the defendant had charged tourists a fee to enter a cave, the entrance to which was on his land. However, it turned out that a large section of the cave extended underneath the land of the claimant, and so the defendant had been committing the tort of trespass in taking visitors onto those parts of the cave to which the claimant had title.

What remedy, if any, should English law award to the claimant on these facts? In this chapter, I consider two plausible remedial responses, and ask whether either might be justified. The first is 'user damages',² a sum of money calculated at the amount which the claimant could reasonably have charged the defendant to permit him to act as he did. It seems to be tolerably clear that user damages would be available to the claimant here as a matter of the positive law.³ This is so even though the claimant has not suffered any obvious loss,⁴ because they would not have been able to exploit the land themselves had the defendant not acted as he did, and because the market value of the claimant's land was unaffected by the defendant's activity.

The second remedy considered below is the disgorgement of profits made by the defendant as a result of their wrongdoing. Here, the positive law is far less clear. Disgorgement is certainly available where a defendant profits by infringing a claimant's patent,⁵ and there are some cases which could be rationalized as awarding disgorgement. In *Oughton v Seppings*,⁶ for example, the defendant sold off a horse belonging to the claimant, who was able to recover the proceeds of sale. Despite this, it is not at all clear whether there is a rule of English law which would govern the facts of *Edwards*. In what follows, I do not attempt a doctrinal analysis of those cases which might be marshalled in support of any particular view. Those cases have been ably recounted elsewhere,⁷ and so I do not consider there to be much value in running through them in this chapter. All that would achieve would be to confirm what textbook writers have already demonstrated: there is some support for the view that disgorgement is sometimes available as a remedial response to some torts. In part because of the confused state of English law, my

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¹ 265 Ky 418 (1936).

² I adopt the label used by Lord Reed in *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20 [95].

³ See the analysis of Lord Reed, *ibid*, [25]-[30].

⁴ Hence Lord Shaw's famous example: 'If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: "Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise": *Watson, Laidlaw & Co Ltd v Pott, Cassels & Williamson* 1914 SC (HL) 18, 31.

⁵ Patents Act 1977, s 61(1)(d).

⁶ (1830) 1 B & Ad 241.

⁷ See, eg, Graham Virgo, *The Principles of the Law of Restitution* (3rd ed, OUP 2015) ch 17; Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th ed, OUP 2019) ch 19; Shane Colton, James Edelman and Jason N.E. Varuhas (eds), *McGregor on Damages* (21st ed, Sweet & Maxwell 2020) ch 15.

concern below is to consider what the law ought to be; fit with the decided cases is not crucial for the success of such a project.

Before setting out the structure of the chapter, I should explain why I have chosen to limit my inquiry to such a narrow set of facts. It seems to be accepted, by both legal commentators and by judges, that there is something special about property in relation to both user damages and to disgorgement. If we can pin down what that something special is, then we should be on firmer territory when we consider whether similar remedies should be available elsewhere. So, leading commentators claim that, if disgorgement as a response to a tort should be available anywhere,⁸ it is where the tort involves interference with another's property.⁹ A similar point goes for user damages, which are just one instance where English law might award a claimant damages calculated to represent the amount that the claimant could have demanded from the defendant to permit them to act as they did. Such damages – 'negotiating' damages – are also available after a breach of contract, if that contract 'created or protected' a 'valuable asset' which could have been exploited for economic gain.¹⁰ In formulating this rule, the Supreme Court began with user damages, considering them to be the central case where damages of this sort are appropriate, and purported to use their rationale to explain and to limit negotiating damages more generally. This is an approach popular with legal theorists, many of whom have sought to determine the proper role for negotiating damages by starting with what they consider to be the central case of interference with property, and then by working out from that central case to see whether other cases are sufficiently similar to it such that negotiating damages should be available.¹¹

The rest of this chapter is made up of three sections. The first sets out the methodology I adopt, and explains why my approach differs from much of the existing literature on this topic. The second focuses on the thought, which strikes many as intuitively attractive, that the concept of 'property' itself can do some work in justifying either or both of our two remedies. I flesh out different forms of that argument, and argue that none is convincing. In the final section, I say something more positive. If we are to work out how a wrong should be remedied, we should first know why the duty which the defendant breached should exist. In the present context, that requires a justification of a claimant's right to exclude others from their property. I sketch out four such justifications, and consider what they might have to say about whether user damages and/or disgorgement can be justified.

⁸ Although some commentators, such as Steve Hedley, doubt that disgorgement for torts should be possible at all: Steve Hedley, *A Critical Introduction to Restitution* (Butterworths 2001) 248; Steve Hedley, *Restitution: Its Division and Ordering* (Sweet & Maxwell 2001) 108.

⁹ See, eg, Burrows, *Remedies* (n 7) 351; Virgo, *Restitution* (n 7) 453. Other writers claim instead that disgorgement should be available for all deliberate wrongs, and so implicitly they reject the claim that proprietary wrongs are the central case where disgorgement is most easily justified: eg *McGregor* (n 7) para 15.007.

¹⁰ *One Step v Morris-Garner* (n 2) [92] (Lord Reed).

¹¹ For examples of this approach, see Daniel Friedmann, 'Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong' (1980) 80 *Columbia LR* 504; Lionel D. Smith, 'Disgorgement of the Profits of Breach of Contract: Property, Contract and Efficient Breach' (1994) 24 *Can Bus LJ* 121, 129-32; Ernest J. Weinrib, 'Restitutionary Damages as Corrective Justice' (2000) 1 *Theoretical Inquiries in Law* 1; Hanoch Dagan, 'Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory' (2000) 1 *Theoretical Inquiries in Law* 115, 132-39; Nicholas W. Sage, 'Disgorgement: From Property to Contract' (2016) 66 *U Toronto LJ* 244.

B. Method

My aim is to consider whether user damages and/or disgorgement might be justified in response to a case like *Edwards*, or – to put the same thing in another way – to ask whether there are any good reasons for the law to award these remedies. This is a prescriptive exercise; fit with the positive law is not decisive. In this, I make quite a radical departure from most of the literature on these remedies, which tends to be written with an ‘interpretive’ approach.¹² I hope to say enough in this Section to explain why I do not follow that trend.

First however, an explanation of interpretive theory is necessary.¹³ When doing interpretive work, the commentator seeks out ‘normative commitments’ which are immanent within and which explain existing law.¹⁴ This is done through an iterative process of reasoning: we start with the legal materials (i.e. the outcomes and reasoning of decided cases) and suggest some candidate explanatory principles of those materials, which are then assessed against a number of criteria to determine their plausibility. Some principles will be more normatively appealing than others; some will fit the materials better. In order to determine which principle is the best one to adopt, we must weigh these criteria against one another. When we have done this exercise, we are then in a position to say that some cases may have been wrongly decided because they do not cohere with the preferred explanatory principle.

Like many – but by no means all – interpretivists, the general aim which motivates my work in this chapter is to consider what decisions judges and legislatures ought to make.¹⁵ Two classes of decision are particularly important here: (1) decisions as to what legal rules govern those issues on which existing law is unclear; and (2) decisions to remove, to retain or to change existing legal rules. In the rest of this Section, I argue that this aim is not most usefully served by interpretive theory. To be clear, I do not claim that interpretive theory is valueless, nor that it cannot ever be useful in pursuit of my aim. To the contrary, interpretive theory is obviously valuable. It can point out plausible inconsistencies in the law which call for our attention and it can reveal reasons in support of legal rules which are genuinely good reasons. What I hope to do is push against the thought that interpretive theories should influence decision makers.

To see the limits of interpretive theory, it is useful to contrast it with an alternative sort of account, which we can term a purely prescriptive account. Purely prescriptive accounts come in two forms.¹⁶ They could be directed at the question of what the law ideally should be, as if

¹² Recent works which consider user damages, negotiating damages, or disgorgement, and which are explicitly labelled by their authors as ‘interpretive’ include: Andrew Burrows, *The Law of Restitution* (3rd ed, OUP 2011); Katy Barnett, *Accounting for Profit for Breach of Contract: Theory and Practice* (Hart 2012); David Winterton, *Money Awards in Contract Law* (Hart 2015); Burrows, *Remedies* (n 7); Stephen A. Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (OUP 2019).

¹³ The most influential recounting of interpretive theory remains that in Stephen A. Smith, *Contract Theory* (OUP 2004). See too Allan Beever and Charles Rickett, ‘Interpretive Legal Theory and the Academic Lawyer’ (2005) 68 MLR 320; Jason N.E. Varuhas, ‘Mapping Doctrinal Methods’ in Paul Daly and Joe Tomlinson (eds), *Researching Public Law in Common Law Systems* (Edward Elgar 2023).

¹⁴ I take this phrase from Varuhas, ‘Doctrinal Methods’ (n 13).

¹⁵ For examples of interpretivists explicitly stating that they intend to guide future decisions in relation to negotiating damages, see Barnett, *Accounting for Profit* (n 12) 5 and Winterton, *Money Awards* (n 12) 20. Other interpretivists claim that their aim is only to ‘enhance understanding’ of the law, and do not claim to be evaluating the law or suggesting how it should develop: eg Smith, *Rights, Wrongs, and Injustices* (n 12) 25-27.

¹⁶ Charlie Webb, ‘Property, Unjust Enrichment, and Defective Transfers’ in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 337.

starting from scratch, from a completely blank slate. Or they could instead ask what the law should be now, given that we have been doing things a particular way for a period of time. That courts have decided certain cases certain ways in the past plausibly has some normative force, even if those decisions were unjustified when they were first made. If that is right, then this second sort of purely prescriptive account accepts that we may have good reasons not to adopt the prescriptions of a purely prescriptive account of the first sort.

The question for interpretive theories is what rational purchase they can have on decision makers, when contrasted with purely prescriptive accounts. Obviously, decision makers should be interested in purely prescriptive accounts; they might, for example, purport to tell a judge how they should decide a novel case. But there is nothing left here for interpretive theory to do.¹⁷ To see the point most clearly, imagine that a judge is confronted with a novel case, and that an interpretive theory suggests a solution which is different to one suggested by a (sound) purely prescriptive account of the second sort. It is implausible to think that the judge could be justified in ignoring the prescriptions of the latter, so that they might give effect to the former. If the prescriptive account is sound, then it *must* follow – by the nature of purely prescriptive accounts – that the suggestion of the interpretive theory should not be adopted. The same point holds for the case where a judge or legislature is called on to remove, retain, or alter an existing rule. It makes no sense to think that the suggestions generated by an interpretive theory ought to be preferred to those generated by a sound prescriptive one.

So, there looks to be no useful role here for interpretive theory to play. But there is a deeper issue with interpretive theory that should be highlighted: it is not a form of argument that, taken in isolation, has the means to make claims about how anyone – including decision makers – ought to behave. Recall that interpretive theories purport to explain the law by revealing its normative commitments. However, simply setting out the law's normative commitments does nothing to establish that those commitments should continue to be adopted. What is required is a further argumentative step, either claiming that those commitments are good, or claiming that those commitments ought to be followed regardless of their merit. In other words, we need to end up with some sort of purely prescriptive account.

An example makes this point clear. Consider Nicholas McBride's avowedly interpretive theory of user damages.¹⁸ He distinguishes between 'welfare-oriented' and 'liberty-oriented' legal rights. The law recognizes the former, he argues, to protect an 'interest we have in things going well for us', while the latter are recognized to protect an 'interest we have in being allowed to determine for ourselves how things go for us'.¹⁹ User damages, McBride argues, respond to infringements of rights which the law considers to be liberty-oriented:

[W]hen a liberty-oriented right is violated, it would be inappropriate to confine the plaintiff to suing the defendant for welfare-oriented compensation. As the right that was violated in the plaintiff's case was geared towards protecting his liberty, then he may well not have suffered any material harm to his welfare as a result of that right being violated. However,

¹⁷ For much the same point, see Charlie Webb, 'The Double Lives of Property' (2011) 2 *Jurisprudence* 205, 215.

¹⁸ Nicholas J. McBride, 'Restitution for Wrongs' in Charles Mitchell and William Swadling (eds), *The Restatement Third: Restitution and Unjust Enrichment* (Hart 2013).

¹⁹ *Ibid*, 273.

the plaintiff will still have lost something – a liberty – that *the law thinks he was entitled to have*... For example, where A goes for a ride on B's horse without B's permission, he deprives B of a freedom that *the law sought to grant him* – the freedom to decide for himself who gets to ride on the horse and who doesn't. By allowing B to sue A for [user] damages, *the law seeks to compensate B* for the loss of this freedom by giving him an amount of money that reflects the value of being able to say whether or not A could go for a ride on his horse.²⁰

The italicized words emphasize that McBride's theory – like all interpretive theories – is about how to understand existing practices. But claims about what people have done are claims of a different order entirely to those about what people should do. The former, taken alone, tells us nothing about the latter. Suppose, for example, that A calls on the courts or the legislature to remove the rule that holds A liable to pay user damages to B. It misses the point to respond by telling A that the law considers B's right to be liberty-oriented, and that the law is seeking to compensate B for the loss of some freedom the law sought to grant him. A might fairly respond that he knows full well what the law is trying to do, but that he is challenging it. For example, he may argue that the law should not think of B's right in this way, or that the law should not respond to all infringements of liberty-oriented rights with negotiating damages.

Alternatively, suppose that D invades a right of C's, and that C then brings a claim against D for negotiating damages. Suppose further that no case has yet recognized that such damages are available after that particular wrong. The law is unclear. We do not know that it considers C's right to be liberty-oriented and, even if it does, we do not know that it always responds to infringements of liberty-oriented rights with negotiating damages. The best a judge might do with McBride's theory here is ask whether they should consider C's right to be liberty-oriented, and ask what remedies should follow. When read without these added prescriptive elements, McBride's theory simply does not have the tools to tell a judge what they should decide.

Of course, it might be argued that interpretive theories can be recast as a kind of purely prescriptive account, when we factor in the force of the principle that like cases ought to be treated alike. Thus, an argumentative step is added to the claim that some theory reveals the normative commitments of an area of law – the claim that decisions ought to be made in line with those commitments, so that all legal decisions are made on the same grounds as any other.

If one endorses this position, then there is no true objection here; on this view, interpretive theory collapses into the second sort of prescriptive account mentioned above. It may be that a full prescriptive theory concerned with determining the proper role for negotiating damages and/or for disgorgement would need to take the law's pre-existing normative commitments into account.²¹ If so, then we do need some answer to the question of what those commitments are.

²⁰ Ibid, 273-74 (emphasis added).

²¹ However, I strongly doubt that this thought, if true, could plausibly justify the claim that judges should make decisions to cohere with some interpretive theory. When taking account of the principle that like cases should be treated alike, our concern is primarily with consistency of outcome – who wins or loses the case, and the remedial consequences – rather than with consistency of the normative commitments which explain that outcome. If a judge decides a case in a way consistent with the outcome of an earlier one, but does so by adopting some new rationale, it seems implausible to think that any serious injustice is done to the participants in the earlier case. Alternatively, if the thought is that judges should not act in a way that might disrupt the settled expectations of citizens who need to plan their affairs, then it is bizarre to think that they should do so by developing the law in accordance with

However, in this chapter I shall ask what I consider to be a more important question – whether there are good reasons for the law to have these remedies at all. It is worth briefly explaining this prioritisation.

No one seriously believes that the law's normative commitments should continue to be followed whatever they may be. Those commitments could be sufficiently unjust such that they should be changed. Where this is done, it may follow that some past disputes were decided inconsistently with how disputes of the same sort will be decided in future; the principle that like cases must be treated alike has its limits. But the interpretive method gives us no tools to work out when these changes can be justified. In order to do so, we must weigh the reasons in favour of the other possible positions against the reasons in favour of departing from them given to us by existing practice. This exercise can only be done if we know what both those sets of reasons are. So, if interpretive theory collapses into prescriptive theory, and if the theorist aims to guide decision makers, then at some stage the interpretivist must engage with the question of what the law should be, even if it is only to demonstrate that their theory is not too radical a departure from more attractive positions. And in order to do that, they must also be able to tell us what good reasons we have to stick with the commitments or the rules which we already have. On any view, then, an inquiry into the genuine values which may be promoted by disgorgement or by user damages is needed. And as the following two Sections make clear, I do not think that this is an inquiry which has yet received sufficient attention.

C. Property

It follows from the previous Section that what I am looking for are good reasons for the law to award either user damages or disgorgement following facts like those of *Edwards*, where one person makes unauthorized use of property belonging to another. To keep things manageable, I consider things in this chapter as if working from a blank slate; I leave consideration of how the weight of history might change my conclusions to another time.

As a starting point, I want to examine the intuitively attractive thought that the very idea of property can justify either or both of these remedies.²² Justifications which seek to build on that thought come in two forms in the existing literature. First, there are accounts which invoke the supposed need to protect the institution of private property as a whole. Typical of accounts of this sort is that of IM Jackman, who argues that user damages in particular are awarded because the law's 'facilitative institutions' – including private property – 'require protection against those who seek to take the benefit of an institution without submitting to the burdens thereof'.²³ Although offered in relation to user damages, it seems to me that this argument would also strike many as plausible in relation to disgorgement.

some normative commitment hidden within it. If that commitment required academic interpretation to be discovered, then presumably no citizen will have based any of their affairs on it.

²² Although writers disagree about whether the arguments considered in this Section are persuasive only in relation to one of disgorgement or user damages, or in relation to both, I shall take the two together. My criticisms bite no matter which remedies these arguments are intended to cover.

²³ I.M. Jackman, 'Restitution for Wrongs' (1989) 48 CLJ 302, 302. See too I.M. Jackman, *The Varieties of Restitution* (2nd ed, Federation Press 2017) ch 8. For arguments along similar lines, see, eg, Peter Cane, *The Anatomy of Tort Law* (Hart 1997) 116-17 and Mitchell McInnes, 'Gain, Loss and the User Principle' (2006) 14 RLR 76, 81.

However, exactly what this argument is supposed to mean is not entirely clear to me. On one view, it amounts to no more than the claim that user damages or disgorgement can be justified because they deter wrongful interferences with property.²⁴ If this interpretation is correct, then the account is open to the objection that neither user damages nor disgorgement work very well as a deterrent.²⁵ Although they remove some incentive to commit a wrong, they encourage the thought that wrongdoing may be worth the risk: the worst that can happen to the wrongdoer is either that they pay a reasonable fee for what they have done, or that they are returned to the position they were already in before their wrong. Since that wrong may never be discovered or litigated, neither remedy does much to deter. Taken seriously, the sensible inference to draw from the argument is that the law should not recognize either remedy and our debate should be about the proper role for punitive damages.

When read in any other way, institutional accounts look circular. The institution of private property is just the sum of the rules which govern our dealings with items of property. But our debate is about what those rules should be, and so about what the institution of private property should be. We are constructing an institution, not protecting an existing one from harm. This account is therefore of little help for my purposes in this chapter.

More useful then may be the second kind of account which builds upon the intuition that ‘property’ can be helpful in constructing a justification of user damages or disgorgement. These accounts focus on a concern for the individual property rights of particular people, rather than on broader institutional or societal concerns. Typical is the following argument made by Ernest Weinrib, which has proved very influential:

Because property rights give proprietors the exclusive right to deal with the thing owned, including the right to profit from such dealings, any gains resulting from the misappropriation of property are necessarily subject to restitution. Gains from dealings in property are as much within the entitlement of the proprietor as the property itself.²⁶

Weinrib goes on to endorse the view that user damages remove the value of a gain taken by the defendant,²⁷ and so his argument is intended to cover both user damages and disgorgement. However, it is only Weinrib’s formulation of his preferred principle – as one allocating gains to an owner – that makes this a central feature of his account. Other writers have claimed that user damages respond to a ‘loss’, but still endorse much the same underlying idea. For example, Francesco Giglio claims that user damages respond in part to the claimant’s loss, because they restore to them an ‘element of a property or property-like right’ which the defendant has taken away from them.²⁸ For present purposes, the important underlying claim here is that property rights bring with them an exclusive right to determine the property’s use, and user damages

²⁴ For explicitly deterrence-focussed defences of disgorgement, see James Edelman, *Gain-Based Damages* (Hart 2002); Barnett, *Accounting for Profit* (n 12); McGregor (n 7) para 15.005.

²⁵ McBride, *Restitution* (n 18) 263-66. See too Lionel Smith, ‘Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another’ (2014) 130 LQR 608, 627 and Robert Stevens, *The Laws of Restitution* (OUP 2023) 300-01.

²⁶ Weinrib, ‘Restitutionary Damages’ (n 11) 12.

²⁷ Ibid, 16.

²⁸ Francesco Giglio, ‘Restitution for Wrongs: A Structural Analysis’ (2007) 20 CJLJ 5, 17.

serve to give the claimant something to which they are entitled in virtue of their prior right over the property used by the defendant.

Many writers endorse these arguments, but state them in different terms. Perhaps the most prominent advocate of this view is Daniel Friedmann,²⁹ but similar views have been expressed by Peter Birks,³⁰ William Day,³¹ Ross Grantham and Charles Rickett,³² Sirko Harder,³³ Peter Jaffey,³⁴ and Graham Virgo.³⁵ Although each one differs in some details,³⁶ all agree that user damages and/or disgorgement are available after interference with the claimant's property because the defendant either presently has or previously had something which belongs to the claimant. The law makes the defendant give that something – or perhaps only its value – over to the claimant. Following Friedmann, I shall call this the 'property theory'.

Despite its popularity, the property theory looks circular; it is little more than a restatement of whatever candidate rule which we are trying to justify. To use Weinrib's language, how do we know that an owner of property has a right to all of the gains or profits derived from that property? The answer is that we know this because we award gains or profits derived from that property to the owner. But then if we did not make such awards, it would not be the case that the owner of property has a right to all of those gains. The property theory therefore looks like little more than an assertion that disgorgement and/or user damages should be available because they should be available.

²⁹ See, eg, Friedmann, 'Restitution of Benefits' (n 11) 507: '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'. See too Daniel Friedmann, 'Restitution for Wrongs: The Basis of Liability' in William Cornish, Richard C. Nolan, Janet O'Sullivan, G.J. Virgo and Richard Nolan (eds), *Restitution: Past, Present and Future* (Hart 1998).

³⁰ Peter Birks, 'Unjust Enrichment and Wrongful Enrichment' (2001) 79 Texas LR 1767, 1785: 'economic assets are meant to earn, and it makes perfectly good sense to say that the earning opportunities inherent in such an asset are all attributed to its owner'. See too Peter Birks, *Unjust Enrichment* (2nd ed, OUP 2005) 82-86.

³¹ William Day, 'Restitutions for Wrongs: One Step Forwards, Two Steps Back?' (2018) 26 RLR 60, 62: 'there is a convincing argument that restitution should be a remedy for causes of action protecting (per se) property rights because property rights carry with them an exclusive entitlement to profit from the asset in question – or at least to control who does profit from the asset'.

³² Ross Grantham and Charles Rickett, 'Tracing and Property Rights: The Categorical Truth' (2000) 63 MLR 905, 909: 'The right to protection from interference and the right to exclusive benefit of the asset are central rights which in large measure define property rights. The plaintiff's right to recover the value of the asset, and indeed any incidental benefits obtained from the use of the asset, are, therefore, already present at the moment of interference by virtue of his property right'. See too Ross Grantham and C.E.F. Rickett, *Enrichment and Restitution in New Zealand* (Hart 2000) 484-85; R.B. Grantham and C.E.F. Rickett, 'Disgorgement for Unjust Enrichment?' (2003) 62 CLJ 159.

³³ Sirko Harder, *Measuring Damages in the Law of Obligations* (Hart 2010) ch 13. Harder claims that user/negotiating damages and disgorgement should follow the 'unauthorised use of an exclusive entitlement' (at 216) – defined as an asset 'the exploitation of which is exclusively reserved' for a specific person (at 216) – and that ownership of tangible or intangible property is the 'prime example' of an exclusive entitlement (at 219).

³⁴ Peter Jaffey, 'Licence Fee Damages' (2011) 19 RLR 95, 107: 'the remedial right to [user damages] arises directly from, and in vindication of, the primary right of property – the right to the property and its value, including the value realisable through use'. See too Peter Jaffey, *Private Law and Property Claims* (Hart 2007) 99-103.

³⁵ Virgo, *Restitution* (n 7) 422: 'since the profits derived from the use of the claimant's asset, it is appropriate that the defendant makes restitution of the value of that benefit to the claimant. So, for example, where the defendant takes the claimant's car and hires it out without permission, it is appropriate that the money received by the defendant should be paid to the claimant since it constitutes the fruits of the claimant's asset'.

³⁶ In particular, there is disagreement about how the claims should be classified. Some argue that user damages and disgorgement are an instance of 'unjust enrichment', others do not.

To some extent, this apparent circularity is explicable because not all of the authors who endorse the property theory intend it to provide an external framework against which we might criticize or defend the law. Instead, it is said to be an interpretive principle drawn out from the cases which the law adopts, whether it should or not. Weinrib is clearest here; his aim is ‘to *understand* the particulars of private law in the light of its general and pervasive ideas’.³⁷ But this is not true of all authors. Harder, for example, believes the property theory to address the issue of ‘when gain-based relief in this area *ought* to be available’,³⁸ and expressly begins his study by drawing a sharp distinction between the description of the law and the evaluation of that law.³⁹ Other writers are far less clear on their methodology. They label the property theory the ‘underlying principle’,⁴⁰ the ‘justification’,⁴¹ the ‘explanation’,⁴² the ‘concern’,⁴³ and/or the ‘basis’⁴⁴ of the law, but rarely, if ever, do they explain what those terms are intended to mean. Nonetheless, the theory is invariably used to generate prescriptions for decision makers. Some writers have claimed that particular cases are incorrectly decided because they do not cohere with the theory,⁴⁵ while others claim that novel cases should be decided in accordance with it.⁴⁶ Therefore, with apologies to those writers who did not mean to endorse the theory in this way, I shall treat the property theory as an attempt to answer the question of whether there are good reasons for the law to make user damages and/or disgorgement available.

There are, I think, two ways in which we might try to flesh out the property theory such that it becomes more like an argument in defence of a candidate rule, and less like a restatement of that rule. Those ways track a useful distinction that Charlie Webb has drawn between two senses in which one might use the concept of ‘property’.⁴⁷

1. The Analytical Concept

³⁷ Weinrib, ‘Restitutionary Damages’ (n 11) 5 (emphasis added).

³⁸ Harder, *Measuring Damages* (n 33) 209 (emphasis in original).

³⁹ *Ibid.*, 12-13.

⁴⁰ Friedmann, ‘Restitution of Benefits’ (n 11) 504.

⁴¹ Virgo claims that the property theory is one idea which ‘justifies’ user damages and disgorgement, and that the theory explains why these remedies are ‘appropriate’ after interference with another’s property: Virgo, *Restitution* (n 7) 422.

⁴² Jaffey, ‘Licence Fee Damages’ (n 34) 104.

⁴³ Grantham and Rickett, ‘Disgorgement’ (n 32) 162.

⁴⁴ Jaffey, ‘Licence Fee Damages’ (n 34) 105.

⁴⁵ A few examples will suffice. Jaffey argues that *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 was wrongly decided on the basis of his theory: *ibid.*, 108, n 56. Virgo suggests that both *Stoke-on-Trent City Council v W and J Wass Ltd* [1988] 1 WLR 1466 and *Forsyth-Grant v Allen* [2008] EWCA Civ 505 may be incorrect, because they refused to award negotiating damages or disgorgement in response to private nuisance, a tort which protects property rights: Virgo, *Restitution* (n 7) 461-62.

⁴⁶ Again, a few examples make the point. Grantham and Rickett argue that it follows from the property theory that disgorgement of the defendant’s gains should be available on the facts of *Edwards*, even though no English case clearly establishes this: Grantham and Rickett, ‘Disgorgement’ (n 32) 173-75. Birks too claims that disgorgement should be awarded on the facts of *Edwards* by English courts: Birks, *Unjust Enrichment* (n 30) 84-85. Friedmann, Jaffey and Weinrib all finish their analyses by considering whether the property theory suggests that similar remedies should be available in a wide range of cases which do not obviously involve unauthorized interference with property, including after a breach of contract or an invasion of privacy.

⁴⁷ Charlie Webb, ‘Three Concepts of Rights, Two of Property’ (2018) 38 OJLS 246.

First, we can take ‘property’ in its analytical sense – as a descriptive label to attach to certain legal rights or interests. This is the sense in which theorists use the term when they debate what property *is*, what it means to say that someone has a property right, or whether certain legal rights properly count as property rights. Birks used ‘property’ in its analytical sense when he claimed that property rights, in contrast to personal rights, are those rights ‘whose exigibility is defined by reference to the existence and location of a thing’.⁴⁸ Similarly, when Wesley Hohfeld argued that a property right is a ‘complex aggregate of rights (or claims), privileges, powers, and immunities’ held against other people, he was seeking to flesh out the analytical concept of property.⁴⁹

The important point here is not whether Birks or Hohfeld were correct. Rather, to bring the discussion back to user damages and disgorgement, the thought is that if these remedies are not available to a claimant in a case like *Edwards*, then it might follow that that claimant does not truly have a property right in their land. However, this conclusion seems absurd; the fee simple absolute in possession is surely a property right, if anything is. Some writers seem to endorse this argument when they formulate a version of the property theory. For example, Friedmann considers the ‘right of exclusive enjoyment’ of a thing which is owned to be the ‘*essential* attribute of property’.⁵⁰ Similarly, Grantham and Rickett claim that the ‘right to protection from interference and the right to exclusive benefit of the asset are central rights which in large measure *define* proprietary rights’.⁵¹ The worries here are analytic rather than normative: user damages and/or disgorgement should follow as a matter of logic from the recognition that the claimant has a property right.

The problem with all this is that it is not clear why we should care about whether the English legal system is one which recognizes ‘true’ property rights. What we care about is whether the substantive rules of the system are justified. It may be true that if English law removed user damages and refused to recognize disgorgement then it would not have, or would have only some watered-down version of, private property. However, it does not follow that this would be a substantive flaw. At most, this form of the property theory could only prove that the label ‘property right’ would not accurately describe our legal titles to tangible things.

2. The Normative Concept

The second sense in which we might use the notion of ‘property’ is as a normative concept, i.e. as a ground of or explanation for reasons or duties which govern our actions. If a thing which you own is in my possession, without your consent, most people would ordinarily be happy to say that I should give it back to you, at least if and when you demand it from me. And the idea of property plays an important part in my reasoning: I have a reason to hand possession over to you, or I have a duty to do so, *because* that thing is yours and not mine. Here, to say that ‘property’ is an explanation for my action is not to state that I am subject to a duty to keep off the thing, but is rather to say why I am under such a duty.

⁴⁸ Peter Birks, *An Introduction to the Law of Restitution* (rev ed, Clarendon Press 1989) 49.

⁴⁹ Wesley Newcomb Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1916) 26 Yale LJ 710, 746.

⁵⁰ Friedmann, ‘Restitution of Benefits’ (n 11) 507 (emphasis added).

⁵¹ Grantham and Rickett, ‘Categorical Truth’ (n 32) 909 (emphasis added).

Can this normative concept of property help us to rehabilitate the property theory? It is hard to see how it can. If we ask why the defendant should hand their gains over to the claimant in *Edwards*, it is hardly satisfying to argue that they should do so because those gains belong to the claimant. The next question we would have to ask is why they do, and so here the notion of property is not in fact doing any real justificatory work.

One way in which a property theorist might seek to get around this concern is to deny that it is a problem at all. They might accept that their argument looks circular in this way, but claim that it is nevertheless true – that we cannot point to some further value served by a legal rule is not always a mark against that rule. Indeed, it is a feature of some rules that they appear to be justifiable in this way. That everyone is under a legal duty not to interfere with another's body is probably the most intuitively plausible example. It seems odd to ask someone to point to the goods brought about by this rule in order that they can justify it; the rule is justified, one might think, because our bodies are not means at another's disposal. That strikes many as sufficient, even though it looks like little more than a restatement of the rule which we are trying to justify.

Moves along these lines are familiar in property law scholarship. In particular, some writers have made similar arguments in debates about whether rights to exclude others from things can be justified. Arthur Ripstein is the clearest exponent of a view of this sort.⁵² Property rights, he argues, are amenable to the same arguments as those which justify our bodily rights:

if we ask why what others do with or to your body is up to you, there seems to be only two possible types of answers: one says that you have such authority because giving people authority in this way is likely to promote happiness, autonomy, or something else in the long run. The other type of answer says that you are not available for other people to use; the reason what others do to or with your body is up to you is because it is not up to them... My claim is only that in looking for the point or purpose of "giving" someone the right to exclude others from their property, the form of the answer can be the same, just as the form of the right is the same. It is up to the owner to decide what happens because it is not up to any other person – the owner is entitled to be independent of others with respect to the use of the things in question.⁵³

Thus, on this view, property rights can be justified without pointing to some good consequences that those rights bring about. Their existence need not serve some further purpose. Instead, our rights are constitutive of our normative relationship with others. This captures, says Ripstein, the sense in which it seems wrong to interfere with someone else's property even if it could be demonstrated that the interference has brought about some valuable state of affairs that would otherwise not exist.

If arguments of this sort seem persuasive, then it may be that user damages or disgorgement could be justified in similar terms. Perhaps profits derived from the use of an owner's property just are means which belong to that owner. If so, that could be reason enough to endorse the property theory. One could say that it is up to the claimant to decide how those profits are to

⁵² Arthur Ripstein, 'Possession and Use' in James Penner and Henry E. Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013).

⁵³ *Ibid*, 175.

be used, because it is not up to any other person. Certainly, the analogy to bodily rights seems to me to weaken the claim that the property theory is circular in a problematic way. If circularity of this sort is endemic to the justifications of legal rules, then it is not such a strong mark against the property theory.

Ultimately, I suspect that your intuitions either go along with this theory, or demand that you roundly reject it. There is not the space in this chapter to consider fully whether the theory can be defended. However, I can try to weaken whatever intuitive force it has, with two points. First, writers disagree quite profoundly about whether and when disgorgement can be justified. Although many writers do endorse the property theory, others claim that there is no reason to allow disgorgement,⁵⁴ that it is justified after *any* wrong,⁵⁵ or that it is justified only after any *deliberate* wrong.⁵⁶ If the first of these views is right, then the property theory must be wrong; if the second or third is right, then the property theory is redundant because disgorgement would be justified in *Edwards* without reliance on the theory. This sort of disagreement about the property theory's force suggests that we should be resistant to the claim that the theory is amenable to arguments of the sort made by this version of the property theory.

Second, I suspect that some of the intuitive strength of the theory comes from an analogy with the fruits doctrine. That doctrine holds that a person who owns a thing is automatically entitled to the physical fruits of that thing when they are produced, simply in virtue of their owning the first (principal) thing.⁵⁷ If I own an apple tree, I own its apples. A person who deliberately interferes with those apples commits a tort against me in doing so, whether they were blown off by the wind and lying on the ground, or whether they were plucked from the branches of my tree.⁵⁸ Here, we are on firmer territory than in relation to user damages and/or disgorgement. It has been said that the fruits doctrine is one recognized in all known systems of property law,⁵⁹ and writers sometimes claim that the doctrine follows self-evidently from the recognition of ownership of the principal.⁶⁰ In his classic work on ownership, AM Honoré grouped an owner's rights to fruits, to rent and to profits derived from their property together under a single incident of ownership, which he labelled the 'right to the income'.⁶¹

However, the analogy to the fruits doctrine is weak. In the case of fruits, the profit is the best title to a tangible chattel which has been physically and newly produced. This is not the profit made in cases where user damages and/or disgorgement are claimed, which is whatever the defendant happens to have acquired in the process of making use of the property. This

⁵⁴ See above, at n 8.

⁵⁵ This was the position adopted in earlier editions of *Goff and Jones*: eg Gareth Jones, *The Law of Restitution* (7th ed, Sweet & Maxwell 2007) para 36.006.

⁵⁶ eg *McGregor* (n 7) para 15.007.

⁵⁷ For textbook discussion see, eg, William Swadling, 'Property: General Principles' in Andrew Burrows (ed), *English Private Law* (3rd ed, OUP 2013) para 4.434; Duncan Sheehan, *The Principles of Personal Property Law* (2nd ed, Hart 2017) 25; Michael Bridge, Louise Gullifer, Kelvin F.K. Low and Gerard McMeel (eds), *The Law of Personal Property* (3rd ed, Sweet & Maxwell 2022) para 17.033.

⁵⁸ *Mills v Brooker* [1919] 1 KB 555.

⁵⁹ Felix S. Cohen, 'Dialogue on Private Property' (1954) 9 Rutgers LR 357, 366.

⁶⁰ See, eg, Andrew Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 LQR 412, 418; Sarah Worthington, 'Revolutions in Personal Property: Redrawing the Common Law's Conceptual Map' in Sarah Worthington, Andrew Robertson and Graham Virgo (eds), *Revolution and Evolution in Private Law* (Hart 2018) 231.

⁶¹ A.M. Honoré, 'Ownership' in A.G. Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961) 117-18.

difference also seems to be of normative significance. That fruit has come physically from the principal goes some way in explaining why the fruit should be owned by the owner of the principal.⁶² Where an apple falls from a tree, that apple was previously a part of the tree, and so the owner of it had rights over the apple while it was on the tree.⁶³ To say that the owner of the tree does not own the apple is not to prevent them gaining a right over that apple; it is to extinguish a right over it which they previously held.⁶⁴ To reject the fruits doctrine is akin to claiming that, when I rip a page out of your book, you lose your rights over the page but retain your rights over the rest of the book.

Thus, I consider the property theory to be unsatisfying, whatever precise form it takes. The theory can be fleshed out in different ways, but every iteration of it seems to be incomplete. If we are to find a full justification of either of our two remedies, we should look elsewhere.

D. Property, Again

In this Section, I build on a different intuitively attractive thought in order to consider whether user damages or disgorgement might be justified. That thought is that the remedy which should follow an infringement of a given right should be determined by reference to the reasons which justified the infringed right. If that thought is correct, then it follows that our answer depends on an account of the reasons which might justify the recognition of an owner's right to exclude others from their property.⁶⁵

I do not have the space in this chapter to fully defend that starting thought.⁶⁶ However, I can instead demonstrate its plausibility by showing that an alternative strand of theorisation of user damages is incomplete as a justification of those damages, and that this strand of thought is incomplete precisely because it is missing an account of the reasons which justify an owner's right to exclude others. According to this view, user damages respond to the mere fact that a duty has been breached. The central point has been put in different ways. Some argue that user damages 'vindicate' an infringed right;⁶⁷ others argue that user damages provide a 'substitute'

⁶² Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* (C.H. Oldfather and W.A. Oldfather tr, Clarendon Press, 1934) Book IV, ch 7, §4. See similarly Stevens, *Restitution* (n 25) 302. My argument differs from Stevens in that I do not mean to suggest that the fruits doctrine is *required* in virtue of this fact. For a fuller analysis of the merits of the fruits doctrine, see Alexander Waghorn, *The Goals of Property Law*, PhD Thesis (University of Cambridge, 2021) ch 5.

⁶³ Although this point seems to me to be uncontroversial, Lionel Smith must doubt it because he insists on drawing a distinction between the production of fruit and the 'subdivision' of a thing: Lionel D. Smith, *The Law of Tracing* (OUP 1997) 21-22.

⁶⁴ For the same point in the context of rights over things, such as hair or sperm, separated from our bodies, see Muireann Quigley, *Self-Ownership, Property Rights and the Human Body* (CUP 2018) 239.

⁶⁵ I am not the first to make this argument in this context: see James Gordley, 'The Purpose of Awarding Restitutionary Damages: A Reply to Professor Weinrib' (2000) 1 *Theoretical Inquiries in Law* 39 and James Gordley, *Foundations of Private Law* (OUP 2006) ch 21. I discuss Gordley's substantive arguments below, in D.3.

⁶⁶ The thought obviously owes much to John Gardner's 'continuity thesis', set out in John Gardner, *Torts and Other Wrongs* (OUP 2019) ch 2 and explored in Sandy Steel, 'Compensation and Continuity' (2020) 26 *Legal Theory* 250. The continuity thesis has its doubters: see, eg, Charlie Webb, 'Duties and Damages' in Paul B. Miller and John Oberdiek (eds), *Oxford Studies in Private Law Theory: Volume I* (OUP 2020) and John C.P. Goldberg and Benjamin C. Zipursky, *Recognizing Wrongs* (Belknap Press 2020) 159-63.

⁶⁷ See, eg, Jason N.E. Varuhas, 'The Concept of "Vindication" in the Law of Torts: Rights, Interests and Damages' (2014) 34 *OJLS* 253, 284-89; Smith, *Rights, Wrongs, and Injustices* (n 12) 202-06.

for that right.⁶⁸ If these arguments are correct, then my starting point looks out of place. What matters under these accounts is not *why* a right should exist. Rather, what matters is that a right *does* exist and that it has been infringed. If those facts are made out, user damages follow.

However, to be plausible, such accounts must incorporate some explanation of what it is that makes particular right-infringements more or less serious than other infringements of the same right.⁶⁹ I might drive your car around town, or I might instead spend that time touching it with my little finger. In both cases, I have infringed the same right: your right to exclude me from the car.⁷⁰ In both cases, the vindictory and substitutionary accounts therefore appear to call for the same response. But this result is implausible; it ignores the relative significance of the two right-infringements. What is vindicated or substituted cannot be the right itself, but rather it is something like the extent of the infringement of the right.

It follows that these accounts are incomplete without a further account which can explain whether a given right-infringement is more or less significant than another.⁷¹ An account which attempts to justify user damages as a response to the mere fact of a breach of duty alone cannot succeed. What is needed is reliance on the reasons which justify the infringed right: the more a given wrongdoer acts contrary to the reasons which justify the right that they infringe, the more significant is their infringement.

Like the property theory, the vindictory and substitutionary accounts lack an analysis of the reasons which might justify an owner's right to exclude others from their property. It may be that these accounts can be made convincing once such an analysis is added to the accounts; I will not attempt a rehabilitation in what follows. Nor do I have the space to consider each and every justificatory approach towards private property. There is a huge literature on that topic, written from many different perspectives. Instead, I shall sketch out four justificatory accounts of private property, which I have selected either because of their popularity among private law theorists or because they appear most obviously relevant to the problem at hand. I then consider whether each one suggests, taken on their own terms, a plausible justification for user damages or for disgorgement in the core case, analogous to the facts of *Edwards*.

1. Kantian Accounts

⁶⁸ See, eg, Robert Stevens, *Torts and Rights* (OUP 2007) ch 4 and Stevens, *Restitution* (n 25) ch 17.

⁶⁹ For variations of this criticism levelled at the substitutive account, see James Edelman, 'The Meaning of Loss and Enrichment' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 219 and Burrows, *Remedies* (n 7) 48. Both Edelman and Burrows claim that the way to determine an infringement's seriousness is in reference to its consequences. Although I do not doubt that consequences must be important, my example shows that they are not the only issue at play here.

⁷⁰ One might object at this point that we can disaggregate your right to exclude me from the car into many different rights, including two separate rights: the right that I not touch the car with my little finger, and the right that I not drive the car around town. But this objection simply kicks the can down the road. Why is the latter right more significant than the former? And, just as importantly, why is your right that I not touch the car with my little finger equally as significant as your right that I not touch the car with my thumb?

⁷¹ Smith makes a brief attempt to set out such an account: Smith, *Rights, Wrongs, and Injustices* (n 12) 207-08. On Smith's (interpretive) account, the law considers three factors to determine a wrong's seriousness: the importance of the right infringed; the defendant's state of mind when committing the wrong; and the wrong's consequences. However, Smith's factors suggest that the same remedy should follow in both examples in relation to the car.

The first is the ‘Kantian’ account, which has been most clearly expounded by Ripstein.⁷² The account begins by considering a pre-legal state of nature, where all people are subject to duties which dictate that they must act consistently with each other’s independence. To be an independent person is to be in a relationship with others whereby those others do not make choices about your means.⁷³ In the pre-legal state, independence first requires that people do not interfere with each other’s bodies. Kant then considers how one might justify shifting from that normative position to one in which independence includes a respect for people’s rights over items of property. That move is a morally demanding one. It entails that people’s freedom to act is reduced, because they become subject to duties to keep off items of property which would otherwise be available for them to take and use.

Kant’s solution is to invoke a ‘postulate of practical reason’, i.e. a principle that is true but ‘incapable of further proof’.⁷⁴ The postulate means that all people must will a system of private property into existence, lest they act contrary to the postulate, and so contrary to reason. This is so because to deny such a system would mean that we would not be able to set or pursue plans to the same degree that we otherwise would. Suppose you are making an omelette.⁷⁵ If you have no right to the eggs that you earlier gathered while you cook the mushrooms, you have no right to stop another taking those eggs; your ability to set and pursue purposes would depend on the choices of another. To avoid this state of affairs, Kant argues, rights to exclude others from the eggs are needed.

For present purposes, this account is unhelpful because it cannot justify why, in a case like *Edwards*, the claimant should have an *absolute* right to exclude people from their land, rather than simply a right that others not interfere with the uses to which the claimant is putting the land. A system of usufruct, which only recognizes much more limited rights of that sort, would be sufficient to address the concern which motivates Kant to endorse the postulate.⁷⁶ In fact, such a system appears superior under Kantian premises, because it would leave more projects open to non-right-holders which they might pursue without committing legal wrongs. Thus, I do not think that a Kantian account can help us to justify user damages or disgorgement in *Edwards*. In fact, it rather does the opposite. If the defendant’s actions should not be wrongful, then presumably no remedy should follow them.

2. Use-Value Accounts

A second sort of justification attempts to avoid the flaws of the Kantian account by invoking instrumental concerns. It begins from a similar premise to that which underlay Kant’s postulate: people should not interfere with those valuable projects being pursued by others, and private

⁷² Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Harvard UP 2009). In this chapter, I focus only on Ripstein’s account. However, there are a number of alternative interpretations of Kant available in the literature. See, eg, B. Sharon Byrd and Joachim Hruschka, ‘The Natural Law Duty to Recognize Private Property Ownership: Kant’s Theory of Property and his Doctrine of Right’ (2006) 56 U Toronto LJ 217; Ernest J. Weinrib, *Corrective Justice* (OUP 2012) ch 8.

⁷³ Ibid, 15.

⁷⁴ Ibid, 61.

⁷⁵ The example is Ripstein’s: ibid 91-92.

⁷⁶ I am here adopting an argument made by James Penner in response to Ripstein’s interpretation of Kant: J.E. Penner, *Property Rights: A Re-Examination* (OUP 2020) 177-80.

property is best justified because it allows people to pursue those projects free from interference. On such an account, it is our (non-legal) interest in *using* items of property which is central,⁷⁷ and property rights imperfectly promote and protect that interest.

At first blush, this account, again, cannot help us to justify user damages or disgorgement, because it suggests that a mere trespasser commits no wrong; if the claimant's legal right serves their interest in making use of land, then others should be free to act, so long as they do not interfere with that use. In response, we can invoke some or all of the following instrumental concerns. First, to permit trespasses increases the risk that an owner's uses for their property are interfered with. Second, an absolute right of exclusion is cheap for courts to enforce.⁷⁸ They need not inquire into the mental state of the right-holder to determine what projects the property was planned to be used for, but instead need only ask whether the purported wrongdoer physically interfered with it. Third, for similar reasons, an absolute duty of non-interference is a relatively easy norm for citizens to follow. They need not work out to what uses property is being put to know whether their actions are non-wrongful, but rather need only know to keep off those things which are not theirs.⁷⁹ Fourth, even supposedly harmless trespasses may cause some kind of psychological harm which the law has reason to prevent.⁸⁰

Do these four arguments have any implications for *Edwards*? The first and third concerns suggest that the law has reason to draw a distinction between cases where the defendant acts innocently and cases where they act knowing that they are creating a risk that they might interfere with the claimant's use of their property. If they could not reasonably be expected to know of that risk, then they could not take steps to avoid it. So, a legal rule holding innocent defendants liable to pay user damages or disgorgement would not promote the values identified by the first or third concern. In contrast, if one knowingly risks interference with an owner's uses, these concerns do bite and suggest that a substantial remedy may do some good.

However, these concerns do not map onto user damages or disgorgement. In the case where the defendant acts knowingly, there seem to be two plausible underlying thoughts which might justify the award of a substantial remedy. First, one might argue that a remedy is needed to act as a deterrent – to ensure that people do not go about risking interference with the uses to which others are putting their property. But as we have seen, neither user damages nor disgorgement help very much to deter anything. The worry here would be much better addressed via punitive sanction. Second, one might argue that a remedy is needed to communicate disapproval at the fact that the defendant has exposed the claimant to a risk that their use-interest be set back. But, again, user damages and/or disgorgement would be remarkably ineffective ways to achieve this putative aim. Neither remedy takes any account at all of the severity of the setback risked by

⁷⁷ See, eg, J.E. Penner, *The Idea of Property in Law* (OUP 1997) 70-71: 'The right to property is grounded by the interest we have in using things in the broader sense. No one has any interest in merely excluding others from things, for any reason or no reason at all. The interest that underpins the right to property is the interest we have in purposefully dealing with things'.

⁷⁸ Thomas Merrill and Henry Smith in particular have emphasized the importance to property law of minimising costs for courts and citizens. See, eg, Thomas W. Merrill and Henry E. Smith, 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle' (2000) 110 Yale LJ 1.

⁷⁹ Penner, *Re-Examination* (n 76) 198-99.

⁸⁰ For instance, it may be that a harmless trespasser to land causes the wronged person to fear for their personal safety, and that this fear disrupts their ability to live their life as they did before the wrong. For an example of a rationalisation of the wrongfulness of (some) supposedly harmless trespasses along these lines, see Colin Bird, 'Harm Versus Sovereignty: A Reply to Ripstein' (2007) 35 *Philosophy & Public Affairs* 179.

the defendant, nor of the likelihood of that setback materialising. Yet these concerns would be important if we took seriously a desire to communicate disapproval about the defendant's risk-taking behaviour. Although these remedies may bring about some desirable consequences, it is implausible to claim that those consequences can satisfyingly justify either user damages or disgorgement.

The second and fourth concerns identified above are of even less help. If our aim is to keep costs on courts down, then it is odd to encourage litigation via legal rules which give claimants a financial incentive to litigate.⁸¹ And if our concern is to respond to psychological harm, then the sensible thing to do would be to compensate for that harm whenever it is actually suffered. Neither a reasonable fee for the use of the claimant's property nor the amount of the defendant's gain bear any relation at all to the claimant's psychological harm.

3. Aristotelian Accounts

A third kind of justification of private property rights takes its inspiration from Aristotle, who argued that property rights are justifiable primarily as a means of providing incentives to work, and to resolve quarrels over the allocation of resources.⁸² In an alternative system of common property, the thought goes, some would receive benefits despite putting in little work to care for what is owned in common, while others would receive little relative to their efforts.

Writing explicitly under this Aristotelian framework, James Gordley has argued that user damages are justified because they discourage disputes, and encourage parties to bargain with each other and to come to agreements.⁸³ Suppose that D wants to use C's property for some commercial venture. There are two incompatible interests pulling in different directions: C's interest in securing a high price and D's interest in securing a low one. When C and D enter negotiations, Gordley argues, having user damages as a default background legal rule helps to balance these interests. So, D is unlikely simply to press ahead and use C's property without authorisation, because D knows that they will incur a substantial liability if they do so. If, instead, D would only be liable for, say, damage done to the property, D would be incentivized to ignore C's rights, so long as D was confident that they would be able to use the property without damaging it. Moreover, the default rule of user damages means that C cannot demand an exorbitant fee to permit D to make use of their property. If C did so, D would be incentivized to press ahead and then pay the legally mandated reasonable fee.

I doubt that Gordley accurately describes the incentives created by user damages in this example. He claims that C is incentivized not to demand an exorbitant fee from D. However, there seems to be a plausible argument that this is exactly what C is incentivized to do. If they make such a demand, there is a chance that D will agree to it. Given the default user damages

⁸¹ In comparison to, for example, a rule which said that the claimant could recover only nominal damages in *Edwards*. An argument might be made that permitting the claimant a choice between user damages and orthodox compensation for loss would reduce costs in that it would save courts from determining counterfactual loss. Although this argument seems to me to have some merit, it is surely insufficient to justify user damages. It seems wrong to think that this concern could make permissible a legal rule which allows a claimant to recover substantially more than their actual loss. In the same way, it would be absurd to allow claimants to choose between their losses and being paid £1,000,000. This is so even though that rule would have plenty of cost-saving merit.

⁸² *Politics* Book II, Part V.

⁸³ Gordley, 'Restitutionary Damages' (n 65) 48-52.

rule, C can make that demand safe in the knowledge that a reasonable fee will act as a safety net, a fixed minimum sum from which they can move upwards. We can raise similar doubts in relation to the incentives placed on D, who is plausibly incentivized to make unauthorized use of C's property. If they do so, the worst that might happen is that they are ordered to pay the going rate for what they have done, while the best that could happen is that C does not bring a claim against him. User damages seem to encourage disputes here if they do anything.

Leaving Gordley's arguments to one side, I doubt that there are good reasons for user damages under the Aristotelian premises. Any sufficiently clear rule should avoid quarrels,⁸⁴ and it is difficult to see why compensation for counterfactual loss would be insufficient to reassure those who labour on property that they will be secure in reaping what they have sown. On this view of things, user damages give claimants an underserved windfall. Consider *Edwards* as an example. On its facts, the claimant had not sown anything. Had they done so – for example, had the defendant's tourist business drawn customers away from a rival business run by the claimant – they could have recovered compensation for their lost profits. That award would be sufficient to ensure that people are secure in reaping what they have sown.

The same point holds in relation to disgorgement. To award the claimant the profits made by the defendant does nothing to protect the claimant in their labouring or to incentivize them to work. Instead, it confers on them the benefits of work which they have not in fact done.

4. Authority-Value Accounts

A final sort of justification of property rights argues that they serve the interest people have in determining the normative situation of others. An example of this sort of account is that of David Owens, who argues that property rights may be justifiable, in part at least, because they serve an interest that people have in 'having authority over things', by which he means an ability to shape the obligations, powers and liberties of others.⁸⁵ The legal rights recognized by a system of private property promote that interest because they give the holder of the right the authority to shape the norms to which others are subjected. For example, as an owner of land, I am able to confer liberties to use that land on others who would otherwise be under a duty to keep themselves off it.

According to Owens, authority in this sense is worth having for its own sake. Consider the case where my painting has been stolen.⁸⁶ Even if the painting is irretrievable, it still seems to make some rational sense for me to value the fact that I have rights over it. I might give those rights to my child, or grant a liberty to use the painting to a friend, and it is at least plausible that both I and my child or friend have reason to value the change to our normative position.

⁸⁴ Or at least any rule which is not so out of line with ordinary reflections about how a dispute should be resolved that the rule would simply be disregarded. However, even where this is the case, it is open to doubt to what extent the law should take citizens' reflections into account. A sufficiently unjust law ought not to be kept simply because ordinary citizens generally take it to be a justified law. As I mentioned above, I am approaching things in this chapter as if working from a blank slate. In part this is so I can look at the problem free from arguments of this sort, which turn in part on empirical facts about what people generally do (or do not) believe to be justified.

⁸⁵ David Owens, 'Property and Authority' (2019) 27 *Journal of Political Philosophy* 271. See too David Owens, *Shaping the Normative Landscape* (OUP 2012).

⁸⁶ *Ibid*, 284.

My child and the friend would prefer to have these rights than not. This is so, Owens argues, even if none of us will ever use, possess or control the painting.

If this authority interest exists, then it does seem to be able to help us to make sense of the case like *Edwards*. Under this account, even if the claimant had no interest in using his land, he did have an interest in ‘determining who is forbidden or permitted to come onto [his] land’.⁸⁷ That interest was set back by the defendant when they trespassed on the land.

I should here raise a point about the argument’s scope. It has nothing in particular to say about why an absolute right to exclude others from property should be permissible. Owens’ point is rather that, once such a right has been recognized, the authority interest kicks in and can be used to help to explain certain further features of property.⁸⁸ So, if I only had, say, a right that others not interfere with my use of my land, then the authority interest would still be in play. I could grant someone a liberty to interfere with my use; the ability to do this would be valuable because it changes the normative situation of others. Thus, this fourth account of property is not truly an alternative to the others, but is rather an addition to them. It depends for its force on the attractiveness of some prior justification of absolute rights to exclude.

If Owens’ argument is correct, can it help us with *Edwards*? I struggle to see how it could lead us to disgorgement. One might think that we could remedy the defendant’s invasion of the claimant’s authority by allowing them to ‘adopt’ that invasion as their own, to make it as if the defendant had been acting on the claimant’s behalf.⁸⁹ However, as Sandy Steel has argued, this argument is incomplete.⁹⁰ We could remedy the invasion of the claimant’s authority by making it as if the defendant had had permission to act as he did on the condition that he pay a fee, or on the basis that the claimant permitted him to act free of charge. How can we choose between these alternatives, without question begging?

Here’s one argument: allowing the claimant to select between the alternatives would appear consistent with Owens’ authority-based account. If a reason in favour of the claimant’s right to exclude is that the right gives them authority over others, then perhaps that reason suggests that the claimant having authority in relation to the remedy would be appropriate as a means to make up for the initial setback to their authority-interest. However, this argument strikes me as rather weak. It cannot be right that the claimant is able to choose *any* remedy they might want, because that would permit them to inflict wildly disproportionate harm onto the defendant. The remedial options from which the claimant can choose must be limited. Whether disgorgement should be one of those available options is a question which is left unanswered.

Under something like Owens’ account, user damages look more palatable. It makes some sense to award the claimant whatever they would have agreed to permit the defendant to act as they did, because that sum reflects the value which they place on the infringement to their authority interest.⁹¹ However, this is not (yet) an argument in defence of user damages, which are quantified at an objectively reasonable amount. If the claimant would only have agreed to

⁸⁷ Ibid, 286.

⁸⁸ Ibid, 288.

⁸⁹ This is similar to a justification of disgorgement offered by Ripstein: Arthur Ripstein, ‘As If It Never Happened’ (2007) 48 William & Mary LR 1957, 1993, n 84.

⁹⁰ Sandy Steel, ‘Damages without Loss’ (2023) 139 LQR 219, 233-34.

⁹¹ This argument is similar to those adopted in McBride, ‘Restitution’ (n 18) 272-74, in Charlie Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (OUP 2016) 197-200, and in Steel, ‘Damages without Loss’ (n 90) 240-42.

allow the wrong at an extravagantly high price, the implication of the argument is that there is a *pro tanto* reason to award the claimant that extravagant sum. If such a reason exists, then the award of a reasonable sum can be justified, on this view, as an approximate figure which works rough justice and is easier to administer than a rule which requires courts to discover the sum at which the claimant would have agreed to permit the defendant's wrong.

E. Conclusion

John Gardner once wrote that propositions which are widely accepted to be obvious should put us on our guard. A philosopher's job, Gardner thought, is to 'expose the difficulties with what most people... take to be obvious', in case it turns out that the supposedly obvious is not in fact true.⁹² A similar thought motivated this chapter. In the existing academic literature, no one has seriously doubted that user damages should exist, and only very few have not accepted that disgorgement should follow the wrongful use of another's property. Instead of examining their possible justifications, commentators have been on a quest to find the Holy Grail – the one true explanatory theory which can reconcile as many decided cases as possible while managing to paint them in an attractive light. In doing so, I fear that we have missed out on asking more important questions. Although I have not done enough to show that neither user damages nor disgorgement can be justified, I have argued that almost all of the existing attempts to do so fall short. Or, more accurately, I have argued that whatever normative commitments the law adopts may well not be commitments worth having. If so, that is an issue which more obviously calls for our attention.

⁹² John Gardner, 'As Inconclusive as Ever' (2019) 19 *Jerusalem Review of Legal Studies* 204, 209.