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Trade Secrets, Unjust Enrichment, and the Classification of Obligations

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I. Introduction

A trade secret is a form of information that's then-thirteen-year-old Justice Scalia found so compelling because of the "peculiar character" of the "property" that it could be "destroyed by its owner's voluntary disclosure to a single person."[2] Trade secrets are also "property" that can be misappropriated by "improper means" such as theft, bribery, and espionage.[3] Trade secrets are quickly so valuable (worth $17.1 to $24.8 trillion)[4] that it's wrongful discretion of trade secrets is viewed as a "cardinal sin" in business and "[t]he theft of trade secrets is a crime that can cripple a company and even a country."[5]

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One way in which to consider the difference between rights in contract and rights in law is that the property rights in contract are those rights which are given to the parties to a contract by the contract itself. Property rights in law are those rights which are given to the parties by the law, regardless of what the contract says. Property rights in law are hard to contradicting, or amended or nullified by contracts, and are hard to enforce against third parties. Property rights in contract are easy to contradict, or amend or nullify by contracts, and are easy to enforce against third parties. Property rights in law are those rights which are given to the parties by the law, regardless of what the contract says. Property rights in contract are those rights which are given to the parties by the contract itself. Property rights in law are hard to contradicting, or amended or nullified by contracts, and are hard to enforce against third parties.

Contracts cannot be distinguished from distributive justice, which refers to the distribution of benefits and burdens among people. Contracts are not distributive justice, because contracts are not about the distribution of benefits and burdens among people. Contracts are about the distribution of benefits and burdens among people, but not distributive justice. Contracts are about the distribution of benefits and burdens among people, but not distributive justice, because contracts are about the distribution of benefits and burdens among people, but not distributive justice, because contracts are about the distribution of benefits and burdens among people, but not distributive justice, because

[239] *See* Nancy A. Weston, *The Metaphysics of Modern Tort Theory*, 28 Val. U. L. Rev. 919, 956-57 (1994).

[240] *See* Susan Randall, *Corrective Justice and the Torts Process*, 27 Ind. L. Rev. 1, 50 n.1 (1993).

[241] Professor Weinrib has written extensively on corrective justice's coherence and its "immanent rationality," i.e., its ability to operate and be understood entirely from within its own principles. "[C]orrective justice is the locus of an immanent rationality. In this connection, two points must be recognised: that corrective justice embodies a distinctive rationality and that this rationality is an immanent one." Ernest J. Weinrib, *The Juridical Classification of Obligations, in* The Classification of Obligations, 37, 43 (Peter J. Birks ed., 1997.)

[242] Ernest J. Weinrib, The Idea of Private Law, 12 (1995).

[243] *Id*. at 207.

[244] *See* Aristotle, the Nicomachean Ethics 84-88 (Hippocrates G. apostle trans., 1975).

[245] *See* Ernest J. Weinrib, *The Juridical Classification of Obligations*, *in* The Classification of Obligations, 37, 43 (Peter J. Birks ed., 1997). Weinrib says, "[C]orrective justice admixes no considerations originating in positive law. Corrective justice is not itself something posited. Rather, it is a moral concept signifying the regulation of an interaction by reference to the correlatively of doing and suffering injustice." *Id*.

[246] Ernest J. Weinrib, The Idea of Private Law, 210 (1995).

[247] *Id*. at 134-36.

[248] *See Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc*., 114 So. 2d 357, 359 (Fla. Dist. Ct. App. 1959) (holding that defendant was not liable for building a structure that cast an afternoon shadow on plaintiff's bathing area. The court remarked that the law does not require "that one must never use his property in such a way as to do an injury to his neighbor . . . . It means only that one must use his property so as not to injure the lawful rights of another.")

[249] *See Palsgraf v. Long Island Railroad*, 162 N.E. 99, 100 (N.Y. 1928) (J. Cardozo: "The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.")

[250] One implication of this statement is that under corrective justice damages are compensatory, not punitive. Another implication is that, because corrective justice goes to the nature of the obligation and not the means by which that obligation is discharged, the use of liability insurance is compatible with corrective justice.

[251] *See* Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 Va. L. Rev. 149, 164 (1992).

[252] *See* Jules L. Coleman, *Intellectual Property and Corrective Justice*, 78 Va. L. Rev. 283, 284 (1992).

[253] *See* Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits: Part II*, 1 J.L. & Phil. 5, 12-13 (1983)

[254] *See* Ernest J. Weinrib, *The Juridical Classification of Obligations*, *in* The Classification of Obligations, 37, 44-45 (Peter J. Birks ed., 1997). Professor Weinrib defines juridical classifications as those legal classifications that express the "distinctive right-based rationality implicit in the interaction of the . . . parties," one that "transcends the contingencies of positive law, and that gives rise to a rationality that is immanent to the parties' relationship." *Id*. at 40. Also, "A classification is juridical to the extent that it reflects the distinctive moral rationality of private law. . . . Corrective justice allows us to see tort, unjust enrichment, contract, and the fiduciary relationship as the moral categories implicit in the interaction of plaintiff and defendant." *Id*. at 54.

[255] Ernest J. Weinrib, *The Juridical Classification of Obligations*, *in* The Classification of Obligations, 37, 44 (Peter J. Birks ed., 1997).

[256] *Id*. at 45.

[257] For a definition of "juridical classifications", *see* discussion, *supra* note 253.

[258] Ernest J. Weinrib, The Idea of Private Law, 136 (1995).

[259] *See id*. at 136.

[260] *See id*. at 136.

[261] *Id*.

[262] By "owner", I mean the person who possesses a trade secret and employs reasonable safeguards to keep it secret. In using the term "owner", I do not mean to presume the conclusion that the possessor of a trade secret has proprietary, or "ownership" rights. That is a question for society to decide. Today, however, the law does in fact accord proprietary rights to trade secret owners.

[263] *See* discussion, *supra* Part VI.

[264] *See e.g*., *E.I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1014, 1017 (5th Cir. 1970).

[265] *See* Uniform Trade Secrets Act § 3.