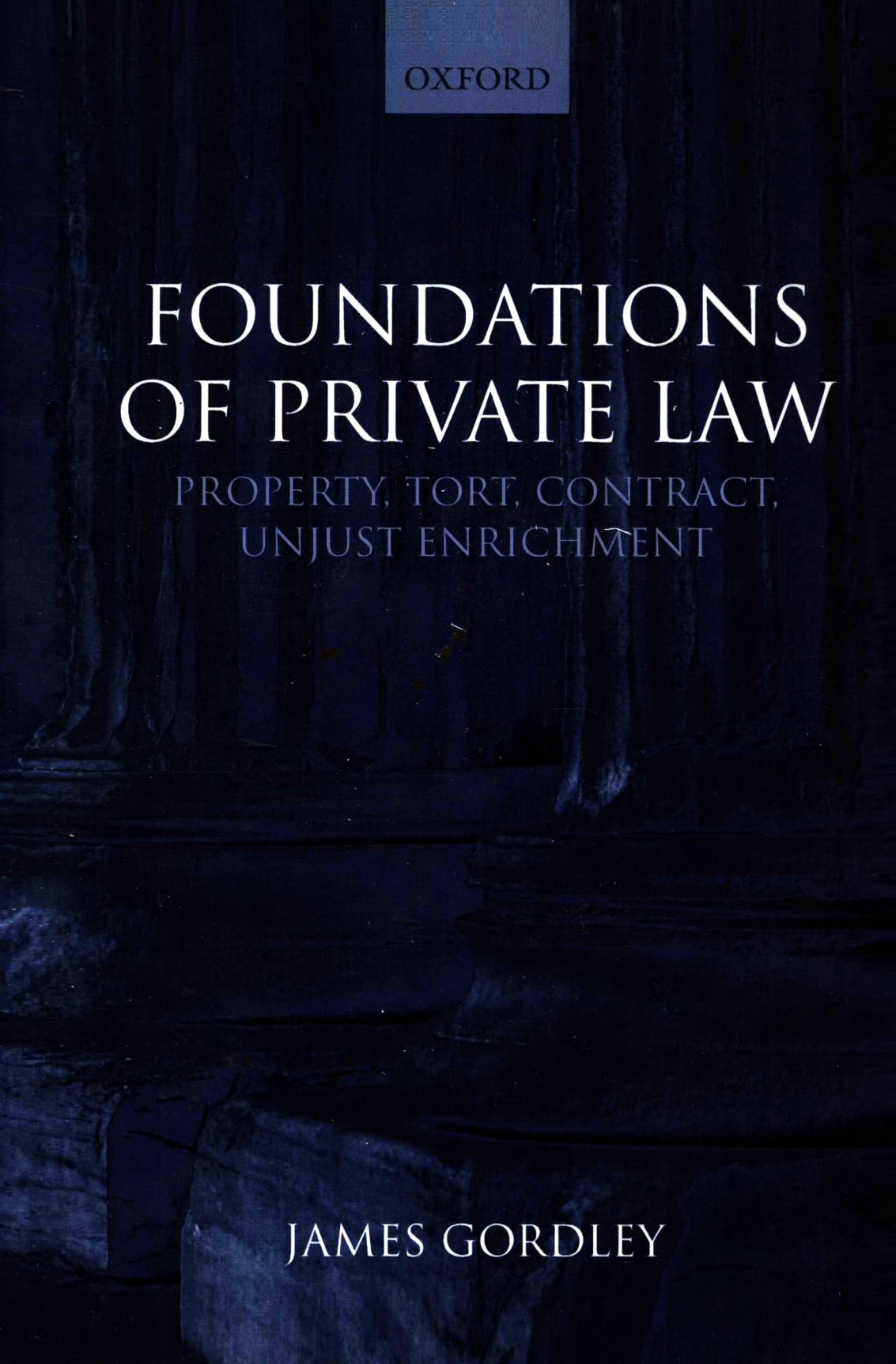
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PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT
JAMES GORDLEY

Foundations of Private Law

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Contents

V. UNJUST ENRICHMENT

PART I

THE ENTERPRISE

The Enterprise

This book will try to identify the principles that underlie basic fields of private law: property, tort, contract, and unjust enrichment. It will not deal with the law of marriage and inheritance although these fields are often counted as part of private law. They involve much different considerations such as what families should be like and how much control people should have over resources after they have died.

While this work builds on that of other scholars, it is different in two ways. One difference is that I will examine the law of the number of Western countries while most scholars consider their own. Their approach is too narrow if, as we shall see, similar societies face similar problems Moreover, most countries are facing them with common tools forged in the West, at first by the Romans, and now in use throughout the world. Thus they face similar problems as to how these tools should be used.

I wish that time and my own skills enabled me to consider the law of more countries. I have had to concentrate on those which have been the great exporters of ideas: the law of the more prominent common law and civil law jurisdictions. Nevertheless, I am afraid that because I am examining the law of several jurisdictions, this work will be classified, not as one about law, but as one about 'comparative law'. In my view, many scholars who specialize in 'comparative law' have obscured the reason for looking at the law of more than one country. Until late in the 20th century, the idea that dominated comparative legal research was that the law of each jurisdiction constituted a 'system'. One could not compare legal rules without seeing their place within a 'system'.[1] The archetypical work was by René David: *Les Grands Systèmes de droit contemporains*.[2] According to David, 'Each law constitutes in fact a system: it employs a certain vocabulary, corresponding to certain legal concepts; it uses certain methods to interpret them; it is tied to a certain conception of social order which determines the means of application and the function of law'.[3] This approach gave the impression that the law of England or France or Germany formed a coherent whole based on certain general principles or conceptions of law which were the key to understanding its rules. I believe, instead, that the jurists in all these so-called 'systems' were struggling with common problems, guided by similar concepts dimly glimpsed, but not expressed clearly in their national legal systems. If I am right, then we can learn much by seeing how others have faced similar problems. We will feel reassured when solutions are similar. We will understand a problem better when jurists have striven for similar results even at the cost of stretching the formal rules and doctrine of their own systems. We will see that sometimes different rules are different means to obtaining the same results. If so, it is wrong to consider how the jurists of one country deal with a problem without considering the efforts of others. To consider their efforts is not 'comparative law' except in the sense it is 'comparative engineering' for GM to see what Daimler Benz is doing. To do so is integral to the study of the legal problems

[1] Marc Ancel, 'Les grandes étapes de la recherche comparative all XX^{e} siècle', in *Studi in memoria di Andrea Torrente* (1968), 21.

[2] (7th edn, Paris, 1978).

[3] ibid. 20.

themselves. I will show in Chapter 2 that much of the difference between national laws has little to do with differences in ultimate principles and more to do with how they should be understood and applied.

Another and more fundamental departure from most legal scholarship is my account of where we are in the enterprise of making sense of private law. I have a story to tell which may seem on its face unpersuasive to my contemporaries. I believe the basic principles which can explain private law were once more clearly grasped than they are now. The source of our present confusion is that we lost track of them.

Private law, as we now understand it, was the creation of Roman lawyers. I will show that this is so even in common law jurisdictions. Before the 19th century, English law was organized around writs, with a collage of rules governing when writs could be brought. Order was brought out of chaos in the 19th century when the English, borrowing a huge amount from the civil law, reorganized their thinking around such categories as contract and tort—rather than assumpsit and trespass—and imported continental learning to understand these categories. That says a good deal for the work of the Romans. As will be seen, they developed the legal categories in which we still think, categories which must be of value or they would not have spread across the world. But their thinking was not systematic or theoretical. They considered specific cases or proposed general maxims. They certainly would not have analyzed consent, as a Greek philosopher might have done, by discussing what will or intention means.

I believe, and I have explained in my previous writings,[4] that the first coherent legal theory, in which the particular cases and the maxims were explained by general principles, came from a self-conscious effort to combine Roman law with Greek philosophy, and in particular, the philosophy of Aristotle. Curiously enough, that attempt was not made during the Middle Ages, when the Roman legal texts ruled the law schools and Aristotle much of the rest of the curriculum. The medieval jurists stuck to their Roman texts. The Aristotelians, under the influence of philosophers such as Thomas Aquinas, explored problems of moral philosophy. An attempt to combine the two approaches began in Spain in the 16th century with a group that historians refer to as the 'late scholastics'. The result, I have argued, was a reorganization of Roman law into a systematic doctrinal structure on the basis of Aristotelian philosophical principles. Paradoxically, many of their conclusions were adopted by the northern natural law school of the 17th and 18th centuries just as the Aristotelian premises on which they had been founded were coming under attack by the new school of critical philosophy.

The argument of this book, in essence, is that these older writers in the Aristotelian tradition had it right, or, at least, most of it. They identified the basic principles which best explain not only the Roman law of their times but modern private law as well. True, there were matters they failed to consider—such as what we call the law of nuisance—and matters they failed to explain—such as what we call strict liability. Yet if we consider their basic principles, we can see how to resolve even these problems.

The first chapter of this part will describe their basic principles. It will show that they were relatively simple although they were expressed in a technical vocabulary and

[4] Especially, James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford, 1991).

have often been misunderstood. Indeed, a modern person with no allegiance to any philosophical system might take them as matters of common sense. Chapter 1 will also show that these principles were rejected during the 'Enlightenment' for reasons that do not commend themselves today. They were rejected, not because they contradicted common sense, but rather because common sense was no longer accepted as a proper standard. They were rejected in the hope that new ideas would prove fruitful which in fact have proved sterile. Those contemporaries who take a modern approach are led into inconsistencies. While the first two chapters will deal with these fundamental problems, later chapters will explain how the older principles can best explain private law. If they can, that alone says much about modern attempts. If those principles can explain much of modern law, it is so much the worse for philosophies whose principles cannot.

I will try to show, then, that principles that commend themselves to our own common sense, that were once accepted almost universally long ago, that were discarded for the wrong reasons, still best explain private law. It would be an important objection if these principles were not coherent. I will explain why they are in Chapter 1. It would be an important objection if common principles could not explain laws that differ. I will explain how they can in Chapter 2. The heart of the enterprise, however, to which all but the two introductory chapters are devoted, is to show how these principles can best explain the law of property, tort, contract, and unjust enrichment. If they can, there is something to be said for these principles, whatever one thinks of their philosophical pedigree.

Some scholars may believe I cannot stop there. Historically, those who expounded these principles claimed they were universal and linked them to a coherent metaphysics. Some may think I should preface this book by a larger one considering whether these principles are reflected in the law of every culture or evaluating the truth of Aristotelian metaphysics. Those may be worthy enterprises but I do not think I have to undertake them here. I do believe that the knowledge of each thing is ultimately tied to the knowledge of every other. But it is a poor scholarly method that demands one claim either to know everything or to know nothing. It would be surprising if the principles that govern tort law in England or Germany were not linked to higher principles of moral philosophy which may or may not be universal or linked to the nature of man. That does not mean every book on private law must consider the principles of law in every culture or the nature of man. Each scholar has to work on part of the puzzle. But other scholars should then react to what he has done. Suppose it is right, as we will argue, that Western law, which is now nearly ubiquitous, is best explained by principles of the Aristotelian tradition. Why is that so? Those who are hostile to that tradition should explain why these principles have such explanatory power, how a misguided philosophy gave rise to them, or how they can be defended without recourse to that philosophy. Of course, they might claim instead that these principles do not have the explanatory power with which I credit them. But the point of this book is to show that they do.

1

Basic Principles

I. The Aristotelian Tradition

Writers in the Aristotelian tradition believed there is a distinctively human life to which all one's capacities and abilities contribute. Living such a life is the ultimate end to which all well-chosen actions are a means, either instrumentally or as constituent parts of such a life. Actions which contribute to such a life are right. Those that detract from it are wrong. Unlike other animals, a human being can identify the actions that do contribute. In doing so, a person exercises an acquired ability—a virtue—which these writers called 'prudence'. In following the dictates of prudence, he may need other virtues as well, such as the courage to face pain and danger or the temperance to forego pleasure.

The type of prudence a person exercises in seeing that an action contributes to the sort of life he should live (*nous* for Aristotle, *intellectus* for Thomas Aquinas) has been translated as 'understanding' or 'intuition'.[1] To call this ability 'prudence' does not explain how it works. It is merely to say that somehow, we are able to see that some choices are right and others wrong. Without such an ability we would never be able to act rightly. In any event, this ability is not deductive logic. Prudent people understand things that they cannot demonstrate.

To found ethics on deductive logic might suggest that the same choices are always either right or wrong like the conclusions of mathematics. While prudence indicates that some choices are right or wrong, the same choices are not always right or wrong for everyone. People are different and so are their circumstances. Even if they were not, there still might not be just one right or best choice a person should make. Freedom of the will, according to Aquinas, means not merely that one can choose to do right or wrong but that there can be different ways to choose rightly, no one of which is best.[2] Nevertheless, the choice may matter very much. It matters which of many possible beautiful buildings an architect chooses to build even though one cannot rank order their beauty. For Aquinas, it mattered that God created the universe, but he discussed God's freedom in the same way as that of human beings: there is no best of all possible worlds that God had to create.[3]

The Aristotelian ethical tradition is out of fashion. William James once said, however, without meaning to be complimentary, that much of it could be described as

[1] Aristotle, *Nicomachean Ethics* IV.xi; Thomas Aquinas, *Summa theologiae* II-II, Q. 49, a. 2.
[2] Thomas Aquinas, *Summa theologiae* I–II, Q. 10, a. 2; Q. 13, a. 6. [3] ibid. I, Q. 19, aa. 3, 10.

'common sense made pedantic'. Despite the rise of modern philosophy, I suspect that most people, as a matter of common sense, do believe that some ways a person can live are better than others, and that those people who live in a better way more fully realize what it means to be a human being. They recognize that while there are many good ways to be a human being, there are some that are decidedly bad. They believe that while they are fallible, they have some ability to tell the difference, an ability which is not merely deductive logic.

In any event, for writers in the Aristotelian tradition, living a distinctively human life requires, not only virtues such as prudence, temperance and courage, but external things as well. Moreover, because human life is social, a person should not only want such things for himself but want to help others acquire them as well. They distinguished two fundamental concepts of justice on which the law ultimately rests: distributive and commutative justice. The object of distributive justice is to ensure that each person has the resources he requires. The object of commutative justice is to enable him to obtain them without unfairly diminishing others' ability to do so.

These ideas intertwine. It is good to preserve each person's share of resources because it is good for each person to have what he needs to live as he should. One can speak about how a person should live because there is a distinctively human life to be lived and a distinctively human capacity to understand and to choose what contributes to such a life.

We will consider the concepts of distributive and commutative justice in detail since much of what follows will turn on them. The Aristotelian tradition provided a plausible account of them. Later philosophers, as we will see, did not.

In the case of distributive justice, while the ultimate objective is to provide people with what they need to live well, it does not follow that resources should be allocated by asking what things each person needs and assigning them to him. Hugo Grotius pointed out that such a system could work only if a society is very small and its members are on quite good terms.[4] In any event, each person's own decision about what he most needs would then be subject to the judgment of an allocator rather than left to his own prudence. Most writers in the Aristotelian tradition do not even consider the possibility. For them, distributive justice is concerned with giving each person a proper share of resources.

Ideally, each citizen should receive a share that is proportional to his 'merit' or 'desert'. There is, however, no single principle for appraising merit. Aristotle and Thomas Aquinas mention two different and conflicting ones and hint that there is some truth in both. According to one principle, which would be favored in a democracy, every person ideally should have the same amount. To the extent a society is democratic, greater virtue, meaning a greater capacity to make the right choices, does not entitle a person to make more choices. A society in which greater virtue did entitle one to do so would not be a democracy but an aristocracy, or rule of the virtuous (as distinguished from an oligarchy in which the power to govern would come from wealth or inherited status). According to the principle of distributive justice that an

[4] Hugo Grotius, *De iure belli ac pacis libri tres* (B. J. A. de Kanter-van Hetting Tromp, ed., Leiden, 1939), II.ii.2.

aristocracy would favor, those with superior virtue should ideally have a larger share of resources.[5]

Here, equality (or inequality) of resources should not be confused with equality (or inequality) of welfare as a utilitarian or a modern economist would imagine it. True welfare or happiness, in the Aristotelian tradition, is not defined in terms of utility or preference satisfaction but in terms of leading a good life. To say that resources are distributed equally in a democracy does not mean that people are equally able to lead such a life since, democracy or not, the virtuous are better able to make choices and will be able to live better. Equality means equal power to command resources: what we might roughly call equal purchasing power.[6] Ronald Dworkin in an important essay called it 'equality of resources' as opposed to 'equality in welfare'. As an illustration, he imagined shipwrecked sailors on an island dividing its resources equally by auctioning them off, all bids to be made in clam shells, and each sailor to start with an equal number of shells.[7] My image in an earlier article was similar: heirs auctioning the items in an estate among themselves by bidding in poker chips, each starting with an equal number.[8]

Writers in this tradition made it clear that such principles are ideals. A democracy should not confiscate the wealth of rich people, virtuous or otherwise, and divide it up.[9] We can see one reason why they should not if we consider Aristotle's objections—which Aquinas shared—to Plato's proposal to abolish private property. Do so, Aristotle said, and there will be endless quarrels, and people will have no incentive to work or to take care of property.[10]

These conclusions became staples of the Aristotelian tradition. They were accepted in the 16th and early 17th centuries, by a group known to historians as the late scholastics or Spanish natural law school, who self-consciously attempted to synthesize Roman law with the ideas of their intellectual heroes, Aristotle and Aquinas. Few people today are familiar even with the names of its leaders: for example, Domingo de Soto (1494–1560), Luis de Molina (1535–1600) and Leonard Lessius (1554–1623), and yet, as I have shown elsewhere,[11] they were the first to give Roman law a theory and a systematic doctrinal structure. Their work deeply influenced the 17th century

[5] Aristotle, *Nicomachean Ethics* V.iv. 1131^{b}–1132^{b}; Thomas Aquinas, *Summa theologiae* II-II, Q. 61, a. 2.

[6] Roughly, because people acquire things that are worth more to them than the amount of purchasing power they represent. A person who loses such a thing, and cannot buy another like it, will have lost more than that amount. Consequently, if someone takes or destroys it, he should pay its value to the owner even if that is more than the amount for which the owner could have sold it. If something identical is not available on the market and someone offers to buy it, the owner can sell it for a price that reflects its value to him. See James Gordley, 'Contract Law in the Aristotelian Tradition', in Peter Benson, ed., *The Theory of Contract Law: New Essays* (Cambridge, 2001), 265 at 313.

[7] Ronald Dworkin, 'What is Equality? Part 2: Equality of Resources', *Phil. & Pub. Affairs* 10 (1981), 283–90.

[8] James Gordley, 'Equality in Exchange', *Calif. L. Rev.* 69 (1981), 1587 at 1614–15.

[9] Aristotle, *Politics* V.5. 1304^{b}; V.9. 1310^{a}; VI.3. 1318^{a}, 25–6; VI.5 1319^{b}–1320^{a}.

[10] Aristotle, *Politics* II.v; Thomas Aquinas, *Summa theologiae* II-II, Q. 66, a. 2.

[11] James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford, 1991), 69–111; James Gordley, 'Tort Law in the Aristotelian Tradition', in David Owen, ed., *Philosophical Foundations of Tort Law: A Collection of Essays* (Oxford, 1995), 131; James Gordley, 'The Principle against Unjustified Enrichment', in Klaus Luig, Haimo Schack, and Herbert Wiedemann, eds., *Gedächtnisschrift für Alexander Lüderitz* (Munich, 2000), 213.

founders of the northern natural law school, Hugo Grotius (1583–1645) and Samuel Pufendorf (1632–94) who disseminated many of their conclusions through northern Europe, paradoxically, at the very time that Aristotelian and Thomistic philosophy was falling out of fashion. While these authors developed the ideas just described in different ways, they all said that by nature, or originally, or in principle, all things belong to everyone. They all described private ownership as instituted to overcome the disadvantages of common ownership, usually the ones mentioned by Aristotle and Aquinas.[12]

Subject to these limitations, however, they agreed that one person could not deprive another of his property. The owner may have more than he ideally should since an incentive has to be given to work and to manage. But, by establishing the incentives, the society has recognized that a person is entitled to the larger share that his work and good management brings him. The actual distribution of resources in society can only approximate the ideal.

These writers also accepted the Roman rule, *res pereat domino*—the accidental loss of a thing is borne by its owner. The late scholastics recognized that not only physical destruction but fluctuations in prices could change the distribution of purchasing power. They acknowledged that prices fluctuate, and must do so to reflect what they called the need, the scarcity and the cost of goods.[13] Modern writers such as Stephen Perry and Ernest Weinrib have thought it strange that if there is such a thing as a just distribution, accidents should be allowed to change it.[14] Writers in the Aristotelian tradition acknowledged that accidents could do so, but still believed, as I think most people do today, that some distributions of resources are in principle more fair than others.

While they are not explicit, I doubt if they could imagine a workable society which did not allow random events and price changes to change the distribution of wealth anymore than one which did not allow incentives to care for property or to labor. Indeed, to eliminate chance gains and losses, a society would have to distinguish them from gains and losses that are the result of labor and care. That may not be possible. Even if it were, the attempt might lead to so many charges of arbitrariness as to cause the quarrels that a system of private property is supposed to prevent.

Moreover, some resources are more vulnerable to chance destruction or to price fluctuation than others. Some decisions about what to produce or consume are more prone to error. If everyone were fully compensated when his property was destroyed or his decisions were thwarted by bad luck, those who had chosen to hold more vulnerable

[12] Domenicus Soto, *De iustitia et iure libri decem* (Salamanca, 1551), lib. 4, q. 3, a. 1; Ludovicus Molina, *De iustitia et iure tractatus* (Venice, 1614), disp. 20; Leonardus Lessius, *De iustitia et iure, ceterisque virtutibus cardinalis libri quatuor* (Paris, 1628), lib. 2, cap. 5, dubs. 1–2; Grotius, *De iure belli ac pacis*, II.ii.2; Samuel Pufendorf, *De iure naturae et gentium libri octo* (Amsterdam, 1688), II.vi.5; IV.iv.4–7.

[13] Gordley, *Philosophical Origins*, 94–102; Soto, *De iustitia et iure libri*, lib. 6, q. 2, a. 3; Molina, *De iustitia et iure* II, disp. 348; All of these factors had been mentioned, albeit cryptically, by Thomas Aquinas. *In decem libros ethicorum expositio* (Angeli Pirotta, ed., Matriti, 1934), lib. 5, lec. 9; *Summa theologiae* II-II, Q. 77, a. 3 ad 4. They were discussed by medieval commentators on Aristotle. Odd Langholm, *Price and Value in the Aristotelian Tradition* (Bergen, 1979), 61–143.

[14] Stephen Perry, 'The Moral Foundations of Tort Law', *Iowa L. Rev.* 77 (1992), 449 at 451; Ernest Weinrib, 'Corrective Justice', *Iowa L. Rev.* 77 (1992), 403 at 420.

property or to embark on riskier projects would consume more resources than those who did not. A person who chose to live in a glass house, to pick an extreme example, might use up five or ten houses in the same time another person would use up one. If he were compensated, the system would not be conserving a given distribution of wealth but transferring wealth to persons whose property is more vulnerable and whose projects are more adventurous.

Writers in the Aristotelian tradition do not make these arguments expressly. But they may have had an understandable difficulty in seeing how one could eliminate the rule *res pereat domino*. Thus, although they recognized that even commutative justice depended upon distributive justice, they recognized then, that the principle that should ideally govern the distribution of wealth could only be approximated.

If this perspective is correct, the social controversies of modern times can be better understood. While these controversies will not go away, they should turn on questions of feasibility and fairness. It is not helpful to consider property rights without considering fairness and distributive justice. Conversely, it is not helpful to be concerned about justice while failing to look carefully at questions of feasibility.

In any event, in this study, this account of distributive justice will figure in two ways. First, when the question of how property rights should be acquired or defined arises, we will continually return to the reasons why such rights should exist in the first place. Often, the reason may be that there are pragmatic constraints on how they ideally should be. We must identify these constraints and see how they should be limited. That approach is different than one which regards property rights as sacrosanct and unlimited. It is also different than one which identifies pragmatic constraints with 'utility' as a modern economist understands the term. Economists tend to define utility in terms of the ability to satisfy a preference—whatever the preference may be—given the resources one happens to possess—however that distribution may help or hinder others in their pursuit of a good life. The difficulties with this approach will be considered later. Here, we need only note that many writers have seen only these two alternatives: either rights must be sacrosanct or they must depend on utilitarian considerations and so be defeasible when those considerations so dictate.

In contrast, by the older approach, respect for rights and considerations of pragmatism walk hand in hand. Ideally, a person should have a certain share of wealth. Unfortunately, he often cannot if we are to provide others with an incentive to labor and conserve resources. That is a pragmatic consideration which long predated modern economists' notions of utility. If, however, for pragmatic reasons, the law provides such an incentive, then the person who labors and conserves resources thereby acquires a right. The extent of his right is limited by the pragmatic reasons for providing the incentive. But one cannot deprive him of his right without reneging on the commitments which such a system entails. There is no contradiction then, between defining a right in terms of the pragmatic considerations that lead to its recognition, and recognizing that it is a right nonetheless. As we will see, if we overlook that point, we cannot explain most of private law.

One of my critics has claimed that because my approach offers an integral account of both rights and pragmatic considerations, it cannot form an intellectually coherent whole. It must 'disaggregate into a mixture of utilitarian and rights-based