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Abstract

In their celebrated paper, Calabresi and Melamed offered a framework, often referred to as the ''Cathedral'' analysis, which explains when and why entitlements should be protected using two main sets of rules—property rules and liability rules. This framework is now widely used to explain some private law doctrines. However, cases that are easily explained as applications of liability rules are usually difficult to explain under the private law theory of correlative corrective justice. This is because the basic idea underlying corrective justice conflicts with the notion of rules that allow the nonconsensual property appropriation subject to compensation. This Article attempts to reconcile liability rules under both Cathedral analysis and corrective justice. To do so, we discuss three positive examples of pure liability rules and analyze them under a new model that we believe is consistent with corrective justice. We then discuss further implications of the model.

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I. INTRODUCTION

Over forty years ago, Judge Guido Calabresi and A. Douglas Melamed proposed a framework that explains when and why entitlements should be protected using different sets of rules.[1] This framework, known as the Cathedral analysis, distinguished between two main types of entitlement rules. The first rule, a property rule, prohibits any use or transfer of entitlements without the owner's consent. The second rule, a liability rule, allows the use or transfer of entitlements without the owner's consent, but only if proper compensation is paid. Under the Cathedral analysis, the transaction costs the parties would theoretically incur to reach a consensual transaction determine which set of rules apply in any given set of circumstances.[2]

The Cathedral analysis was celebrated for both its theoretical and practical contributions, and today, legal doctrines reflecting both types of rules exist. However, while the Cathedral analysis is easily justified in utilitarian terms, liability rules cannot be accounted for in the orthodox corrective justice framework. Under orthodox corrective justice, if an action, such as a nonconsensual use of another's property, is considered a wrong, there is no justification for preventing the victim of that action from enjoining it *ex-ante*. Conversely, if the victim is not allowed to prevent the action from occurring, then such action is not considered wrong.

Discussing the inconsistency between corrective justice and liability rules is not a mere theoretical exercise. Some positive law doctrines can only be explained as liability rules. Thus, if these doctrines cannot be accounted for under corrective justice, the theory of corrective justice loses some of its explanatory power. On the other hand, if corrective justice can account for such rules, its explanatory and normative validity as a legal theory will be reinforced.

Accordingly, this Article proposes a new model that explains how, at least in some cases, liability rules are consistent with corrective justice, meaning that the two are not necessarily contradictory. Part II of this Article

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

2. For example, when an individual wishes to acquire another person's property, transaction costs are expected to be low and therefore a property rule will apply. If, however, a factory intends to pollute a densely populated area, the transaction required—the factory's purchase of all local residents' right to clean air—is much more complicated and the transaction costs are expected to be high. Therefore, a liability rule should apply.

discusses the Cathedral analysis and its inconsistency with the corrective justice framework. Part III presents three doctrines typically explained as liability rules and lays the foundation for the later analysis. Part IV describes the proposed model and applies it to aforementioned various legal doctrines. It likewise explains how our model can not only explain existing doctrines but can also support the adjustment of existing rules to make them more consistent with corrective justice. Finally, Part VI concludes the discussion.

II. LIABILITY RULES: THE THEORETICAL FRAMEWORK

A. The Cathedral Analysis: Calabresi and Melamed

In their important article, Calabresi and Melamed provide a new framework for defining and analyzing different types of entitlement rules using economic principles.[3] The first type, which they call *property rules*, protects entitlements.[4] Under these rules, an object's owner is entitled to protection against the object's nonconsensual appropriation. Likewise, in voluntary transactions, the owner can set the object's price.[5] In contrast, the second type, which Calabresi and Melamed call *liability* rules, does not protect the object's owner against the object's nonconsensual appropriation. Rather, if the object is appropriated, its owner is entitled to its objectively determined value.[6] The third type, which this Article will not discuss and which they label *inalienability rules*, provides that an object's owner is not entitled to voluntarily transfer it to another but is entitled to protection from its appropriation.[7]

Calabresi and Melamed tell us that whether a property rule or a liability rule is proper, which is to say an entitlement protection's propriety, depends on the parties' potential transaction costs. When transaction costs are low, property rules make sense.[8] However, when transaction costs are

3. *See id.*
4. *See id.*
5. *See id.* at 1092.
6. *See id.*
7. *See id.* at 1092–93.
8. If no transaction costs exist, efficient transactions are always likely to occur. In such a system, we should be indifferent to the rules protecting such entitlements or at least prefer a property rule only system. However, transaction costs are generally assumed because they are likely to exist. *Cf.* Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); *see* Calabresi & Melamed,

sufficiently high, some entitlement transfers that would be beneficial to all parties involved will not occur because their transaction costs exceed their expected value.[9] In such cases, a shift to a liability rule is economically justifiable.

Unlike the owner of an entitlement protected by a property rule, the owner of an entitlement protected by a liability rule will not be awarded an injunction against an ongoing or anticipated infringement. Instead, they would be limited to a monetary damages remedy.[10] Accordingly, as long as victims are limited to monetary damages, their entitlements are protected by a liability rule. This is so even if infringer's liability is strict. Conversely, whenever victims may obtain injunctions prohibiting infringement, their entitlements are protected by a property rule. This remains true even if this infringement is defined by an infringer's negligence.[11]

Calabresi and Melamed demonstrated their framework by analyzing cases of nuisance caused by pollution.[12] They asserted that nuisance cases involving pollution are commonly framed as a choice between three alternatives.[13] Under alternative one, polluters may not pollute unless they secure their neighbors' consent.[14] If a polluter pollutes absent consent, the neighbor is entitled to enjoin the polluter.[15] This alternative falls into the property rule category. Under alternative two, polluters may pollute but must compensate their neighbors for damages.[16] Because neighbors are not entitled to enjoin the polluter, this alternative would be considered a liability rule. Under alternative three, polluters may pollute without paying damages compensation and with no fear of enjoinment. Their neighbors can only stop

supra note 1, at 1096.

9. *See* Calabresi & Melamed, *supra* note 1, at 1106–07.

10. *Id.* at 1092 (describing that property rules give the property holder a veto right to stop the sale, whereas liability rules mandate the sale at an objective price).

11. If negligence rules apply and the injurer is not negligent, then there is no basis for a remedy, and the law considers the victim as either lacking the relevant entitlement or not suffering infringement.

12. *See* Calabresi & Melamed, *supra* note 1, at Part IV. Their example is formulated using the facts in *Spur Industries v. Del E. Webb Development Co.*, 494 P.2d 700 (1972), which served as a case study for their further inquiries.

13. *See* Calabresi & Melamed, *supra* note 1, at 1115–18.

14. *See id.* at 1115–16 (explaining that in this situation, the neighbor "may enjoin the [polluter's] nuisance").

15. *See id.* at 1116.

16. *Id.* (explaining that in this situation, "nuisance is found but the remedy is limited to damages").

them by obtaining their consent.[17] This alternative constitutes a property rule protecting the polluter's entitlement to pollute. Calabresi and Melamed articulated that, under their framework, a *fourth* alternative is also necessary: neighbors may enjoin polluters subject to compensating the polluters for the polluters' damages.[18] This means that liability rules protecting polluters' entitlement to pollute are also possible.[19]

Under Cathedral Analysis, selecting the proper alternative requires two distinct determinations. First, it is necessary to decide how the entitlement should be allocated to begin with. In the pollution example above, this would involve deciding whether the neighbor is entitled to unpolluted property or the polluter is entitled to pollute.[20] Second, a decision must be made concerning the type of entitlement protection to set in place. If transaction costs are low, property rules like those in alternatives one and three should be selected. On the other hand, if transaction costs are high enough, liability rules like those in alternatives two and four are more appropriate.

Hence, both property rules and liability rules can be soundly explained by reference to economic efficiency.[21] As we will elaborate later, it is also

17. *Id.* at 1116 (explaining that in this situation, the polluter's "pollution is not held to be a nuisance to [the neighbor]").

18. *Id.* (explaining that in this situation, the polluter is entitled to pollute but that his entitlement is "protected only by a liability rule").

19. One reason that Calabresi and Melamed added this fourth rule was to preserve the causal symmetry suggested by Coase's bilateral concept of causation. *See id.* at 1120. According to Coase, when an accident occurs, both parties can be considered the *raison d'être* of the accident. *See* Coase, *supra* note 8, at pt. II. For example, when a spark from a passing train causes a fire in a nearby wheat field, it is not solely the railroad owner who caused the accident, because it would not have occurred if the farmer had not grown wheat near the tracks. *See* LeRoy Fibre Co. v. Chi., Milwaukee, & St. Paul Ry., 232 U.S. 340, 353–54 (1914) (Holmes, J., dissenting) (suggesting that while the railroad cannot prevent the farmer from using his land, if the farmer was negligent, he would not be awarded damages for his lost crops). For discussion, *see, e.g.*, Michael L. Krauss, *Property Rules vs. Liability Rules*, INT'L ENCYCLOPEDIA L. & ECON. 785–86 (1998), http://encyclo.findlaw.com/3800book.pdf.

20. *See* Calabresi & Melamed, *supra* note 1, at 1118. There are several economic justifications for this initial allocation, which will not be elaborated on here.

21. This is not to say that Calabresi's & Melamed's framework took all economic factors into consideration. Much debate over this analysis has been raised by commentators of law and economics. *See*, *e.g.*, Lucian Arye Bebchuk, *Property Rights and Liability Rules: The Ex Ante View of the Cathedral*, 100 MICH. L. REV. 601 (2001); Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091 (1997); James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440 (1995). For a citation analysis of Calabresi & Melamed's Article, *see* James E. Krier & Stewart J. Schwab, *The Cathedral at Twenty-Five: Citations and Impressions*, 106 YALE L.J. 2121 (1997). However,

clear that some rules in positive law conform to this framework and can be explained by it. But is this Cathedral analysis justifiable in terms of corrective justice?

B. The Corrective Justice Response

1. Weinrib's Correlative Corrective Justice

Ernest J. Weinrib's theory of private law has been one of the most influential right-based analyses of law to date. Relying on Aristotelian corrective justice and Kant's doctrine of right, it explains that private law should be understood as a corrective mechanism for injustice.[22] This corrective mechanism, however, presupposes correlativity.[23] In Calabresi and Melamed's pollution context, this means that "liability reflects the conclusion that the defendant and the plaintiff have respectively done and suffered the same injustice."[24] Hand-in-hand with the Kantian concept of personality—which treats human beings as purposive entities who are free to act as long as they do not interfere with the rights of others[25]—correlativity serves as the inner, normative justification for legal rights and duties.[26]

Under this corrective justice framework, Weinrib criticizes the Cathedral analysis on two main grounds. First, he points out the odd symmetry that its property–liability framework creates.[27] While a right not to suffer pollution and a correlative duty not to pollute make sense, it is hard to conceive of a polluter's right-based claim to pollute imposing a correlative duty on the polluter's neighbor to suffer pollution.[28] Weinrib posits that the polluter may, at most, have the liberty to pollute but not the

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because this Article does not concentrate on economic analysis, these issues will not be elaborated on any further.

22. ERNEST J. WEINRIB, CORRECTIVE JUSTICE 2 (2012) [hereinafter CORRECTIVE JUSTICE].

23. From the medieval Latin "correlatives, meaning the quality of having a mutual or corresponding relationship." *See generally Correlative*, OXFORD LIVING DICTIONARIES: ENGLISH, https://en.oxforddictionaries.com/definition/correlative (last visited Feb. 25, 2017).

24. *See* CORRECTIVE JUSTICE, *supra* note 22, at 10.

25. *Id.* at 11. Weinrib explained this framework through the distinction between factual and normative gains and losses. *See* ERNST J. WEINRIB, THE IDEA OF PRIVATE LAW 114–20 (2012) [hereinafter PRIVATE LAW].

26. *See* CORRECTIVE JUSTICE, *supra* note 22, at 9.

27. *See id.* at 104–05.

28. *See id.* at 105–07 (noting that if neighbor encased his property in a dome and therebye avoided exposure to pollution, no duty to the polluter would be violated).

right to do so.[29] In other words, it is difficult to think of a polluter holding a property right against a neighbor.[30]

Weinrib's second argument focuses on the very existence of liability rules.[31] He argues that a mere liability rule should never be considered an entitlement's sole protection. Further, the notion that the polluter is allowed to purchase the entitlement at market value is not correlative with the concept that the neighbor has a right not to suffer pollution. Instead, liability rules treat "[t]he polluter's violation of the victim's right . . . as an allowable choice, rather than as a wrong."[32] In other words, Cathedral analysis's chief fault lies in framing tort law as a "law of accidents" rather than a "law of wrongs."[33] Once we accept that the law is about dealing with the wrongful acts that an injurer has inflicted on a victim, the symmetrical Cathedral analysis view is no longer sustainable. This follows because, in the legal sense, only a wrongful act can be considered "the cause" of a victim's harm.

2. Coleman's Mixed Conception of Corrective Justice

Jules Coleman and Jody Kraus present an account of Cathedral Analysis based on a noncorrelative approach to corrective justice.[34] Their approach questions whether any loss should be deemed recoverable by law without inquiry into whether the act that caused it was wrongful.[35] In contrast to correlative corrective justice models, it posits that the victim's grounds for

29. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16, 33 (1913).

30. *See* CORRECTIVE JUSTICE, *supra* note 22, at 106.

31. *See id.* at 106–07.

32. *Id.* at 106. Moreover, the neighbor's right not to suffer from pollution is further distorted by conditioning the right to injunctive relief on his purchase of the polluter's consent to stop polluting. Conversely, if the polluter is entitled to pollute, then an injunction––even if the polluter is compensated––is not within the scope of the neighbor's rights.

33. In doing so, Weinrib rejects the allocative approach to corrective justice, meaning the view of tort law's purpose as the fair allocation of the cost of accidents. For discussion, *see* John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1147 n.86 (2007) ("One way to gauge the commitment of these corrective justice theorists [Ripstein, Coleman, Stephen Perry, and Tony Honoré] to a notion of tort as a law that shifts losses rather than as a law that provides recourse for victims of wrongs is to consider the degree to which they distance themselves from Professor Weinrib."). Goldberg and Zipursky then suggest that while Coleman and Perry embraced the allocative approach, Ripstein "[p]rofess[es] allegiance to a roughly Weinribian view of tort law." *Id.*

34. This approach was later referred to as Annulment Theory. *See* Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335 (1986).

35. *See id.* at pt. II.A.

recovery—the existence of a wrongful loss—should be separated from the grounds for the injurer's liability--the wrongfulness of the act.[36]

Accordingly, Coleman and Kraus reconceive of tort law as offering three distinct rules of justified transfer.[37] The first is a property rule, similar to that proposed by Calabresi & Melamed, wherein the transfer of an entitlement is justified if and only if it is based on an *ex-ante* agreement between the parties.[38] In this case, whenever the injurer appropriates an entitlement absent previously agreed-upon terms, the transfer cannot be justified by the payment of damages.[39]

Coleman and Kraus label the second rule a "*liability rule only*."[40] In this case, the owner of an entitlement has no right to transfer his entitlement via an agreement with the injurer. Instead, the injurer may only create a justified transfer of the entitlement by providing the original owner with *ex-ante* compensation.[41] In these cases, then, the transfer is justified if and only if compensation was given to the original owner beforehand, without any agreement between the parties.

Finally, the third rule they suggest is a joint liability and property rule.[42] Under this rule, the owner of an entitlement has a right to negotiate its transfer *ex-ante*. However, the injurer also has the right to impose a transfer on the owner,[43] the exercise of which, in turn, grants the original owner a right to compensation.

It is this third rule that Coleman and Kraus apply to cases such as

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36. *See, e.g.*, JULES COLEMAN, RISKS AND WRONGS 306–11 (1992) [hereinafter RISKS AND WRONGS]; Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 429–30 (1992); Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 351–53 (1992) (adding that even if the wrongful loss was caused by the wrongful act of the injurer, the extent of the injurer's liability should equal the (wrongful) gain received by the wrongful act, without inquiry into the wrongful loss of the victim); *see* Stephen R. Perry, *Comment on Coleman: Corrective Justice*, 67 IND. L.J. 381 (1992) (discussing and critiquing Coleman's approach); Ernest J. Weinrib, *Non-Relational Relationships: A Note on Coleman's New Theory*, 77 IOWA L. REV. 445 (1992).

37. *See* Coleman & Kraus, *supra* note 34, at 1348.

38. *See id.* at 1353.

39. *See id.*

40. *See id.*

41. *See id.* This may occur when the property owner is not permitted to refuse to deal, the price is fixed, and the only component lacking to secure the transaction is *ex-ante* payment by the "injurer."

42. *See id.*

43. *See id.* at 1349 ("[The injurer] may legitimately compel a transfer provided he renders compensation *ex post*.").

Vincent v. Lake Erie Transportation Co.[44] There, a ship owner during a bad storm chose to stay moored to a dock, damaging it, rather than risk his ship to the hazardous waters.[45] In cases like *Vincent*, Coleman and Kraus argue that while the dock owner is always free to transfer his entitlement to the dock via agreement, as in the course of regular business, such an agreement is not a necessary condition of the dock's transfer.[46] Rather, in an emergency, like a serious storm, the ship owner is also entitled to take and use the dock despite the absence of any previous agreement.[47] However, this a forced transfer does trigger a corresponding right to compensation in the dock owner.[48] In other words, the ship owner's transfer of the entitlement is only justified if he later compensates the dock's owner for the dock's lost value.[49]

Coleman and Kraus also suggest two types of pure liability rules.[50] In the first, an entitlement owner is not at liberty to seek a voluntary *ex-ante* transfer agreement but, if made the victim of a forced transfer, is entitled to *ex-ante* compensation.[51] In the second, the entitlement owner is permitted to enter into transfer agreements but such agreements are not necessary conditions for a justified transfer.[52] Further, under this latter rule, *ex-post* compensation is sufficient to justify the transfer.[53]

Interestingly, even adopting this noncorrelative view of corrective justice, both liability rules seem to be based on an economic, rather than a corrective justice view. For example, Coleman and Kraus contend that the second liability rule is justified because the maximization of social welfare requires reducing transaction costs and eliminating the owner's monopoly or veto power.[54] Their analysis, then, does not provide a *corrective justice*

44. 124 N.W. 221 (1910).
45. *See id.* at 457–58
46. *See* Coleman & Kraus, *supra* note 34, at 1358.
47. *Id.*
48. *Id.*
49. *See id.*
50. *See id.* at 1347–48.
51. *See id.*
52. *See id.*
53. *See id.* at 1359–60 (referring to this as the Posnerian view).
54. *See id.* at 1350 ("[W]e might not want to foreclose [the owner]'s seeking a transfer on terms acceptable to him, we might also not want to preclude transfer in the event satisfying those terms should prove infeasible, or if obstacles to negotiating should make voluntary transfer too costly or impractical. Moreover, compensation may be set too high, so that inefficiently few transactions will take place if voluntary transactions are forbidden.").

account of liability rules in tort law.[55]

In a series of articles, and later in his book *Risks and Wrongs*, Coleman offered a revised view of corrective justice recognizing the importance of correlativity.[56] His new theory, which he referred to as the "mixed conception" of corrective justice, recognizes that the causal link between an injurer's act and the wrong suffered by the injurer's victim provides the injurer—and no one else—with a duty to repair the wrong.[57] However, even under his new theory, Coleman still maintains that the wrongfulness of a loss is not a relational matter.[58] In this sense, his theory can still be distinguished from Weinrib's corrective justice.[59]

Under his new theory, Coleman discusses the Cathedral analysis once more. To reconcile it with his own theory, he interprets Calabresi & Melamed's rules as referring to the content of rights rather than to the form of entitlement transfer.[60] He proposes four ways to specify the content of a particular right, the first three of which are almost identical to those above.[61] However, his fourth way views the content of a right as the conjunction of the property and liability rules that apply to it.[62] Under this fourth way, an object's owner has a property right that requires the injurer to obtain valid transfer consent; any transfer absent this consent leaves the owner with a liability rule that affords him a valid claim for compensation.[63] However, paying compensation does not correct the wrong by securing the victims consent *ex-ante*.[64]

Applying this fourth way to circumstances like those in *Vincent*, Coleman argues that the ship owner, the injurer in this case, was justified in keeping his ship moored to the dock but nonetheless wronged the dock

55. *See, e.g.*, Perry, *supra* note 36, at 384 (arguing that Coleman does not consider the second category, as opposed to the first and the third—as presented here—to be one of corrective justice).

56. RISKS AND WRONGS, *supra* note 36, at 311–24.

57. *Id.* at 320.

58. *Id.* at 324.

59. For a critical discussion of correlativity under Coleman's new theory, see Weinrib, *supra* note 36.

60. RISKS AND WRONGS, *supra* note 36, at 338 ("Instead of saying that the Calabresi-Melamed framework specifies ways of protecting rights . . . . [I]t constitutes a framework for specifying the content of particular rights . . . .")

61. *Id.* at 339–40.

62. *Id.* at 340 ("(4) Alternatively, we can specify the content of a right by the conjunction of property and liability rules.").

63. *Id.* at 340.

64. *Id.* at 335–40.

owner by not securing his consent. This represents the property rule part of the right. Nevertheless, the shipowner was under a duty to compensate the dock owner for his wrongful loss. This represents the liability rule part of the right.[65]

Whether or not Coleman's new theory successfully explains Cathedral analysis, his explanation fails to reconcile the tension between a correlative understanding of corrective justice and the concept of liability rules. For example, assuming that the ship owner's act is justified, under a correlative understanding of rights, we must conclude that the dock owner was not wronged. If this is the case, it is unclear why the ship owner should be under any duty to compensate anyone—after all, his act was justified. In other words, under a correlative understanding of corrective justice, a "justified wrongful act" is a contradiction in terms. Thus, Coleman's explanation is irreconcilable with a correlative understanding of corrective justice. Accordingly, we will focus on reconciling Weinrib's correlative understanding of corrective justice with the concept of liability rules under the Cathedral analysis.

We now turn to several existing doctrines that reflect pure liability rules.

III. PURE LIABILITY RULES IN PRIVATE LAW

Cathedral analysis only distinguishes between property and liability rules. However, it is also common to identify property rules with strict liability regimes and liability rules with fault-based regimes like negligence. For example, in most negligence cases, compensatory damages arise because the negligent act was not foreseeable and the legal discussion takes place after the fact. In such instances, the identity between liability rules and fault-based regimes makes sense. However, asserting this sort of identity is potential error.[66]

Imagine, for a moment, that I could prove that you were about to negligently harm me. It would follow that I would have a property-type right to enjoin you from doing so. Likewise, any discussion of you having a right to act wrongfully, subject to paying me compensation, would be nonsensical. Under corrective justice, therefore, negligence can just as easily be seen as a property rule. Accordingly, any asserted identity between

65. *Id.* at 340–42, 371–72.

66. *See supra* Part II.A. In fact, one could argue that what we refer to below as pure liability rules are only possible under strict liability doctrines.

fault-based regimes, like negligence, and liability rules is false. In fact, as should be apparent, the real distinction between property and liability rules lies in the ability of an entitlement's owner to enjoin a future injurer. Property rules permit injunction. Liability rules do not.

Thus, to show how liability rules can be reconciled with corrective justice, we must first identify doctrines that represent true liability rules. These doctrines, discussed below, we will refer to as *pure liability rules*.

A. The Law of Accession

The law of accession was adopted by the common law and is applied in United States' courts.[67] It is based on Roman law doctrines that deal with the proprietary outcomes of the union of two or more things. The basic rule is that when objects unite into a new, inseparable object, the owner of the object that constitutes the principle part of the new object becomes the owner of the entire new object. The owner of the accessory part, on the other hand, is limited to a claim for compensation.[68]

The boundaries of the modern law of accession are unclear. For example, it is unclear whether the rule applies when the mixture is unlawful, as when the act occurs by willful trespass or conversion.[69] How damages

67. *See*, *e.g.*, Pulcifer v. Page, 32 Me. 404, 405 (1851). For a review of the general rule of accession and the three main tests applied by courts (good-faith, transformation, and combination), see Jay L. Koh, *From Hoops to Hard Drives: An Accession Law Approach to the Inevitable Misappropriation of Trade Secrets*, 48 AM. U. L. REV. 271, 321–34 (1999).

68. RUDOLPH SOHM, THE INSTITUTES OF ROMAN LAW 243–44 (James C. Ledlie trans., Clarendon Press 1892). The basic Roman rule involves three general circumstances: accession, specification, and confusion. *See* Earl C. Arnold, *The Law of Accession of Personal Property*, 22 COLUM. L. REV. 103, 103 (1922); *see also* SOHM, *supra* note 68, at 247. In accession, a new object results from the mixture of two different objects that produces a new kind of object. *See* Arnold, *supra* note 68, at 103. In specification, an individual's labor changes the character of the object. *Id.* In confusion, two of the same kinds of objects are mixed, but they maintain their original form, like the mixture of water with water. *Id.* The first two instances are part of the law of accession. *Id.*; *see also* SOHM, *supra* note 68, at 247. This Article concentrates on the mixture of objects, not the mixture of objects with labor.

69. According to Sohm, the Roman rule of accession applied regardless of the intention of the mixing party. SOHM, *supra* note 68, at 244. This was not the case, however, when an individual's labor improved the object. *Id.* at 244–45. When this occurs, the individual is not entitled to the object, unless he had a bona fide reason for improving it. *Id.* at 245–47. In the United States, one court has maintained that "[t]he acknowledged principle of the civil law is that a willful wrongdoer acquires no property in the goods of another, either by the wrongful taking or by any change wrought in them by his labor or skill, however great that change may be." *See* Silsbury v. McCoon, 3 N.Y. 379, 387 (1850). In the case of *Pulcifer*, however, the doctrine was applied even though the act constituting the mixture of objects was unlawful and intentional. *See Pulcifer*, 32 Me. at 405.

should be calculated when a person loses property due to a mixture is also unclear.[70] Likewise, it is unclear whether a person who loses property due to a mixture is always entitled to damages or whether there are exceptions.[71] For the purposes of this Article, we will assume that the rule of accession applies when the mixture of objects is not the result of a wrongful act, and that the person deprived of his property is entitled to damages equal to the value of his original object prior to the mixture.

This rule is easily justifiable under economic analysis[72] and fits the definition of a pure liability rule. You are entitled to my property if you mix your property with mine in good faith, subject to the payment of compensation for the value of my property before the mixture. From a transaction cost perspective, if the cost of discovering that the object to be used was yours and acquiring your consent was prohibitively high, then a pure liability rule would be justified. But what does corrective justice say about such a rule?

While no corrective justice commentators have offered direct analysis of the rule of accession, in Arthur Ripstein's discussion on property, there is a corrective justice account of a non-innocent mixture of objects or labor.[73]

This may be the result of the fact that the term "accession" was used in Roman law to describe an alternative for original acquisition of property in cases where a new object was annexed to an owned piece of land due to no wrong of another person. For elaboration on this form of original acquisition of property see Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEG. ANALYSIS 459 (2009); SOHM, *supra* note 68, at 244. It seems, then, that the proper understanding of the rule is that when the accession is the result of an unlawful act, the proprietary rule will not apply and the original lawful owner of the object retains ownership in the new object. This conclusion, however, does not reflect the result in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940), at least on its face. In that case, the defendant, who made a derivative work from the plaintiff's play through "deliberate plagiarism," was entitled to any profits he could prove were unrelated to the copyright infringement. *Id.* at 397, 399. The Supreme Court's decision fits with the law of accession under the following premise: an infringer may profit from an object that is not mixed and inseparable, but "[w]here there is a commingling of gains, [the infringer] must abide the consequences . . . ." *Id.* at 406. As explained in Part V, this decision can be explained on different, more coherent, grounds.

70. The amount of damages the deprived owner is entitled to varies. Under the dominant view, if the accession was in good faith, the deprived owner is entitled to object's value before accession, not the value of the improved object. *See, e.g.*, Wall v. Holloman, 156 N.C. 275, 278 (1911); Beede v. Lamprey, 64 N.H. 510, 513 (1888).

71. In *Pulcifer*, for example, the person deprived of ownership was not entitled to damages. *Pulcifer*, 32 Me. at 405. This, however, is due to the cause of action the plaintiff chose, replevin (the return of the object), rather than trover (the recovery of damages due to trespass or conversion). *See* The Atchison v. P.D. Schriver, 72 Kan. 550, 554 (1906).

72. In fact, the original Roman justification was economic efficiency. *See* SOHM, *supra* note 68, at 248.

73. ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY ch. 4

Ripstein rightly states that, under Kant's approach to property, if I choose to mix my labor with objects that are your property I simply waste my efforts.[74] Likewise, it follows that if you improve an object I own, I now own an improved object.[75] However, Ripstein is willing to go a step further—you "fritter away your labor" even if you *mistakenly* improve something that is mine, and vice versa.[76]

This makes sense under the correlative corrective justice approach. If I own property and you engage it without my consent, you have done a wrong and cannot be entitled to my property under any circumstances. But what if we consider a different conception of what you have done? What if, by mistakenly and innocently using my property, you do no wrong because the circumstances justify your actions as part of your freedom under a universal right? Under corrective justice, if you have committed no wrong, there can be no normative justification for asking you to compensate me. On its face then, this notion does not fit the compensatory aspect of the law of accession.[77]

B. Private Necessity and Vincent v. Lake Eire Transportation Co.

The second pure liability rule is that of private necessity, based on the now familiar *Vincent* case.[78] In that case, the court distinguished the facts at hand from circumstances in which a ship carried by a storm hits a dock or another boat.[79] In those circumstances, the ship's owner would not be liable for damages.[80] In *Vincent*, however, the defendant "*prudently and advisedly availed itself of the plaintiffs' property for the purpose of preserving its own more valuable property*."[81] When a deliberate act causes damage, the court

(2009)

74. *Id.*

75. *Id.* at 98–99; *see also* CORRECTIVE JUSTICE, *supra* note 22, at 140–41.

76. RIPSTEIN, *supra* note 73, at 103.

77. We will later show how a different model of corrective justice explains this kind of compensation.

78. *See* Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (1910). As you may recall, in *Vincent*, a ship completed unloading its cargo and was under a duty to vacate a dock. *Id.* at 457. However, in light of an impending storm threatening its integrity, the ship's master decided to keep the lines fastened to the dock to prevent its destruction. *Id.* at 457–58. As a result, however, the ship harmed to dock during the storm. Notably, the duty in *Vincent* was also a contractual one. *Id.*

79. *Id.* at 459.

80. *Id*. This can be understood as a simple negligence rule.

81. *Id.* at 460 (emphasis added).

concluded, the payment of compensation is required, even if the act itself is justified.[82]

The Second Restatement of Torts also explains the rule of private necessity whereby,[83] in circumstances where an actor needs to use another's property *"to prevent serious harm to the actor, or his land or chattels*,"[84] the actor has a privilege to do so. However, it also states that the actor's privilege is incomplete;[85] the actor is not excused from a duty to compensate the owner for any damage caused to the property. Moreover, as the Restatement makes clear, the actor's duty to compensate is not subject to any fault on the actor's part—rather, all that is required for liability to arise is that the action was caused "*intentionally, negligently, or accidentally.*"[86]

Cathedral analysis readily explains the law of private necessity in general and the *Vincent* case in particular. First, in circumstances of sudden necessity, negotiations are usually impracticable because the parties lack both the time and the ability to negotiate and the property's owner has what amounts to a situational monopoly.[87] Second, imposing strict liability on the individual facing necessary harm is economically justified because only strict liability, as opposed to fault-based liability, provides optimal incentives for the dock owner to operate at an efficient activity level.[88]

Coleman and Kraus, you may recall, group *Vincent* under the third rule. They provide the dock owner the privilege to engage in negotiation and the ship owner the right to use the dock absent consent, providing the ship owner compensated the dock owner *ex-post*.[89] Their conclusion, then, seems very much in line with the Cathedral analysis. This is hardly surprising,

82. *Id*. at 460.

83. RESTATEMENT (SECOND) OF TORTS § 197 cmt. j, illus. 2 (AM. LAW INST. 1965).

84. *Id.* § 197(1)(a) (emphasis added). These include circumstances in which one holds a reasonable, even if false, belief that one is in fact facing such circumstances. *See id*. § 197 cmt. c.

85. That is, as long as the owner's protected interest is not at risk. *See id*. at § 197 cmt. j.

86. *Id*. (emphasis added).

87. For a review of economic literature on necessity and situation monopoly, *see* Alfredo G. Esposto, *Contracts, Necessity and Ex Ante Optimality*, 9 EUROPEAN J.L. & ECON. 145, 146–47 (1999) ("The central point of the economic analysis of contracts made during a *period of temporary necessity* (PTN) is that they are products of a situational monopoly. This will lead to, at the very least, high transaction costs and, at worse, inefficient levels of defensive and offensive expenditures.").

88. For a recent economic analysis justifying the *Vincent* court's distinction between purposely using another's property and simply damaging it, see Oren Bar-Gil & Ariel Porat, *Harm–Benefit Interaction*, 16 AM. L. & ECON. REV. 86 (2014).

89. *See supra*, notes 44–55 and accompanying text.

given that the goal of their analysis was welfare maximization.

Finally, Weinrib suggests a correlative corrective justice analysis and justification of *Vincent*.[90] He first sets out to explain the ship owner's right to use the dock under the Kantian framework.[91] Enlisting Samuel von Pufendorf's analysis of private necessity, he shows that the ship owner should have the privilege to use the dock owner's property to save his own, (1) if damaging the dock owner's property is the only way to preserve his property, i.e. if necessity obtains; and (2) if the value of the property preserved is far greater than the value of the property destroyed, i.e. if proportionality is satisfied.[92] Under these conditions, an owner no longer possesses the right to exclude another from taking and using the owner's property.

Weinrib next addresses the normative basis for the ship owner's resulting liability to the dock owner.[93] Here too, he adopts Pufendorf's notion of proportionality, explaining that while the state of necessity requires us to limit the dock owner's right to exclude, such limitation should only be enforced if it is the least harmful alternative that allows the ship owner to prevent harm to his property.[94] To achieve proportionality, Weinrib concludes, the ship owner then must compensate the dock owner for any damages his use incurred. In other words, a necessity justification does not transfer an owner's property right to another actor. Instead, it only confers a *privilege to use* the owner's property for the justified purpose of saving the actor's own property.[95]

Weinrib's analysis seems to provide a coherent and thorough answer to the question posed by the *Vincent* case. Nevertheless, one question remains open. If an individual facing necessity justifiably gains the privilege to use an owner's property, what *wrong* has the individual committed that justifies the imposition of a legal duty to compensate? The answer to this question

90. *See* Ernest J. Weinrib, *Private Law and Public Right*, 61 TORONTO L.J. 191, 206 (2011).

91. *See id.*

92. *See id*. at 206–10 (citing SAMUEL VON PUFENDORF, ON THE LAW OF NATURE AND NATIONS 2.6.8 (1934)).

93. *See id.* at 207.

94. *See id.* at 207–08 ("In order to preserve the endangered object, it is necessary that the defendant use the plaintiff's property, even to the extent of injuring it, if need be. It is not, however, necessary that the defendant be relieved of responsibility for the damage to the thing used.").

95. *Id.* at 208 ("Under the privilege, the defendant commits no wrong in using the plaintiff's property for the justified purpose and therefore cannot be prevented from using it. Nonetheless, the property used remains the embodiment of the plaintiff's right.").

plays a significant role in the model we propose in Part IV.

C. Compulsory Licensing in Copyright Law

The United States Copyright Act outlines a number of compulsory licenses, the first of which, the "[c]ompulsory license for making and distributing phonorecords,"[96] is also good example of a pure liability rule. Copyright law protects authors of a wide range of works, including musical compositions.[97] The owner of a copyrighted work is entitled to a bundle of exclusive rights, which include the right to reproduce, to distribute, to publicly perform, to display, and to produce derivative works.[98] However, the author's right is limited under a rule of compulsory license, as far as non-dramatic musical works are concerned.[99]

The compulsory license scheme for making and distributing phonorecords could be outlined as follows. Once the owner of a non-dramatic musical work authorizes its distribution to the public in the United States, any person is allowed to make and distribute his own version of the work, subject to the payment of royalties set by the act.[100] Admittedly, the compulsory license scope is rather limited. It does not allow licensees to publicly perform the musical work or to embed it in another audiovisual work, like a movie. It also does not entitle licensees to use previously recorded versions of the musical work that are protected as sound recordings.[101] However, the compulsory license does confer two important privileges on licensees. First, it allows them to make their own recording of the work without the originator's express permission. Second, it further allows them to make the necessary musical arrangements to the work "to conform it to the style or manner of interpretation of the performance

96. 17 U.S.C. § 115 (2012). Phonorecrods "are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'phonorecords' includes the material object in which the sounds are first fixed." *See id.* § 101.

97. *Id.* § 102(a).

98. *Id.* § 106.

99. The Copyright Act does not define what a nondramatic musical work is. There is, however, a distinction between a musical work (including any accompanying words) and a dramatic work (including any accompanying music). *See id.* § 102(a)(2)–(3).

100. *Id.* § 115(a)(1); *see also* MELVILLE NIMMER, NIMMER ON COPYRIGHT § 8.04 (2015).

101. One of the types of works protected by copyright is a "sound recording," which is the fixed version of a musical work in a phonorecord. *See* 17 U.S.C. § 101 (2012).

involved."[102] This is why this type of compulsory license is commonly referred to as a "cover license."

Congress explicitly stressed the economic rationale behind this liability rule before introducing its ancestor, the Copyright Act of 1909.[103] Congress explained that fear of "the establishment of a great trade monopoly" motivated the compulsory license's introduction.[104] At the time, major record companies were actively consolidating the market for "mechanical" licenses,[105] which led to a fear that not enough versions and interpretations of published musical works would be recorded.[106] This economic fear of monopoly can be easily expressed in terms of transaction costs: A monopoly holder's refusal to deal, under what would otherwise be efficient terms, produces significant, if not infinite, transaction costs. It is these significant costs that a liability rule seeks to mitigate.[107]

Under corrective justice, however, liability rule of this type is very difficult to justify. Once we agree that you have rights in your musical work and that your rights include the right to exclude others from reproducing and distributing it, it is unclear why I should be allowed to infringe your rights, even if I compensate you for the infringement. Likewise, if we instead understand that I am free to record my own unique versions of your musical work and distribute them because something about the distinction between my derivative work and your original work is sufficient to deny you the right to bar my conduct, it is equally unclear why I should have to compensate you. In other words, if I had the privilege to act as I did, under corrective justice, you were not wronged and should not be entitled to compensation.

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102. *Id.* § 115(a)(2).

103. *See* Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 215, 217–20 (2010)

104. H.R. REP. NO. 60-2222, at 8 (1909).

105. For a detailed review of the formation of this monopoly, see Abrams, *supra* note 103.

106. This fear was stated in the report of the Register of Copyright, which was filed in the revision of the Copyright Act that eventually occurred in 1976. *See* REGISTER OF COPYRIGHTS, COPYRIGHT LAW REVISION–REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISIONS OF U.S. COPYRIGHT LAW 34, 87th Cong., 1st Sess. (Comm. Print 1961); Abrams, *supra* note 103, at 222–23.

107. *See, e.g.*, Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1 (1993) (discussing monopoly power as it relates to the choice between liability rules and contract law). Moreover, with respect to the particular alternative performance, the parties would often have a bilateral monopoly, which supports the idea that transaction costs would be high and negotiations failure would be probable. *See* Oliver E. Williamson, *The Theory of the Firm as Governance Structure: From Choice to Contract*, 16 J. ECON. PERSP. 171 (2002).

IV. FRAMING LIABILITY RULES WITHIN CORRECTIVE JUSTICE: JOINT OWNERSHIP AND RESTITUTION

A. A Theoretical Model: Pure Liability Rules Under Corrective Justice

The above examples represent what we have named *pure liability rules*. They deprive owners of the right to enjoin others from using their property and therefore cannot be reconceived as property rules. Accordingly, the existence of these liability rules pose a challenge to the correlative corrective justice approach.

To reconcile these two concepts, we must first accept that an individual's appropriation of an owner's property in accordance with a pure liability rule is also in accordance with the owner's freedom—and the freedom of others—and therefore does not breach the owner's rights.[108] Otherwise, the action would be wrongful and the owner would be entitled to injunctive relief. For example, in *Vincent*, if the action of the ship owner towards the dock owner does not also accord with the dock owner's freedom—that is to say, if it was wrongful—then we should conclude that the dock owner was entitled to prevent the ship owner from entering the harbor in the first place, and we would be dealing with a property rule, not a pure liability rule.

Once we establish that the actor's appropriation did not infringe on the owner's rights, however, this would typically leads us to conclude that no one is liable and that the owner has no right to compensation, regardless of the seriousness of the resulting harm. However, the model proposed here posits that, in some circumstances, a justified act could nevertheless result in the actor's duty to compensate the owner for the value of the object and, in other circumstances, result in joint ownership, obliging thev actor to share any profits derived from it.

Under the framework discussed above, when the right conditions obtain, I may have the freedom to use your property. My freedom to use your property, however, does not entitle me to ownership of your property or to its value.[109] Rather, those rights remain with you. Usually, returning your

108. IMMANUEL KANT, *The Metaphysics of Morals*, PRACTICAL PHILOSOPHY 6:230–6:231 (Mary J. Gregor trans. & ed., 1797).

109. The distinction between the object and its value in the context of remedies is parallel to Weinrib's distinction between qualitative and quantitative remedies. *See* CORRECTIVE JUSTICE, *supra* note 22, at 94.

property to you in its original condition preserves your rights. However, returning your property in its original condition is not always possible, as when my use destroys it, damages it beyond repair, creates a new object, or unifies your property with some property of mine.

When I merely use your property for a limited time, because you still retain the right to your property and to its value, I have the correlative duty to return the property or its value to you. So long as the object exists in its original condition, both aspects of your right are restored by a claim and delivery action. When the object is destroyed, however, your right to the object itself can no longer be vindicated. However, your right to its value remains intact, and I retain the correlative duty to deliver to you your object's value in the form of damages.

When I fuse your property with mine into a new object, I likewise can no longer return your property in its original condition. However, in this case, your right to the property itself is not necessarily wholly destroyed. Rather, the new object can easily be considered jointly owned, with ownership allocated according to our relative contributions to the eventual outcome. This, however, only vindicates your right in the object itself. You also have a right to your original property's value, which may or may not be fulfilled by the proposed joint ownership. For example, your portion of the new object may be worth less than your original property. In such a case, joint ownership would not successfully protect your right to its value. At this point, then, you would have to make a choice between your right to your original property itself and your right to its value. If you chose to pursue your right to the property itself, our joint ownership of the new object would prevail, and, to avoid unjust enrichment, I would have duty to share with you any gains I might take from the new object. If you chose, on the other hand, to pursue your right to your original property's value, I would only need to restore to you your original object's value, and joint ownership could be avoided. Finally, it is important to note that giving you both the value of your object and joint ownership in the new object, would leave you unjustly enriched. Accordingly, it is not an appropriate remedy.

We now turn to applying the principles of this model to the examples discussed in Part III.

B. Applying the Model to Pure Liability Rules

1. The Vincent Case

According to the model presented above, in analyzing *Vincent*, the first question is whether the ship owner's act infringed on the dock owner's rights or if, instead, it was part of the ship owner's freedom in a way that does not infringe on the dock owner's freedom. In other words, the question is what distinguishes the ship owner's act from any other act of trespass. According to Weinrib's analysis, the ship owner's freedom to use the dock is derived from the distress he was subjected to.[110] We can illustrate this notion as follows. In such circumstances, it would be an unreasonable limitation of my freedom to allow you to prevent me from using your property to save my own. Therefore, your right to exclude me from your property in circumstances of necessity could not be in accordance with a universal right of freedom.[111]

Once we establish that the ship owner's act did not infringe the dock owner's right and is therefore not wrongful, we next examine the normative source of the ship owner's liability towards the dock owner. As we explained in the model, while the ship owner had the freedom to use the dock in order to protect his property, he did not have the right to convey the dock to himself. This is so because the circumstances creating the necessity cannot justify the transfer of property outright. Therefore, once the ship owner's rightful use of the property ended, he was obliged to return the dock to its owner in the same condition he found it. However, in *Vincent*, the dock was severely damaged. Returning a damaged dock wrongs the dock owner and deprives him of his right to the dock and to its value. This explains why the ship owner was liable to the dock owner for the damage caused to the dock. This liability reflects the right of the dock owner to receive the dock back in its original condition.[112]

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110. Weinrib, *supra* note 90, at 206–10.

111. KANT, *supra* note 108, at 6:230–6:231; *see also* RIPSTEIN, *supra* note 73, at 13–14. This also seems to be the position of the RESTATEMENT (SECOND) OF TORTS § 197 (AM. LAW INST. 1965).

112. This line of argument is similar to the corrective justice analysis of unjust enrichment in the case of mistaken payments. The acceptance of the mistaken benefit is not wrong on the part of the receiver until he becomes aware that the benefit was given to him mistakenly. It is only then that the duty of restitution emerges; he acts wrongfully only if he does not pay restitution (with the exception of change of position). *See* Ernst J. Weinrib, *Unjust Enrichment*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 654 (Dennis Patterson ed., 2d. ed. 2010).

This analysis coincides with the outcome in *Vincent* as well as with the rule of private necessity under the Restatement. First, it shows that I have the freedom to use your property while under necessity, and your right does not include the freedom to exclude me from its use. The Restatement reflects this, stating that "[o]ne is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm . . . ."[113] Second, the analysis explains why I have a duty to compensate you for any damage to your property, regardless of whether I was reckless or negligent, and even though I acted in accordance with my own freedom. This conforms with the Restatement's section 197, comment (j), which states that "the actor is subject to liability for all harm to the possessor or to his interest in the land which the actor may cause, whether intentionally, negligently, or accidentally, while exercising his privilege."[114]

2. The Law of Accession

As previously mentioned, the law of accession applies when my use of your object mixes or combines it with an object of mine, resulting in a new indivisible object. In such cases, the law of accession grants ownership of the new object to the former owner of its principle component. For example, when I combine your pieces of broken chain and my pieces of broken chain to forge a new chain, I create a new indivisible object.[115] Assuming my pieces of chain are the principle part of the new chain, I shall become its sole owner.

When applying the model to circumstances governed by the law of accession, we must first consider when an act leading to such circumstances would accord with my freedom and therefore not infringe on your right. If I know that the pieces of broken chain I use are yours before I forge them into a new chain, it is very difficult to explain how I am acting in accordance with my freedom and your right. This is why, under corrective justice, it is difficult to justify the application of the law of accession when I use an object I know is yours. Similar logic applies when I do not know the object is your property, but there is a good reason to think that I should have known.

The situation is different where I neither know nor should know the

113. RESTATEMENT (SECOND) OF TORTS § 197 (AM. LAW INST. 1965).
114. *Id.*
115. *See, e.g.*, Pulcifer v. Page, 32 Me. 404 (1851).

object I am using is yours. In such circumstances, often referred to as good-faith or innocent trespass or conversion; my use of your property accords with my freedom, and therefore your rights do not include excluding me from this use. Unlike private necessity, however, this argument calls for further elaboration.

a. Previous Accounts of Innocent Trespass

Previous corrective justice accounts of innocent trespass have been unsatisfactory. Weinrib, for example, argues that a trespass, even if innocent, should nevertheless be considered wrongful.[116] Ripstein proposes a similar approach.[117] While often considered the orthodox view of corrective justice, this approach has also been deemed to be one of its weaknesses. John Goldberg and Bejamin Zipursky, for example, while discussing the notion of moral luck in tort law, describe innocent trespass as one of the issues that "ha[s] led some tort scholars to worry about the intelligibility and coherence of tort law."[118] Finally, noncorrelative approaches to corrective justice find it easier not to describe an innocent trespasser as a wrongdoer, while treating the loss caused by his acts as wrongful.[119]

While Weinrib and Ripstein's analysis is consistent with corrective justice, we contend that it is not the only possible way to understand innocent trespass under correlative corrective justice. Innocent trespass can also be viewed as in accord with personal freedoms under a universal law. That is to say, in certain circumstances, considering my innocent act of trespass wrongful and allowing another to enjoin me from it might unreasonably limit my freedom to use my own means to act as an intentional entity. Further, when this limitation on my freedom is truly unreasonable, it follows that it should not be part of anyone else's right to enjoin me from my actions. Consider, for example, a situation where I decide to cut down trees on my own land to build a ship. Only, despite taking all possible

116. CORRECTIVE JUSTICE, *supra* note 22, at 138–39; Ernst J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQ. L. 1, 24–25 (2000). It is important to mention that while viewing an innocent trespass as a wrongful act, Weinrib does distinguish between innocent and willful trespass when discussing the applicable remedies, as explained below.

117. Arthur Ripstein, *What You Already Have*, at 17–20 (on file with authors).

118. Goldberg & Zipursky, *supra* note 33, at 1145.

119. For discussion, *see* Linda Ross Meyer, *Why Me?*, 16 QUINNIPAC L. REV. 299, 304–05 (1996).

precautions, the trees I cut down turn out to be on your land. In these circumstances, while it is consistent with corrective justice to consider my act wrongful, it is inconsistent with my freedom, under universal law, for you to prohibit me from acting in the first place—from innocently trespassing.

b. Publicity of Possession

Kant's publicity of possession requirement helps explain this conclusion. Under Kant's doctrine of right, publicity of possession is one of three prerequisites to the acquisition of new property. It requires that I provide public notice of both my possession and my choice to exclude others from any property newly acquired.[120] Further, the absence of public notice bars me from excluding anyone from the thing in my possession and therefore negates my property right in it.[121]

What more, publicity of possession's importance does not end after the original acquisition of property. The doctrine of adverse possession, for example, finds roots in it as well.[122] Consider, for example, cases in which courts award title to good-faith adverse possessors, but not to bad-faith adverse possessors.[123] In such cases, good-faith possession occurs when the possessor does not know the land belongs to someone else because of the owner's failure to display his ownership publicly[124] and failure to evict during the necessary time period.[125] In contrast, bad faith possession entails the absence of these conditions. The salient difference is the original

120. KANT, *supra* note 108, at 6:259.

121. RIPSTEIN, *supra* note 73, at 105.

122. Ripstein, following Kant, argued that the adverse possession doctrine is necessary to provide property owners with closure. In other words, if the possessor of property is always subject to a valid claim of an earlier rightful possessor, property rights can never be conclusive and final, and people may never confidently use their means to pursue their ends. Arthur Ripstein, *Private Order and Public Justice*, 92 VA. L. REV. 1391, 1425 (2006); *see* also KANT, *supra* note 108, at 6:364–6:365; RIPSTEIN, *supra* note 73, at 86.

123. For a survey of cases referring to each of these options, see R. H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 337–49 (1983); Thomas W. Merrill, *Property Rules, Liability Rules and Adverse Possession*, 79 NW. U. L. REV. 1122, 1154 (1984–1985); Carpenter v. Ruperto, 315 N.W.2d 782, 786 (Iowa 1982) ("We now confirm that good faith, as explained in this case, is essential to adverse possession under a claim of right."). *But see* Roger A. Cunningham, *Adverse Possession and Subjective Intent: A Reply to Professor Helmholz*, 64 WASH. U. L.Q. 1, 64 (1986).

124. KANT, *supra* note 108, at 6:364.

125. Ripstein, *supra* note 122, at 1425.

owner's success or failure to properly publicize possession.

Publicity of possession is also an integral part of the idea of freedom under universal law. As with Kant's doctrine of right, public notice is required in original acquisition to allow me to exclude others from an external object. Likewise, as in adverse possession, publicity is required to prevent other people from appropriating my property. In both cases, publicity can be understood as a condition for limiting other's freedom with respect to objects they may use as means for their own purposes. In the absence of publicity, my use of your property is not wrongful and limits to my freedom to it are discordant with universal law. Therefore they cannot be part of your right. On the contrary, when you make your possession known before adverse possession occurs, my unilateral use of your property is no longer part of my freedom.[126] My possession is therefore wrongful and you retain every right to enjoin me from it. Finally, notice that under these circumstances, my freedom, again, is only to *use* your property, not to appropriate it.

The above discussion explains why my act of innocent trespass could be considered part of my freedom to use my own means to achieve my own ends and therefore not wrongful. We now turn to my action's results once I know you own the object and I am no longer free to use it.

Once I become aware that the object I am using is yours, usually, all I have to do is return the object to you in a condition that is no worse than its condition before my use. For example, if I merely took your chain and used it to lock my property, when I discover my mistake, all I have to do is return the chain undamaged. Similarly, if I broke your chain while using it, as in *Vincent*, I must pay you its value.[127]

c. Consequences for Accession

But what happens, if in innocently using your object I mixed it with my object to form a new inseparable object? Under the law of accession, the result of such circumstances would be the transfer of property in the new

126. Some courts have applied the adverse possession doctrine to chattels, in the form of the Discovery Rule, *see* O'Keeffe v. Snyder, 83 N.J. 478 (N.J. 1980). Additionally, the importance of conclusiveness and publicity in chattels is manifested by the doctrine of market ordinance.

127. This result is somewhat similar to Weinrib's discussion on remedies in the case of innocent trespass. Weinrib concluded that when a trespass is innocent, no donative intent could be attributed to the trespasser and therefore he should be able to deduct his expenses from the value of the object taken. *See* CORRECTIVE JUSTICE, *supra* note 22, at 140–42.

object to whoever owned the principle part of it. This result seems uncomfortable under corrective justice because it extends my freedom to use your property to my potential entitlement to appropriate your object indefinitely without your consent. Under the model proposed here, however, the results are different. In order to protect your right to your original object, you should be considered a joint owner of the new object according to your respective contribution to it. In order to protect your right to your original object's value, however, you should be able to recover its value prior to my use of it. This leaves you with the choice between becoming my partner in joint ownership of the new object and requiring me to compensate you for your loss.

Finally, it is clear that each alternative has different implications with regard to our property rights in the new object. Should you choose to receive compensation for the lost value of your original object, it must be understood that you also agree to transfer your property interest in the new object. This is much like the current law of accession.

However, should you choose to remain my partner in the ownership of the new object, the question of the right to determine its use arises. The answer also follows the rationale of the law of accession and joint ownership in general. That is, whoever owns the larger portion of the object is entitled to determine how it may be used, subject to general duties such as good faith.[128] However, the right to use the joint object is not the right to recoup all gains from such use. Rather, the user has a duty to pay the other partner a due share, otherwise the user would be unjustly enriched.

3. Compulsory Licenses in Copyright Law

When compulsory licenses are concerned, we must again establish the first part of the model and show that the act a compulsory license allows is not wrongful. In contrast to the two liability rules discussed, compulsory licenses for cover versions of musical works have nothing to do with good-faith or necessity-based justifications. In fact, the essence of compulsory licensing is that the license is available to whoever seeks it. Explaining why my willful taking of your property is not wrongful is thus a much more

128. Note that this possibility was also acknowledged by Kant, who described common ownership as the state in which both parties are in possession of the object but only one has the full right to use it. KANT, *supra* note 108, at 6:270.

difficult task.

To properly discuss the scope of copyright under corrective justice, we must first explain to what the right protected refers. Whether intellectual works can be considered external objects, is up for some debate. Ripstein, for example, argued that Kant himself excludes intellectual works from his property framework by defining rights in such works as an author's rights to "speak in his own words."[129] Robert Merges, on the other hand, argued that Kant did not necessarily exclude intellectual works from his doctrine of property and that a person could have property rights in intellectual "things."[130] This distinction is not essential to understanding copyright law under corrective justice or Kant's doctrine of right because copyright law would still exclude people from exercising their freedom, whether in relation to objects or to their internal methods of communication. However, understanding copyright as an author's right to "speak in his own words" or to engage with the public facilitates a better understanding of authorship and intellectual products.

Abraham Drassinower proposed the first and most thorough analysis of copyright under corrective justice.[131] He argued that, due to the formal egalitarian principle underlying the Kantian doctrine of right, the rights granted to authors must be limited to preserve others' freedoms to create and engage with the public themselves. Under Drassinower's framework, an author's claim to a right in his work is only valid if it can coexist alongside others' equal claims to rights in their works. Accordingly, copyright's general rule is best explained as an author's right to expressions of his work, but not to the ideas underlying it.[132]

Drassinower later elaborated on this argument, explaining the unifying idea of copyright in Kantian terms as follows. Because the right at stake is an author's right to engage with the public and "speak in his own words," copyright law, which governs a system of communicative acts, must afford this right to every author in a way that maintains an equal right for all

129. RIPSTEIN, *supra* note 73, at 95 n.13. Ripstein referred to Kant's discussion on "What is a Book." *See* KANT, *supra* note 108, at 6:289. For a similar argument, *see* Neil Weinstock Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 374, 374–75 (1993).

130. ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 77–78 (2011).

131. Abraham Drassinower, *A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law*, 16 CAN. J.L. & JURIS. 10 (2003).

132. *See id.* at 13.

others.[133] The mirror image of this claim is that a copyright infringement occurs when one person compel another to speak in their own words against their will.[134]

In terms of corrective justice, Drassinower's framework propounds that copying an author's expression is wrong because it compels her to speak. Authors have a right to their expressions and this right safeguards, among other things, their right not to speak in their words. However, this right not to speak does not prevent others from using the ideas underlying their works and such uses are not wrong.

Although Drassinower's framework explains the nexus of freedoms that all authors share under universal law, it is also consistent with an understanding of authored works as external "things." For example, the speech of an author who speaks in her own words results in expressions that can be referred to as intellectual objects. The author's rights in these intellectual objects can be divided into two distinct forms and correlative rights. First, the author has a right to the *abstract form* of her intellectual object, the nonphysical, conceptual expression of the author's work. Second, the author has a right to all possible *concrete forms* of her intellectual object—all the concrete representations of the concept of her expression. In other words, all physical and digital recordings of the abstract form of her work. The rights to both forms of the intellectual object, abstract and concrete, derive from her freedom to engage with the public. However, they are also subject to the freedom of others to engage with the public themselves and thereby to gain equal rights in the abstract and concrete forms of their own intellectual objects.

Using our expansion of Drassinower's framework, we can now illustrate how the making of a cover version of a musical work is not wrong and is consistent with the freedom of any other author under universal law. First, it is important to emphasize that making a cover version is a new engagement with the public in relation to the original musical work. This is because the performance of a musical work, regardless of whether it rearranges the original, constitutes a new intellectual object.[135] For like any author's

133. ABRAHAM DRASSINOWER, WHAT'S WRONG WITH COPYING? 56 (Harvard U. Press 2015).

134. *Id.* at 111–15. This approach is significantly based upon Kant's explicit discussion on the rights of authors. *See* IMMANUEL KANT, *On the Wrongfulness of Unauthorized Publication of Books*, *in* PRACTICAL PHILOSOPHY (Mary J. Gregor trans. & ed., 1996).

135. MONROE C. BEARDSLEY, AESTHETICS: PROBLEMS IN THE PHILOSOPHY OF CRITICISM, 21–24, 56 (1958) ("The object we are talking about in the criticism of music, at least usually, is not the

freedom to engage with the public, all performers have a correlative freedom to do the same.

In its abstract form, the performer's resulting intellectual object does not interfere with the original author's rights. The author's conception of her work is distinct from the performer's conception of the same work, the abstract forms of their intellectual objects are distinct. Moreover, if the performer has a distinct abstract object, it follows that he has the right to translate it into a concrete form, for without the right to disseminate a concrete form of his expression, the cover performer's freedom would be meaningless. Therefore, following our model, the act of recording a cover version—and potentially performing it publicly—is part of the performer's freedom, and hence not wrongful.

Recall, however, that the performer's freedom to engage with the public by recording a cover version of a musical work does not include the freedom to *appropriate* the author's work. And while recording a cover version certainly consists of the performer's speech, in the form of the performance itself, it is hard to dispute that it is also a concrete form of at least part of the author's intellectual object. If it were not, it would not be a cover. Similarly, at least in theory, if the performer could create an entirely identical version of the song, it would also not be a cover, rather a copy. Thus, if you record a musical work and I make a cover version of it, I am clearly the sole owner of the abstract form of a new intellectual object, the nonphysical form of my cover performance. Likewise, this form of my intellectual object is distinct from your correlating intellectual object, the abstract, nonphysical form of your own expression. But when I make physical or digital copies of my cover version, these concrete forms of my distinct intellectual object include part of the concrete forms of your intellectual object. The concrete forms of our two distinct intellectual objects, are therefore merged into a single indivisible concrete object—any copy of the cover version.

According to our model, the author is entitled to her intellectual objects and their value. Likewise, the performer is using both the abstract form of the object and its concrete form rightfully. However, unlike the abstract form of the object, which the author is not deprived of when the cover

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symphony in general but some production of it."); PETER KIVY, AUTHENTICITIES: PHILOSOPHICAL REFLECTIONS ON MUSICAL PERFORMANCE 271–72 (1998) ("The logic of music as a performance act . . . is a logic in which the gap between 'text' and performance is not merely a necessary evil but at the same time a *desired*, *intended* and logically *required* ontological fact.").

version is recorded, the unauthorized use of a concrete form of her intellectual object does deprive the author of her rights. Because in a copy or recording of a cover version, the concrete form of the author's object cannot be separated from the concrete version of the performer's object and returned to her, the author becomes a joint owner of every new concrete form of the object.

As to the value, the result is somewhat different. With regard to the author's right to the value of the abstract form of her object, it is easy to see that because she was never deprived of it, she was never deprived of its value. With regard to the author's right all concretes form of her object, however, making and selling copies of the cover version, without compensating her, deprives the author of the value of concrete forms of her intellectual object. Because the author has the right to produce an infinite number of concrete forms of her object, the value of any single concrete form is *de minimis*. Accordingly, it is unlikely she will choose the compensation alternative over joint ownership.

To conclude, we argue that the compulsory license for cover versions of musical works can be explained under corrective justice as follows. Similar to the previous examples, one key aspect of understanding compulsory licenses in the corrective justice framework is the ability to distinguish the right to *use* another's property from the right to *deprive* her of it. In cover version compulsory licensing, the performer has the freedom to use the abstract and concrete forms of the author's objects as part of his freedom to engage with the public. This freedom, however, does not include a right to appropriate either form of the author's objects. While the production of a cover version does not deprive the author of her object's abstract form, it does deprive her of its concrete form. Likewise, because any copy of the cover version is an inseparable mix of the concrete form of the author's and the performer's intellectual objects, they become joint owners of each new copy. When the performer exercises his freedom to engage with the public by disseminating copies of his cover version, he has the duty to share any profits gained with the author because if he fails to do so, he will be unjustly enriched. This explains why everyone has the freedom to create cover versions but, under the doctrine of compulsory licenses, must pay royalties to the song's original author.

V. FURTHER IMPLICATIONS

So far, we have proposed that despite long being considered contradictory concepts, corrective justice can explain liability rules. As proof, we have offered a model and applied it to existing legal doctrines usually explained by the Cathedral analysis. In this next part, we suggest that our model can not only explain existing liability rules but may also justify the adjustment of existing legal doctrines. We will illustrate this by reexamining the Supreme Court's decision in *Sheldon v. Metro-Goldwyn Pictures Corp.*[136] and the corresponding right to make derivative works in copyright law.

The facts of *Sheldon* are simple. The defendant, Metro-Goldwyn Picture Studios (MGM), created and distributed a motion picture titled "Letty Lynton," which was based on the "Dishonored Lady," a play co-written by plaintiff Edward Sheldon.[137] In the first round of litigation, Sheldon and his fellow plaintiffs sought injunctive relief and an accounting of profits from MGM.[138] Although the district court granted MGM's motion to dismiss the claim due to lack of copyright infringement,[139] the court of appeals reversed, granting the injunctive relief and remanding the case for further proceedings regarding the accounting of profits.[140] At the second round of litigation, the district court awarded the plaintiffs all of MGM's net-profits from the motion picture's distribution.[141] On appeal, the court of appeals reversed again, deciding that an apportionment of the profits was proper because the plaintiffs were entitled only to the profits resulting from the infringing parts of the motion picture and not to those profits resulting from MGM's non-infringing acts.[142] The Supreme Court affirmed this decision and articulated that "[w]here there is a commingling of gains, [the infringer] must abide the consequences, unless he can make a separation of the profits so as to assure to the injured party all that justly belongs to him."[143] To conclude, collectively, the courts enjoined MGM from distributing the motion picture but decided that the plaintiffs were only

136. 309 U.S. 390, 406 (1940).
137. Sheldon v. Metro-Goldwyn Pictures Corp., 7 F. Supp. 837, 838–39 (S.D.N.Y. 1938).
138. *Id.*
139. *Id.*
140. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936).
141. Sheldon v. Metro-Goldwyn Pictures Corp., 26 F. Supp. 134, 141 (S.D.N.Y. 1938).
142. Sheldon v. Metro-Goldwyn Pictures Corp., 106 F.2d 45, 51 (2d Cir. 1939).
143. *Sheldon*, 309 U.S. at 406.

entitled to one-fifth of the net-profits from the film's distribution, as that was all that could be attributed to the infringement.

Under current law, works "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted" are governed by the right to make derivative works.[144] The Copyright Act grants this exclusive right to a work's author.[145] Considering the circumstances in *Sheldon* under the modern framework, MGM's adaptation of the plaintiffs' play would have infringed on their exclusive right to make derivative works and thus entitled the plaintiffs to the Copyright Act's enumerated remedies. One available remedy is injunctive relief, which the court has the full discretion to grant or deny.[146] Another available remedy is an accounting of the profits produced by the copyright infringement. Much like the Court's decision in *Sheldon*, this allows the infringer to deduct expenses and withhold any profits not attributable to the infringement.[147] Note that unlike the equitable injunctive relief, it is not within the court's discretion to deny the infringer any gains proved not attributable to the infringement.[148]

Applying Cathedral analysis to the circumstances in *Sheldon* and the law governing derivative works leads to a puzzling result. On the one hand, granting injunctive relief to the author of a wrongfully adapted play seems like protecting an entitlement using a property rule. On the other hand,

144. 17 U.S.C. § 101 (2012).

145. 17 U.S.C. § 106(2) (2012).

146. 17 U.S.C. § 502(a) (2012) ("Any court having jurisdiction of a civil action arising under this title may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.").

147. 17 U.S.C. § 504(b) ("The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work."); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) ("[The] decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court . . . ."); *see also* NIMMER, *supra* note 99, § 14.06[B].

148. *See* NIMMER, *supra* note 100, at § 14.03[D]. In one case, however, the court decided that the author is entitled to ownership in the derivative work created by the infringer. *See* Anderson v. Stallone, 1989 U.S. Dist. LEXIS 11109 (C.D. Cal. Apr. 25, 1989). Under this rule, it could be argued that all profits made from the derivative work are attributable to the infringement and thus belong to the author.

allowing the infringer to profit from using the property of another, provided the victim is compensated for the use, seems like the protecting an entitlement using a liability rule. Thus, the existing law governing derivative works may be inconsistent with the core distinction between property rules and liability rules characteristic of the Cathedral analysis.

Under the corrective justice framework, analysis of the doctrine of derivative works and the Courts' analysis in *Sheldon* leads to a similarly puzzling result. First, it is obvious that MGM wronged the plaintiffs by using their play in its motion picture without their consent. The court acknowledged this by stating that MGM was a "deliberate plagiarist."[149] This is why injunctive relief was granted, confirming that the plaintiffs' right was protected by a property rule. Second is the apportionment of profits between the plaintiffs and MGM. Following the corrective justice framework, this is slightly more difficult to explain. One would expect that when a wrong is committed and its result is the mixing of the wrongdoer's and the victims' property or labor, the wrongdoer would forfeit the property and any right to any gains made.[150] This is consistent with the idea that MGM's wrong was not only the mixing of the plaintiffs' work with its own but also in distributing their work without their consent. This should theoretically result in MGM being denied any gains made from the wrongful act. Under corrective justice, MGM should also be barred from collecting gains under the theory that they represent unjust enrichment of the plaintiff, because the fact that MGM acted willfully would establish a donative intent.[151] This is, however, inconsistent with the Courts' decisions and current copyright law.

It seems that the courts in *Sheldon* apportioned the profits because they considered at least some aspect of MGM's conduct acceptable, i.e. not wrong. However, this is entirely inconsistent with their grant of injunctive relief and with the authors' exclusive right to make derivative works under current copyright law. Under the orthodox framework of corrective justice, therefore, the Court's ruling presents a contradiction without resolution: If MGM's conduct was wrongful, an injunction but not the apportionment of profits is appropriate. On the other hand, if MGM's conduct was not wrong, an injunction is inappropriate and there is no justification for compelling

149. Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 405 (1940).

150. *See* CORRECTIVE JUSTICE, *supra* note 22, at 140–42; RIPSTEIN, *supra* note 73, at 98–99, 103; *see also Stallone*, 1989 U.S. Dist. LEXIS 11109, at *8–11, 18.

151. CORRECTIVE JUSTICE, *supra* note 22, at 140–42.

MGM to share its resulting gains.

However, applying our model to the right to make derivative works in the same way we applied it to the compulsory licensing of musical cover versions, yields a single solution. It explains why an apportionment of profits is proper but also why an injunction should not have been granted. First, it explains why a second author should be free to use expressions from preexisting works to make a new works. Recall that under Drassinower's corrective justice analysis, all authors enjoy the basic freedom to speak in their own words and engage with the public. Likewise, authors have the right to prevent others from compelling their speech or speaking in their name.[152] However, as with cover versions of musical works, the right to prevent authors from engaging with the public and speaking in their own words through the use of expressions from preexisting works too excessive a limit on all other authors' freedom. Therefore, it cannot be part of any one author's set of rights. This is why, under our model, the right to make a derivative work, which is a new "original work" based upon preexisting works, and therefore not the original author's "own words," should be part of every author's freedom. While this is also the conclusion Drassinower reached, he further concluded that the first author should have no right to derivative works based upon his expressions.[153] The second stage of our model supports a different conclusion.

As you may recall, although we believe that Drassinower's copyright framework under corrective justice explains the nexus of freedoms that authors share under universal law, we do not think that it contradicts the understanding of works of authorship as external "things." As with the case of cover versions, here too, the maker of a derivative work has a right both to the abstract form of the intellectual object, representing his new speech, and a right to each concrete form of the object expressing it and disseminating it to the public. The abstract form of the object representing the second author's new speech is limited to his own new engagement with the public and is not in tension with the speech of the author's first work. Conveying the new speech to the public through a concrete form of the object, however, necessarily includes conveying a concrete form of the first author's intellectual object, as well. While this act is part of the second

152. *See* DRASSINOWER, *supra* note 133, at 56.

153. *Id.* at 222–24; *see* also KANT, *supra* note 134, at 8:86–8:87; Kim Treiger-Bar-Am, *Kant on Copyright: Rights on Transformative Authorship*, 25 CARDOZO ARTS & ENT. L.J. 1059, 1081 (2008).

author's freedom to speak in his own words and engage with the public—and therefore not part of the first author's right—it still results in objects that inseparably combine both authors' speech.

While the second author is free to make a derivative work and disseminate it to the public in a concrete form, he is not entitled to appropriate the speech of the first author in its concrete form and deprive her of it. Because the first author's concrete form of the object cannot be separated and returned to her, the first author should be a joint owner of every new concrete form the second author's produces—all copies of the derivative work. Moreover, because intellectual objects are concerned here as well, and because the first author has the right to produce an infinite number of concrete forms of her object, it seems that the value of any single concrete form of the first author's object is *de minimis*. Accordingly, it is unlikely that the first author will choose the compensation alternative instead of joint ownership.

The discussion above suggests the following rule regarding the making of derivative works. Every author has the right to engage with the public by making and disseminating derivative works based upon the expressions of preexisting works, and this act is not wrongful. Accordingly, no author is entitled to enjoin another from making derivative works based upon that author's original work. However, regarding the concrete representations of the derivative work themselves, these should be jointly owned by the first and second authors. While the second author has the freedom to disseminate these forms to the public, he is under an obligation to share his profits with the first author, for otherwise he will be unjustly enriched.

This result could be accomplished using different types of legal doctrines. One alternative is an *ex-ante* compulsory licensing mechanism that would set the royalties the second author must pay the first author according to each author's contribution to the derivative work.[154] Another alternative is an *ex-post* apportionment of gains, much like the rule decided in *Sheldon* and adopted in the Copyright Act. In both cases, however, an injunction is not justified.[155]

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154. *See* Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1264–65 (1997) (proposing a compulsory licensing mechanism in the context of derivative works).

155. For proposals to deny injunctive relief to the first author in the context of derivative works see Paul Edward Geller, *Hiroshige vs. Van Gogh: Resolving the Dilemma of Copyright Scope in Remedying Infringement*, 46 J. COPYRIGHT SOC'Y U.S.A. 39, 61 (1998); Orit Fishman-Afori, *Flexible Remedies as a Means to Counteract Failures in Copyright Law*, 29 CARDOZO ARTS & ENT. L.J. 1 (2010); Jed Rubinfeld, *Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J.

This application of our model to the case of derivative works could explain a recent decision of the German Constitutional Court regarding authors' right to use the copyrighted works of others for the purpose of engaging in a new creative activity. [156] Discussing the constitutionality of the "free use" doctrine, "freie Benutzung," under German copyright law, the court decided that the second author's freedom to use parts of protected works is compatible with the first author's right in his work.[157] Moreover, the court further suggested that a setting a fair compensation for such use conforms with the freedom of both authors.[158] Our model best explains this decision, at least under right-based theories.

Some may argue that, under corrective justice, this new doctrine is inconsistent with another important doctrine in copyright law, the fair use doctrine. Under current copyright law, the use of a copyrighted work will be considered fair and non-infringing if it is made "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," provided the following factors are taken into consideration:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[159]

Courts have clarified that when assessing the first factor, the most significant question is whether the use is "transformative" or not.[160]

1, 57–58 (2002).

156. BVerfG, 1 BvR 1585/13, §§ 78–80 Mai 31, 2016.

157. *Id.* Note that under current German law, the free use doctrine does not provide compensation for the first author. *See* Urheberrechtsgesetz [Copyright Act] Sept. 9, 1965, BGBL. I at 1273, § 24, as amended, Oct. 1, 2013, BGBL. I at 3728.

158. BVerfG, 1 BvR 1585/13, §§ 78–80 Mai 31, 2016.

159. 17 U.S.C. § 107 (2012). Empirical evidence shows that while the fourth factor is most mentioned in fair use cases, it is the first factor that is the most significant in the fairness analysis. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions*, 1978–2005, 156 U. PENN. L. REV. 549 (2008); Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011).

160. The term "transformative use" was coined by Judge Leval in his Article. *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990). It was also adopted by the United States Supreme Court. *See* Campbell v. Acuff-Rose Music Inc., 510 U.S. 569, 576 (1994).

Transformative use "adds something new, with the further purpose or different character, altering the first [expression] with new expression, meaning, or message."[161] Further, a use can be transformative in two significant ways, transformative of purpose and transformative of content.[162]

Drassinower's corrective justice framework aptly explains the fair use doctrine. It expounds that the fair user is also an author who is free to use copyrighted expressions to engage with the public in an intertextual manner.[163] Therefore, the first author has no right to the intellectual object resulting from the second author's fair use. Drassinower's framework of copyright thus posits only two possible categories to which acts,—users' or authors'—can be attributed. The first category is compelled speech. Infringing copies that result from an act that constitutes compelled speech are not themselves objects of new authorship. The second is a new author's own speech. Copies that result from an act of authorship that represents a new author's own speech do not infringe, regardless of whether the new speech is based upon another's old speech. Speech to which the fair use doctrine properly applies fall into this category. While our model recognizes Drassinower's two categories, it also proposes a third, intermediate category that is consistent with Drassinower's underlying copyright framework—a category of derivative works to which the fair use doctrine does not apply.

The key to understanding why there are different rules governing the right to make derivative works and fair use under our model is the transformative-ness of the use of preexisting expressions. When a second author uses a preexisting expression to engage with the public in a transformative way—meaning, changing the purpose, context, meaning, or message of the first expression—although the first author's expression is *identifiable* in the concrete form of the object representing the second author's speech, that expression is not a *representation* of the first author's engagement with the public. Thus, the concrete form of the new intellectual object represents only the second author's transformative expression and is wholly owned by him. He is thus under no duty to share his gains with the

161. *Id.* at 579. For further discussion, *see* Netanel, *supra* note 159, at 746–51.

162. For discussion, *see* Rebecca Tushnet, *Content, Purpose, or Both*, 90 WASH. L. REV. 869 (2015). *See also* Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815, 843–50 (2015).

163. *See* Abraham Drassinower, *Taking User Rights Seriously*, *in* IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW 462 (2005). Drassinower's analysis was based on the Canadian doctrine of "fair dealing," which is somewhat different than the American fair use doctrine.

first author.

In other words, while we may think that the first author's speech is part of the new transformative object, when the fair use doctrine is properly applied, the new object does not represent the first author's speech at all. Moreover, while some derivative works constitute transformative use, and therefore should be governed by the fair use doctrine, not all derivative works will merit its application—so the two categories do not fully overlap.[164] As Judge Pierre Nelson Leval of the Second Circuit recently stated, while the changes in certain derivative works in comparison to the first work "can be described as transformations, they do not involve the kind of transformative purpose that favors a fair use finding."[165]

The understanding that there could be a derivative work that is not transformative, in the fair use sense, is the impetus behind our third category of derivative works. Works that fall into this third category are not mere infringing copies because they clearly attach additional creativity and authorship to the first author's speech. On the other hand, they are also not transformative in the fair use sense because they do not alter the purpose, meaning, or message of the first author's speech.

Three different variations on a Harry Potter novel demonstrate the distinction between these three categories. A reproduction of the book without the author's consent, even one with minor alterations, clearly infringes, and falls into the category of compelled speech. In contrast, placing an image of the Harry Potter character in a modern art exhibition as a criticism of today's youth's diminishing interest in novels likely falls under the category of transformative use. It constitutes fair use because this act is clearly outside the scope of the author's original speech. Adapting the Harry Potter novel into a motion picture, however, fits into neither category. While this act clearly involves additional authorship and creativity, and thus results in something obviously more than a mere reproduction, it also falls short of transformative-ness, as it clearly does not change the basic purpose, meaning or message of the first author's speech.

Our model thus distinguishes between derivative works and transformative use as follows. In the case of non-transformative derivative works, the concrete form of the object representing the second author's

164. *See* Anthony R. Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 484, 494 (2008); Tushnet, *supra* note 162, at 887; Samuelson, *supra* note 162, at 843–44.

165. Authors Guild v. Google, Inc., 2015 U.S. App. LEXIS 17988, *27 (2d Cir. 2015).

speech also represents the first author's speech because they both participate in the same discussion, and the purpose and context of the new expression are not different. In contrast, in the case of transformative use, the concrete form of the new object represents only the speech of the second author. In other words, a derivative work of a protected expression elaborates and develops an existing discussion with the pubic, while a transformative use initiates a new one.

VI. CONCLUSION

In this Article, we have addressed the inconsistencies between Cathedral analysis and corrective justice. The core of the problem lies in corrective justice's apparent inability to justify and explain the existence of pure liability rules in private law. We have argued that this difficulty can be resolved using a new model that accounts for pure liability rules in some circumstances while remaining consistent with corrective justice.

The model analyzes liability rules asking first, whether I have the freedom to use your property for my own purposes. This question turns on the nexus of freedoms each individual has under universal law. Second, our model explains the possible results of such use. In some cases, my freedom to use your property results in no liability but in others, liability arises. This is because, I may have the freedom to use your property under certain circumstances, however I am never at liberty to appropriate your property. If, by using your property in accordance with my freedom, I have also damaged your property, I am under a duty to compensate you for its loss. Likewise, if the object I used is destroyed, this can only be accomplished by my compensating you for the loss of its value. Finally, in cases where my use of your property results in the formation of a new object, an object in which my property is mixed inseparably with yours, I owe you a choice between your object's lost value, in the form of monetary damages, and possession of object itself, in the form joint ownership in the new object.

Finally, our model explains existing legal doctrines typically considered as liability rules under corrective justice. This result is significant because it reinforces the explanatory validity of the theory of corrective justice in relation to positive private law. Our model can not only explain existing legal doctrines, it also supports the reform of existing rules in ways that make them more consistent with corrective justice. Thus, if valid, our proposed model, on both explanatory and normative grounds, should benefit the theory of corrective justice as a whole.