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REMEDIAL CONSILIENCE

Marco Jimenez^{*}

ABSTRACT

This Article provides a new way of organizing and thinking about one of the most important, useful, and ubiquitous—yet misunderstood, neglected, and underdeveloped—areas in all of law: remedies. Even though remedial issues are present in every case, too little theoretical attention has been paid to them, leaving a wide array of remedial doctrines—from injunctions to declaratory decrees, punitive damages to contempt, and unjust enrichment to specific performance—in search of a unifying theory.

This Article offers such a theory. Specifically, it argues that the broad array of seemingly distinctive remedies, operating over diverse subject matter areas, can be organized and justified by way of four distinct but related remedial principles: the principles of restoration, retribution, coercion, and protection. Each principle focuses on either the victim or the wrongdoer, and does so from either an ex ante or ex post perspective. These principles, in turn, allow one to organize and unify a large swath of seemingly unique and unrelated remedies under a broad conceptual umbrella.

More importantly, however, by showing that seemingly idiosyncratic remedies reflect larger remedial principles, it is my hope that this Article—by identifying and exploring the relationship between and among these principles—can help judges, practitioners, and policy makers think more clearly about what they are doing, as a descriptive matter, and ought to be doing, as a normative matter, when awarding and justifying any particular

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remedy—a matter they must consider no less frequently than in every single case.

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I. REMEDIAL DISUNITY: IDENTIFYING THE FOUR REMEDIAL INTERESTS

Though Solomon himself were to lay down the substantive law, though it were to satisfy every just demand of natural right and social policy, the law would be an imperfect instrument unless and until the remedies applicable were formulated with equal care.¹

– Charles Alan Wright

In a seminal article written over half a century ago, Professor Charles Alan Wright lamented that although “[e]very litigated case, without exception, necessarily includes a question of remedy,” there was still—as recently as 1955—“no law of remedies.”² The scholar, judge, or practitioner interested in obtaining a bird’s-eye view of the field could find no single source where “the whole subject [was] put in perspective,” but was left to comb through separate treatises on “Damages, Equity, Specific Performance, Injunction, Quasi-Contracts, Rescission, Declaratory Judgments, Restitution, and perhaps others”³ to gather shards from a broken field she would have to reconstruct for

¹ Charles Alan Wright, *The Law of Remedies as a Social Institution*, 18 U. DET. L.J. 376, 377 (1955).

² *Id.* at 376; *see also id.* at 377 (“Civil actions are not brought to vindicate nice theories as to negligence or nuisance or consideration. They are brought because a person who has been injured, or is afraid he may be, wishes to prevent the injury or be redressed for it.”).

³ *Id.* at 376. There was, in short, “no place where [one could] find the whole subject put in perspective.” *Id.* Even today, students are confounded by the sheer number of remedies available for seemingly identical wrongs and are taught to think about (or memorize!) remedies in terms of a hodgepodge of rules regarding

herself. Even today, far too many lawyers and judges think about remedies as appendages to substantive fields, and talk in specific terms about “contract remedies,” “tort remedies,” or “remedies for unjust enrichment,” rather than more generally about the underlying remedial principles holding these seemingly disparate fields together. Fortunately, since the time of Professor Wright, many remedies scholars have begun to organize remedies along the lines of general remedial principles (e.g., “compensation,” “restitution,” or “punishment”),⁴ but even here, too little attention has been paid to the relationship that exists between and among these remedial principles; relationships that, if discovered, would help unify the field of remedies by highlighting the shared characteristics underlying *all* remedies in *every* substantive field.

This Article attempts to fill this gap by making sense of the deep structure of remedies. Specifically, this Article develops a framework that identifies and unites these seemingly diverse remedial principles into a unified whole, and offers a new way to think about (and justify) what judges do (and ought to do) when awarding remedies. My claim is this: the ostensibly distinct remedies

legal versus equitable remedies, contract versus tort damages, specific performance versus replevin, cost of completion versus diminution in value damages, expectation versus reliance damages, compensatory damages versus restitutionary versus punitive damages, injunctive versus declaratory relief, and they struggle to fit in other concepts such as contempt, nominal damages, accounting for profits, constructive trusts, equitable liens, subrogation, etc. The list of terms one is confronted with when endeavoring to understand the “subject” of remedies goes on and on.

⁴ For example, several modern remedies casebooks have revealed these connections to the student by organizing the material along functional lines. For instance, in his leading casebook, Professor Laycock not only discusses broad remedies categories that apply across many substantive fields (i.e., compensatory remedies, preventive remedies, restitutionary remedies, punitive remedies, and ancillary remedies), but also goes one step further and helpfully discusses two overarching theories, corrective justice and law and economics, which run throughout the law of remedies and have been offered by others as being capable of helping these broad general principles hang together in a coherent fashion. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS*, at xxix, xxx, 3, 15–19 (3d ed. 2002) (“[T]he book reflects my belief that a course in remedies should not be a series of appendices to the substantive curriculum. It contains no chapters on remedies for particular wrongs or particular kinds of injury. Such chapters are important, but their place is in the substantive courses to which they pertain. This book attempts to explore general principles about the law of remedies that cut across substantive fields and that will be useful to a student or lawyer encountering a remedies problem in any substantive context.”); *see also* DAVID I. LEVINE ET AL., *REMEDIES: PUBLIC AND PRIVATE*, at vii (4th ed. 2006) (“The traditional organization of a remedies book subordinates the remedy to the substantive law, classifying the material in whole or in part by cause of action: remedies for damage to chattel, remedies for damage to land, remedies for breach of contract, etc. We believe that there is more to be learned by adopting a transsubstantive approach to remedies. By organizing the material around the remedy, and not the substantive law, our materials allow the professor and the student to explore the concerns that are common to remedial issues in whatever substantive context they arise.”).

For a wonderful discussion of how remedies came to be thought of as its own field of law, see Douglas Laycock, *How Remedies Became a Field: A History*, 27 *REV. LITIG.* 161 (2008).

(e.g., expectation damages, injunctions, restitution, contempt, punitive damages) that reign over the vast terrain of seemingly unrelated substantive fields (e.g., torts, contracts, unjust enrichment, property, constitutional law) mostly fall into one (or more) broad remedial categories, which are themselves related, and serve to protect one (or more) discrete and well-defined “remedial interest(s).” Each remedial interest, in turn, focuses on either the victim (usually the plaintiff) or the wrongdoer (usually the defendant) from one of two temporal perspectives: an *ex ante* perspective, which focuses on remedies issued prior to the commission of a wrongful act (a preventive injunction, for example, would fall into this category), or an *ex post* perspective, which focuses on remedies issued after a wrongful act has been committed (an award of money damages, for example, would fall into this category).

The remedial taxonomy developed above can be usefully mapped onto the following remedial matrix, to which I will refer throughout this Article.

FIGURE 1: THE REMEDIAL MATRIX

		<u>Temporal Element</u>	
		Ex Ante	Ex Post
<u>Personal Element</u>	Victim	IV	I
	Wrongdoer	III	II

In quadrant I resides the “restorative interest,” where the principle of restoration is paramount. Here, the law of remedies tends to be approached from an *ex post, victim-oriented* perspective and is concerned with making the plaintiff whole by restoring the victim of a wrongful harm to the position he or she occupied prior to the harm. The most common restorative remedy is an award of money damages (e.g., expectation damages),⁵ but in-kind relief, such as requiring a defendant to specifically perform a contract or to return stolen

⁵ LAYCOCK, *supra* note 4, at 4.

goods (e.g., through the writ of replevin), would fall under this category as well.⁶

In quadrant II resides the “retributive interest,” which views remedies from an *ex post*, *wrongdoer-oriented* perspective and tends to reflect society’s desire to punish wrongdoers (usually in accordance to the severity of their wrong) for the harms they have inflicted. Punitive damages is probably the most obvious example of a remedy falling into quadrant II, although, as this Article will argue in a future section,⁷ any remedy that forces a defendant to unwillingly transfer to another something to which he or she asserts a recognizable property interest could constitute *retributive* punishment. Thus, for instance, the body of law governing unjust enrichment, which attempts to take from the defendant the very thing (or its value) he or she has taken from the plaintiff would largely fall into quadrant II.

In quadrant III resides the “coercive interest.” This remedial interest takes an *ex ante*, *wrongdoer-oriented* approach to remedies and reflects society’s interest in ensuring that potential future wrongdoers are both *deterred* (i.e., negative coercion) from committing socially inefficient acts and *incentivized* (i.e., positive coercion) to commit socially productive acts. Insofar as punitive damages are designed to deter future wrongdoers rather than punish a particular wrongdoer, they provide a good example of negative coercion. An example of positive coercion would be, for instance, a court’s sanction of coercive civil contempt to compel a party to comply with a court order.

Finally, in quadrant IV resides the “protective interest,” which seems to be the least appreciated and developed of the four remedial interests, though arguably the most important, for reasons that will be discussed later in this Article.⁸ This interest approaches remedies from an *ex ante*, *victim-centered* perspective and reflects society’s desire to *protect* potential victims from threatened transgressions *before* any harm occurs. Although negative injunctions (i.e., injunctions requiring an adjudicated wrongdoer to refrain from engaging in a prohibited activity) provide the quintessential example of a remedy falling within this category, I hope to show by the end of this Article that many (if not most) remedies already serve, to a greater or lesser extent,

⁶ *Id.*

⁷ *See infra* Part II.B.

⁸ *See infra* Part II.D.

this basic remedial interest and should therefore be crafted with this most fundamental remedial interest in mind.⁹

Given the discussion above, we can now update the previous remedial matrix as follows:

FIGURE 2: THE FOUR REMEDIAL INTERESTS

		<u>Temporal Element</u>	
		Ex Ante	Ex Post
<u>Personal Element</u>	Victim	Protection (IV)	Restoration (I)
	Wrongdoer	Coercion (III)	Retribution (II)

With this chart before us, my thesis can now be set forth in two parts. First, this Article argues that all of the remedies with which we are familiar (e.g., expectation damages, specific performance, punitive damages, injunctions, contempt, and restitution), in addition to the vast array of remedies at a judge's disposal, can generally be understood as advancing one (or more) of these remedial interests. This is the focus of Part II of this Article where each remedial interest is explored in some depth.

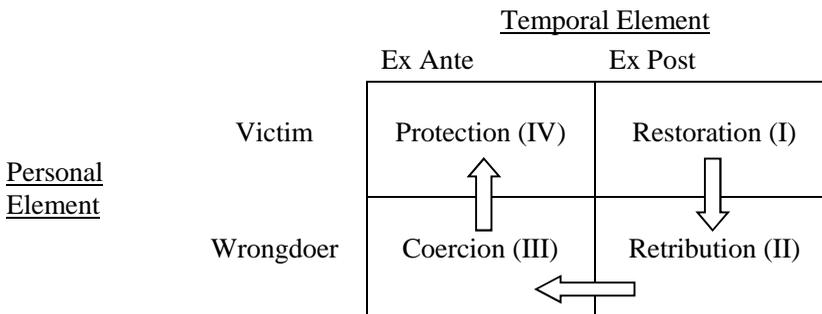
Second, Part III of this Article argues that this organization reveals the following important and previously unappreciated relationship between and among these remedial interests: that in a bipolar litigation model, in which the victim is made whole by the wrongdoer,¹⁰ a remedy located within any given quadrant will not only accomplish the goals unique to the quadrant within which it is located, but will also have predictable effects on the subsequent quadrant as well. Thus, for instance, a remedy designed to advance quadrant I's restoration interest (e.g., paying to the victim a sum of money as compensatory damages) will also advance quadrant II's retributive interest, because retributive justice will require that the sum paid to the victim be taken

⁹ See *infra* Part III.A.

¹⁰ As opposed, for example, to a victim being made whole by a special master administering a victim compensation fund.

from the adjudicated wrongdoer's pocket to make the victim whole. This quadrant II payment, in turn, will provide some measure of deterrence against other potential wrongdoers who are thinking about engaging in such costly behavior, thereby advancing the interests located in quadrant III (i.e., negative coercion). And this deterrence, in turn, will afford a certain measure of protection to similarly situated potential victims, thereby paying homage to the values located within quadrant IV's protective interest. By this account then, every remedy will tend, to a greater or lesser extent, toward the protection interest located within quadrant IV, if only indirectly. This relationship is illustrated in Figure 3 below.

FIGURE 3: THE REMEDIAL PATHWAY



Before proceeding further, it is worth pausing to make a few observations. First, it is useful to note that the remedial interests reflected in quadrant I (the restorative interest) and quadrant III (the coercive interest) are at the forefront of the well-known debate in the private law between corrective justice scholars,¹¹ on the one hand, who emphasize that remedies ought to provide just compensation to the victims of wrongful conduct,¹² and law and economics scholars,¹³ on the other hand, who emphasize that remedies ought to be chosen to efficiently deter potential future wrongdoers.¹⁴ The taxonomy also helps us readily identify a similar tension that pervades the criminal law, where heated

¹¹ See, e.g., ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 5 (1995); Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 *IND. L.J.* 349, 357 (1992).

¹² LAYCOCK, *supra* note 4, at 16.

¹³ See, e.g., STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 1-4 (1987); William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 *GA. L. REV.* 851 (1981); Richard A. Posner, *A Theory of Negligence*, 1 *J. LEGAL STUD.* 29 (1972).

¹⁴ LAYCOCK, *supra* note 4, at 17.

debate has raged for centuries between those who have argued that punishment can only be justified on retributive grounds¹⁵ (quadrant II) and those who have argued that punishment, as an evil to be avoided where possible,¹⁶ can only be justified when it has the salutary effect of deterring future crimes¹⁷ (quadrant III). In both of these instances, the taxonomy presented above reveals that scholars and judges holding fast to their understanding of an issue have little chance of coming to an agreement with members of an opposing camp about the resolution of difficult remedial problems (hence, the centuries-long debates in these areas) *not* because one side is “wrong,” or unreasonable, or unwilling to come to terms with its ideological adversary, but because each side is focusing on *different* personal and temporal aspects of the remedial problems before them! Stated differently, each side is arguing, in effect, about different pieces of the same remedial puzzle, and too little emphasis is paid to the shared remedial purpose that is (indirectly), and ought to be (directly), the focus of most of these remedies: protecting potential victims!

¹⁵ See, e.g., GEORG WILHELM FRIEDRICH HEGEL, *PHILOSOPHY OF RIGHT* ¶ 100 (T.M. Knox trans., Oxford Univ. Press 1952) (1821) (“[P]unishment is regarded as containing the criminal’s right and hence by being punished he is honoured as a rational being. He does not receive this due of honour unless the concept and measure of his punishment are derived from his own act. Still less does he receive it if he is treated either as a harmful animal who has to be made harmless, or with a view to deterring and reforming him.”); IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 195 (W. Hastie trans., Edinburgh, T. & T. Clark 1887) (“Juridical Punishment can never be administered merely as a means for promoting another Good either with regard to the Criminal himself or to Civil Society, but must in all cases be imposed only because the individual on whom it is inflicted *has committed a Crime*. . . . The Penal Law is a Categorical Imperative; and woe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment, or even from the due measure of it”); Michael S. Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY* 179, 181–82 (Ferdinand Schoeman ed., 1987) (“We are justified in punishing because and only because offenders deserve it. Moral culpability (‘desert’) is in such a view both a sufficient as well as a necessary condition of liability to punitive sanctions.” (footnote omitted)).

¹⁶ JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 158 (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1996) (1789) (“[A]ll punishment in itself is evil.”); see also THOMAS HOBBS, *LEVIATHAN* 223 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651) (“A Punishment, is an Evil inflicted by publique Authority, on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the Law”).

¹⁷ *Hopt v. Utah*, 110 U.S. 574, 579 (1884) (“The great end of punishment is not the expiation or atonement of the offence committed, but the prevention of future offences of the same kind.”); BENTHAM, *supra* note 16, at 165 (noting punishment should be administered “to prevent, in as far as it is possible, and worth while, all sorts of offences whatsoever”); WILLIAM PALEY, *THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* 383–85 (West & Richardson, 8th American ed. 1815) (“The proper end of human punishment is, not the satisfaction of justice, but the prevention of crimes.”); EDMUND L. PINCOFFS, *THE RATIONALE OF LEGAL PUNISHMENT* 29 (1966) (“[T]raditional utilitarians hold that punishment can be justified only by reference to prevention of crime.”).

This Article proceeds by laying bare each piece of the remedial puzzle by examining each remedial interest in some detail. In the course of doing so, this Article attempts to show the manner in which these remedial interests are related to one another, and explores the consequences of this relationship for the law of remedies. Finally, this Article offers some concluding thoughts not only on the protective interest, but also on the law of remedies as a whole.

II. REMEDIAL PLURALISM: EXPLORING THE FOUR REMEDIAL INTERESTS

A. *The Restorative Interest*

In seeking to identify a principle or set of principles by which the law of remedies might be organized, perhaps no notion comes more readily to mind than that of “mak[ing] the victim whole.”¹⁸ Since the dawn of time—or at least since unregulated blood feuds were replaced by organized systems of “composition” and money damages¹⁹—it has been a truism of private law adjudication that a party legally wronged by another shall have a right of redress against the wrongdoing party.²⁰ The right of redress for a harm that has *already occurred*, of course, is necessarily a backward-looking remedy that focuses on the victim’s interest in restoration (quadrant I). Such relief may, in turn, take one of two forms: substitutionary (i.e., where some replacement, usually money damages, is given as a substitute for the thing lost) and in-kind relief (i.e., where the exact thing that was taken from the victim is given back to him or her).

Compensatory damages is the most common form of substitutionary restoration awarded by judges, and is probably the most common of all private law remedies.²¹ In its most basic form, this “basic principle underlying common law remedies [states that remedies] shall afford only compensation for the injury suffered.”²² The amount of compensation, however, is not merely a matter of discretion to be decided upon by a judge or jury; the remedy

¹⁸ Indeed, this notion stretches back all the way to the Code of Hammurabi (c. 1750 B.C.) and has been with us since. See, e.g., Stephen Schafer, *Victim Compensation and Responsibility*, 43 S. CAL. L. REV. 55, 55 (1970).

¹⁹ See, e.g., James Q. Whitman, *At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices?*, 71 CHI.-KENT L. REV. 41, 82–83 (1995); see also S. B. CHRIMES, ENGLISH CONSTITUTIONAL HISTORY 64–65 (3d ed. 1965).

²⁰ See LAYCOCK, *supra* note 4, at 1.

²¹ See, e.g., Schafer, *supra* note 18, at 56–57, 63.

²² See, e.g., Ill. Cent. R.R. v. Crail, 281 U.S. 57, 63 (1930) (“[T]he basic principle underlying common law remedies [is] that they shall afford only compensation for the injury suffered . . .”).

should, so far as possible, restore the injured party to his or her rightful position.²³

The benefit of such a principle is twofold. First, in an ideal world with a well-functioning market, an award of compensatory damages will, in many cases, allow a party who has been deprived of some right (e.g., the victim's car has been stolen) to purchase an exact equivalent in the open market (e.g., a new car),²⁴ which, after compensation, would make it "as though" the victim were never injured.²⁵ This is so because the award of money damages should make the victim indifferent between the preservation of the right, on the one hand, or its deprivation plus a compensatory sum, on the other.²⁶

Second, this principle allows us to make sense of a broad range of seemingly distinct remedies: Whether we are speaking generally about damages across a broad range of substantive fields (e.g., contracts and torts),²⁷ or specifically about particular damages awarded within a given substantive field (e.g., expectation, reliance, and restitution damages in contracts; pain and suffering damages in torts; and restitution and disgorgement damages in unjust enrichment), by couching these seemingly distinct remedies in terms of more general principles, one can go a long way not only toward uniting this otherwise chaotic array of individual remedies, but can also provide each remedy with a degree of theoretical coherence and legitimacy that can help solve similar remedial problems.

²³ *United States v. Hatahley*, 257 F.2d 920, 923 (10th Cir. 1958) ("The fundamental principle of damages is to restore the injured party, as nearly as possible, to the position he would have been in had it not been for the wrong of the other party.").

²⁴ *See* LAYCOCK, *supra* note 4, at 22 ("In functioning markets, giving plaintiffs the value of what they lost implements the rightful position by enabling plaintiffs to replace the thing they lost. Plaintiffs may choose to spend the money some other way, but so long as the choice is theirs, there is no reason to doubt that they have been made whole.").

²⁵ *See* ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 491 (5th ed. 2008). A perfectly restorative substitutionary remedy would make the victim indifferent between the preservation of the right at issue, on the one hand, and the deprivation of the right at issue plus a specific compensatory sum, on the other.

²⁶ *See, e.g., id.* ("*Perfect compensation* is a sum of money that leaves the *victim indifferent* between the injury with compensation or no injury."). Of course, there are some injuries for which money damages will always be inadequate, ranging from wrongful death, at one end of the spectrum, to the loss of goods to which the owner attaches some unique, idiosyncratic value (e.g., a family heirloom), at the other end. For these types of injuries, the court employs the irreparable injury rule to protect the injured party with a property rule whenever possible. *See* LAYCOCK, *supra* note 4, at 380–81.

²⁷ *See, e.g., Chronister Oil Co. v. Unocal Refining & Mktg.*, 34 F.3d 462, 464 (7th Cir. 1994) ("The point of an award of damages, whether it is for a breach of contract or for a tort, is, so far as possible, to put the victim where he would have been had the breach or tort not taken place.").

Indeed, the claim that one of the main purposes of remedies is to compensate victims for the harms they have suffered may seem too banal to merit discussion. It is. But I am not concerned with a general failure among judges, commentators, or litigants to underemphasize the importance of compensatory remedies. Rather, it is the opposite problem with which I am concerned: the importance of compensatory remedies is much too frequently overemphasized by commentators and judges alike,²⁸ much to the detriment of other important remedial goals.

Overemphasizing compensatory remedies is problematic for several reasons. First, it may cause us to overlook the fact that remedies can and should serve other principles beyond merely providing “compensation for the injury suffered.”²⁹ In fact, these other principles are at least as important and, in some cases, *more* important than a principle that seemingly focuses exclusively on compensatory damages would seem to indicate.³⁰ Too narrow a focus on compensatory damages, therefore, may cause one to misunderstand the nature of many remedies.

The second problem is, as suggested in the beginning of this section, that compensatory damages are not even the be-all, end-all *restorative* remedy and should (at the very least) be thought of alongside other in-kind restorative remedies that, contrary to popular perception,³¹ are both more basic—and more commonly preferred by judges, commentators, and litigants themselves—than the traditional emphasis on compensatory damages would indicate.³²

²⁸ See, e.g., O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) (“The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference.”).

²⁹ Cf. *Ill. Cent. R.R. v. Crail*, 281 U.S. 57, 63 (1930) (“[T]he basic principle underlying common law remedies [is] that they shall afford only compensation for the injury suffered . . .”).

³⁰ These principles will be taken up *infra* in Part II.B–D.

³¹ See, e.g., OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 236 (Mark DeWolfe Howe ed., Belknap Press 1963) (1881) (“It is true that in some instances equity does what is called compelling specific performance. But . . . [t]his remedy is an exceptional one. The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass.”).

³² See *id.*; DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 385 (4th ed. 2010) (“Plaintiff’s right to the property through replevin casts doubt on claims that Anglo-American law reflects a preference for substitutionary relief over specific relief . . .”); *id.* at 391 (arguing that the irreparable injury rule is dead, in that “whenever the choice of remedy matters to [the] plaintiff, the rule is satisfied”); see also *USH Ventures v. Global Telesystems Grp., Inc.*, 796 A.2d 7, 14–15 (Del. Super. Ct.) (“[F]or the remedy at law to prevail, the remedy at law must be: available as a matter of right; full, fair and complete; and as practical and efficient to the ends of justice as the equitable remedy. This is a very practical standard which favors equity in cases where the Plaintiff for good reason seeks relief other than money damage.” (citations

It is often the case, for example, that although a plaintiff seeks to be restored to his or her rightful position, substitutionary restorative remedies (i.e., compensatory damages) simply will not do, perhaps because the substitutionary remedy is itself inadequate,³³ perhaps because a court has decided that even where money damages are adequate, a right-holder ought to be entitled to something more fundamental than a mere award of compensatory damages,³⁴ or perhaps because, quite simply, the plaintiff desires specific relief³⁵ and the court can find no reason why it ought to be denied.³⁶ Where one or more of these factors are present, a party will often request that he or she be restored in-kind to his or her rightful position and a court will frequently oblige.³⁷

In any event, even where substitutionary restorative remedies (e.g., compensatory damages) are combined with in-kind restorative remedies (e.g.,

omitted)), *aff'd*, 781 A.2d 696 (Del. 2001) (mem.); *Van Wagner Adver. Corp. v. S & M Enters.*, 492 N.E.2d 756, 759 n.2 (N.Y. 1986) (“While the usual remedy in Anglo-American law has been damages, rather than compensation ‘in kind,’ the current trend among commentators appears to favor the remedy of specific performance, but the view is not unanimous.” (citations omitted)). The court in *USH Ventures* went on to note that remedies are merely “choices to solve problems,” and called for the abolition of the “hierarchy between law and equity.” *Id.* at 15.

³³ *See, e.g.*, *Cont’l Airlines, Inc. v. Intra Brokers, Inc.*, 24 F.3d 1099, 1104 (9th Cir. 1994) (“[F]or equitable relief to be appropriate, there must generally be no adequate legal remedy.”).

³⁴ *See, e.g.*, *Pardee v. Camden Lumber Co.*, 73 S.E. 82, 84 (W. Va. 1911) (noting that, although the irreparable injury rule may “permit[] a mere trespasser to utterly destroy the forest of his neighbor, provided he is solvent and able to respond in damages to the extent of the value thereof,” such a rule is contrary to the “general principles of English and American jurisprudence,” which “guarantee to the owner of property the right, not only to possession thereof and dominion over it, but also its immunity from injury”).

³⁵ *See, e.g.*, *Brook v. James A. Cullimore & Co.*, 436 P.2d 32, 35 (Okla. 1967) (allowing recovery of personal property under the legal remedy of replevin, without regard to whether the irreparable injury rule is satisfied, although the defendant offered to pay fair market value of the goods withheld). Replevin is now a generally available remedy for contracts for the sale of goods. *See* U.C.C. § 2-716(1) (2011) (allowing specific performance not only where “the goods are unique,” but also “in other proper circumstances”); *id.* § 2-716(3) (specifically mentioning replevin).

³⁶ *See, e.g.*, *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 82–83 (3d Cir. 1948) (paying homage to the traditional rule that “[a] party may have specific performance of a contract for the sale of chattels if the legal remedy is inadequate,” but noting that there is “no reason why a court should be reluctant to grant specific relief when it can be given without supervision of the court or other time-consuming processes against one who has deliberately broken his agreement,” and denying specific performance on other grounds).

³⁷ *See, e.g.*, *Milliken v. Bradley*, 418 U.S. 717, 744, 746 (1974) (“[T]he scope of the [injunctive] remedy is determined by the nature and extent of the constitutional violation. . . . [T]he remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.”); *see also* DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 23 (1991) (“Courts do not deny specific relief merely because they judge the legal remedy adequate. The irreparable injury rule almost never bars specific relief, because substitutionary remedies are almost never adequate. At the stage of permanent relief, any litigant with a plausible need for specific relief can satisfy the irreparable injury rule.”).

injunctions for specific performance of a contract), these forms of judicial relief collectively still only make up a portion of the remedies awarded by courts and therefore do little to explain the numerous other remedies that courts frequently award. Restorative remedies, in short, are necessary but not sufficient to account for the numerous individual remedies awarded more broadly within the “law” of remedies.

What may be said of these other nonrestorative remedies? Are they merely aberrations to more fundamental restorative remedies, relegated to a miscellaneous remedial category called “other things courts do when restoration is not an option”? Or, do these nonrestorative remedies speak to something more fundamental?

To answer this, we must turn our attention to the other remedial interests, not only as methods of categorizing the various remedies, but also as a means of exploring the relationship between and among the various remedial interests. If we are to be satisfied with the four remedial interests as a way of not only categorizing but also *justifying* the various remedies courts award, we will have to do much better than merely point out that certain remedies tend to fall into certain remedial categories.

B. The Retributive Interest

Punishment is punishment, only where it is deserved. We pay the penalty, because we owe it, and for no other reason; and if punishment is inflicted for any other reason whatever than because it is merited by wrong, it is a gross immorality, a crying injustice, an abominable crime, and not what it pretends to be.³⁸

– F.H. Bradley

Juxtaposed to the substantive goal of restoration—which takes a backward-looking, *victim-centered* approach to remedies and attempts to restore the victim to his or her rightful position—another principle by which the law of remedies might be organized is the principle of retribution, which would take a backward-looking, *wrongdoer-centered* approach and focus not on what should be given to the victim by way of restoration, but on what should be taken from the wrongdoer by way of retributive punishment.

³⁸ F.H. BRADLEY, *ETHICAL STUDIES* 26–27 (2d ed. 1927).

Admittedly, it may seem strange to talk about retribution as a principle by which the law of remedies might be organized. As J. D. Mabbott once observed, retributivism seems to be “the only moral theory except perhaps psychological hedonism which has been definitely destroyed by criticism,”³⁹ and I suspect that many of us, when we think about retribution, instinctively conjure up an age in which uncivilized man, unable to control his bloodlust,⁴⁰ acted upon some vaguely articulated visceral need to mete out revenge⁴¹ against those who had wronged him.⁴² Additionally, even assuming that retribution could be dressed up and made to look more respectable in polite company, the entire idea seems to lend itself to *criminal* law, rather than *civil* law, where it is frequently juxtaposed with another ubiquitous principle we shall soon be discussing—coercion.⁴³ The mere thought of retribution as an organizing principle in *private* law, therefore, not only grates against the ears of many civil law scholars, but also seems to cut against the innumerable instances in which judges have gone out of their way to categorically reaffirm the shibboleth of restoration while *denying* the normative and descriptive significance of retribution.⁴⁴

³⁹ J. D. Mabbott, *Punishment*, 48 MIND 152, 152 (1939). Over the past seventy years, however, this atavism of moral philosophy has made a bit of a comeback in no small part due to Mabbott’s article, but mostly in the public law realm. See, e.g., D J Galligan, *The Return to Retribution in Penal Theory*, in CRIME, PROOF AND PUNISHMENT: ESSAYS IN MEMORY OF SIR RUPERT CROSS 144, 144 (1981). Retributivism is still largely ignored in the realm of private law remedies, a defect I hope this Article will help remedy.

⁴⁰ See HOLMES, *supra* note 31, at 40 (“It certainly may be argued, with some force, that it has never ceased to be one object of punishment to satisfy the desire for vengeance.”).

⁴¹ See, e.g., *id.* at 45 (describing retribution as “vengeance in disguise”); KARL A. MENNINGER, THE HUMAN MIND 448 (3d ed. 1947) (“The reasons usually given to justify punishment do not explain why it exists. They serve only to conceal the truth, that the scheme of punishment is a barbarous system of revenge, by which society tries to ‘get even’ with the criminal.”); PINCOFFS, *supra* note 17, at 45 (“To give as one’s reason for inflicting pain or deprivation on a man that he has done a certain thing is an all too familiar way of talking. This is the language of revenge.”). But see IMMANUEL KANT, LECTURES ON ETHICS 214 (Louis Infield trans., Hackett Publ’g Co. 1981) (1930) (drawing a distinction between retributive punishment and revenge, insisting that the former requires a principle of equality between the crime and the punishment, whereas the latter is marked by an “insist[ence] on one’s right beyond what is necessary for its defence,” making such punishment “revengeful”).

⁴² See, e.g., PINCOFFS, *supra* note 17, at 1 (“Legal punishment is viewed by some of the most sensitive and well-educated people of our time as a survival of barbarism, bereft of rational foundation, supported only by inertia and the wish to have vengeance on criminals.”).

⁴³ See *infra* Part II.C.

⁴⁴ RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 127–28 (7th ed. 2007). Standard economic analysis suggests that the goal of contract remedies is “compensation and not compulsion.” See, e.g., E. ALLAN FARNSWORTH, CONTRACTS § 12.3, at 737 (4th ed. 2004). Because of this, promisors who breach for financial reasons “should not be dealt with harshly,” concepts like punitive damages have no place in contract law because they will “encourage performance when breach would be socially more desirable,” and “[w]illful breaches should not be distinguished from other breaches.” *Id.*

Yet, as this Article argues below, the notion of retribution nevertheless *does* play a significant role across a wide range of private and public law remedies, and the failure to recognize this concept renders incomprehensible a large swath of remedies issued daily by courts around the country. To be clear, my claim here is not that courts exercise (or even possess) unbridled discretion to vindictively punish parties to their gavel's content. They do not. What I do mean to suggest, however, is that courts frequently exercise their discretion to implement a very circumscribed and principled type of punishment—retributive punishment—on a much more regular basis than is commonly acknowledged. Therefore, before proceeding further, I want to pause and briefly sketch out precisely what I mean when I use the term *retribution* or *retributive punishment* throughout the remainder of this article.

Although retribution is a particularly slippery concept, in no small part due to the fact that it has been defined in many different ways over the years,⁴⁵ “retribution” as used in this Article shall refer specifically to a theory of legal punishment requiring that (a) a wrongdoer should only be punished for breaching a legally recognized duty,⁴⁶ (b) in proportion to the grievousness of his wrong.⁴⁷ The first prong of this definition focuses on the *justification* for punishment and maintains that a wrongdoer may not be punished *for the sole purpose of* compensating a victim, deterring a future wrongdoer, or even

⁴⁵ In a well-known article, John Cottingham offered at least nine separate versions of retributivist theories. See John Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238 (1979). The nine theories of retributivism discussed were repayment theory, desert theory, penalty theory, minimalism, satisfaction theory, fair play theory, placation theory, annulment theory, and denunciation theory. *Id.*

⁴⁶ “Juridical [p]unishment . . . must in all cases be imposed only because the individual on whom it is inflicted *has committed a Crime*.” KANT, *supra* note 15, at 195; see also MICHAEL S. MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 88 (1997) (“The distinctive aspect of retributivism is that the moral desert of an offender is a *sufficient* reason to punish him or her”); Hugo Adam Bedau, *Concessions to Retribution in Punishment*, in JUSTICE AND PUNISHMENT 51, 52 (J.B. Cederblom & William L. Blizsek eds., 1977) (“[A] retributivist holds that a punishment is just if and only if the offender deserves it.”).

⁴⁷ “[T]he mode and measure of Punishment which Public Justice takes as its Principle . . . is just the Principle of Equality, by which the pointer of the Scale of Justice is made to incline no more to the one side than the other.” KANT, *supra* note 15, at 196; see also *Tison v. Arizona*, 481 U.S. 137, 149 (1987) (“The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.”); IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 12 (1989) (listing the principle that “[p]unishment ought to be *proportionate* to the offense” as one of the five fundamental tenets of retributivism); Stanley I. Benn, *Punishment*, in 7 THE ENCYCLOPEDIA OF PHILOSOPHY 29, 32 (Paul Edwards ed., 1967) (noting that retributivism “insists that the punishment must fit the crime”); Joel Feinberg, *The Classic Debate*, in PHILOSOPHY OF LAW 727, 728 (Joel Feinberg & Jules Coleman eds., 6th ed. 2000) (“The proper amount of punishment to be inflicted upon the morally guilty offender is that amount which fits, matches, or is proportionate to the moral gravity of the offense.”); Kent Greenawalt, Commentary, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 347–48 (1983) (observing that for retributivism, “the severity of punishment should be proportional to the degree of wrongdoing”).

protecting a future innocent victim. Rather, retributive punishment maintains that a wrongdoer should only be punished for violating a legally recognized duty that results in a wrongful harm to another party. The second prong of this definition focuses on the *scope* of punishment called for in an individual case and requires that the wrongdoer only be punished in *proportion* to the wrong committed. Getting the scope or quantum of the remedy just right requires thinking along the lines of Goldilocks: the judge must ensure *both* that the wrongdoer not be treated too leniently (e.g., by letting the wrongdoer “off the hook” by requiring him or her to pay a compensatory sum less than that required to compensate the victim for the harm suffered) or too harshly (e.g., by sacrificing the wrongdoer on the altar of social justice for the sake of deterring future wrongdoers from engaging in similar nefarious actions). By keeping this working definition of retributive punishment in mind, I hope to show, by way of example, that the principle of retribution is not only pervasive in our public criminal law, as one might expect, but can also be found roaming quite freely throughout the terrain of the private law, an idea that may well surprise those who focus more on what courts *say* than on what courts *do*.

Like restorative remedies, retributive remedies may also take one of two forms: substitutionary and in-kind. I suspect that most of us, when we think about retributive remedies, think about the in-kind, eye-for-an-eye, talionic punishments sanctioned by such ancient legal texts as Hammurabi’s Code,⁴⁸ the Mosaic Law,⁴⁹ and the Twelve Tables of Rome.⁵⁰ Though Mahatma Gandhi undoubtedly had these in-kind remedies in mind when he famously

⁴⁸ See, e.g., THE CODE OF HAMMURABI 25 (L.W. King trans., 2011) (c. 1750 B.C.E.), available at <http://www.general-intelligence.com/library/hr.pdf> (“If a man put out the eye of another man, his eye shall be put out. [An eye for an eye].” (alteration in original)); *id.* (“If he break another man’s bone, his bone shall be broken.”); *id.* (“If a man knock out the teeth of his equal, his teeth shall be knocked out. [A tooth for a tooth].” (alteration in original)); *id.* at 27 (“If a builder build a house for some one, and does not construct it properly, and the house which he built fall in and kill its owner, then that builder shall be put to death. If it kill the son of the owner the son of that builder shall be put to death. If it kill a slave of the owner, then he shall pay slave for slave to the owner of the house.”).

⁴⁹ See, e.g., *Exodus* 21:23–25 (King James) (“And if *any* mischief follow, then thou shalt give life for life, Eye for eye, tooth for tooth, hand for hand, foot for foot, Burning for burning, wound for wound, stripe for stripe.”); *Exodus* 21:31 (King James) (“Whether he have gored a son, or have gored a daughter, according to this judgment shall it be done unto him.”); *Leviticus* 24:19–20 (King James) (“And if a man cause a blemish in his neighbour; as he hath done, so shall it be done to him; Breach for breach, eye for eye, tooth for tooth: as he hath caused a blemish in a man, so shall it be done to him *again*.”); *Deuteronomy* 19:21 (King James) (“And thine eye shall not pity; *but* life *shall* go for life, eye for eye, tooth for tooth, hand for hand, foot for foot.”).

⁵⁰ See, e.g., *The Laws of the Twelve Tables*, reprinted in 1 THE CIVIL LAW 57, 70 (S.P. Scott trans., AMS Press 1973) (c. 450 B.C.E.) (“When anyone breaks a member of another, and is unwilling to come to make a settlement with him, he shall be punished by the law of retaliation.”).

quipped that an eye for an eye “ends in making everybody blind,”⁵¹ this criticism fails to appreciate how well many in-kind retributive punishments actually work; a retributive remedy that required a thief to return a stolen pair of glasses to his victim would result in a remedy that made the world’s collective eyesight better, not worse.⁵² Further, this criticism ignores substitutionary retributive punishments, of which a large portion can be found prominently throughout the private law of contracts, torts, and unjust enrichment, not to mention the world of criminal law, where they reign virtually supreme.

As mentioned earlier, the most obvious instance in which the principle of retribution animates our private law is the area of punitive damages.⁵³ Here, courts recognize an interest in punishing wrongdoers who behave in a reprehensible manner by acting “in reckless disregard of the consequences” when the wrongdoer “likely knew or ought to have known . . . that his conduct would naturally or probably result in injury,”⁵⁴ or by showing, for example, that the wrongdoer acted with a “willful and conscious disregard of the rights or safety of others,”⁵⁵ a “conscious disregard for . . . a great probability of causing substantial harm,”⁵⁶ “ill will” toward the victim, or behavior “so outrageous that malice toward a person injured as a result of that conduct can be implied.”⁵⁷

But the notion of retribution is much more pervasive than would be suggested by narrowly focusing on punitive damages. Consider, for instance,

⁵¹ THE YALE BOOK OF QUOTATIONS 269 (Fred R. Shapiro ed., 2006).

⁵² For a wonderful defense of talionic punishment in general, see WILLIAM IAN MILLER, *EYE FOR AN EYE* (2006).

⁵³ See, e.g., *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2621 (2008) (“[T]he consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct.”); *Philip Morris USA v. Williams*, 549 U.S. 346, 359 (2007) (Stevens, J., dissenting) (“[A] punitive damages award, instead of serving a compensatory purpose, serves the entirely different purposes of retribution and deterrence that underlie every criminal sanction.”); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (“[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” (alteration in original) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996))); *Gore*, 517 U.S. at 575 (taking into account “the degree of reprehensibility of the defendant’s conduct,” among other factors, in determining an appropriate punishment); *Carey v. Phipus*, 435 U.S. 247, 266 (1978) (“[S]ubstantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.”).

⁵⁴ *Union Pac. R.R. v. Barber*, 149 S.W.3d 325, 343 (Ark. 2004).

⁵⁵ *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 76 (Cal. 2005) (quoting CAL. CIV. CODE § 3294(c)(1) (West 2004)).

⁵⁶ *Calmes v. Goodyear Tire & Rubber Co.*, 575 N.E.2d 416, 419 (Ohio 1991) (quoting *Preston v. Murty*, 512 N.E.2d 1174, 1174 (Ohio 1987)).

⁵⁷ *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985).

the realm of contract law, where, perhaps more than in any other substantive area of the law, the role of punishment has long been thought to have no place⁵⁸ for at least two separate reasons. First, because it is sometimes thought that the “duty to keep a contract” is merely “a prediction that you must pay damages if you do not keep it,—and nothing else,”⁵⁹ it seems to follow that, so long as the victim’s interest in restoration is protected in the event of breach (e.g., through an award of compensatory damages), then the wrongdoer has fulfilled his or her contractual duty, and there remains no harm for which retributive punishment would be justified. Second, if we assume that the victim has been fully compensated in the event of a wrongdoer’s breach, then the principle of retribution would also have the deleterious effect of “deter[ring] efficient . . . breaches, by making the cost of the breach to the contract breaker greater than the cost of the breach to the victim.”⁶⁰

⁵⁸ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS ch. 16, topic 4, intro. note (1981) (“‘Willful’ breaches have not been distinguished from other breaches . . .”); HOLMES, *supra* note 31, at 236 (“The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfill[ment] has gone by, and therefore free to break his contract if he chooses.”); E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1147 (1970) (“In its essential design . . . our system of remedies for breach of contract is one of strict liability and not of liability based on fault . . .”).

⁵⁹ Holmes, *supra* note 28, at 462; see also *Norcia v. Equitable Life Assurance Soc’y of the U.S.*, 80 F. Supp. 2d 1047, 1048 (D. Ariz. 2000) (“[The] ‘bad man’ theory of contracts permeates American common law. That is, a contracting party usually cannot demand performance of a valid contract; rather, the defaulting party must either perform or pay damages equivalent to the value of the promised performance. Under this approach to contract theory, it follows that when performance becomes uneconomic, a contracting party will not infrequently break a contract, preferring instead to pay damages.”); *Estate of Murrell v. Quin*, 454 So. 2d 437, 440 (Miss. 1984) (Robertson, J., concurring in part and dissenting in part) (“Fuzzy moral notions of right and wrong, good and bad are irrelevant. That persons not parties to the contract may suffer loss is of no concern of the law. . . . Persons potentially affected who have failed to act to protect their interests sit idle at their peril. The law is wholly indifferent to non-legal consequences. It would allow one to think and behave as the proverbial Holmesian bad man to his heart’s content.” (citing Holmes, *supra* note 28, at 459)); Clark A. Remington, *Intentional Interference with Contract and the Doctrine of Efficient Breach: Fine Tuning the Notion of the Contract Breacher as Wrongdoer*, 47 BUFF. L. REV. 645, 647 (1999) (“The law has come to regard the obligation to perform a contract as being generally equivalent to an option to perform or pay damages. Holmes saw the matter this way more than one hundred years ago.”). The court in *Norcia* went on to find that when a bad man breaches a contract, the only punishment is to pay damages, and nothing else. *Norcia*, 80 F. Supp. 2d at 1047 (quoting Holmes, *supra* note 28, at 462); see also *Redgrave v. Bos. Symphony Orchestra*, 602 F. Supp. 1189, 1194 (D. Mass. 1985) (recognizing that “[t]he suggested freedom to break a contract and suffer liability only for the legally recognized damages is within the scope of the idea often referred to as Holmes’[s] bad man theory of contract law—that one who is willing to pay the penalty of such damages as the law assesses is free to break the contract and pay” (citing Holmes, *supra* note 28, at 461–62)), *aff’d in part and vacated in part*, 855 F.2d 888 (1st Cir. 1988) (en banc).

⁶⁰ POSNER, *supra* note 44, at 127–28. Standard economic analysis suggests that the goal of contract remedies is “compensation and not compulsion.” See, e.g., FARNSWORTH, *supra* note 44, § 12.3, at 737. Because of this, promisors who breach for financial reasons “should not be dealt with harshly,” concepts like punitive damages have no place in contract law because they will “encourage performance when breach would

Nevertheless, even in the law of contracts, the principle of retribution *does* play a prominent role and is often needed to make sense of numerous remedial decisions made by courts. Consider, for instance, the famous 1921 case of *Jacob & Youngs, Inc. v. Kent*,⁶¹ in which the parties entered into a contract pursuant to which the plaintiff–builder, Jacob & Youngs, agreed to build a country residence for the defendant–homeowner, Kent.⁶² In their contract, Jacob & Youngs further promised to install only pipe manufactured by the Reading Pipe Company.⁶³ The defendant completed the construction, but throughout much of the house unintentionally installed Cohoes pipe, which was of the same quality, appearance, market value, and cost as Reading pipe.⁶⁴ After Kent took possession of the residence, he discovered that some of the pipe did not conform to the contract, claimed that Jacob & Youngs failed to satisfy a condition in the contract, and refused to pay the balance due.⁶⁵

Judge Cardozo, writing for the court, found that although Jacob & Youngs breached the contract by failing to install the specific brand of pipe requested by the defendant, its mistake was both unintentional and harmless.⁶⁶ Therefore, according to Cardozo, the real issue was whether, in such a situation, the court should imply a condition, the nonsatisfaction of which would result in a

be socially more desirable,” and “[w]illful’ breaches should not be distinguished from other breaches.” *Id.*; see also POSNER, *supra* note 44, at 94–142.

⁶¹ 129 N.E. 889 (N.Y. 1921).

⁶² *Id.* at 890.

⁶³ *Id.* Specifically, the contract said that “[a]ll wrought-iron pipe must be well galvanized, lap welded pipe of the grade known as ‘standard pipe’ of Reading manufacture.” *Id.* Another provision in the contract specifically required that “[a]ny work furnished by the Contractor, the material or workmanship of which is defective or which is not fully in accordance with the drawings and specifications, in every respect, will be rejected and is to be immediately torn down, removed, and remade or replaced in accordance with the drawings and specifications, whenever discovered.” RANDY BARNETT, *CONTRACTS: CASES AND DOCTRINE* 888 (4th ed. 2008).

⁶⁴ *Jacob & Youngs, Inc.*, 129 N.E. at 890. As noted by Carol Chomsky:

Some manufacturers used names for their pipe that makers of ‘genuine wrought iron pipe’ thought misleading. In order to avoid confusion, trade publications suggested specifying a particular manufacturer that was known to produce pipe of the quality desired so that only pipe of that standard would be used. The contract between Kent and Jacob & Youngs also contained language suggesting that the specification of Reading pipe was meant only to specify a standard, not to require absolutely that no other brand be used.

Carol Chomsky, *Of Spoil Pits and Swimming Pools: Reconsidering the Measure of Damages for Construction Contracts*, 75 MINN. L. REV. 1445, 1447 n.11 (1991) (citing RICHARD DANZIG, *THE CAPABILITY PROBLEM IN CONTRACT LAW* 122 (1978)).

⁶⁵ *Jacob & Youngs, Inc.*, 129 N.E. at 890.

⁶⁶ *Id.* Further bolstering the builder’s claim was the fact that the Cohoes pipe that was installed was of the same quality, appearance, market value, and cost as Reading pipe. *Id.*

forfeiture, or whether the court should merely find that Jacob & Youngs breached the contract (but did not violate an implied condition), and hold it liable for compensatory damages. In a memorable passage, Cardozo wrote:

The courts never say that one who makes a contract fills the measure of his duty by less than full performance. They do say, however, that an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach of a condition to be followed by a forfeiture. The distinction is akin to that between dependent and independent promises, or between promises and conditions.⁶⁷

Framed in such a manner, the issue that now confronted Judge Cardozo was whether the language in the contract constituted (a) a *condition* that had not been satisfied, in which case Jacob & Youngs would not be entitled to recover the balance due under the contract unless it replaced the nonconforming pipe with Reading pipe, or (b) a *promise* that had been breached, in which case Jacob & Youngs could recover the balance due under the contract, but would be liable to Kent for any damages he might have suffered due to the installation of nonconforming pipe. In making this determination, Cardozo set forth the following rubric for distinguishing conditions from promises:

Some promises are so plainly independent that they can never by fair construction be conditions of one another. Others are so plainly dependent that they must always be conditions. Others, though dependent and thus conditions when there is departure in point of substance, will be viewed as independent and collateral when the departure is insignificant. Considerations partly of justice and partly of presumable intention are to tell us whether this or that promise shall be placed in one class or in another.⁶⁸

Here, because Cardozo found that considerations of justice (the departure was insignificant in point of substance, the defect was insignificant in its relation to the project, and the cost of replacing the nonconforming pipe was great) and presumable intention (the breach was unintentional rather than willful) favored Jacob & Youngs, Cardozo held that the language used in the contract requesting Reading pipe was a promise, rather than a condition, and that Jacob & Youngs was entitled to payment of the balance due under the

⁶⁷ *Id.* (citations omitted).

⁶⁸ *Id.* (citations omitted).

contract.⁶⁹ Because Jacob & Youngs breached, however, they were still liable to Kent for money damages. In determining the measure of those damages, Cardozo wrote:

[T]he measure of the allowance is not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing. . . . The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained.⁷⁰

Here, because the breach was insignificant, and because the difference between these two measures of damages was disproportional, Kent could only recover diminution in value damages (i.e., the difference in value between the house with Reading pipe and the house with Cohoes pipe) rather than the more generous cost of completion damages (i.e., the amount it would cost Kent to tear out the nonconforming Cohoes pipe and replace it with Reading pipe).⁷¹ Because Cohoes and Reading pipe were of the same quality, appearance, value, and cost, the expectation damages awarded by the court “would be either nominal or nothing.”⁷²

This case, and others like it,⁷³ is commonly understood by many commentators as presenting a choice between two different measures of expectation damages—cost of completion versus diminution in value—both of which are *restorative* (quadrant I) in that they attempt to measure the injured party’s loss by restoring that party to the position he or she would have occupied but for the breach.⁷⁴ Viewed in this manner, the case seems to read like other contracts cases in which the court is confronted with a policy choice between two different measures of a restorative remedy, both of which are

⁶⁹ See *id.* at 891.

⁷⁰ *Id.*

⁷¹ See *id.*

⁷² *Id.*

⁷³ See, e.g., *Groves v. John Wunder Co.*, 286 N.W. 235, 238 (Minn. 1939); *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 114 (Okla. 1962); *Eastlake Constr. Co. v. Hess*, 686 P.2d 465, 470 (Wash. 1984) (en banc).

⁷⁴ See, e.g., Eric G. Andersen, *A New Look at Material Breach in the Law of Contracts*, 21 U.C. DAVIS L. REV. 1073, 1095 n.71 (1988) (describing *Jacob & Youngs, Inc.*, *Groves*, and *Peevyhouse* as cases in which “the issue is not whether to award damages sufficient to put the victim of the breach in the same position as if the contract had been performed,” for this is a given, but rather determining “how to measure or define that position”); Chomsky, *supra* note 64, at 1450–51 (“When choosing a remedy, a court aims primarily to compensate the injured party adequately—to place her in as good a position as if the contract had been performed—while avoiding overcompensation.” (footnote omitted)).

completely within the purview of quadrant I.⁷⁵ Faced with this decision—again, still viewing the problem through the lens of restoration—it does not seem unreasonable to make this policy choice on economic (or other) grounds. Thus, according to some commentators, where the “[l]oss in value to the owner is likely to be only a small fraction of the cost to complete,” then “diminution in market price [is] probably the better approximation of this loss.”⁷⁶ Not only is it frequently thought that a cost of completion remedy might lead, in some cases, to “economic waste,”⁷⁷ but even where it does not, such a remedy may be criticized as “result[ing] in a ‘windfall’ to the injured party.”⁷⁸

On the other hand, many of these same commentators also recognize that where diminution in value damages do not fully reflect the loss suffered by the promisee, it will result in undercompensation.⁷⁹ Like the notion of “windfall” discussed above, this too is unacceptable if the goal is restoration. Quadrant I’s lens of restoration, then, seems to provide no clear answers to distinguish between cost of completion and diminution in value cases, and has even led some commentators to suggest that we might resolve the issue by splitting the remedial baby:

Rather than accept the draconian choice between overcompensation through cost [of completion] and undercompensation through diminution in market price, the trier of the facts ought to be allowed at least to fix an intermediate amount as its best estimate, in the light of all the circumstances, of the loss in value to the injured party.⁸⁰

This approach, however, seems to be without a principled justification, as it seems to advocate awarding a remedy in between two principled amounts *for the sake of* awarding a remedy, rather than forcing courts to grapple with the underlying justification for the remedy itself. Unlike King Solomon, whose order to split the baby achieved justice precisely because it was *not* carried

⁷⁵ See *supra* note 73.

⁷⁶ FARNSWORTH, *supra* note 44, § 12.13, at 789–90 (second emphasis added).

⁷⁷ See, e.g., *Cnty. of Maricopa v. Walsh & Oberg Architects, Inc.*, 494 P.2d 44, 47 (Ariz. Ct. App. 1972) (“The conceptual defense of economic waste has been recognized in Arizona.”).

⁷⁸ FARNSWORTH, *supra* note 44, § 12.13, at 790.

⁷⁹ See, e.g., *id.* (“On the other hand, the less generous measure may deprive the injured party of compensation for some of the *loss in value* if that loss is not fully reflected in the diminution in market price.”).

⁸⁰ *Id.*

out,⁸¹ a “splitting the baby” remedy, if carried out (either by King Solomon, then, or by a judge, today), would seem to result in injustice because it would give to one party only half as much as that party deserved while leaving the wrongdoing party with a half share too much. Might there be a better solution to this problem?

This Article suggests that the answer is yes: the seemingly intractable problem presented by *Jacob & Youngs, Inc. v. Kent* and other similar cases seems to be an illusion created by viewing the problem exclusively through the restorative lens itself, which becomes obfuscated when presented with legal problems that cannot clearly be discerned through the lens by which it is viewed. By changing our remedial lens, however, and viewing these problems through other remedial lenses (e.g., the quadrant II lens of retribution), these seemingly thorny remedial questions become both clearer and more interesting as well.

So how might our analysis of the remedial problem set forth in *Jacob & Youngs, Inc. v. Kent* be affected by viewing the matter through a different remedial lens—say, the retributive lens? First of all, such an approach would invite the judge to consider, for instance, the fact that a cost of completion remedy, rather than overcompensating the victim, may be just what was necessary to take ill-gotten gains from a wrongdoing party; or that a diminution in value remedy, rather than undercompensating a victim, may be one way for a court to ensure that no more is taken from a relatively innocent wrongdoing party than what is absolutely necessary. So, for example, by taking the retributive interest seriously, we could look at a case like *Jacob & Youngs* with fresh eyes, and would reexamine Cardozo’s rhetoric concerning the cause of the default, the willfulness of the breach, and the builder’s insistence to exercise its own discretion by installing pipe it perceived to be “just as good”⁸² not as the obscure and peripheral musings of an all-too-

⁸¹ See 1 *Kings* 3:16–28 (New American Bible). The story of King Solomon proceeds as follows: Two prostitutes came before King Solomon for a judgment, each claiming to be the mother of a baby. King Solomon requested a sword, and gave the order to “[c]ut the living child in two, and give half to one woman and half to the other.” One woman was mortified, and pleaded with Solomon: “Please, my lord, give her the living child—please do not kill it!” The other woman, however, said, “It shall be neither mine nor yours. Divide it!” King Solomon then rendered his verdict, saying, “Give the first one the living child! By no means kill it, for she is the mother.” We are told that “[w]hen all Israel heard the judgment the king had given, they were in awe of him, because they saw that the king had in him the wisdom of God for giving judgment.” *Id.*

⁸² *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 891 (N.Y. 1921) (quoting *Easthampton Lumber & Coal Co. v. Worthington*, 79 N.E. 323, 324 (N.Y. 1906)).

clever judge (as it often seems to my students when viewed through the restorative lens of compensation).

Instead, when viewed through the retributive lens, such rhetoric becomes central to unlocking the case's meaning. Words that otherwise seemed strange and aberrational in the context of contract law,⁸³ such as Cardozo's refusal to visit this particular builder's "venial faults with oppressive retribution" while admonishing others that "[t]he willful transgressor must accept the penalty of his transgression,"⁸⁴ are given new meaning and hold a potentially powerful sway over private law. By recasting *Jacob & Youngs* as a case not only (or even primarily) about restoration, but also about retribution, it reveals that punishing the breaching party by taking from the wrongdoer what the wrongdoer himself took from the injured party (i.e., Reading pipe, measured by the cost of completion remedy) is not warranted where the breach was both unintentional and trivial.

If this is correct, and courts take seriously the notion of retributive relief in private law, then there should be instances in which courts, when faced with a choice between two different restorative remedies, decide the issue on *retributive* grounds by punishing more severely defendants who *intentionally* breached their contracts, or otherwise behaved badly, by taking from the wrongdoing parties what they themselves have taken from their victim, either in-kind or substitutionarily, by way of a dollar equivalent. A perfect test case, it would seem, would be one in which a judge would seem to be guided by retributive concerns and where an intentional breach is both trivial and incidental to the main purpose of the contract, and even more conclusive still would be a case in which the cost of completion damages are grossly disproportional to the diminution in value damages. The law, it turns out, is replete with such cases.⁸⁵

⁸³ See FARNSWORTH, *supra* note 44, § 12.3, at 737. Farnsworth noted that standard economic analysis suggests that the goal of contract remedies is "compensation and not compulsion." *Id.* Because of this, promisors who breach for financial reasons "should not be dealt with harshly;" concepts like punitive damages have no place in contract law because they will "encourage performance when breach would be socially more desirable," and "[w]illful" breaches should not be distinguished from other breaches." *Id.*; see also POSNER, *supra* note 44, at 93–142.

⁸⁴ *Jacob & Youngs, Inc.*, 129 N.E. at 891.

⁸⁵ In addition to numerous material breach cases with fact patterns similar to *Jacob & Youngs, Inc. v. Kent*, Section 39 of the *Restatement (Third) of Restitution and Unjust Enrichment* would go even further toward punishing intentional breaches by forcing promisors to disgorge any profits from their opportunistic breaches. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 39, at 646 (2011) ("If a deliberate breach of contract results in profit to the defaulting promisor and the available damage remedy

Consider, for instance, *Groves v. John Wunder Co.*⁸⁶ In this case, the plaintiff owned a tract of land on which there were deposits of sand and gravel and a plant for excavating and screening the gravel.⁸⁷ The defendant leased the land from the plaintiff for \$105,000 to remove the sand and gravel and promised to leave the property at a uniform grade.⁸⁸ After removing the richest gravel, the defendant deliberately breached the contract by refusing to restore the land to a uniform grade at a cost \$60,000, when it realized that the value of the land if restored would only be \$12,160.⁸⁹ Not surprisingly, the defendant argued along the lines of the principle established in *Jacob & Youngs* that a cost of completion remedy should not be awarded where it was disproportionate to a diminution in value award.⁹⁰

Here, once again, the court was ostensibly confronted with a choice between two different measures of restoration. However, unlike the builder in *Jacob & Youngs*, which Cardozo found to have acted unintentionally, the Supreme Court of Minnesota found the defendant's breach in *Groves* to be "wil[l]ful," and therefore opted to restore the plaintiff to its rightful position through the more generous cost of completion damages.⁹¹

If we try to explain such cases on restorative grounds, the problem, as previously suggested, becomes intractable: we can either pretend that both cost of completion and diminution in value damages are equally (and fully) compensatory and ignore the (usually obvious) differences between them, or we can recognize that the courts in such cases are being confronted with a difficult choice between overcompensation and undercompensation⁹² without

affords inadequate protection to the promisee's contractual entitlement, the promisee has a claim to restitution of the profit realized by the promisor as a result of the breach.").

⁸⁶ 286 N.W. 235 (Minn. 1939).

⁸⁷ *Id.* at 235.

⁸⁸ *Id.*

⁸⁹ *Id.* at 236.

⁹⁰ *Id.* at 242 (Olson, J., dissenting).

⁹¹ *Id.* at 236 (majority opinion).

⁹² See, e.g., POSNER, *supra* note 44, at 121 ("It is true that not enforcing the contract would have given the defendant a windfall. But enforcing the contract gave the plaintiff an equal and opposite windfall . . ."); see also *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525, 534-35 (9th Cir. 1962) ("The question [regarding the collateral source rule] is not whether a windfall is to be conferred, but rather who shall receive the benefit of a windfall which already exists. As between the injured person and the tortfeasor, the former's claim is the better. This may permit a double recovery, but it does not impose a double burden. The tortfeasor bears only the single burden for his wrong. That burden is imposed by society, not only to make the plaintiff whole, but also to deter negligence and encourage due care. . . . Collateral source funds are . . . intended for the benefit of the injured person, and not for that of the person who injures him. That intention should be effectuated."). In *Gypsum Carrier*, we see clearly the court's concern with the retributive interest, both in terms of making sure

any (restorative) way of choosing between the two different measures. We can also, I suppose, try to attribute the court's decision to remedial discretion; this is probably what is intended when this case is discussed by authors alongside the likes of *Jacob & Youngs* and distinguished by a “*cf.*” signal. This, too, seems unsatisfactory, and reminds one of the unprincipled “split the baby” approach discussed above.⁹³

However, if we allow for the possibility that the retributive interest is playing a role here, and take seriously the suggestion that courts are moved by the fact that the defendant's breach ought to be punished more severely when it is willful and in bad faith,⁹⁴ then this case, and others like it,⁹⁵ suddenly fall into place.

Furthermore, these cases cut sharply against the so-called Holmesian view of contracts,⁹⁶ which holds that “[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.”⁹⁷ The law, it turns out, suggests something quite different:

that, as between an innocent and wrongdoing party, the wrongdoer pays for his wrong (“[c]ollateral source funds are . . . intended for the benefit of the injured person, and not for that of the person who injures him”), and in terms of ensuring that the wrongdoer does not pay either too much or too little for his wrong (“[t]he tortfeasor bears only the single burden for his wrong”). *Id.* Remarkably, the court seemed to be confronted with a choice of selecting between a restorative or retributive remedy, and came down on the side of the latter (“[a]s between the injured person and the tortfeasor, the former's claim is the better”), even where this leads to over-protection of the restorative interest (i.e., a “windfall”). *Id.* The case is also interesting in that it also touches on the relationship between the restorative and retributive interests to the coercive interest (“[t]hat burden is imposed by society, not only to make the plaintiff whole, but also to deter negligence and encourage due care”), *id.*, an idea that will be further pursued in Part III.

⁹³ See *supra* text accompanying note 81.

⁹⁴ See, e.g., *Groves*, 286 N.W. at 236; see also RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 39, at 646 (2011).

⁹⁵ See, e.g., *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 263, 265 (1946) (awarding compensatory damages that were “speculative and uncertain” because “the wrongdoer shall bear the risk of the uncertainty which his own wrong has created”); *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 82 (3d Cir. 1948) (paying homage to the traditional rule that “[a] party may have specific performance of a contract for the sale of chattels if the legal remedy is inadequate,” but noting that there is “no reason why a court should be reluctant to grant specific relief when it can be given without supervision of the court or other time-consuming processes against one who has *deliberately* broken his agreement,” and denying specific performance on other grounds (emphasis added)).

⁹⁶ There is some debate as to whether this was actually Holmes's view or not. As I have argued elsewhere, Holmes should probably be understood as making a descriptive point, rather than a normative one, and was merely describing what contract law looks like when viewed through the bad man's eyes. See Marco Jimenez, *Finding the Good in Holmes's Bad Man*, 79 FORDHAM L. REV. 2069 (2011).

⁹⁷ Holmes, *supra* note 28, at 462; see also HOLMES, *supra* note 31, at 300–01 (“It is true that in some instances equity does what is called compelling specific performance. But . . . [t]his remedy is an exceptional one. The only universal consequence of a legally binding promise is, that the law makes the promisor pay

*although the breach of a legal duty will almost always invoke society's interest in restoring a victim to its rightful position, society's interest in retribution (varying in proportion to the wrongfulness of the wrongdoer's breach) will sometimes outweigh society's interest in restoration, even in a field as seemingly divorced from punishment as contract law.*⁹⁸

Outside of contract law, of course, the case for retributive punishment is even easier to establish.⁹⁹ In the law of unjust enrichment, for example, courts

damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses.”)

⁹⁸ George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225, 1226 (1994) (“The fundamental premise of most theories of contract damages has been that contract damage law is a ‘strict liability’ system; that is, the reason the breach occurs does not matter in determining the measure of damages. That premise is wrong. In fact, the reason the breach occurs has always influenced courts’ determination of the proper measure of damages.” (footnote omitted)). But if punishment is sometimes appropriate in contract law, how is one to explain the reluctance of courts to award punitive damages for ordinary contract breaches? In fact, is not the purpose of punitive damages to punish and deter wrongdoers, rather than compensate victims, whereas the stated purpose of contract damages is the exact opposite: to compensate the injured party, but not to punish or deter?

Even here, where it is hard to imagine the remedial “rules” being any clearer, things are not what they seem. Where a wrongdoer’s conduct is particularly egregious, courts will often find ways to punish the wrongdoing party, either by “adjusting” the amount of “compensation” due, as discussed above, or by “breaking the rules” of contract damages and awarding punitive damages where the breaches are particularly egregious. *See, e.g.*, *Thomas v. Med. Ctr. Physicians, P.A.*, 61 P.3d 557, 568 (Idaho 2002) (“[I]n breach of contract cases . . . punitive damages might be appropriate if the defendant’s conduct is sufficiently egregious.”); *Brown v. Fritz*, 699 P.2d 1371, 1377 (Idaho 1985) (“[W]hen damages are sought for breach of a contractual relationship, there can be no recovery for emotional distress suffered by a plaintiff. If the conduct of a defendant has been sufficiently outrageous, we view the proper remedy to be in the realm of punitive damages.”); *Paiz v. State Farm Fire & Cas. Co.*, 880 P.2d 300, 307 (N.M. 1994) (“[A]n award of punitive damages in a breach-of-contract case must be predicated on a showing of bad faith, or at least a showing that the breaching party acted with reckless disregard for the interests of the nonbreaching party.”).

While a mere breach of conduct will not imply a basis for punitive damages, “[a] mental state sufficient to support an award of punitive damages will exist when the defendant acts with ‘reckless disregard’ for the rights of the plaintiff—i.e., when the defendant *knows* of potential harm to the interests of the plaintiff but nonetheless ‘utterly fail[s] to exercise care’ to avoid the harm.” *Id.* at 308 (alteration in original). The court in *Paiz* went on to emphasize that while the general rule is that breach-of-contract damages are limited to compensatory damages, courts have employed “a narrow exception . . . by penalizing conduct that constitutes a ‘wanton disregard’ for the nonbreaching party’s rights, or ‘bad faith,’ with an award of punitive damages.” *Id.* at 309. A breach of the implied covenant of good faith and fair dealing will be found if “one party wrongfully and intentionally used the contract to the detriment of the other party” where the breaching party “is consciously aware of, and proceeds with deliberate disregard for, the potential of harm to the other party.” *Id.* at 309–10. Although the court ultimately found that punitive damages were not proper in this case because there was a finding of only negligence, there is a wonderful discussion of when punitive damages for breach of contract would be appropriate. *See id.* at 307; *see also Grynberg v. Citation Oil & Gas Corp.*, 1997 SD 121, 573 N.W.2d 493.

⁹⁹ *See, e.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977) (noting that Section 4 of the Clayton Act is a “remedial provision” that, by allowing treble damages, plays “an important role in penalizing wrongdoers and deterring wrongdoing”).

frequently take into account the culpability of the wrongdoer in awarding an appropriate remedy, and it is hard to deny (though courts and commentators sometimes do so)¹⁰⁰ that the notion of punishment is playing a significant role.¹⁰¹ Consider, for instance, the case of *Olwell v. Nye & Nissen Co.*,¹⁰² in which the plaintiff sold his interest in an egg-packing business to the defendant, but retained ownership of an egg-washing machine that was formerly used by the business, which the plaintiff stored in a space adjacent to the defendant's premises.¹⁰³ Unknown to the plaintiff, the defendant began using the plaintiff's egg-washing machine to cut down on the cost of labor.¹⁰⁴ When the plaintiff learned of this fact several years later, he offered to sell the machine to the defendant, but the parties could not agree on a price.¹⁰⁵ The plaintiff then brought an action in unjust enrichment to recover "the reasonable value of [the] defendant's use of the machine."¹⁰⁶

Although the defendant argued that the plaintiff's remedy should be limited to replevin or the rental value of the machine¹⁰⁷ (both of which would fall into

In his empirical examination of cases involving the granting or denial of injunctions involving violations of building restrictions, Professor Van Hecke found that the fact "[m]ost frequently and significantly relied upon as an affirmative basis for injunction was the defendant's willfulness. The cases abound with such appraisals as deliberate, defiant, flagrant, intentional, premeditated, and at his peril." M. T. Van Hecke, *Injunctions to Remove or Remodel Structures Erected in Violation of Building Restrictions*, 32 TEX. L. REV. 521, 530 (1954).

¹⁰⁰ See, e.g., RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 51, at 203 (2011) ("The object of restitution . . . is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty.")

¹⁰¹ See, e.g., *id.* § 1 cmt. d at 8 ("Restitution may strip a wrongdoer of all profits gained in a transaction . . . but principles of unjust enrichment will not support the imposition of a liability that leaves an innocent recipient worse off . . ."). However, where the transferee *is* guilty of fault, the tables turn quickly. See, e.g., *id.* § 49, reporter's note a at 184 (noting where the plaintiff has lost more than the wrongdoer has gained, "the measure of restitution is determined with reference to the tortiousness of the defendant's conduct or the negligence or other fault of one or both of the parties in creating the situation giving rise to the right to restitution"). In addition:

If the defendant was tortious in his acquisition of the benefit he is required to pay for what the other has lost although that is more than the recipient benefited. If he was consciously tortious in acquiring the benefit, he is also deprived of any profit derived from his subsequent dealing with it.

Id.; see also *id.* § 51, at 203 ("[T]he unjust enrichment of a conscious wrongdoer . . . is the net profit attributable to the underlying wrong . . ."); *id.* ("The object of restitution in such cases is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty.")

¹⁰² 173 P.2d 652 (Wash. 1946).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 652–53.

¹⁰⁵ *Id.* at 653.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

the restorative remedies of quadrant I), the trial court sided with the plaintiff, and the decision was affirmed on appeal. The court held:

Actions for restitution have for their primary purpose taking from the defendant and restoring to the plaintiff something to which the plaintiff is entitled, or if this is not done, causing the defendant to pay the plaintiff an amount which will restore the plaintiff to the position in which he was before the defendant received the benefit.¹⁰⁸

If the value of the gain to the defendant was always equal to the loss to the plaintiff, the court reasoned, there would be no substantial problem as to the amount of recovery, since actions seeking restitution would be equivalent to actions seeking money damages.¹⁰⁹ However, in cases such as this one, where the amount of gain realized by the defendant is not identical to the loss sustained by the plaintiff, “the measure of restitution is determined with reference to the tortiousness of the defendant’s conduct or the negligence or other fault of one or both of the parties in creating the situation giving rise to the right to restitution.”¹¹⁰ Here, because the defendant was tortious in its acquisition of the benefit of the egg-washing machine, the court required the defendant to disgorge this benefit, even though the amount of the defendant’s gain far exceeded the plaintiff’s loss.¹¹¹

Another illuminating example is provided by the twin cases of *Edwards v. Lee’s Administrator*¹¹² and *Beck v. Northern Natural Gas Co.*,¹¹³ which, like *Jacob & Youngs* and *Groves*, are remarkably similar in regard to all relevant facts save one: the culpability of the wrongdoing party. In *Edwards*, the “Great Onyx Cave” lay beneath the land of two separate landowners, Edwards and

¹⁰⁸ *Id.* at 654 (quoting RESTATEMENT OF RESTITUTION: QUASI CONTRACTS & CONSTRUCTIVE TRUSTS ch. 8, topic 2, intro. note at 595–96 (1937)) (internal quotation marks omitted).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (quoting RESTATEMENT OF RESTITUTION: QUASI CONTRACTS & CONSTRUCTIVE TRUSTS ch. 8, topic 2, intro. note at 596 (1937)) (internal quotation marks omitted).

¹¹¹ *Id.* (“If he was consciously tortious in acquiring the benefit, he is also deprived of any profit derived from his subsequent dealing with it.” (emphasis omitted) (quoting RESTATEMENT OF RESTITUTION: QUASI CONTRACTS & CONSTRUCTIVE TRUSTS ch. 8, topic 2, intro. note at 596 (1937)) (internal quotation marks omitted)). Interestingly, toward the end of the opinion, the court attempted to justify its remedy by speaking in terms of awarding “the measure of restoration” needed to make the plaintiff whole, although it is clear throughout the opinion that the court was attempting no such thing: rather than restoring the plaintiff to his rightful position via an award of compensatory damages (a quadrant I remedy), the court was clearly focused on removing the wrongdoing party from the position it wrongfully occupied by forcing it to disgorge its gains to the plaintiff (a quadrant II remedy). *Id.*

¹¹² 96 S.W.2d 1028 (Ky. 1936).

¹¹³ 170 F.3d 1018 (10th Cir. 1999).

Lee.¹¹⁴ Edwards discovered an entry to the cave on his land and began to “embark upon a program of advertising and exploitation for the purpose of bringing visitors to his cave.”¹¹⁵ Specifically, Edwards built a hotel near the mouth of the cave, improved and widened the footpaths and avenues in the cave, and led tours through the cave, making enough money “not only to cover the cost of operation, but also to yield a substantial revenue in addition thereto.”¹¹⁶ The visitors, however, were led not only through the portion of the cave beneath Edward’s land, but through the portion of the cave beneath Lee’s land as well, which could only be accessed through Edward’s entrance.¹¹⁷ When Lee learned of this fact, he brought suit for trespass and sought damages, an injunction preventing further trespasses, and an accounting for profits resulting from operation of the cave.¹¹⁸ Although the cave under Lee’s land was not damaged in any way, and although it could be accessed only via Edward’s entrance, the court nevertheless forced Edwards to disgorge to Lee a pro-rata portion of his net profits, in large part because Edwards *knew* of the trespass to Lee’s land, and, the court reasoned, the law should not allow such a wrongdoer to profit from his own wrong.¹¹⁹

The trespass issue was nearly identical in *Beck*, but the defendant’s culpability, and therefore the remedy that was awarded, was quite different. In *Beck*, Northern Natural Gas Company (Northern) obtained storage rights to the Viola formation underlying 23,000 acres of property.¹²⁰ After Northern began storing gas, “some of the gas vertically migrated from the Viola to the Simpson formation, a smaller formation directly beneath the Viola.”¹²¹ Once Northern learned of this fact, it thoroughly evaluated the Simpson formation, and obtained lease agreements from two-thirds of the affected landowners, exercising its eminent domain power against the others, including the plaintiffs.¹²² As in *Edwards*, the plaintiffs brought an action for “trespass and unjust enrichment related to the migration of gas to the Simpson formation”¹²³ and sought a pro-rata portion of the profits Northern gained as a result of

¹¹⁴ 96 S.W.2d at 1029.

¹¹⁵ *Id.* at 1028.

¹¹⁶ *Id.* at 1029.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1030, 1032–33 (“[A] wrongdoer shall not be permitted to make a profit from his own wrong.”).

¹²⁰ *Beck v. N. Natural Gas Co.*, 170 F.3d 1018, 1021 (10th Cir. 1999).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

storing gas in the Simpson formation.¹²⁴ The court, however, refused to award such a remedy, holding that “[t]he benefit that Northern received from the landowners was the use of the Simpson formation without payment of rent, for which the proper measure of damages was, as the district court found, fair rental value.”¹²⁵ The court attempted to distinguish this case from others awarding disgorgement to the plaintiff on the ground that, but for the defendant’s actions in making use of the land, profits would not have gone to the original landowners.¹²⁶

This reasoning, of course, cannot explain what is really driving the court’s decision, in that it ignores the fact that the plaintiffs in both *Olwell* and *Edwards* also would not have gained any profits but for the actions of the defendant. A better explanation seems to be that the culpability of the defendants in *Olwell* and *Edwards* was much higher than the culpability of the defendant in *Beck*, and the court was adjusting its remedy to punish more severely the more culpable defendants, which is the principle at the heart of retributive punishment.¹²⁷ Making such allowances to account for the culpability of the wrongdoing party, cases like those discussed above soon fall in line.

Indeed, the new *Restatement (Third) of Restitution and Unjust Enrichment* takes one step forward in this direction by allowing courts to directly take into account the wrongdoer’s culpability in determining the remedy to be awarded, although it too strangely denies that what it is doing is *punishing* the culpable party¹²⁸—rejecting the explanation that seems to best explain the remedy. My sense is that the defendants in such cases, and probably most individuals without legal training, would see the matter quite differently and view a remedy tied to the culpability of a defendant’s conduct in terms of retributive punishment.

¹²⁴ *Id.*

¹²⁵ *Id.* at 1024.

¹²⁶ *Id.*

¹²⁷ Compare *Edwards v. Lee’s Adm’r*, 96 S.W.2d 1028, 1030, 1032 (Ky. 1936) (describing the defendants as willful trespassers and wrongdoers), and *Olwell v. Nye & Nissen Co.*, 173 P.2d 652, 653 (Wash. 1946) (describing the defendant as acting without the plaintiff’s knowledge and benefiting “by his wrong”), with *Beck*, 170 F.3d at 1021, 1024 (describing the defendant’s actions to prevent a problem and acknowledging a limited scope of wrongdoing).

¹²⁸ See, e.g., RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 51, at 203 (2011) (“The object of restitution . . . is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty.”).

C. *The Coercive Interest*

The business of government is to promote the happiness of the society, by punishing and rewarding. . . . In proportion as an act tends to disturb that happiness, in proportion as the tendency of it is pernicious, will be the demand it creates for punishment.¹²⁹

– Jeremy Bentham

In contrast to the two remedial interests discussed above, both of which took a *backward-looking* approach to remedies (from either a victim- or wrongdoer-centered perspective), another principle by which the law of remedies might be organized is the coercive interest (quadrant III).¹³⁰ This interest, made popular by utilitarians and, more recently, law and economics scholars, takes a *forward-looking, wrongdoer-centered* approach to remedies and focuses neither on what should be given to the victim by way of restoration, nor on what should be taken from the wrongdoer by way of retribution,¹³¹ at least not directly.¹³²

Instead, the coercive approach advocates that remedies be chosen according to whether they (a) effectively encourage efficient or socially productive activity, on the one hand (i.e., positive coercion), or (b) deter inefficient or socially unproductive conduct (i.e., labeling those who commit such acts as wrongdoers), on the other (i.e., negative coercion).¹³³ Thus, in sharp contrast to

¹²⁹ BENTHAM, *supra* note 16, at 70.

¹³⁰ I use the term *coercion* rather than *deterrence* because, from an economic standpoint, the law is concerned not only with deterring inefficient activities, but also in encouraging efficient activities as well. See POSNER, *supra* note 44, at 25 (“[T]he common law is best . . . explained as a system for maximizing the wealth of society.”).

¹³¹ See, e.g., LAYCOCK, *supra* note 32, at 226 (arguing that, in its pure form, “economic analysis suggests that reprehensibility is irrelevant, and that underdeterrence is all that matters”).

¹³² BENTHAM, *supra* note 16, at 317. Whether punishment deters or not

depends altogether upon the expectation it raises of similar punishment, in future cases of similar delinquency. But this future punishment . . . must always depend upon detection. If then the want of detection is such as must in general . . . appear too improbable to be reckoned upon, the punishment, *though it should be inflicted*, may come to be of no use.

Id. (emphasis added).

¹³³ JEREMY BENTHAM, *An Introduction to the Principles of Morals and Legislation*, in A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 113, 281 (Wilfrid Harrison ed., Basil Blackwell Oxford 1948) (1789) [hereinafter BENTHAM, *Introduction to the Principles of Morals and Legislation*] (noting the purpose of punishment is “to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, every thing that tends to subtract from happiness: in other words, to exclude mischief”). According to Bentham, punishment was just one way of “exclud[ing] mischief,” and other ways include preventing mischief, suppressing mischief by “disablement,”

both the restorative¹³⁴ and retributivist¹³⁵ theories discussed above, the coercive interest holds that the only “principle [that] justifies the infliction of punishment” is the prevention of a legal wrong¹³⁶ and the quantum of punishment inflicted on the defendant should be also directed at the prevention of a legal wrong, neither more nor less,¹³⁷ “whether [this quantum] be proportionable to the guilt of the [wrongdoer] or not.”¹³⁸

and giving satisfaction for mischief already committed by “affording a pleasure or satisfaction to the party injured.” *Id.* at 281 n.1 (emphasis omitted). Bentham’s concern in preventing mischief roughly corresponds with what I have called the protection interest, and his concern with giving satisfaction for mischief committed roughly corresponds with what I have called the restorative interest. Bentham’s concern with punishment, however, is an essentially utilitarian one (its purpose is “to control action . . . by its influence over [others’] wills; in which case it is said to operate in the way of *example*”), and he does not seem to make room for a utilitarian remedy outside the scope of punishment. *Id.* Further, Bentham’s theory distinguishes between two types of punishment that are designed to achieve the broader goal of deterrence: “[p]articular prevention,” which attempts to deter this particular wrongdoer by incapacitation, reformation, or intimidation, and “general prevention,” which tends to make an example of this particular wrongdoer to deter others in society from committing similar wrongful acts. *See* 1 JEREMY BENTHAM, *Principles of Penal Law*, in THE WORKS OF JEREMY BENTHAM 365, 396 (John Bowring ed., Edinburgh, Simpkin, Marshall, & Co. 1843) [hereinafter BENTHAM, *Principles of Penal Law*]. I find Bentham’s terms particularly confusing, however, for they conflate the notions of punishment, deterrence, and protection, which I have tried hard to separate in this Article. For example, incapacitation is not inconsistent with Kant’s retributivist theory of punishment, without regard to whether it has the wholesome utilitarian effect of deterrence; reformation can be achieved without recourse to anything we would understand as punishment today (though punishment itself can certainly be one effective method of reformation); and intimidation, if successful, can hardly be called punishment, for there need not have been any wrongful act capable of punishment. *See* JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 178 (Prometheus Books 1988) (1789) [hereinafter BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION] (noting that punishment should be administered “to prevent, in as far as it is possible, and worth while, all sorts of offences whatsoever”); PINCOFFS, *supra* note 17, at 86 (“The purpose of legal punishment . . . for Bentham, [is] the prevention of crime.”).

¹³⁴ The restorative view only allowed compensation to those suffering legal wrongs, and only in the amount necessary to put them in the position they would have occupied but for the wrong. *See supra* Part II.A.

¹³⁵ The retributive view required that punishment only be administered to a wrongdoer who has committed a legal wrong, and only in proportion to the wrong he has inflicted on his victim. *See supra* Part II.B.

¹³⁶ PALEY, *supra* note 17, at 384; *see also* PINCOFFS, *supra* note 17, at 29 (“[T]raditional utilitarians hold that punishment can be justified only by reference to prevention of crime.”).

¹³⁷ *See, e.g.,* BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 133, at 182 (“The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given.” (emphasis omitted)).

¹³⁸ PALEY, *supra* note 17, at 384. Thus, as with retributivism, the utilitarian’s answer to the question of how *much* we should punish is logically derived from his answer to the question of *why* we should punish in the first place, but it is important to point out that the two ideas do not stand or fall together; a rejection of the utilitarian principle of deterrence as a method for determining the quantum of punishment would not undermine the claim that the justification for punishing a wrongdoer is to prevent wrongdoing.

Along with retribution, the coercive interest (particularly in its negative form emphasizing deterrence) has long influenced the field of criminal law,¹³⁹ but has recently gained attention as a principle capable of organizing private law remedies,¹⁴⁰ mostly through the work of law and economics scholars.¹⁴¹ According to these scholars, remedies should be designed to achieve optimal levels of deterrence by preventing inefficient breaches of legal duties.¹⁴² So, for example, in the eyes of a law and economics scholar, “[t]he basic aim of contract law . . . [should be] to deter people from behaving opportunistically toward their contracting parties,”¹⁴³ the basic aim of tort law should be “the optimal reduction of accident costs,”¹⁴⁴ and the basic aim of criminal law should be “to prevent people from bypassing the system of voluntary, compensated exchange” so as “to promote economic efficiency.”¹⁴⁵ This can be done by setting the “remedy” equal to the amount of harm caused by the wrongdoer, multiplied by the inverse of the probability of detection, which would ensure that all nondetected wrongdoers would also be optimally deterred.¹⁴⁶

¹³⁹ *Id.* at 383 (“The proper end of human punishment is, not the satisfaction of justice, but the prevention of crimes.”); *see supra* Part II.B.

¹⁴⁰ *See, e.g.*, POSNER, *supra* note 44, at 23 (noting that only “since about 1960” has modern law and economics attempted to make sense of “the legal system across the board: to common law fields such as torts, contracts, restitution, and property; to statutory fields such as environmental regulation and intellectual property; to the theory and practice of punishment; to civil, criminal, and administrative procedure; to the theory of legislation and regulation; to law enforcement and judicial administration; and even to constitutional law, primitive law, admiralty law, family law, and jurisprudence”).

¹⁴¹ *See, e.g.*, POSNER, *supra* note 44.

¹⁴² *See* COOTER & ULEN, *supra* note 25, at 512. More formally, “optimal deterrence occurs at the point where the marginal social cost of reducing crime further equals the marginal social benefit.” *Id.*

¹⁴³ POSNER, *supra* note 44, at 94 (footnote omitted).

¹⁴⁴ JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 14 (2001); *see also id.* (“[E]conomic analysis explicates negligence in terms of the Learned Hand formula. . . . Negligence is the imposition of unreasonable risks, and the criteria for the proper application of the concept of a reasonable risk are given by the Learned Hand test. The Learned Hand test is itself simply an expression of the economic goal of tort law, namely, the optimal reduction of accident costs.”); Patrick J. Kelley, *The Carroll Towing Company Case and the Teaching of Tort Law*, 45 ST. LOUIS U. L.J. 731, 743 (2001) (“The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk.” (quoting *Conway v. O’Brien*, 111 F.2d 611, 612 (2d Cir. 1940), *rev’d*, 312 U.S. 492 (1941)) (internal quotation marks omitted)).

¹⁴⁵ Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195 (1985).

¹⁴⁶ *Cf.* COOTER & ULEN, *supra* note 25, at 396–97. This is because “deterrence,” as it is usually understood, refers to both the specific deterrence of the wrongdoer, and the general deterrence of other potential wrongdoers who are able to act with the benefit of the defendant’s example. *See, e.g.*, JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* 2–3 (1990).

Before looking at the relationship between the coercive interest and the other two remedial interests we have discussed, it is worth pausing to examine some of the areas in which the coercive interest has played a prominent role in structuring our law of remedies. One area in which the coercive interest is frequently acknowledged as a guiding remedial principle in private law is in the realm of punitive damages.¹⁴⁷ In case after case, courts have emphasized the twin objectives of punitive damages awards: to punish the wrongdoing party (a quadrant II activity) and deter potential future wrongdoers from engaging in similar prohibited conduct (a quadrant III activity).¹⁴⁸

Although the scope of this remedy has been reigned in in recent years,¹⁴⁹ thereby constraining a court's ability to achieve optimal deterrence,¹⁵⁰ its presence in our law is an important reminder that sometimes a remedy has as its primary purpose neither restoration (quadrant I) nor retribution (quadrant II), but coercion (quadrant III), usually in the form of deterring others from engaging in socially harmful activity. In fact, one of the primary reasons for the existence of this remedy is to operate in precisely those cases in which restorative damages may be unavailable or, if available, inadequate to achieve optimal deterrence.¹⁵¹

¹⁴⁷ See, e.g., *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2627 (2008) (“[A] penalty should be reasonably predictable in its severity, so that even Justice Holmes’s ‘bad man’ can look ahead with some ability to know what the stakes are in choosing one course of action or another.”).

¹⁴⁸ See, e.g., *id.* at 2621 (“[T]he consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct.”); *Philip Morris USA v. Williams*, 549 U.S. 346, 359 (2007) (Stevens, J., dissenting) (“[A] punitive damages award, instead of serving a compensatory purpose, serves the entirely different purposes of retribution and deterrence that underlie every criminal sanction.”); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (“[T]he damages awarded [must] be reasonably necessary to vindicate the State’s legitimate interests in punishment and deterrence.”); *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (“[S]ubstantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.”); *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 382 (Ct. App. 1981) (“The primary purposes of punitive damages are punishment and deterrence of like conduct by the wrongdoer and others.”).

¹⁴⁹ See, e.g., *Exxon Shipping Co.*, 128 S. Ct. at 2633 (“[G]iven the need to protect against the possibility . . . of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio . . . is a fair upper limit in . . . maritime cases.”); *Philip Morris USA*, 549 U.S. at 353 (prohibiting a jury from punishing a defendant for harm caused to non-party “strangers to the litigation,” even when such punishment may be necessary to achieve optimal levels of deterrence); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (“[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process.”).

¹⁵⁰ See COOTER & ULEN, *supra* note 25, at 397 & n.33 (noting that optimal punitive damages would require setting the “punitive multiple equal to the reciprocal of the enforcement error,” but that such an approach may be unconstitutional under *Philip Morris USA v. Williams*).

¹⁵¹ See, e.g., *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003). In *Mathias*, a case involving a motel infested with bedbugs, a punitive damages award of \$186,000 was upheld, even though compensatory damages were only \$5,000, in part because “[t]he defendant’s behavior was outrageous . . . and

Moving away from punitive damages, there are other areas in which the coercive interest plays an important role in structuring remedies.¹⁵² But perhaps nowhere is this truer than in the area of tort law, where law and economics scholars have advocated that the principle of deterrence (which I shall refer to more broadly as the principle of efficient coercion) reign over a wide range of civil wrongs.¹⁵³ Perhaps nowhere is this principle better exemplified than in the Learned Hand formula.

First formally set forth in *United States v. Carroll Towing Co.*,¹⁵⁴ Judge Learned Hand rejected the traditional “reasonable man” standard that seemed to require a potential wrongdoer to view the law of negligence from the good

at the same time difficult to quantify because a large element of [the harm] was emotional.” *Id.* at 674, 677. Judge Posner, writing for the court, justified the high ratio of punitive to compensatory damages in part by noting:

The award of punitive damages in this case . . . serves the additional purpose of limiting the defendant’s ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is ‘caught’ only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.

Id. at 677; *see also* *Kemezy v. Peters*, 79 F.3d 33, 34 (7th Cir. 1996) (“Compensatory damages do not always compensate fully. Because courts insist that an award of compensatory damages have an objective basis in evidence, such awards are likely to fall short in some cases, especially when the injury is of an elusive or intangible character. . . . [P]unitive damages are necessary in such cases in order to make sure that tortious conduct is not underdeterred, as it might be if compensatory damages fell short of the actual injury inflicted by the tort.”).

¹⁵² *See, e.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977) (noting that Section 4 of the Clayton Act is a “remedial provision” that, by allowing treble damages, plays “an important role in penalizing wrongdoers and deterring wrongdoing”); *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952) (“[A] rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers.”); *Taylor v. Meirick*, 712 F.2d 1112, 1120 (7th Cir. 1983) (noting that although “[i]t may seem wrong to penalize the infringer for his superior efficiency and give the owner a windfall,” this remedy “discourages infringement,” whereas a traditional award of compensatory damages would “not effectively deter this kind of forced exchange”); *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 390 F.2d 117, 123 (9th Cir. 1968) (holding that the remedy of “accountings of profits would, by removing the motive for infringements, have the effect of deterring future infringements”).

¹⁵³ *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 9, 85–86 (1987) (noting that although “most lawyers and law professors still believe . . . that the actual as well as the ideal function of tort law is to achieve fairness rather than efficiency,” in fact “something like the Hand formula has long been used to decide negligence cases,” and “Hand was purporting only to make explicit what had long been the implicit meaning of negligence”).

¹⁵⁴ 159 F.2d 169, 173 (2d Cir. 1947); *see also* LANDES & POSNER, *supra* note 153, at 9, 85–86 (observing that although “most lawyers and law professors still believe . . . that the actual as well as the ideal function of tort law is to achieve fairness rather than efficiency,” in fact “something like the Hand formula has long been used to decide negligence cases,” and “Hand was purporting only to make explicit what had long been the implicit meaning of negligence”).

man's internal point of view¹⁵⁵ and provided the following external standard by which courts should determine whether or not a defendant had acted negligently:

[An] owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability [of harm]; (2) the gravity of the resulting injury, [if the harm comes about]; [and] (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether $B < PL$.¹⁵⁶

¹⁵⁵ See, e.g., Kelley, *supra* note 144, at 749–50. Professor Kelley has noted that just as “[t]he critical question for Holmes . . . was not simple foreseeability by the ordinary reasonable man, but the specific laws of antecedence and consequence that enable us to foresee harm from certain conduct under certain circumstances,” so too did Judge Hand, a “friend and admirer of Holmes,” “refus[e] to include foreseeability in his simplified reformulation of the unreasonable foreseeable risk test.” *Id.* The result was a test that was “more scientific: you do not need to use that weaselly creature, the ordinary reasonable man, with his penchant for sentiment and outmoded custom, who may upset the purely objective calculation of costs and benefits.” *Id.* But see Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 817 (2001) (noting that, although the reasonable person test and the Hand formula can be thought of “as independent and alternative techniques for determining negligence,” the two can also be combined “by characterizing the Hand [f]ormula as the test a reasonable person would use in deciding which precautions to take to avoid accident risks to others”).

¹⁵⁶ *Carroll Towing Co.*, 159 F.2d at 173. As pointed out by Professor Kelley, “Judge Hand had expressed this same understanding of the appropriate test of negligence, without the algebraic notation, over six years before in *Conway v. O'Brien*.” Kelley, *supra* note 144, at 743; see also *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940) (“The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk.”), *rev'd*, 312 U.S. 492 (1941); *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 370 (Ct. App. 1981) (finding Ford to have engaged in cost-benefit analysis in deciding whether to spend money to improve safety of Ford Pinto to reduce costs resulting from accident-related injuries and deaths); Kelley, *supra* note 144, at 754 (“Judge Posner recognized the *Carroll Towing Co.* negligence formula as ‘a valuable aid to clear thinking about the factors that are relevant to a judgment of negligence and about the relationship among those factors’ even though ‘the formula does not yield mathematically precise results in practice, [since the burden of precautions, and the probability and potential gravity of harm have never all been quantified] in an actual lawsuit.” (alteration in original) (footnotes omitted) (quoting *U.S. Fid. & Guar. Co. v. Jadranska Slobodna Plovidba*, 683 F.2d 1022, 1026 (7th Cir. 1982))); Posner, *supra* note 13, at 32–33 (“Hand was adumbrating, perhaps unwittingly, an economic meaning of negligence. Discounting (multiplying) the cost of an accident if it occurs by the probability of occurrence yields a measure of the economic benefit to be anticipated from incurring the costs necessary to prevent the accident. The cost of prevention is what Hand meant by the burden of taking precautions against the accident. . . . If the cost of safety measures or of curtailment—whichever cost is lower—exceeds the benefit in accident avoidance to be gained by incurring that cost, society would be better off, in economic terms, to forgo accident prevention. A rule making the enterprise liable for the accidents that occur in such cases cannot be justified on the ground that it will induce the enterprise to increase the safety of its operations. When the cost of accidents is less than the cost of prevention, a rational profit-maximizing enterprise will pay

Under this approach, which appears in our common law¹⁵⁷ and is reflected in the *Restatement (Third) of Torts*,¹⁵⁸ a court need “merely calculate[] the costs and the benefits of an activity to decide whether an injurer [is] negligent,”¹⁵⁹ and need not be concerned with determining what a reasonable¹⁶⁰ person in a defendant’s position would have foreseen or whether

tort judgments to the accident victims rather than incur the larger cost of avoiding liability.” (footnote omitted).

¹⁵⁷ See Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1037–38 (1991) (“[T]he process of balancing the magnitude of the risk against the cost of risk prevention has been embedded in negligence law since the nineteenth century, and was rendered official by the *First Restatement of Torts* and Learned Hand’s opinion in *United States v. Carroll Towing Co.*” (footnote omitted)). *But see* Gilles, *supra* note 155, at 814 (arguing that although the *Restatement (Third) of Torts* has explicitly adopted the Hand formula, the cost-benefit approach of risk-utility balancing has been an implicit aspect of the reasonable person standard for seventy years); Kelley, *supra* note 144, at 752–53 (“Stephen Gilles has confirmed what this author had earlier suggested: judges ordinarily instruct juries on the negligence issue to determine whether the actor behaved as a ‘reasonably prudent person’ or an ‘ordinary reasonable person.’ Judges do not ordinarily instruct juries on the negligence issue to balance the costs and benefits of greater care.” (footnotes omitted)); Kenneth W. Simons, *Tort Negligence, Cost-Benefit Analysis, and Tradeoffs: A Closer Look at the Controversy*, 41 LOY. L.A. L. REV. 1171, 1183 (2008) (“To be sure, there is much controversy about the descriptive claim that the Hand test reflects Anglo-American tort law. Jury instructions (except in some products liability cases) rarely refer to Hand balancing, and appellate decisions refer to such balancing only intermittently. Rather, ‘reasonable care under the circumstances’ appears to be the (remarkably vague and opaque) ‘standard’ that many jurisdictions require juries to apply in determining negligence.” (footnotes omitted)).

¹⁵⁸ See RESTATEMENT (THIRD) OF TORTS § 3 (2010) (“A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person’s conduct lacks reasonable care are the foreseeable likelihood that the person’s conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.”). It may have been the case, however, that Judge Learned Hand was himself influenced by the ALI’s *Restatement* project, rather than the other way around. See Kelley, *supra* note 144, at 743–44 (“Where, then, did Judge Hand get his formula? We know from his biographers that Learned Hand was an intellectually ambitious and progressive judge, alive to the latest currents of thought in the legal community. This found expression in many ways, including Judge Hand’s early membership in the American Law Institute (ALI) and his vigorous support for its project of restating the common law. This suggests that a likely source for Hand’s description of the negligence standard would be the *Restatement of the Division of the Law Relating to Negligence*, approved by the ALI at its annual meeting in 1934. Sure enough, when we turn to that *Restatement* we find negligence explained as conduct posing an unreasonable foreseeable risk of harm to another. The *Restatement* defined an unreasonable risk as ‘one of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.’ The *Restatement* went on to list factors to be considered in determining the utility of the actor’s conduct, as well as factors considered in determining the magnitude of the risk.” (footnotes omitted) (quoting RESTATEMENT OF TORTS § 291 (1939))); *see also* Randy Lee, *A Look at God, Feminism, and Tort Law*, 75 MARQ. L. REV. 369, 387 (1992) (“The *Restatement* approach differs from the Hand test only in that it measures the burden and loss, factors in terms of social burden and loss rather than in terms of the burden and loss to the parties.”).

¹⁵⁹ Frank J. Vandall, *Judge Posner’s Negligence-Efficiency Theory: A Critique*, 35 EMORY L.J. 383, 383 (1986).

¹⁶⁰ Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 591 (2002). *But see* POSNER, *supra* note 44, at 169–70 (characterizing *Blyth v. Birmingham Water Works* as a case illustrating Baron Alderson’s economic

a tortfeasor's actions were wrongful or not.¹⁶¹ Instead, a court need only determine which party is the "cheapest cost avoider"¹⁶² (i.e., "the actor who could most easily discover and inexpensively remediate the hazard"),¹⁶³ and then place the cost of accident prevention on this person to encourage them to take only those precautions that are economically feasible.¹⁶⁴ The extent to which judges actually operate this way, as a descriptive matter, is beyond the scope of this Article,¹⁶⁵ but the fact that the coercive interest in general, and deterrence in particular, plays at least some role in the way judges think about remedies seems to be well established.

Finally, the coercive interest also plays a prominent role in the area of coercive civil contempt. This remedy, which allows a judge to "punish a prior offense as well as coerce an offender's future obedience,"¹⁶⁶ is an extremely powerful tool, allowing the judge to coerce a contemnor to perform or refrain from performing some specified act by imposing a daily fine on the contemnor or, in extreme cases, to confine him or her until he or she complies with the judge's order.¹⁶⁷ Once the contemnor, who "carr[ies] the keys of [his] prison in [his] own pocket[],"¹⁶⁸ performs or refrains from performing the specified act, the contempt is "purged," and the coercive fine (or imprisonment), having

understanding of the law of negligence, and remarking that although the injury was "of unprecedented severity," the court did not find negligence because "[t]he damage was not so great as to make the expected cost of the accident greater than the cost of prevention" because "the probability [of the loss] had been low").

¹⁶¹ Kelley & Wendt, *supra* note 160, at 591–92 (citing Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2402–13 (1990)).

¹⁶² Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1119 (1972).

¹⁶³ M. Stuart Madden, *Selected Federal Tort Reform and Restatement Proposals Through the Lenses of Corrective Justice and Efficiency*, 32 GA. L. REV. 1017, 1047 (1998).

¹⁶⁴ See, e.g., Gilles, *supra* note 155, at 818 (noting that "[t]he Hand Norm tells us that it is negligent to omit a precaution if the reduction in expected accident costs would have been greater than the costs of the precaution," or, stated algebraically, "it is negligent to omit a precaution if $PL > B$ "); Kelley & Wendt, *supra* note 160, at 591 ("[A]dvocates of the *Carroll Towing Co.* test have suggested that the ordinary reasonable person standard asks a cost-benefit question: whether the burden of taking precautions against a foreseeable risk is less than the foreseeable probability times the foreseeable gravity of threatened harm to others if the precautions are not taken." (footnote omitted)).

¹⁶⁵ Anecdotally, many examples can be provided in which judges both embrace and reject the coercive interest as an organizing remedial principle. Compare *Van Wagner Adver. Corp. v. S & M Enters.*, 492 N.E.2d 756, 760–61 (N.Y. 1986) (encouraging efficient breach by refusing to award specific performance in a contract governing the lease of a billboard), with *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 82 (3d Cir. 1948) (refusing to allow an efficient breach where one party "has deliberately broken his agreement").

¹⁶⁶ *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 828 (1994).

¹⁶⁷ Comment, *The Coercive Function of Civil Contempt*, 33 U. CHI. L. REV. 120, 120 (1965).

¹⁶⁸ *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902).

achieved its objective, comes to an end.¹⁶⁹ It is this power that distinguishes law “from mere social obligation,”¹⁷⁰ and “[w]ithout the availability of civil contempt, the law as between private parties loses its coercive quality, and for all practical purposes becomes mere voluntarism rather than law.”¹⁷¹

It is one thing to acknowledge that the coercive interest plays an important role in structuring our thinking about the way judges do (and ought to) award numerous remedies, but could this remedial interest serve to effectively organize all of our thinking about remedies, as some law and economics scholars might suggest? Here, the answer must be no. First, such a position would seem to undermine the restorative interest (quadrant I), in that it would deny a victim of wrongdoing a right to just compensation if such compensation were deemed unnecessary to deter a wrongdoer—or other members of society (including the victim)—from committing a similar wrongful act in the future.¹⁷² And second, the wholesale adoption of the coercive interest could also undermine the retributive interest (quadrant II), in that it could occasionally require a judge to punish an innocent party in a particularly newsworthy, high-profile case for the purpose of deterring others, all of which could help achieve a greater social good.¹⁷³ For, as others have argued

¹⁶⁹ *Id.*

¹⁷⁰ *Gwynn v. Gwynn*, 530 P.2d 1311, 1316 (Alaska 1975) (Connor, J., dissenting).

¹⁷¹ *Id.* Justice Connor went on to note that “[t]he ability of one party to invoke the remedy of civil contempt is vital to the functioning of the legal order, as well as the effectuation of the particular rights which that party seeks to enforce.” *Id.*

¹⁷² In fact, it is an overreliance on quadrant III that has caused some law and economics scholars to submit proposals that either ignore, or are anathema to, the restorative interest (quadrant I). *See, e.g.*, David Rosenberg & Steven Shavell, Essay, *A Simple Proposal to Halve Litigation Costs*, 91 VA. L. REV. 1721 (2005) (proposing to halve litigation costs while preserving effective deterrence by choosing only one half of all cases brought before a court to be litigated, while doubling the damages award for the victorious plaintiffs in those cases).

¹⁷³ PINCOFFS, *supra* note 17, at 33 (noting that although the utilitarian “will punish when, and only when . . . there is likely to be less mischief than if he did not punish, or punished in some other way,” it will sometimes be the case that “the best way to minimize mischief would be to punish an innocent man”); *see also id.* at 34 (“Would not a consistent utilitarian judge sometimes be constrained by the principle of the minimization of mischief to make use of misplaced punishment for the reduction of crime? How, as a utilitarian, could he *fail* to punish [an innocent] man . . . if an example were needed?”). Pincoffs further explained that “[n]ot only . . . will the utilitarian judge occasionally punish the innocent, but also he will from time to time reward the guilty.” *Id.* at 37. This position, however, is untenable.

To punish an innocent or reward a guilty man seems the very paradigm of injustice; and, to the extent that we value justice, we seem unable to accept the utilitarian position insofar as it bears on punishment.

Even if it can be shown that the utilitarian judge would very seldom punish an innocent or reward a guilty man, he would not—we are sure—refrain on principle from such acts, for he has only one principle: the maximization of public happiness. Guided by this one principle he cannot but regard the prisoner before the bar as a possible lever for the public weal. But to make use of

previously, “it is the threat of punishment and not punishment itself which deters,” and so long as “men believe that punishment has occurred even if in fact it has not,”¹⁷⁴ actual punishment of the wrongdoer would be unnecessary as the coercive interest will have accomplished its goals.

Therefore, although the coercive interest plays an important role in the law of remedies¹⁷⁵ and has been used by courts from time to time to justify extra-compensatory remedies,¹⁷⁶ its wholesale adoption seems impractical, in that it would not only require judges to punish wrongdoers more severely than warranted (based on the harm they have caused) for the sake of deterrence, but would allow society to sacrifice innocent parties on the altar of social justice for the sake of the greater good—a proposition that not only offends our notions of justice and fair play, but, to my knowledge, has not been accepted by any court.

D. The Protective Interest

Before turning to the protective interest itself, it will be useful to pause and summarize what we have covered thus far. We have seen that the restorative, retributive, and coercive interests can each be used to justify an assortment of remedies awarded by courts, and that each of these interests contains important clues about the way individual remedies are conceptualized and administered. We have also seen, however, that none of the theories we have discussed is capable, by itself, of uniting the kaleidoscope of remedies frequently

prisoners in this opportunistic way is to ignore the demands of justice. This is the center of gravity of the argument [against utilitarianism].

Id. (emphasis omitted).

It is important to note, of course, that just as the utilitarian criticisms of retributivism did not render utilitarianism true, so too is it that these retributivist criticisms of utilitarianism do not render retributivism true. *See id.* at 48.

¹⁷⁴ Mabbott, *supra* note 39, at 152.

¹⁷⁵ *See, e.g., Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 439–40 (2001) (“[C]itizens and legislators may rightly insist that they are willing to tolerate some loss in economic efficiency in order to deter what they consider morally offensive conduct, albeit cost-beneficial morally offensive conduct; efficiency is just one consideration among many.” (alteration in original) (quoting Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1450 (1993)) (internal quotation marks omitted)).

¹⁷⁶ *See, e.g., Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 674, 677 (7th Cir. 2003) (awarding \$5,000 in compensatory damages and \$186,000 in punitive damages to guests bitten by bedbugs on the ground that “[t]he defendant’s behavior was outrageous but the compensable harm done was slight”); *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 382 (Ct. App. 1981) (justifying punitive damages on the ground that “the manufacturer may find it more profitable to treat compensatory damages as a part of the cost of doing business rather than to remedy the defect”).

administered by judges under a single conceptual umbrella. If, as I have suggested, each remedy tends to advance the goals of one or more distinct remedial interests, each with its own temporal and personal perspective, does this mean that the legal realists have won after all, in that a judge is free to choose the remedial interest by which he or she will decide a case based on what he or she had for breakfast?

Before answering this question, it is important to note that, up until now, we have mostly considered the three previous remedial interests in isolation, as though each remedy could be siloed and understood through a single privileged perspective. What we have seen, however, is that while each interest yields important clues about the remedial puzzle as a whole, each interest is, in the end, simply one piece of the larger remedial puzzle. Each piece, to be sure, reveals a great deal about the nature of a given remedy that ostensibly lies within its four corners, but necessarily leaves out important information contained in the surrounding pieces. Even more importantly, each piece, taken in isolation, tells us very little about the way the remedial puzzle should itself be put together.

This final section to Part II, therefore, takes a slightly different approach. In addition to examining the protective interest—the fourth and final piece of the remedial puzzle—it spends some time exploring the conceptual space shared between and among each of the remedial interests previously discussed. In so doing, it is my hope that the law of remedies will be advanced in two important ways. First, such an approach will allow us to better understand perhaps the most important remedial interest (the protective interest) that, up until now, has been paid scant attention to by scholars and judges alike. Indeed, the identification of this interest alone could go a long way toward providing scholars and judges with a theoretically sound and juridically compelling justification upon which to base future remedial awards. Second, and perhaps even more importantly, by laying bare the relationship between and among all four remedial interests, it will be seen that *all four* remedial interests are invoked, to a greater or lesser extent, in the awarding of *most* remedies. Judges and policy makers who understand this relationship will not only better understand the effects of awarding a given remedy, but will also be able to fashion more complete and efficient remedies than would otherwise be possible, while better justifying those remedies that may appear, at first glance, to be either too harsh or too lenient.

With this background in mind, we are ready to turn our attention to the protective interest itself. Like the coercive interest, the protective interest is *forward-looking*, but unlike the coercive interest, the protective interest analyzes the wrong at issue from the potential *victim's* (rather than *wrongdoer's*) perspective. Perhaps the most commonly recognized protective remedy is the preventive injunction,¹⁷⁷ which, like restorative remedies, focuses on the victim's rights, but, unlike restorative remedies, aims to *maintain* the potential victim in his or her rightful position, rather than allowing the wrongdoer to harm the victim and then *restoring* the victim to his or her rightful position.¹⁷⁸

In this regard, the protective interest operates much like Calabresi and Melamed's property rule, which requires "that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller," whereas a remedy protected by, say, the restorative interest would operate according to their liability rule, which would only allow a wrongdoer to "destroy the initial entitlement if he is willing to pay an objectively determined value for it."¹⁷⁹ Although there is some truth to this statement, it seems strange to discuss how entitlements are protected, in a remedial context, before even defining what an entitlement is, in a rights-based context.¹⁸⁰

In Anglo-American law, at least, the decision between protecting a party with a property rule or a liability rule is governed by the long-standing "irreparable injury" rule.¹⁸¹ According to this rule, which has policed the divide between courts of law and courts of equity for half a millennium, courts only invoke the protective interest and grant an equitable injunction (preventing the victim from being harmed) in those instances where money damages would be inadequate to put the injured party back in the position he or she occupied prior to the injury.¹⁸² In theory, this rule allows wrongdoers to

¹⁷⁷ Declaratory judgments are another important preventive remedy, in which courts help parties avoid future harm by declaring in advance how the law would apply to a potential future dispute. For an excellent article discussing the pros and cons of using declaratory judgments to prevent such disputes *ex ante*, rather than adjudicate them *ex post*, see Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275 (2010).

¹⁷⁸ See *infra* text accompanying notes 181–87.

¹⁷⁹ Calabresi & Melamed, *supra* note 162, at 1092.

¹⁸⁰ An attempt to more precisely define the concept of entitlement, and explore the relationship between rights and remedies, will be taken up in a future article.

¹⁸¹ See generally LAYCOCK, *supra* note 37.

¹⁸² See, e.g., *Bannercraft Clothing Co. v. Renegotiation Bd.*, 466 F.2d 345, 356 n.9 (D.C. Cir. 1972) ("The very thing which makes an injury 'irreparable' is the fact that no remedy exists to repair it."), *rev'd on other grounds*, 415 U.S. 1 (1974).

infringe on a victim's rights in the present so long as they are willing and able to pay money damages in the future.¹⁸³ In practice, however, few courts allow a wrongdoing party to behave in such a manner—in spite of this well-settled rule,¹⁸⁴ which seems to be honored more in the breach than in the observance. This insight can help shed light on each of the remedial interests previously discussed.

Consider, for example, the case of *Pardee v. Camden Lumber Co.*,¹⁸⁵ in which a landowner sought an injunction to prevent a company from cutting the timber on his land. Because the plaintiff's timber had a readily ascertainable market value, and because the defendant was willing to pay this value after chopping down the wood, the irreparable injury rule (in addition to well-established precedent) required that the court allow the defendant to chop down the plaintiff's timber, leaving the plaintiff to recover only the restorative (and substitutionary) remedy of money damages.¹⁸⁶ The court, albeit uncomfortably, even admitted as much.¹⁸⁷ Yet, the judges understandably felt uneasy about the case and were uncomfortable applying the rule.¹⁸⁸ Something seemed strange—even perverse—with allowing one party to run roughshod over a victim's rights simply because that party could pay for the harm it caused.¹⁸⁹ Something seemed wrong, in short, with protecting a plaintiff's right with a liability rule rather than a property rule even though doing so would

¹⁸³ See, e.g., LAYCOCK, *supra* note 37, at vii (“[C]ourts will not prevent harm if money damages could adequately compensate for the harm. [The rule] says that I am free to destroy your property as long as I can pay for it.”); see also HOLMES, *supra* note 31, at 236 (“It is true that in some instances equity does what is called compelling specific performance. But . . . [t]his remedy is an exceptional one. The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses.”); Holmes, *supra* note 28, at 462 (“The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.”); *supra* Part II.A.

¹⁸⁴ See, e.g., LAYCOCK, *supra* note 37, at 23 (“Courts do not deny specific relief merely because they judge the legal remedy adequate. The irreparable injury rule almost never bars specific relief, because substitutionary remedies are almost never adequate. At the stage of permanent relief, any litigant with a plausible need for specific relief can satisfy the irreparable injury rule.”).

¹⁸⁵ 73 S.E. 82, 83 (W. Va. 1911).

¹⁸⁶ See *id.* at 84 (“Our rule permits a mere trespasser to utterly destroy the forest of his neighbor, provided he is solvent and able to respond in damages to the extent of the value thereof.”).

¹⁸⁷ See *id.* at 83 (“This appeal from an order dissolving an injunction awarded to prevent the cutting of timber on a tract of land . . . would necessarily and inevitably fail under a rule or principle often declared by this court, if we should adhere to it. Unless the trespass itself constitutes irreparable injury, none is shown . . .”).

¹⁸⁸ See *id.* (“However, [the irreparable injury] rule seems not to have commanded uniform approval by the public, nor by the members of the legal profession . . .”).

¹⁸⁹ See *id.* at 84.

have not only satisfied the irreparable injury rule, but also would have comported with the restorative interest emphasized in Part II.A.

Having decided to reject the irreparable injury rule (and the restorative remedy of money damages), upon what principle could a court base its decision? The retributive interest, discussed in Part II.B, seems inappropriate here because it would require that a wrongdoing party be retributively “punished” for the harm it caused, but here, one would have great difficulty characterizing any action taken by this court—*before* any harm has occurred—as “punishment.”¹⁹⁰ If, on the one hand, the court allowed the defendant to cut down the plaintiff’s trees on the condition that the defendant compensated the plaintiff, the court would have, in effect, granted the defendant the private right of eminent domain, by which the defendant could seize the trees on the plaintiff’s property so long as it paid the plaintiff his full market value. Only the most perversely creative use of language could characterize the granting of such a power as “punishment.” If, on the other hand, the court issued an injunction and prevented the defendant from taking what did not belong to it in the first place, it is once again all but impossible to see how even the most skilled lexicographer could twist the definition of *retributive punishment* to encompass such a remedy. Thus, like the restorative interest, the retributive interest, quite simply, is not equipped to deal well with cases in which the harm has not yet occurred and is therefore deficient when it comes to approaching remedies prospectively.

Might the coercive interest provide a better solution? At first glance, the coercive interest, with its emphasis on approaching remedies from an *ex ante* perspective, seems well suited to the task. A court would simply need to determine whether allowing the defendant to chop down the plaintiff’s trees would result, on the one hand, in socially productive activity,¹⁹¹ in which case the court should allow this activity (by protecting the plaintiff’s right to his trees with a mere liability rule and allowing the defendant to engage in such activity in exchange for compensation to the plaintiff), or, on the other hand, in socially unproductive activity, in which case the court should disallow this activity (by protecting the plaintiff’s right to his timber with a property rule and thereby preventing the defendant from engaging in such activity without the plaintiff’s permission).¹⁹²

¹⁹⁰ See *supra* text accompanying note 46.

¹⁹¹ As would be the case, for example, where the defendant is able to put the trees to a higher valued use than the plaintiff could, perhaps in the form of construction-grade lumber.

¹⁹² See *supra* text accompanying note 133.

Upon closer examination, however, there are several problems with the coercive interest being applied in such a case. First, as an epistemological matter, it is difficult if not impossible to determine whether the defendant or the court is in a better position than the plaintiff in determining how to put the plaintiff's resources to their most socially productive use.¹⁹³ There is, in other words, a significant risk of undercompensation in allowing anyone other than the plaintiff to determine how much or how little the plaintiff values a specific good or service. Second, there is something normatively troubling with the argument that it is *ever* justifiable to allow one party to take something belonging to another on account of it being efficient to do so.¹⁹⁴ There are, after all, other principles besides efficiency with which society is justifiably concerned. And finally, as a descriptive matter, courts simply do not typically justify *ex ante* remedies (e.g., injunctive relief) on efficiency grounds, although it would be easy for them to do so. Courts do, however, frequently touch upon (and are guided by) the protective interest in more cases than might at first meet the eye, as we shall soon see.

To illustrate this point, let us return once more to *Pardee* to see how the judges actually decided the case. I noted previously that the judges in *Pardee* felt uncomfortable allowing the defendant to cut the plaintiff's trees, although governing law (i.e., the irreparable injury rule) seemed to not only allow—but require—this outcome.¹⁹⁵ How, then, did the judges go about protecting the plaintiff's property with more than a liability rule? The answer, it turns out, is by invoking language suggestive of the protective interest itself!

Taking a decidedly *ex ante*, victim-centered approach to the problem, the court paid scant attention to the remedy required to make the plaintiff whole (restorative interest), the proportional punishment to be inflicted on the defendant to pay for its culpable wrong (retributive interest), or the coercion necessary to encourage or deter this defendant (or others) from engaging in socially productive or unproductive activities (coercive interest). Instead, the court spoke in terms of exercising its “preventive powers” to “protect and vindicate the right of an owner of property” by way of a property rule, which would not only ensure that the owner's property would be “immune[] from

¹⁹³ See, e.g., Marco J. Jimenez, *The Value of a Promise: A Utilitarian Approach to Contract Law Remedies*, 56 UCLA L. REV. 59, 108 (2008).

¹⁹⁴ See, e.g., Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947, 963–69 (1982) (likening efficient breach of contract to efficient theft of property, and rejecting both on moral grounds).

¹⁹⁵ See *Pardee v. Camden Lumber Co.*, 73 S.E. 82, 84 (W. Va. 1911).

injury,” but would also protect a “fundamental principle[] of . . . jurisprudence” not sufficiently appreciated by the irreparable injury rule.¹⁹⁶

And although protective remedies have been treated as exceptional in our common law system, this manner of thinking is far from unusual: whenever the restorative, retributive, or coercive interest seem incapable of effectively dealing with the remedial problem at hand, courts often invoke the logic—if not the words—underlying the protective interest to justify their remedial choices.¹⁹⁷ This often happens whenever the threatened harm can be prevented, regardless of the irreparable injury rule,¹⁹⁸ and is frequent whenever the defendant’s wrongdoing appears to be intentional. And this is true in numerous areas of the law ranging from remedies for breach of contract¹⁹⁹ to unjust enrichment²⁰⁰ to encroachment.²⁰¹ So why does the ostensibly exceptional protective interest seem to have such wide-ranging scope? In short, as this Article argues in the next section, it is because each of the other three remedial interests we have discussed tend to move toward bringing about the ends of the protective interest. Indeed, although courts generally tend to think about remedies in terms of restoration, retribution, or coercion, the remedies they award, in some measure or other, help bring about the aims of protection. This emphasis on *protecting rights*, though rarely expressed, was perhaps best summed up by the court in *Pradelt v. Lewis*,²⁰² which noted that “the duty of

¹⁹⁶ *Id.* at 83–85.

¹⁹⁷ *See, e.g.*, *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 390 F.2d 117, 122–23 (9th Cir. 1968) (repeatedly emphasizing the need to “protect” trademark owner from “deliberate” infringement); *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 82 (3d Cir. 1948) (acknowledging the irreparable injury rule but simultaneously finding that there is “no reason why a court should be reluctant to grant specific relief when it can be given without supervision of the court or other time-consuming processes against one who has deliberately broken his agreement”); U.C.C. § 2-609 official cmt. 1 (2011) (“[T]he essential purpose of a contract between commercial men is actual performance and they do not bargain merely for a promise, or for a promise plus the right to win a lawsuit . . .”).

¹⁹⁸ *See supra* note 183.

¹⁹⁹ *See supra* notes 85, 95, 98–99, 197 (discussing increased remedies for deliberate breaches of contracts).

²⁰⁰ *See supra* text accompanying notes 99–128 (discussing increased remedies for deliberate unjust enrichment cases).

²⁰¹ *See, e.g.*, *Ariola v. Nigro*, 156 N.E.2d 536, 540 (Ill. 1959) (stating that injunctions are only typically issued in accidental encroachment cases after weighing such factors as the “expense and difficulty of removing an encroachment in relation to the damage resulting therefrom, or the benefit that would accrue from its removal”). However, “where the encroachment was intentional, in that [the] defendant proceeded despite notice or warning, or where he failed to take proper precautions . . . the courts . . . have refused to balance the equities, and have issued the mandatory injunction without regard to the relative convenience or hardship involved.” *Id.* (citations omitted).

²⁰² 130 N.E. 785 (Ill. 1921).

the courts is to protect rights, and innocent complainants cannot be required to suffer the loss of their rights because of expense to the wrongdoer.”²⁰³ This thinking lay beneath the surface of much of our remedies jurisprudence, although it is not always so explicitly expressed.

E. Summary

Thus far, I have shown that the law has come a long way since the days of Charles Alan Wright, whose judges had “no place where [they could] find the whole [law of remedies] put in perspective,” but were left to comb through treatises governing “Damages, Equity, Specific Performance, Injunction, Quasi-Contracts, Rescission, Declaratory Judgments, Restitution, and perhaps others”²⁰⁴ whenever they had to decide a remedial problem. While things are certainly better today, the law of remedies still lacks an overarching organizational structure, although, as I have argued, much structure is provided by way of the four remedial interests outlined above. By thinking about remedies in terms of these interests, each of which emphasizes a unique temporal and personal perspective, judges can better structure remedies by thinking about them in terms of the remedial goals they wish to achieve.

I have also shown, however, that no single remedial interest can (or should) be used, as a general matter, to decide all remedies cases. Instead, recourse to *all four* remedial interests (and especially the protective interest) is needed to make sense of the numerous (and varied) remedial problems arising in our courts’ dockets on a daily basis.

III. REMEDIAL CONSILIENCE: UNIFYING THE FOUR REMEDIAL INTERESTS

Up to this point, I have presented each remedial interest as offering a unique vantage point through which one may view the law of remedies in general and the numerous remedies awarded by judges on a daily basis. But, as suggested in Part I of this Article, these interests do not stand alone, but are related to one another in a predictable fashion, which may help judges think more clearly about the remedial goals underlying all remedies. Therefore, this Part briefly examines the relationship between and among the four remedial interests and shows how the choice (consciously or otherwise) to view remedies through a specific remedial lens not only fails to take into account

²⁰³ *Id.* at 787 (quoting *Gulick v. Hamilton*, 122 N.E. 537, 540 (Ill. 1919)) (internal quotation marks omitted).

²⁰⁴ Wright, *supra* note 1, at 376.

important remedial consequences that are too often ignored, but (even more importantly) also fails to take into account the purpose toward which all remedies are—and ought to be—naturally directed: the protection and preservation of the victim's rights.

A. *The Four Remedial Interests in an Ideal World*

Let us begin by imagining a fictitious society, Law Land, composed of four individuals: Wrongdoer, Victim, Judge, and Observer. Suppose that Judge (who we might think of along the lines of Orwell's "Big Brother") follows Wrongdoer and Victim's every move, and has perfect knowledge of the goings-on in her society. Observer, meanwhile, mostly minds his own business, but is curious about how Wrongdoer, Victim, and Judge interact.

Suppose that one day, Victim, upon information and belief, comes to learn that Wrongdoer intends to steal his shovel. Assume further that later that day, Wrongdoer in fact steals, and accidentally breaks, Victim's shovel, which is valued at \$20. Victim, upon learning that his shovel is missing, immediately sues Wrongdoer.²⁰⁵ The matter comes before Judge, who, drawing upon her perfect knowledge of the goings-on in her society, correctly determines that Victim's shovel has gone missing due to Wrongdoer's deliberate actions and not, for example, from Victim's own carelessness in misplacing the shovel. Judge, therefore, decides to issue an award in Victim's favor and returns to her chambers to set about writing her opinion. Upon what grounds shall she justify her remedy?

One answer, of course, and that most frequently used by judges today, is that she is likely to take an ex post, victim-oriented view and justify the remedy by way of the restorative interest.²⁰⁶ Putting pen to paper, she begins to write:

"The fundamental principle of damages is to restore the injured party, as nearly as possible, to the position he would have been in had it not been for the wrong of the other party."²⁰⁷ Here, had it not been for Wrongdoer's actions, Victim would have had a shovel, valued at \$20, so this court therefore finds that Wrongdoer shall pay Victim \$20.

²⁰⁵ Like ours, theirs is a litigious society.

²⁰⁶ See, e.g., *United States v. Hatahley*, 257 F.2d 920, 923 (10th Cir. 1958).

²⁰⁷ *Id.*

Judge looks upon her work with some satisfaction, and, giving the matter more thought, it occurs to her that the \$20 will not come from a money tree, but must be *paid* by Wrongdoer. Thus, Judge realizes that what will feel like restoration to Victim will feel like retribution to Wrongdoer.²⁰⁸ Following our definition of retributive punishment above,²⁰⁹ Wrongdoer will feel both that (a) he is being punished for breaching a legally recognized duty, and (b) that the quantum of punishment has been exacted in proportion to the grievousness of Wrongdoer's wrong. Therefore, Judge realizes that her opinion can also be justified on retributive grounds. To explain this, Judge takes out a fresh sheet of paper and begins to write:

The fundamental principle of retribution is to punish the wrongdoing party, as nearly as possible, in proportion to the grievousness of his harm.²¹⁰ Wishing neither to punish Wrongdoer too little or too much for his actions, the court determines that an appropriate punishment shall be \$20, which will take from Wrongdoer the dollar equivalent of what Wrongdoer himself has taken from Victim.

Judge is pleased by the equivalence between the two monetary awards, although the justifications used are quite different. On the one hand, it strikes Judge as uncanny that an award punishing Wrongdoer should be the same as an award compensating Victim because she can recall many cases in which other judges struggled to draw a firm line between compensation and punishment.²¹¹ On the other hand, she is satisfied that she can kill two remedial birds with one legal stone, so to speak, and compensate Victim while punishing Wrongdoer without having to choose between the principles of restoration and retribution.

Just as she is about to publish her decision, it occurs to Judge that perhaps she is taking too narrow a view of the problem. Judge recalls that Observer, always curious about the goings-on in Law Land, will soon read her decision, which will itself create a precedent by which Observer will feel justified to act.

²⁰⁸ In a somewhat different form, this point has been recognized by our nation's highest court. *See, e.g.,* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003) ("Compensatory damages . . . already contain [a] punitive element.").

²⁰⁹ *See supra* Part II.B.

²¹⁰ *See supra* note 47.

²¹¹ *See, e.g.,* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2621 (2008) ("[T]he consensus today is that punitives are aimed not at compensation but principally at retribution . . ."); *see also* 1B COMM. ON PATTERN JURY INSTRUCTIONS ASS'N OF JUSTICES OF THE SUPREME COURT OF THE STATE OF N.Y., NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL § 2:278 (3d ed. 2013) ("The purpose of punitive damages is not to compensate the plaintiff but to punish the defendant . . .").

“Perhaps,” she thinks to herself, “rather than compensating Victim or punishing Wrongdoer, what I should be doing is ensuring that Wrongdoer and others who learn of Wrongdoer’s punishment, such as Observer, no longer engage in such activities again. What remedy,” she wonders, “would best accomplish this goal?”

Recalling her training in law and economics, Judge remembers that the best remedy would not only leave the *victim indifferent* between not being injured, on the one hand, and being injured plus being compensated, on the other,²¹² but, where the goal is deterrence, as it is here, it would ensure that Wrongdoer (and others, like Observer, who learn of Wrongdoer’s punishment) will have no incentive to engage in such socially unproductive activities in the future.²¹³ Because Judge has at her disposal the means to detect every wrong in her society,²¹⁴ she quickly realizes that an award of \$20 will make Victim indifferent between no injury, on the one hand, and injury plus \$20, on the other, and will likewise ensure that Wrongdoer no longer has any incentive to steal Victim’s shovel.²¹⁵ In Law Land, therefore, \$20 again seems to be the perfect remedy.

At this point, Judge realizes that it must be more than mere coincidence that the restorative, retributive, and coercive interest all point to the same \$20 remedy. Further, Judge realizes that, in the case before her, her decision to invoke any *one* of these remedial interests would have worked just as well to protect any of the other remedial interests just discussed, and would even have helped protect Victim from future harmful acts (the protective interest) by removing Wrongdoer’s (and Observer’s) incentive to steal Victim’s property in the future.

Judge begins to consider, however, exactly how Victim would be protected. If she writes an opinion announcing that \$20 shall be the fine for any future theft of Victim’s shovel, Wrongdoer (and Observer) would have no incentive to steal the item, assuming they could go elsewhere and purchase the shovel

²¹² See, e.g., COOTER & ULEN, *supra* note 25, at 491 (“*Perfect compensation* is a sum of money that leaves the *victim indifferent* between the injury with compensation or no injury.”).

²¹³ More formally, “[s]ocially optimal deterrence occurs at the point where the marginal social cost of reducing crime further equals the marginal social benefit.” *Id.* at 512.

²¹⁴ We will also assume, for the time being, that it is costless for the judge to do so, an assumption that will be revised momentarily.

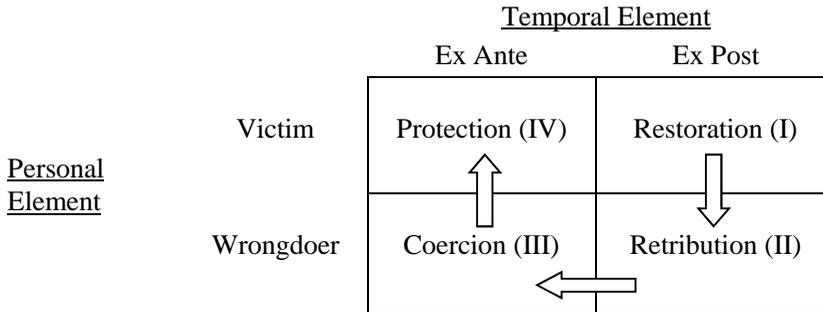
²¹⁵ This is because the wrongdoer will immediately be detected, and will be required to either give the shovel back to the victim, where the shovel is available, or pay its dollar equivalent to the victim (\$20), before the wrongdoer is able to put the shovel to productive use. The wrongdoer’s actions, in other words, would be entirely pointless.

for \$20, its fair market value. Why? Because the Judge would detect the transgression and then force Wrongdoer (or Observer, should he, too, become a wrongdoer) to pay \$20 to Victim. Wrongdoer, in other words, would be indifferent between stealing Victim's shovel and paying \$20 in damages, and purchasing a shovel from the store for \$20.

Pondering this, Judge is overcome by a terrible insight: she realizes that, although her decision would make Wrongdoer indifferent between stealing Victim's shovel (and paying \$20 in damages) and purchasing a shovel from the store for \$20, Wrongdoer would only be *indifferent* between these two acts! This means that Wrongdoer is likely to do whatever is most convenient in the situation he finds himself in at any given time. When Wrongdoer is close to the store when overcome by a desperate urge to own a shovel, which will happen, say, 50% of the time, Wrongdoer will purchase the shovel. But when Wrongdoer is close to Victim when overcome by the same desperate urge to own a shovel, which will happen the other 50% of the time, Wrongdoer will steal the shovel and pay damages to Victim. To *protect* Victim's rightful position, therefore, Judge will have to do something more than just *deter* Wrongdoer, which can only be accomplished by setting the price of the remedy *above* the level at which Wrongdoer is indifferent.

Thinking back on this exercise, Judge realizes that these remedial interests do not operate in isolation, but that the pursuit of one juridical interest leads logically to the advancement of other remedial goals. In short, she notices that choosing one remedial interest (e.g., restoration) does not exclude—but necessarily entails—the pursuit of other remedial interests (e.g., protection).

Further, Judge recognizes an important pattern to this relationship: whereas restoration requires that Wrongdoer pay a sum of money to Victim, enforcing the award *requires* retributively punishing Wrongdoer. In addition, Judge recognizes that enforcing the retributive interest by punishing Wrongdoer will also operate to deter not only Wrongdoer, but others, such as Observer, who learn about Wrongdoer's punishment, thus invoking the *coercive* interest. And finally, Judge realizes that coercing others will have the effect of preventing, to some extent, harm to Victim, such that employing the coercive interest will have the effect of also invoking the *protective* interest. She notices, in effect, that there is a clear line running from the restorative interest to the retributive interest to the coercive interest to the protective interest, per Figure 3 below.

FIGURE 3: THE REMEDIAL PATHWAY

In contemplating this diagram, Judge wonders why, if these relationships among the remedial interests hold in the real world, so many other judges, in the course of deciding a case, go out of their way to declare that they have chosen a particular remedy for its ability to accomplish one part of a remedial goal (e.g., awarding money damages to compensate the victim) at the expense of—and while going out of their way to disclaim that they are furthering—another part of a different remedial goal (e.g., punishing the wrongdoer)?²¹⁶

Judge also worries about the inadequate protection that is indirectly given to the protective interest when other remedial goals take center stage. Pondering these questions, Judge attempts to recall some of the less perfect societies she has studied—societies in which the bad guy is not always caught, or caught but not prosecuted, or prosecuted but not found liable, or found liable but unable (or unwilling) to pay, or where the thing that gets stolen or destroyed (e.g., Victim's shovel) cannot always be valued (as with an heirloom) or replaced (as with the loss of human life). In such messy worlds, what is the relationship between and among the remedial interests previously discussed?

B. The Four Remedial Interests in an Imperfect World

To examine this relationship, Judge conjures up the following test case. Suppose a large auto manufacturer wants to offer an affordable subcompact car and is presented with two choices. First, the company can place the fuel tank above the car's rear axle, which will increase the car's safety by providing

²¹⁶ See *supra* Part II.

additional crunch space in the event of a rear-end collision, but will reduce the available trunk space which will, in turn, decrease overall sales. Second, the company can place the fuel tank behind the rear axle of the car, which will reduce the car's crunch space (and, therefore, its overall safety) by causing the gas tank to explode in the event of a rear-end collision. It is estimated that about 180 drivers will suffer agonizing burn *deaths*, and about another 180 will suffer agonizing burn *injuries*, but due to the increase in overall trunk space, many consumers (not knowing about this defect) will buy such a car, which will increase the company's overall sales.

Suppose further that the company, about to select the second option, learns that all of these deaths and injuries can be prevented by reinforcing the automobiles at a cost of a few extra dollars per automobile. Employing Learned Hand's basic formula, $B < PL$, the company calculates that each death will cost the company \$200,000, and each burn injury will cost the company \$67,000. Because 180 individuals are expected to suffer each type of injury, the company multiplies 180 by \$267,000, and calculates that the total cost to the company from the deaths and injuries that will be caused if the repairs are not undertaken will be roughly \$50 million. Having calculated PL, the company still needs a figure for B. The repairs, it is learned, will cost the company around \$137 million. Plugging this amount into B, the company realizes that it will not be found negligent if it undertakes the repairs; however, it nevertheless realizes that, from an economic point of view, it should *not* undertake the repairs, because it could earn an additional \$87 million by manufacturing the defective cars (which will sell for an additional \$137 million) while paying out damages of \$50 million. Not surprisingly, the company elects *not* to have the repairs made.²¹⁷

In such a situation, what now would be the relationship between and among the remedial interests? Beginning first with the restorative interest, Judge

²¹⁷ This "hypothetical" case is based loosely on the facts of *Grimshaw v. Ford Motor Co.* See 174 Cal. Rptr. 348, 384 (Ct. App. 1981) ("There was evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits."); see also Barbara Ann White, *Risk-Utility Analysis and the Learned Hand Formula: A Hand That Helps or a Hand That Hides?*, 32 ARIZ. L. REV. 77, 131 n.279 (1990) ("In making its cost-benefit analysis, Ford used the figures calculated by the National Highway Traffic and Safety Association to be the value of human life (\$200,000) and serious burn injury (\$67,000). Using an estimation of 180 burn deaths and 180 serious burn injuries per year, Ford calculated that the benefits that would be realized by adding safety devices to the Pinto's fuel tank, in terms of lives saved and injuries prevented, would equal approximately \$50 million dollars, whereas the associated costs would be \$137 million dollars.").

imagines a case in which a victim is severely burned in a horrible crash, and the company is forced to pay \$67,000 in compensatory damages. If we assume that \$67,000 is truly compensatory, at least to the extent such compensatory remedies can be said to actually “restore,” either in-kind or substitutionarily, the victim to the position they occupied *ex ante*, what can we say about the effect of such an award on the other remedial interests?

Even putting aside the fact that the company’s actions may entitle the victim to a separate award of punitive damages,²¹⁸ Judge realizes that the restorative remedy of \$67,000 does, to some extent, also punish the wrongdoer for the harm it has caused because the \$67,000 going to the victim is coming out of the company’s coffers, and, as such, bears a proportional relationship to the harm it has caused this victim. So far, this is just a mirror image of the shovel example above, where the \$20 paid to Victim (restoration) was the same \$20 paid by Wrongdoer (retribution). Due to the messiness of the real world, however, and unlike the shovel example above, Judge realizes that other similarly situated victims may be injured in accidents for which the company is *not* sued (perhaps because the victim never learned that the accident was due, in large part, to a manufacturer’s design defect). Or, perhaps, Judge realizes that the company *may be* sued but, due to judicial error, found not liable. Or, carrying this line of thought further, the company may be sued, and found liable, but win on appeal. Or, taking the case further still, the victim might sue, the company might be found liable, the victim might win on appeal, but the company may become bankrupt before the victim is paid.

Judge realizes, in other words, that although a restorative remedy will, to some extent, further the ends of the retributive interest, it will only do so indirectly and may not do so at all if any of the intervening factors discussed above are present. It is unlikely, in other words, that the retributive interest will be given *full* effect without a court specifically taking it into account.

Turning to the retributive interest, Judge notices another interesting phenomenon. Due to enforcement error, cost of detection, etc., a fully retributive remedy, which would cause the wrongdoer to fully pay for the harm it has caused (but no more), will have *some* deterrent value, to be sure, but will not achieve the level of optimal deterrence sought by the coercive interest.

²¹⁸ This, in fact, is what happened in the actual case. See *Grimshaw*, 174 Cal. Rptr. at 384 (“There was ample evidence to support a finding of malice and Ford’s responsibility for malice.”); *id.* at 391 (“Here, the judge, exercising his independent judgment on the evidence, determined that a punitive award of 3½ million dollars was ‘fair and reasonable.’”).

To see why, let us return to our simple hypothetical in which Wrongdoer stole Victim's \$20 shovel. In an imperfect world, Wrongdoer's chance of getting caught will not be 100%, as we previously assumed, but something much lower—say 50%. Therefore, Wrongdoer, in deciding whether to steal Victim's shovel or purchase his own, will take into account his chance of being caught, along with the damages he will have to pay if caught. Wrongdoer reasons that one half of the time he will be caught and be required to either return the shovel to Victim or pay \$20 in damages. But the other half of the time, Wrongdoer will get away with his theft and will realize a gain of \$20. On average, therefore, each theft will cost Wrongdoer \$10 in damages ($0.5 \times \$20 = \10), but because each theft will yield a total of \$20, he will, on average, realize a profit of \$10 per theft ($\$20 - \$10 = \10). Because theft is, on average, profitable to Wrongdoer, pure retributive punishment will not adequately deter him from engaging in this particular wrongful activity.²¹⁹ For the same reason, retributive punishment will not adequately deter the car manufacturer from putting out a defective product, as only a portion of its defective cars will malfunction, its fault will only be detected in a portion of those malfunctions, it will only be sued in a portion of such detected malfunctions, it will only lose a portion of those cases in which it is sued, etc. To be sure, retributive punishment does provide *some* deterrence, but the amount of deterrence it provides is far from optimal.

Thus, after considering the coercive interest, Judge realizes that the only way to optimally deter the potential wrongdoer from engaging in such activities is to put herself in the wrongdoer's shoes and ensure that the net benefit to the wrongdoer from engaging in such activities would be zero. Returning to the theft example, this can be done by multiplying the damages award by the reciprocal of the probability of enforcement. There, because the thief will only be caught stealing the shovel 50% of the time, we must multiply the damages award (\$20) by the reciprocal of 50% (or 200%), which means that one can only optimally deter Wrongdoer by requiring the thief to pay \$40 each time he is caught. By doing so, we would exceed what is called for under the principle of retributive punishment, but would realize the goals of the coercive interest by removing from Wrongdoer any incentive he might have had to engage in such deleterious behavior. This is so because although each successful theft will still gain him \$20, he must now pay \$40 when he is caught, and, because he is caught 50% of the time, he will recognize, on

²¹⁹ This example is based loosely on an example provided by Robert Cooter and Thomas Ulen in their excellent book. See COOTER & ULEN, *supra* note 25, at 493.

average, a profit of \$0 per theft.²²⁰ In addition to accounting for the probability of the wrongdoer being caught, a successful coercive remedy would also take into account other factors such as: the probability of the victim bringing a lawsuit, the probability of the victim winning the lawsuit, the probability of the victim being successful on appeal, the probability of the wrongdoer being liquid, etc.²²¹

Finally, turning to the protective interest itself, Judge will recognize that optimal deterrence will provide *some* measure of protection to potential victims, but, as discussed previously,²²² will by no means ensure that potential victims receive the same level of protection they would have if Judge focused on the protective interest directly. This is so for several reasons. First, as previously discussed, a perfect coercive remedy would make *Wrongdoer* indifferent between two acts, but, all things equal, would not protect *Victim* more than 50% of the time.²²³ And second, one need only recall that the coercive interest is concerned only with *optimally* deterring wrongdoers from engaging in socially unproductive acts, which therefore *allows* wrongdoers to engage in those activities in which the wrongdoer can internalize (i.e., pay for) his external harms. The Learned Hand formula discussed earlier, for example, embodies this approach.²²⁴ But victims, who place a different value on harms done to them than would a wrongdoer or court, would undoubtedly require a much higher price to be paid to ensure they were adequately protected. They would want, in other words, to be protected with a property rule rather than a liability rule, and judges would have to determine *not* how to optimally *deter* the wrongdoer, but how to optimally *protect* the victim, which will require doing something more than merely making the wrongdoer indifferent between committing and not committing the wrongful act.²²⁵ It will require affording the victim a certain measure of protection consistent with the importance of the

²²⁰ He will gain, in other words, \$20 when he is not caught, which will happen 50% of the time, and will lose \$40 when he is caught, which will also happen 50% of the time, requiring the thief to return the \$20 from his initially successful theft along with the \$20 (or the shovel) from the subsequently unsuccessful theft.

²²¹ An ideal coercive remedy (in terms of achieving perfect or optimal deterrence) will multiply all of these probabilities with one another, and will then force the thief to pay the reciprocal of these joint probabilities multiplied by the damages caused.

²²² See *supra* Part III.A.

²²³ Recall that if Wrongdoer must pay the same amount (e.g., \$20) whether he steals the shovel and pays damages to Victim, or purchases the shovel from a store, we can expect Wrongdoer to engage in whichever act is most convenient to him at the time. Wrongdoer will therefore engage in each act roughly 50% of the time.

²²⁴ See *supra* note 164.

²²⁵ See *supra* Part III.A.

right at stake, which will itself require much more careful consideration by academics, judges, and policy makers than there is scope for in this Article.

C. *A Reprise*

Returning momentarily to Figure 3, we should not be surprised that remedies designed to achieve one remedial purpose may have indirect effects on other important public policy goals. After all, other scholars have attempted to bring closer together the remedial views of corrective justice and law and economics for some time.²²⁶ What is new, and at least somewhat surprising, is that there is an orderly and predictable relationship between and among these remedial relationships, so that the awarding of any particular remedy will fall within the scope of one of the four remedial interests, and that this interest will, in turn, move steadily and predictably toward the one remedial interest that has been underdeveloped and underappreciated in the literature: the protective interest. This interest, in turn, has the ability to descriptively unite what might otherwise seem like idiosyncratic remedies accomplishing wildly different remedial goals and to normatively provide a foundation upon which all remedies might be based.

That all remedies move toward the protective interest, I believe, is no accident, though the question *really* to be answered is this: what, exactly, is it that the protective interest is protecting? If the answer turns out to be that the protective interest is protecting some right belonging to the victim, as I believe it is, then the more interesting question becomes: what is the nature of the relationship between rights and remedies more generally? Unfortunately, such inquiries must await exploration in a future article. For the time being, however, it is enough to recognize the ubiquity (if not primacy) of the protective interest in all remedial awards, and to ask judges to consider more carefully the remedial category into which a plaintiff's desired remedy

²²⁶ See, e.g., LAYCOCK, *supra* note 32, at 17 ("In the classical economic view, the function of compensatory damages is to force law violators to take account of the harm they inflict. If damage liability is less than the harm inflicted, potential defendants will violate the law when it is inefficient to do so. If damage liability exceeds the harm inflicted, potential defendants will obey the law when it is inefficient to do so. Damages should be set exactly equal to harms inflicted, and then, if the expected profit from a tort or breach of contract exceeds the expected damages, the actor should go ahead."); see also COOTER & ULEN, *supra* note 25, at 390 ("[The] concept of perfect compensation, based on indifference, is fundamental to an economic account of incentives. If potential injurers are liable for perfectly compensatory damages, then they will internalize the external harm caused by accidents. And this creates incentives for the potential injurers to take efficient precaution.").

belongs, and the effect that awarding this remedy will have on other remedial interests, especially on the protection of victim's rights.

CONCLUSION

This Article has argued that all remedies fit into one of four distinct remedial categories and serve to further one of four distinct remedial interests. After outlining and discussing each of these interests (the restorative, retributive, coercive, and protective interests), it has explored the relationship between and among these interests, and has argued that all remedies, no matter the remedial category to which they originally belonged, work to further the goals of an interest previously paid scant attention to by scholars and judges alike: the protective interest. This Article has also shown that this interest, though it tends to be the most neglected of the remedial interests, may actually be the most basic and important. Further, the protective interest may itself provide important insights regarding the ultimate nature of the relationship between rights and remedies, to be explored in a follow-up article.