DAMAGES WITHOUT LOSS

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One of the most disputed issues in the law of damages in recent years has been the existence and justification of substantial damages awards for private law wrongs in circumstances in which the victim of the wrong has suffered no loss. Some argue that such awards exist and are justifiable on the basis that they vindicate, in some sense, the rights of the person wronged.[1] Others argue that a sophisticated loss-based analysis of these awards can in fact explain and justify all or most of the law.[2] Finally, some argue that, while such awards do exist, they cannot be reconciled with the fundamentally loss-centred approach to damages in English law and so should be rejected.[3]

In this article, I make two contributions to the debate about the existence and justification of damages awards without loss. First, after introducing some important analytical distinctions about the concept of loss, I show that there are indeed awards, normally described as compensatory, which do not aim to compensate for *loss*. While others have argued for similar a claim, the analysis here does so in a distinctive way: by focussing on the counterfactual nature of the concept of loss; in addition, it responds to recent attempts to salvage a loss-based analysis of certain awards. Second, it examines in greater depth the possible normative foundations of damages without loss. I argue that non-loss-based awards can be justified (i) by the duties that wrongdoers incur upon breaching a duty to serve the underlying goal of the original duty which has been breached, (ii) as a matter of fairness, and (iii) tentatively, in some cases, as a matter of expressive vindication. I show how the existence of such awards does not undermine, but may sit coherently alongside, damages for loss. In short, the article provides an analytical and normative defence of damages without loss.

The first part of the article explains the idea of 'damages without loss'. The second part considers three putative examples of damages without loss: (i) breach-curing awards; (ii) damages in cases of causal overdetermination and pre-emption involving multiple actual or potential wrongdoers; (iii) damages for wrongful interference with rights of control. It argues that each category permits damages awards without loss. The final part outlines some justifications for these awards and shows how they fit alongside damages for loss.

I. The Idea of Damages without Loss

Arguments about whether a particular award of damages is loss-based or not clearly cannot advance very far without some clarity on the concept of a loss. I will understand a loss to be what occurs to a person when an event is a cause of that person's interests being in a condition

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[1] R. Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007), Ch.4; J. Varuhas, "The Concept of 'Vindication' in the Law of Torts: Rights, Interests, and Damages" (2014) 34 O.J.L.S. 253, D. Pearce and R. Halson, "Damages for Breach of Contract: Compensation, Restitution and Vindication" (2008) 28 O.J.L.S. 73.

[2] A. Burrows, "Damages and Rights" in D. Nolan and A. Robertson (eds.) *Rights and Private Law* (Oxford: Hart Publishing, 2012), at p.275.

[3] E. Descheemaeker, "Unravelling Harms in Tort Law" (2016) 132 L.Q.R. 595.

which is worse than the condition they would have been in had that event not occurred. Generally, in the law of obligations, the particular event is a legal wrong, for instance a tort or breach of contract, or an act or omission that is partly constitutive of a legal wrong, for instance, a breach of a duty of care.

Two important points should be made about this concept of loss. First, it is comparative and counterfactual. It involves a comparison between two conditions: an actual condition, and a counterfactual condition, the latter being the condition the person would have been in had the wrong not occurred. Second, the definition leaves open in what precise respect(s) the person must be 'worse' in this comparison.[4] This depends upon what one counts as a relevant 'interest'. One respect may be the person's wealth. Another may be their ability to engage in valuable activities. The first point indicates one way in which an award of damages may fail to be loss-based: the award is made despite the person being no worse off in a counterfactual sense.

This counterfactual concept of loss is adopted for two reasons. First, it can claim to be the dominant conception in the law and has recently been endorsed by the Supreme Court.[5] Second, it is generally explicitly or implicitly assumed in discussions about the phenomenon of damages without loss.[6] If a more capacious conception of 'loss' is preferable, however, then one can simply read what follows as a discussion of damages in the absence of 'counterfactual loss'.

The phenomenon of 'damages without loss' refers, then, to a damages award which does not aim to compensate for loss. An award will not aim to compensate for loss if the present or future existence of a loss is not a necessary condition of the award being made.[7] Furthermore, I will be concerned with awards that are not clearly gain-based and not clearly punitive in character in tort and contract. The issue in dispute in debates about damages without loss is whether such damages exist within what is typically referred to as 'compensatory' damages. In other words, what is at stake is whether the term 'compensatory damages' refers to a unified phenomenon of damages whose aim is to compensate for loss, or whether it also comprises awards which do not share this aim.

II. Categories of Damages without Loss

(a) *Breach-curing awards*

A breach-curing award, as it may be termed, provides the victim of a breach with the monetary means to cure a breach of a legal duty even if the breach has not caused a loss.[8] While ordinary compensation for loss can be described as breach-curing, in that it aims to put the victim in the position they would have been in had the breach not occurred, a breach-curing award

[4] Tadros calls this the issue of the 'currency' of harm: V. Tadros, "What Might Have Been" in J. Oberdiek (ed.) *Philosophical Foundations of the Law of Torts* (Oxford: Oxford University Press, 2014), at p.172.

[5] *Morris-Garner v One Step Support Ltd* [2018] UKSC 20; [2019] A.C. 649 at [36] (Lord Reed): "the difference between the claimant's actual situation and the situation in which he would have been if the primary contractual obligation had been performed". See also *Nykredit Mortgage Bank v Edward Erdman Group Ltd* [1997] 1 W.L.R. 1627 at 1631; [1998] 1 All E.R. 305, at 309 (Lord Nicholls).

[6] It is accepted, e.g., by Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007).

[7] Arguably preventive damages also do not aim to *compensate* for loss. See D. Nolan, 'Preventive Damages' (2016) 132 L.Q.R. 68.

[8] I use the terminology of 'breach-curing' because 'cost of cure' has tended to be associated only with awards for breach of contract.

specifically targets the amelioration of the state of affairs which partly *constitutes* or *constituted* the breach. If B suffers a loss of earnings after being wrongfully physically damaged by A, the loss of earnings is not partly constitutive of the breach of duty, unlike the *physical damage*.

Consider these two examples, one tort, one breach of contract:

> *Earthquake*. A negligently and irreparably destroys B's car at 12.00. The car would have been destroyed by an unforeseeable earthquake at 12.00 anyway.
>
> *Swimming pool*. A contracts with B to build B a (non-defective) swimming pool to be completed by July 1. In breach, A provides a defective swimming pool on July 1. The pool is defective because it contains several leaking areas. Suppose that if A had built B a non-leaky swimming pool by July 1, the swimming pool would have been completely destroyed by a massive flood: if the pool had been water-tight, the flood water would have cascaded into B's house, causing a part of the house to collapse into the swimming pool.

In *Earthquake*, the position appears to be that A is liable to pay the market value of B's car at the time it was destroyed. Since the earthquake is unforeseeable, it will not affect the market value. There is liability to pay such damages despite the fact that the destruction would have occurred in any event.[9] This latter conclusion is sometimes rationalised on the basis that B suffers an 'immediate loss' when B's car is damaged.[10] This confuses the notion of *damage* and the notion of *loss.* It is true that A negligently *damages* B's car. That is, A causes B's car to be in a bad physical condition at 12.00. But causing a person or their property to be in a bad condition is not necessarily the same as causing a person to be in a bad condition which is worse than the condition in which they would otherwise have been. In *Earthquake*, B is not counterfactually worse off at 12.00 than B would otherwise have been. There may, then, be *damage*, but no *loss*.[11]

Consider now *Swimming pool.* It seems likely that B is entitled to substantial damages to allow B to cure the breach, so long as B intends to effect the cure, and the cure is not disproportionately costly.[12] Note, however, that A's breach in failing to provide a non-defective swimming pool by July 1 did not cause B *loss*: A's breach made B better off than B would have been had the breach not occurred. If A had not breached the contract by building a defective swimming pool on July 1, then B would have had a completely destroyed swimming pool. As things stand, B has a defective swimming pool. Nonetheless, B seems to be entitled to damages to allow B to fix the swimming pool's defects.[13]

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[9] For a recent statement, *Coles v Hetherton* [2013] EWCA Civ 1704, [2015] 1 W.L.R. 160 at [27].

[10] *Coles v Hetherton* [2013] EWCA Civ 1704 at [29].

[11] For the distinction between *damage*, which refers to a negative state that a person or their goods is in, and *loss* which refers to a counterfactual worsening of a person's goods, see D. Nolan, "Rights, Damage, Loss" (2017) 37 O.J.L.S. 255.

[12] For the general position on cost of cure damages in contract, see *Ruxley Electronics and Construction Ltd v Forsyth* [1995] UKHL 8; [1995] 3 W.L.R. 118.

[13] For an explanation of how this result can stand with *The Golden Victory* [2007] UKHL 21; [2007] 2 A.C. 353, see R. Stevens, "Damages and the Right to Performance: A Golden Victory or Not?" in J. Neyers, R. Bronaugh and S. Pitel (eds.), *Exploring Contract Law* (Oxford: Hart Publishing, 2009). Essentially, the explanation is that there was never and never would have been a right to the future payments of hire. Consequently, there could be no deprivation of a state of affairs protected by those rights. A further objection arises out of the Court of Appeal decision in *Bence Graphics International Ltd v Fasson UK Ltd* [1998] Q.B. 87; [1997] 1 All E.R. 979. A provided B with defective vinyl film in breach of contract. B, unaware of the defect, made use of the film to manufacture a product which it sold on to third parties. The vast majority of the third parties made no complaint as to the quality

It might be objected that B *will* suffer a loss in the future due to the expenditure B will incur to fix the pool, and the award compensates for this future loss. This is not, however, necessarily the case. B may be unable to incur such expenditure without the damages award being made. So it is not invariably true that B will be worse off than B would otherwise have been but for the breach, with respect to his finances, if the award is not made.

A different version of this objection – that B has or will suffer a loss – is as follows. A has a duty to provide a non-defective swimming pool and a duty to do this by a particular time – July 1. The second duty has been breached and no longer survives since it is impossible to comply with. The first duty, however, continues such that on July 2 and until a non-defective pool is provided, B is suffering a loss: B is worse off than B would be compared to B's position if A complied with all of A's current duties. The problem with this suggestion can be brought out by a comparison with debts - obligations to pay a specified sum of money. A person is liable to the action for the agreed sum, which enforces a debt, even if the payment of the debt would make the creditor worse off than they would be were the debt not paid. This is an unusual case: normally, an order to pay a debt *could* logically be conceived of as preventing the occurrence of a loss, namely, the loss that would occur were the obligation to pay not performed. But, as a matter of the law as it stands, it simply seems neither here nor there whether this is true. It is not, for instance, a defence to the action for the agreed sum to point out that the payment of the debt would expose the creditor to massive tax liabilities and thus render them financially worse off. Now turn again to the swimming pool example. If the obligation to provide a non-defective pool subsists after the breach of the obligation to perform at a specific time, it can indeed be said that the failure to perform the obligation causes B to be worse off than B would have been had that obligation been performed, in the same way that the failure to pay a debt is likely to do so. But *whether this is so* – that is, whether a loss will be suffered if the obligation is not performed – seems unimportant to the availability of cost of cure. Even if the completion of the swimming pool will render B financially worse off than B would otherwise be, this seems unimportant.

of the product. The Court of Appeal did not award the difference in value between defective and non-defective film, but limited damages to the loss: B was not (except by virtue of the few who made complaints) worse off than B would have been, had A not breached. Now the objection is that, if breach-curing awards are insensitive to loss, then a breach-curing award should have been available in *Bence*. Unlike in *The Golden Victory*, B had an accrued contractual right to non-defective goods. A breach-curing award, it is plausible to think, aims at fulfilment of an objective protected by the contractual right, so far as possible, after breach. It follows that it is not clear how an award of damages in *Bence* would contribute to the actual fulfilment of a contractual objective given that the sub-sales had already been completed. At any rate, the current law seems to be that the sub-sale will be taken into account only if it is within the 'reasonable contemplation' of the parties: see *Biggin & Co Ltd v Permanite Ltd* [1951] 1 K.B. 422 at 435-436; [1950] 2 All E.R. 859, at 867-869 (Devlin J), *Bence* itself, and *Euro-Asian Oil v Credit Suisse AG* [2018] EWCA Civ 1720; [2019] 1 All E.R. (Comm) 706. This entails that *sometimes* a sub-sale will be ignored and damages will therefore not reflect *loss*.

(b) *Compensation in circumstances of causal overdetermination and pre-emption involving multiple actual or potential wrongdoers*

One of the most difficult problems in the law of damages is the problem of damages in causal overdetermination and causal pre-emption situations involving multiple wrongdoers.[14] An event is causally overdetermined if there is at least one actual causally sufficient set of circumstances for that event, and the event has other causes. Causal pre-emption occurs when an event or set of events causes an outcome, but the outcome would have been produced in any case at the same time, or very soon after. This section is concerned with a sub-set of these cases, those which involve overdetermination by, or pre-emption of, a wrong. I will argue that there is an important sense in which such cases involve damages without loss.

The paradigm example of causal overdetermination is multiple independently sufficient causes, for instance:

> *Shooters.* A negligently fires a bullet at B. C negligently fires a bullet at B. Both bullets strike and break B's arm in the same place. The effects upon B's arm are the same as would have occurred if only one bullet had fired.

There is general agreement that A and C are both wrongful causes and would be jointly and severally liable to pay B damages.[15] Furthermore, it seems natural to describe these damages as compensatory damages for B's *loss*. This raises a puzzle, however, since it seems that B is not worse off as a result of A's wrong, nor as a result of C's wrong. According to the counterfactual concept of loss, then, it would appear that B has suffered no loss, since, if the relevant event is 'A's wrong' or 'C's wrong', then neither event makes B worse off, due to the presence of the other wrong.

An argument for a loss-based analysis in causal overdetermination and pre-emption cases such as *Shooters* and *Shooters 2* is that in assessing whether a person is worse off as a result of an event, the relevant counterfactual should be sensitive to context: in imagining what would have happened had the event not occurred, sometimes the context will require certain events to be excluded from the relevant counterfactual.[16] So it might be argued that the context of the law of wrongs requires that the counterfactual be one in which no one commits a wrong against the victim. In *Shooters*, one imagines, then, a world in which neither A nor C wrongfully fired.

The main problem with this response is that it's not clear how the 'context' generates the relevant counterfactual. Sometimes the conversational context might suggest a particular counterfactual. Consider: 'Was John's carelessness a reason Amita left him?' Depending on the context, the answer to this causal question might require us to posit different counterfactuals. If the context is a discussion of some specific instance of John's carelessness, then the relevant counterfactual would be one in which that specific instance does not occur. If the context is a discussion of John's qualities in general, it might be one in which John is not a careless person. But which counterfactual does the 'private law' context suggest? This seems

[14] See generally M.D. Green, "The Intersection of Factual Causation and Damages" (2006) 55 De Paul L. Rev. 671; S. Steel, *Proof of Causation in Tort Law* (Cambridge: Cambridge University Press, 2015), Ch. 1.
[15] For the proposition that causation may exist despite the failure of the but-for test and absent evidential uncertainty: *The Financial Conduct Authority v Arch Insurance (UK) Ltd & others* [2021] UKSC 1, [2021] A.C. 649, at [182]-[185].
[16] See V. Tadros, "What Might Have Been" in J. Oberdiek (ed.) *Philosophical Foundations of the Law of Torts* (Oxford: Oxford University Press, 2014).

to be, at least in part, a normative question which cannot be answered by reference to the conversational context of private law, whatever that means.

It would certainly seem unfair if B were entitled to no compensation in *Shooters*. The fact that B was also wronged by another person, C, seems not to bear upon whether B should be compensated by A. We could then say, by virtue of this unfairness, that A has suffered a loss, and equate the circumstances in which a person ought to be compensated with those in which they have suffered a loss. This result could be achieved by stipulating the relevant counterfactual as one in which no other wrongs to B occur. But, on the face of it, this looks to be reverse-engineering the concept of loss to avoid an unfair outcome. On this view, a person suffers a loss because (sometimes) it would be unfair if they were not compensated. Normally, one thinks that compensation is owed because, *inter alia*, a person has suffered a loss, not the other way around.

(c) *Wrongful interference with rights of control: vindicatory, user, and negotiating damages*

Consider these four cases:

> *Body.* A, B's surgeon, due to a mistake for which A is not culpable, operates on B's leg without B's consent during a connected operation. The leg's functioning is vastly improved, and many new valuable options are now open to B.
>
> *Privacy.* A, due to a computer malfunction, posts B's naked pictures on the internet without A's consent. B is in a coma.
>
> *Property.* A, due to a mistake for which A is not culpable, uses B's office chair without B's consent when B is on research leave.
>
> *Contract.* A, due to a mistake for which A is not culpable, builds a hotel next to B's land in breach of a contract with B not to do so. The hotel improves the market value of B's land.[17]

In *Body*, *Privacy*, *Property*, and *Contract*, a substantial award of damages is likely to be made. In each case, the damages are now likely to be described as compensatory.[18] In *Privacy*, the compensation will be for the "loss of the right to control" one's private information.[19] In cases where the information is of a kind that has a market exchange value, that value may form the measure of the damages.[20] In *Property* and *Contract*, the compensation – described as an award of 'user' and 'negotiating damages', respectively – is for the loss of the right to exercise control over a valuable asset.[21] In *Property*, the asset is the chair (or perhaps a legal right over the chair). In *Contract*, the asset is possibly either the primary contractual right concerning the use of A's land, or the legal power to obtain an injunction to prevent violation of that primary right.[22] In both *Property* and *Contract*, the valuation of the loss will be either the market value of the (use of the) asset or, if there is no market, what reasonable people would have agreed as the exchange value of the asset. I will refer to the set of rights invaded in these cases as 'rights of control' (for reasons that will become apparent).

I will argue that the law's own conceptualisation of the nature of the loss in these cases is not accurate. I then consider alternative possible losses that could be said to explain the awards

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[17] Based on *Wrotham Park Estate v Parkside Homes Ltd* [1974] 1 W.L.R. 798; [1974] 2 All E.R. 321.

[18] Sometimes the damages in these cases have been referred to as 'vindicatory'. The idea that there is a distinct category of 'vindicatory' damages was, however, rejected by the majority in *Lumba v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 A.C. 245. The idea that existing categories may have a 'vindicatory' function, in some sense, was not. See also J Edelman, "Vindicatory Damages" in K. Barker, K. Fairweather and R. Grantham (eds) *Private Law in the 21st Century* (Oxford: Hart Publishing, 2017). For substantial damages in trespass to the person without apparent loss: *B v An NHS Trust* [2002] EWHC 429 (Fam); [2002] Fam. Law. 423.

[19] "The essential principle is that, by misusing their private information, MGN deprived the respondents of their right to control the use of private information … The respondents are entitled to be compensated for that loss of control of information as well as for any distress…": *Gulati v MGN Ltd* [2015] EWCA Civ 1291; [2017] Q.B. 149, at [45] (Arden L.J.). Similarly, in the context of wrongful use of data: "Each claimant has lost something valuable, namely the right to control their private BGI": *Lloyd v Google LLC* [2019] EWCA Civ 1599; [2020] Q.B. 747, at [56] (Geoffrey Vos C).

[20] See *Lloyd v Google LLC* [2021] UKSC 50, [2021] 3 W.L.R. 1268, at [139]-[143].

[21] *Morris-Garner v One Step Support Ltd* [2018] UKSC 20, [2019] A.C. 649 at [25]–[63] (Lord Reed).

[22] In *Morris-Garner v One Step Support Ltd* [2018] UKSC 20 Lord Reed emphasised that not every breach of contract will trigger negotiating damages, even if any contractual right may be regarded as an 'asset': [93].

described in the last paragraph. Ultimately, I conclude that, while it is possible to describe these awards as loss-based, it is better to treat them as a distinct category, in particular because the counterfactual inquiry involved in 'loss' plays a diminished role here.

Consider, first, the law's claim that the loss consists of a loss of a right to control something - be it the use of one's body, one's property, one's information, or property subject to a contractual right. The notion of a 'right to control' is opaque. It could mean a legal power. Barker has argued that B suffers a loss in virtue of losing the legal power to enforce B's rights by injunction as a result of A's wrong.[23] Suppose that A trespasses on B's land for a week. A is liable to pay B damages representing the market value of this use. Barker claims that such damages compensate for the loss of the power to enforce one's primary right by injunction. Although one continues to have the power to trigger the court's duty to award an injunction after the trespass, one has lost the power to trigger that duty *prior* to the occurrence of the trespass.

There are two decisive objections to this view. The first is that one is entitled to user damages even after an injunction has been awarded.[24] Suppose that B has obtained an injunction to prevent future trespasses by A. A then trespasses again. B is entitled to user damages against A for the trespass committed after the award of the injunction. But B has not lost a power to obtain an injunction for a period of time. The injunction is in place. The power to obtain it has not been lost. The second problem is that it is not clear that B loses a legal power of enforcement at all in a counterfactual sense. During the period of the wrongful infringement B has the power to seek injunctive relief. After the period of wrongful infringement, A no longer has the power to seek injunctive relief as to the *past*. But that would have been true even if the infringement had never occurred. In a counterfactual sense, then, no legal power has truly been lost as a result of the wrongful infringement.

Another meaning of 'right of control' is a legal power to waive a primary duty. In *Contract,* for example, if a court refuses injunctive relief, B loses the power to waive primary duties in relation to the use of the neighbouring land.[25] Similarly, in *Privacy,* for example, it might be argued that B loses the power to waive A's duty not to use B's private information without B's permission. There is a sense in which the power to waive has been lost: the power to permit use by others of the information used by B has been lost if the information is no longer private. If the information is no longer private, then it is no longer subject to the protection of a primary right, and B no longer has the legal power to decide who is permitted to access it. In such cases, B no longer has the power to decide who permissibly accesses or uses that information. Intuitively, this is loss of something valuable: the power to control to whom to grant access and use of certain of one's information is important, for instance, to the ability to have valuable relationships with others.[26]

It seems possible, then, to account for some awards in *Privacy* and *Contract*-like cases in loss-based terms. There are, however, at least two reasons to doubt whether the 'loss of a right to

[23] K. Barker, "Damages without Loss: Can Hohfeld Help?" (2014) 34 O.J.L.S. 631, 633: "The particular legal power which I suggest A loses…is what I refer to subsequently as a power to 'insist' on his claim rights, or to 'stop' their infringement by applying to a court for ex ante injunctive relief".

[24] See *Inverugie v Hackett* [1995] 1 W.L.R. 713; [1995] 3 All E.R. 84, in which user damages were granted for a period after a possession order had been granted.

[25] One could argue that the refusal to grant an injunction leaves intact the primary right. If so, so much the worse for the loss of power analysis.

[26] *Gulati* [2015] EWHC 1482 (Ch); [2016] F.S.R. 12: "It…got in the way of claimants seeking to forge new, or retrieve damaged, personal relationships," at [32].

control' analysis can explain everything that is going on in these types of case. First, there will only be a loss of the power to waive in *Privacy* when B's information is no longer subject to the right's protection. In many cases, the information will remain private – for instance, even if B's naked photos are in the public domain, they remain private information – B will have the legal power to decide who is *permitted* to use them, even if B has no *factual control* over the images.[27] Second, in *Body* and *Property* there is no counterfactual loss of the power to waive the specific interference which occurred. In *Body*, B had the power to permit the procedure prior to its occurrence. After the interference, that power no longer exists. However, this would have been true even if the interference had not occurred: there would have been no power *now* to waive that specific procedure *in the past*.

These reasons perhaps explain why the courts have also spoken of subtly different loss that is suffered in these cases: the loss is sometimes formulated as a loss of *an opportunity* to decide whether to exercise a right of control.[28] In *Body* and *Property*, for instance, B was not given the opportunity by A to decide whether to permit the interference. It seems plausible that having the opportunity to decide whether to permit an interference with one's rights is often valuable. The opportunity may (but need not) lead to a valuable bargain in cases of marketable rights. The opportunity to decide whether to permit interferences also contributes to one's living an autonomous life.

This loss-based analysis faces two problems. First, it is not clear that the opportunity to decide is indeed a counterfactual loss resulting from the wrong. Either B had the opportunity to decide at the time of the wrong or B did not. If B did have the opportunity, then there is no loss of opportunity caused by the wrong. If B did not have the opportunity, then B would only have had the opportunity to decide whether to permit the interference if A had sought B's permission in each of these cases. The difficulty is that it seems that A's duty, in relation to *Property*, for example, is not to seek B's permission, but simply not to use B's property without permission. Only the former duty – a duty to seek permission – would *always* have given A the opportunity to decide. The second, fundamental, problem is that damages are available in each of these cases even when there is no loss of an opportunity to decide. Suppose that B's permission has been sought in advance in *Body*, but due to a mistake, B's refusal of permission is not documented. B has not been deprived of an opportunity to decide here: B was given an opportunity to decide, but B's decision was simply not respected. It hardly seems plausible that, in an analogous case to *Property*, B would be denied damages on the basis that B was given an opportunity to decide, but B's decision was not respected.

So far we have identified two losses that partially explain the cases under examination: a loss of a power to waive a duty and a loss of an opportunity to decide whether to exercise a power (the latter, in cases in which there was a duty to provide the opportunity or the opportunity would have been given). For a loss-based analysis fully to explain the cases, it would probably have to say that one suffers a loss simply if one's choices or preferences in relation to the subject matter of one's body, property, privacy, or contractual rights are not respected. On this view, it is not, then, necessarily, or only, that B is *deprived* of such a choice/opportunity,

[27] The suggestion is made that damages in these cases compensate for the loss of a *right*. Compare Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007). This has plausibility in cases of destruction of property, when the right-holder indeed loses their primary legal claim right in relation to the destroyed thing against others. It may also be true in *Contract*. But it is not correct in relation to *Body*, *Privacy*, or *Property*. In these examples, B loses no legal rights. B's legal rights are simply not respected.

[28] In *Morris-Garner* [2018] UKSC 20, Lord Reed speaks of the deprivation of "a valuable opportunity to exercise their right to control the use of the information," at [84].

decision, or preference. It is that A's conduct is not *in accordance with* B's choice, decision, or preference. It might be thought intrinsically good that a person's life goes in accordance with their choices, decisions, or preferences. Each of us has an interest in our life being self-directed.

This capacious view – loss as worsening of an interest in self-direction or choice – has some appeal as an explanation.[29] In each of *Body*, *Privacy*, *Property* and *Contract*, there is a sense in which A's conduct means that B's life is less self-directed than it would otherwise have been: either A was deprived of an opportunity to make a decision in relation to A's right, or A's choices with respect to A's body, property, or information were not respected. And yet this view is problematic in three respects.

First, notice that these are losses which are only describable by reference to the wrongful action of another person. If B's leg had suddenly become functional again due to a natural event, he would have had no choice with respect to his leg's being improved. But it would be very odd to say that he had suffered a loss of any kind by this occurrence. The inclination to say that B suffers a loss in *Body* comes from the fact that B's leg is improved by the *non-consensual interference of another human agent*. Normally, loss is conceived of as a worsening in the condition of the person that can be specified *independently* of the wrongful quality of the conduct of another person.

Second, if the loss in these cases is ultimately a worsening of one's interest in self-direction, it is unclear how this explains the measure of damages. Suppose B has two office chairs. One is new and wonderful. The other is old and creaky. Consequently, the market value of the use of the former is greater than the latter. Yet it is odd to think that, if A and C use each chair without permission for the same time period, A and C cause B *different* amounts of autonomy-related loss.[30]

Perhaps, standing alone, these two points would simply justify Lord Reed's description of the loss in these cases as loss, but not in the 'traditional' sense.[31] The decisive test, however, of whether the damages in these cases are loss-based is whether counterfactual questions determine the availability of damages. If the counterfactual feature of loss is not present, it would be better to acknowledge that a different phenomenon is at work.

Consider *Property*, again. If the interest interfered with is an interest in not having one's property used non-consensually, the issue is whether it is relevant to *Property* that the non-consensual use would have occurred in any event. The answer is that it is not. If A argues that the non-consensual use would have occurred anyway because C would have used A's property non-consensually, this would not defeat liability: one may not rely upon another's hypothetical wrong in this way. It is true that the courts do sometimes consider counterfactuals to bear upon the quantification of user or related damages. For instance, in *Privacy*, if the private (marketable) information would had been disclosed anyway consensually, this appears to reduce the award of damages.[32] Nonetheless, a substantial award remains available: the counterfactual inquiry diminishes, but not does not eliminate the damages claim. Contrast: if I

[29] For a view of this kind: N.J. McBride, "Restitution for Wrongs" in Mitchell and Swadling (eds.), *The Restatement Third: Restitution and Unjust Enrichment* (Oxford: Hart Publishing, 2013). See also J. Senu, "Negotiating Damages and the Compensatory Principle" (2020) 40 O.J.L.S. 110.
[30] Cf *Shaw v Kovac* [2017] EWCA Civ 1028; [2017] 1 W.L.R. 4773, at [72].
[31] *Morris-Garner v One Step Support Ltd* [2018] UKSC 20.
[32] *Gulati v MGN Ltd* [2015] EWCA Civ 1291 [45], but cf *Shaw v Kovac* [2017] EWCA Civ 1028 at [71] – [72].

would have lost my earnings in any event, I have suffered *no compensable loss* at all. It is also true that if we consider other areas in which rights protect autonomy-related interests, such as the freedom to move without the constraint of another, counterfactuals are held to be relevant. Thus, in the tort of false imprisonment, if the imprisonment would have occurred in any event had the imprisoning authority acted lawfully in accordance with their public law duties, no (compensatory) damages are available.[33] This seems inconsistent, however, with the approach in relation to private information, which allows the counterfactual to diminish, but not to eliminate the damages claim, and with the approach to user damages, which focuses simply on the occurrence through time of an impermissible use.[34]

These three points together suggest that, at the very least, if these cases are to be analysed in loss-based terms, the notion of loss involved is unusual. Especially given the diminished role of counterfactual inquiry in relation to these compensatory awards, it is better to consider them as damages payable simply by reference to the interference with one's interest in not being under another person's control non-consensually, without conceptualising this as a 'loss'.

Before leaving these awards, let me consider, finally, the objection that the difficulties with a loss-based analysis adverted to above could be avoided by a benefit-based analysis, according to which the basis of liability is the benefit made by the wrong. In short, my response to this objection is that, for this to be plausible, the notion of 'benefit' must be expanded in such a way that it faces the same objections as the expanded notion of loss considered above.

Consider *Property.* Suppose that benefit is understood counterfactually – one benefits from a wrong if and only if one is better off than one would have been had the wrong not occurred. There is some support for the idea that liability is restricted to situations where there is a benefit in this sense.[35] However, other cases suggest that it is mere wrongful use *in itself* which generates the claim for damages, independently of whether the wrongdoer would have been able to obtain the use gratuitously, or at lesser cost than the market cost, if no wrong had been committed.[36] On this non-counterfactual view, if A uses B's office chair without B's permission, but had A not done so, A would have used A's own office chair, B is still entitled to substantial damages: it is of no consequence that A does not obtain a counterfactual benefit.

There is an intuitive sense in which a person can still be said to benefit, even if they are not counterfactually better off. If Mum buys Son a birthday present worth £100, but had she not done so Dad would have bought Son a birthday present worth £150, it seems odd to say that Son receives *no* benefit from Mum. Thus although there is not necessarily a counterfactual benefit in *Property*, it may be that the liability in some cases can be alternatively justified as based upon a *non-counterfactual* benefit. But even if a non-counterfactual concept of benefit is adopted, it is obscure how this benefit is gained in *Body.* The notion of benefit will need to

[33] *Lumba v Secretary of State for the Home Department* [2011] UKSC 12, *Lewis v Australian Capital Territory* [2020] HCA 26; [2020] 94 A.L.J.R. 740.

[34] The user damages cases are distinguished by Edelman J. in *Lewis v Australian Capital Territory* [2020] HCA 26 on the basis that there is no loss of a valuable opportunity to licence in false imprisonment and nor does the defendant obtain a valuable opportunity, at [149], [155].

[35] *Ministry of Defence v Ashman* (1993) 66 P & CR 195; (1993) 25 H.L.R. 513.

[36] *Watson, Laidlaw & Co, Ltd v Pott, Cassels, and Williamson* 1914 SC (H.L.) 18 at 31; (1914) 1 S.L.T. 130: "wherever an abstraction or invasion of property has occurred, then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense" (Lord Shaw). See, similarly, *Turf Club Auto Emporium v Yeo Boon Hua* [2018] SGCA 44, at [213]-[214], characterising user damages as protecting "property rights in themselves".

be understood as a 'normative gain', according to which one gains if one controls another without their consent.[37]

III. Justifications for Damages without Loss

In this section, I develop three kinds of justification for damages without loss: (i) moral duties to respond appropriately to wrongs; (ii) fairness; (iii) expressively marking rights violations. The discussion offered is suggestive rather than a fully articulated theory of such damages; the discussion leaves open a number of questions about the appropriate scope of damages without loss. I then consider and respond to perhaps the most important objection to damages without loss: the objection that such awards are fundamentally inconsistent with damages awards *for loss* and that the law must choose between a loss-based model and a non-loss-based model of compensatory damages awards.

Duties arising from wrongs[38]

If our primary moral duties were simply duties not to wrongfully cause *loss*, then it would be difficult to understand how our secondary moral duties – the duties arising from the breach of primary ones – could be anything other than preventing, negating, or counterbalancing *loss*. And so it would be obscure how the idea that wrongdoers come under secondary duties in the wake of their wrongdoing could help to justify damages in the absence of loss. But many of our primary moral – and legal – duties are *not* loss-based. It is a distortion to think that A's contractual duty to build B a swimming pool, in the example above, is a duty not to cause B loss, or not to withhold a benefit from B. The duty is simply to build a non-defective swimming pool by a certain time. Whether or not this amounts to a counterfactual benefit (which it often will) is neither here nor there. Less obviously, this is also true of core duties in the tort of negligence. In relation to body and property, a person's duty in negligence is to take care not to *damage* another's body or property. As Nolan has shown, damaging is not the same as causing loss.[39] If A negligently breaks B's leg in a car accident, such that B is prevented from boarding a flight on which both of B's legs would have been broken, A *damages* B, but A's negligence does not make B worse off than B would have been with respect to B's leg. In essence, to be physically *damaged* is for one's body to be caused to be in a negative state, even if that state is not worse than the state that would have existed otherwise. Given that some of our primary duties in law and morality are loss-independent, it is intelligible that some secondary duties are also loss-independent.

Consider again *Swimming pool*. Even though the duty to complete a non-defective pool by July 1 no longer exists, surely the wrongdoer is not entirely discharged of any moral duties at that point. It seems that the wrongdoer still has a duty to contribute in some reasonable way to the fulfilment of the contractually promised outcome – nothing has happened through or since breach which should relieve them of that minimal duty. The moral function of promises (and contracts) is, in major part, to allow one person to bind another (with contracts, typically strangers) to fulfil or assist in the fulfilment of their projects; a binding contractual agreement conscripts one to serve the specified end of the other party. If it is still possible to fulfil that

[37] This is further explored below, X.

[38] The discussion here is indebted to J. Gardner, *Torts and Other Wrongs* (Oxford: Oxford University Press, 2019), ch 2; R. Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007), ch 4; D. Winterton, *Money Awards in Contract Law* (Oxford: Hart Publishing, 2015), ch 4.

[39] See D. Nolan, "Rights, Damage, Loss" (2017) 37 O.J.L.S. 255. See also W. Macaskill and S. Steel, "Suing for damaged existence" (unpublished, 2011), distinguishing a comparative and non-comparative sense of damage.

end, and the costs of doing so have not radically altered in ways unpredictable at the time of agreement, or breach of the agreement, then the party in breach has no reasonable complaint to being required to contribute to the fulfilment of the agreed upon end. But the existence of this duty is not contingent upon the breach having caused a loss: the duty is a duty to contribute towards the achievement of the contractual objective, so far as that is still possible. If the party in breach fails to do that, a court would then be justified in ordering them to contribute towards the contractual objective being obtained through performance by a third party – so long as this does not impose a disproportionate burden on the wrongdoer.[40]

Consider now the property damage case discussed above – *Earthquake*.[41] The result – that A is liable to pay the market value of the destroyed property – can be explained on the basis that A's duty in these cases was not negligently to damage B's property. This duty is breached. While A cannot now make it the case that they have not damaged B's property, A can contribute towards making it the case that the property is not in a damaged state. Given that A's original duty was not negligently to *damage*, it is apt that A's secondary duty is to attend to the *damage*, by providing the means to alleviate it, or by defraying the costs of the alleviation of the damage. The alleviation of *damage*, as we saw above, is not the same thing as the alleviation of *loss*.

Various objections may be raised. First, it may be thought that *Swimming pool* is a special case. The act-type required by the primary duty – 'build a swimming pool' – remains possible after the breach of that duty. But in *Earthquake*, the act-type required by the primary duty – 'not physically damaging by one's careless act' – does not remain possible. In *Swimming pool*, then, building the pool can reasonably be considered a kind of imperfect conformity to the original duty, but not so in *Earthquake*. Repairing or replacing the car is not the same type of act as not damaging or destroying the car; it cannot be understood as imperfect conformity to the original duty. My response is that the duties that arise after a breach need not be duties to do the same kind of act as mandated by the primary duty in order for the duty to arise as a response to the breach. Duties have rationales, reasons why they exist. If those reasons – we could also speak of 'purposes', 'aims', 'points' – can still be satisfied, it is apt that the person who breached the duty, and thereby impaired the realisation of that purpose, take on the burden of (imperfectly) realising it now. If part of the rationale of the duty not to negligently damage property is to see to it that the property is unimpaired and available for valuable use, then repairing the damage is an apt secondary duty upon breach.

Second, it may be objected that the legal right not to be negligently 'damaged' is justified, not because of the intrinsic moral significance of *damage*, but as a means of more effectively protecting right-holders from *loss*. The thought is that formulating the legal duty in terms of *counterfactual loss* is a less effective behavioural guide to legal subjects than requiring people not to *damage*, but protection from loss is the ultimate moral concern. In response, however, it seems that *damage* sometimes has intrinsic moral significance: there is a reason, for instance, not to create people whose lives will be full of enormous suffering, even if those persons are not made worse off, because the procreative act was a necessary condition of their existence.[42]

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[40] Webb suggests a duty to provide a means of acquiring substitute performance is an implied (conditional) primary obligation. But our readiness to imply such a term is also explained by the independent moral case for the wrongdoer being under such a duty. See C. Webb, "Performance and Compensation: An Analysis of Contractual Damages and Contractual Obligation' (2006) 26 O.J.L.S. 41, 59-61.

[41] Above, x.

[42] See E. Harman, "Harming as Causing Harm" in M. Roberts and D. Wasserman (eds.) *Harming Future Persons* (Dordrecht: Springer, 2009).

Are there duty-based justifications of damages in the 'rights of control' cases?

This sub-section considers whether the duties wrongdoers incur upon breach of a primary duty to conform to the value or reason(s) for the primary duty, so far as possible, can justify duties to pay user and negotiating damages. I first consider the arguments of Weinrib and Ripstein, who claim that the rights held by property owners, in particular, justify the payment of user damages when property is wrongfully used. I show that their arguments are not fully persuasive. Furthermore, even if they do succeed in justifying user damages in property cases, this justification does not extend to *Body*, *Privacy*, or *Contract*.

Weinrib: the right to use value

Weinrib argues that, in cases involving the wrongful use of property, such as *Property*, 'the owner's right to the profits from the use…of the property imports a correlative duty on others to abstain from such profits'.[43]

Consider, first, the purported duty 'to abstain from such profits'. On the face of it, it is unclear why this duty requires that the benefit derived from the wrongful use be returned to the right-holder. If the duty is to abstain from making such a benefit, this does not itself entail that the benefit be given to the right-holder, rather than simply *not retained* by the duty-bearer. However, Weinrib's answer to this is that the duty is justified by the right-holder's right *to the value derived from the use*. That value belongs to B, since it was never permissibly acquired by A from B.[44] As A cannot literally give back this value, A must provide a substitute: for instance, the market rental value.[45] It is, then, B's persisting right to the value derived from use of the thing ('use value') which justifies user damages for Weinrib.

For this account to be successful (as an account of the current law), two things must be shown: (1) that owners enjoy a right to the value of the use of their things; (2) that user damages are limited to situations in which a person derives *value* from their wrongful use.

The difficulty I will raise concerns (2).[46] It has already been observed that this 'value' need not amount to a counterfactual benefit.[47] More fundamentally, it is not clear that user damages are contingent on *any* benefit, counterfactually determined or otherwise. Suppose A innocently, but wrongfully connects A's water supply to the water tank on B's land. Through no negligence on B's part, the water in the tank is toxic, and A is gradually poisoned over the course of year by drinking the water. A has wrongfully used B's property, but in what sense has A been benefitted? In short, the *mere* exercise or having of control over a thing is not necessarily something of value.[48] If there is liability in this case, it is better simply to say that A is liable because A exercised wrongful control over B's property for a period of time. If the exercise of wrongful control is not the acquisition of a thing of value, though, it's not clear in what way

[43] E. Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012), at 126.
[44] E. Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012), ch. 4.
[45] "By owning the [thing], the plaintiff is also entitled to the value that could be realised from using it": E. Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012), at 138.
[46] This is not to say that (1) is self-evidently true.
[47] Above at X.
[48] See, already making this point, N.J. McBride, "Restitution for Wrongs" in Mitchell and Swadling (eds.), *The Restatement Third: Restitution and Unjust Enrichment* (Oxford: Hart Publishing, 2013).

monetary damages can be understood as restoring that value to B. Damages merely affirm in more than words that the property is for B's exclusive use, not A's.[49]

Ripstein: *acting on the right-holder's behalf*

According to Ripstein:[50]

> If I use what is yours, without your consent, I wrong you. The problem is coming up with the way in which that wrong can be righted, and the only way it can be righted is turning it into a situation in which nobody does wrong after all. The proper way to do so, when I use your property without your consent but without recognizing that it is your property, is to bring about the results that would have occurred had I been acting on your behalf.

One way of expressing the idea in this passage is that the wrongdoer has a duty to make the post-wrong world as consistent with the rightful situation as is now possible. Ripstein's claim is that the wrongdoer does this by acting now as if they had been the right-holder's agent. If there is a wrongful alienation of the property – suppose A sells B's chair in *Property* – then the wrongdoer must account for the profit made to the right-holder, because this would have occurred if the wrongdoer had acted as the former's agent (subject to a deduction for expenses in certain cases). Edelman J expresses a similar idea in stating that an award of user damages is not concerned to compensate for the adverse consequences of a wrong, but "is one manner by which a wrongful act is rectified".[51]

The central difficulty with these ideas is that their incompleteness as a justification for user damages. It is merely asserted that the wrong is righted or rectified if user damages are paid. Presumably, the idea is not that one's duty in trespass is 'not to use another's land without consent *unless one pays a licence fee*', such that one's use is ultimately permissible once the fee is paid. That is not one's duty in trespass. Or is the idea that, although the trespass is wrongful when it occurs, the defendant or court has the power to make a wrongful act permissible after its occurrence? That is: the act of trespass, impermissible at the time, becomes retrospectively permissible. It seems hard to make sense, however, of the idea that a wrongful act at t can retrospectively be made permissible at t + n.

What is really at issue in relation to 'rectification' of a wrong is a duty to 'make up for' the wrong itself in some way. Ripstein claims that this duty is to act *as if* had one had been an agent, because this makes up for the wrong.[52] But *why* adopt this counterfactual – the counterfactual wherein A acts as B's agent? The argument merely asserts a particular counterfactual as the appropriate one. Suppose that A parks in B's driveway for a month, without B's permission. We could imagine the wrongful use not having occurred in the following ways: (i) by A not using the land at all, (ii) by B permitting A to use the land gratuitously, (iii) by B permitting A to use the land for a fee. If this argument is to explain user damages, a further argument is needed why (iii) is the correct counterfactual.

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[49] Weinrib speaks of wrongful conduct as making an "assertion", which is then "shown" to be incorrect by the remedy: Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) at p.126.
[50] A. Ripstein, "As if it Never Happened" (2007) 48 Wm & Mary L. Rev. 1957, 1993 n 84.
[51] *Lewis v Australian Capital Territory* [2020] HCA 26, at [148].
[52] Cf. Edelman J. in *Lewis v Australian Capital Territory* [2020] HCA 26, at [145]: "…the remedy attempts to rectify the wrongful act by requiring payment of an amount that would have made the use lawful". This "would have" is true only when the right-holder would have licensed for a fee.

One is that *this is what would in fact have happened*, if A had not committed the wrong. But, of course, this will not always be true: B may have refused permission or permitted the use for free. So a further argument is needed for (iii) in such cases.

A possible argument is that A's duty is to make the actual world approximate the closest possible world in which the wrong does not occur.[53] This could be said to give best content to the idea that the wrongdoer should make up for the wrong.[54] It might then be said that the world in which the use occurs with a licence fee being paid is *closer* to, because it is more similar to, the actual world than the one in which the use occurs gratuitously, or not at all. That seems false however in cases in which permission would have been granted without a fee being paid. It is more plausible in cases in which the right-holder was disposed not to grant a licence at all, but even here it seems unclear. The world in which the *use* still occurs permissibly ('the no breach, use world') maintains a greater amount of spatio-temporal similarity to the actual world than a world in which the use does *not* occur ('the no breach, no use world'). However, the 'no breach, use world' would involve a significant change in the preferences of the right-holder: whereas in the actual world they are not disposed to permit the use for a fee, in the no breach use world, they are so disposed. So it's not obvious that in all cases the 'no breach, use world' would be closer to the actual world than the 'no use world'.

The limits of duty-based justifications

Even if we accepted Weinrib and Ripstein's arguments, at most, they explain *Property*. In *Body*, *Privacy*, and *Contract*, one cannot say that A acquired a benefit to which B had a right, unless 'benefit' simply means 'wrongful control'.

Consider, again, *Body*. It is obscure in what sense a wrongdoer's obligation to pay damages serves as a means of restoring something in this case. A wrongfully exercised control over B's body. A's providing B monetary damages would not restore B's control over their body, or provide B with a means of acquiring a substitute for control over their body.

Fairness

Consider, again, the causal pre-emption and overdetermination examples in which it is true that, had a wrongdoer not breached their duty, the victim would have been in the same position due to the wrongdoing of another person. For example:

> *Shooters.* A negligently fires a bullet at B. C negligently fires a bullet at B. Both bullets strike and break B's arm in the same place. The effects upon B's arm are the same as would have occurred if only one bullet had fired.

The fairness concern here is simply that being the victim of multiple wrongs should not diminish one's compensatory rights in respect of those wrongs compared to one's position had

[53] Thanks to Fred Wilmot-Smith for the suggestion that motivated this paragraph. On the concept of 'possible worlds', and similarity relations between possible worlds, see generally W. Starr, "Counterfactuals" in E. Zalta (ed.), *Stanford Encyclopedia of Philosophy* (Fall 2019 edition).

[54] This is not obvious: the wrongdoer might be considered to be under a duty to conform as closely as possible to the *reasons* which justified the original duty.

one been the victim of fewer wrongs.[55] If A were permitted to rely upon a counterfactual in which C wronged B, then B would be deprived of an entitlement to compensation in relation to B's earnings that would otherwise have arisen, and this would leave B worse than if B had been the victim of a single wrong.[56]

Expressive vindication

Stephen Smith argues that the 'vindication' of rights or interests in the event of their violation explains substantial awards without loss.[57] Some awards are 'vindicatory' in the sense that they are intended simply to mark – *to communicate* – the fact that the violation of the victim's right was wrongful. Thus Smith explains user damages, negotiating damages, gain-based damages, exemplary damages and damages for wrongs to the person as 'wrong-based' remedies, which aim to 'represent' or to 'mark' the right's infringement.[58] Sometimes, in his view, as with property rights, a market representation is appropriate and practicable; with bodily rights, a non-market-based conventional sum avoids the implication that bodily rights are commercial assets. The quantum of the award is, for Smith, largely determined by conventional rules, but certain factors provide guidance: the duration of the wrong, the importance of the right, the consequences of the wrong, and the culpability of the wrongdoer. These awards are 'expressive' in the sense that they aim to communicate a proposition. The proposition is something like 'the violation of the claimant's rights was wrongful' or, in the case of exemplary damages, 'the violation of the claimant's rights was outrageous'.

Smith's view that the courts often award substantial damages with the aim of *marking* the infringement of a right seems to fit well with cases such as *Body*. In *Body*, even if the notion of loss can be stretched to cover this set of facts, the award of damages does not undo or counterbalance that loss. Indeed, part of the expressive aptness of the award is that it is *inadequate* and *cannot* undo anything, as this avoids the implication that the damages can make up for the wrong that has occurred. Rather, the award expresses a judgment that B's right was wrongfully infringed. While nominal damages could represent this judgment, they risk trivialising the infringement.

Theoretical analysis of 'expressivist' theories of damages in private law is relatively underdeveloped.[59] Three questions need to be answered: (1) Can and do damages awards communicate propositions or commitments to a proposition and, if so, what is communicated by a damages award? (2) What is the value of that communication? (3) Can wrongdoers permissibly be required to serve that value? I cannot properly answer all of these questions

[55] The fact that this would leave B worse than if B had been the victim of a single *wrong* is important to this intuition. This is reflected in the distinction between *Baker v Willoughby* [1970] A.C. 467; [1969] 3 All E.R. 1528, and *Jobling v Associated Dairies* [1982] A.C. 794; [1981] 2 All E.R. 752, discussed below.

[56] A. Ripstein, *Private Wrongs* (Cambridge: Harvard University Press, 2016), at pp.254-257 argues that one's right is a right to be free of all wrongdoing. When the wrongdoer relies upon the wrong of another, they deny that right. But one's right against the wrongdoer is to be free of all wrongdoing *by the wrongdoer*.

[57] See S. Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (Oxford: Oxford University Press, 2019), at pp.202-206. See, similarly, S. Hershovitz, "Treating Wrongs as Wrongs: An Expressive Argument for Tort Law" (2017) Journal of Tort Law 1.

[58] S. Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (Oxford: Oxford University Press, 2019), at pp.202-206.

[59] In addition to the works in n 57, see also F. Stark, "Tort Law, Expression and Duplicative Wrongs" in P. Miller and J. Oberdiek (eds.), *Civil Wrongs and Justice in Private Law* (Oxford: Oxford University Press, 2020); S. Steel, "On The Moral Necessity of Tort Law – The Fairness Argument" (2021) 41 O.J.L.S. 192.

here. Instead, the best I can do is to assess whether plausible answers to these questions are likely to provide us with a justification for damages without loss.

I will assume that damages awards can communicate propositions, or commitments thereto, and that the relevant proposition is something like 'the defendant's conduct was a wrong to the claimant', 'the claimant ought not to have been treated in this way by the defendant', or 'the legal system is committed to the value of bodily/property/contractual rights'.

Consider, then, (2). First, serious wrongdoing has a tendency to undermine victims' sense of self-respect.[60] By serious wrongdoing, I mean wrongdoing to an important right, such as a right over one's body, or a culpable violation of any right. By awarding substantial damages, the courts indicate the importance of the victim as a source of constraint on the defendant and thereby thwart or diminish this tendency. The imposition of a burden on the defendant, rather than a mere declaration, represents the fact that the victim's moral status is of such importance as to require significant burdens to be borne by others. Second, there is the familiar point that these remedies may have a victim-assuaging function, by providing an outlet for victims' potentially reasonable anger.[61]

These two considerations state at least plausible reasons for damages awards. Do they help to justify damages without loss in cases where the duty-based and fairness justifications do not apply, or have less clear application?

A first objection is that the damages in *Body* and *Property* are available even for entirely innocent, non-negligent wrongs.[62] In such cases, it may be doubted whether victims' sense of self-respect is likely to be (reasonably) impacted or their anger assuaged. In *Property*, for example, if the use of the chair was entirely innocent, can it really be said that the owner's sense of self-respect will likely be (or reasonably be) impaired if they do not receive the market value of the wrongful use?[63]

A second objection is that there is an alternative, less burdensome means of responding expressively to wrongs other than monetary awards: if so, this goes to the permissibility question (3). Why can't the seriousness of the wrong be represented simply by a detailed, public, explanation of the wrongfulness of the conduct? In theory, we could imagine a different means of representing the degrees of wrongfulness of conduct, other than varying damages awards. It seems difficult to believe that the wrongfulness of conduct necessarily must be represented by a *monetary* burden upon the wrongdoer. However, the courts are to some extent hemmed in by existing social conventions. Even if other conventions could be envisaged, whereby burdening the wrongdoer in damages is not required sincerely to express the wrongfulness of the conduct, such conventions cannot be created instantaneously. The courts' choice to utilise existing conventions of representation is a lesser evil than failing effectively to recognise wrongs, at least in so far as the burdens on the wrongdoer are not severe.

[60] See S. Hershovitz, "Treating Wrongs as Wrongs: An Expressive Argument for Tort Law" (2017) Journal of Tort Law 1, 9.
[61] For an argument that the law of negligence is partly justified by a concern to maintain civil peace, see A. Robertson, "On the Function of the Law of Negligence" (2013) 33 O.J.L.S. 31.
[62] Smith does not consider this objection, probably because his main aim is to establish a distinct category of 'wrong-based' damages in the law, rather than offering a justificatory account thereof: S. Smith, *Rights, Wrongs, and Injustices* (Oxford: Oxford University Press, 2019), at pp.202- 206.
[63] It is not clear that anyone's sense of self-respect is at stake when the claimant is a legal person.

A third objection is that if certain damages awards without loss are to be explained as expressive in character, the existing system is highly arbitrary. If A wrongfully uses B's Stradivarius violin, negligently mistaking B's violin for A's, then A is liable to pay the hire cost of a Stradivarius violin. But A's wrong is no more serious, *qua wrong*, than if C had wrongfully used D's ordinary violin (assuming, in both cases, that B and D are both able to use equally good violins during the period of interference). Yet A and C will be subject to very different liabilities. The market value of the use of an object is a highly arbitrary representation of the wrongfulness of conduct interfering with it.

If the case for expressivist damages is ultimately that it facilitates the goods I described: self-respect-restoration or preservation and victim-assuaging – then an expressivist account seems most likely to justify damages without loss primarily in cases of culpable wrongs, where these goods are most likely to be at stake. So it is doubtful that this kind of theory can justify awards of damages without loss as we find them in the rights of control cases. In so far as it *does* justify awards of damages without loss, the current law already largely accommodates these justifications within the category of punitive and aggravated damages.

A general objection: damages without loss are inconsistent with damages for loss

A fundamental, general objection made to attempts to justify damages without loss is that such awards are fundamentally inconsistent with damages for loss.[64] On this view, any attempt to combine loss-based awards with non-loss-based awards in one remedial framework, setting aside punitive and gain-based damages, is doomed. An argument for this view is that the justifications for damages without loss wholly usurp the domain of damages for loss: if, for example, the idea of expressive vindication were taken seriously, it would require substantial damages for every right violation independently of loss. It would then be unclear how the law's traditional emphasis upon loss, which generally ties the availability of substantial compensatory damages to the existence of loss – could be accommodated at all within damages awards.

To respond to this objection, I will consider each justification identified in turn. The argument will be that each justification accommodates an important role for counterfactual loss. Consider, first, the idea that wrongdoers' secondary duties to serve the goal(s) of the right breached may justify damages without loss. This idea allows a significant role for damages being conditioned upon loss. If the rationale of an obligation is to protect a person from loss, then it makes sense that the secondary obligation will be restricted to recovery of loss. For instance, damages in the economic torts are likely to be conditioned upon loss, since the rights in those torts are rights not to be caused loss in certain ways.

Furthermore, even within the tort of negligence, which is generally triggered by damage, damages will often rationally be limited to counterfactual loss. The decision in *Jobling v Associated Dairies* provides an illustration.[65] In this case, C's employer, D, negligently damaged C's back in 1973 with the result that C was unable to work for a period. However, in 1976, prior to the trial against D, C was diagnosed with an unrelated pre-existing condition in C's back which prevented and would have prevented C from being able to work in any event from 1976. From 1976, then, D's wrong did not make C worse off with respect to C's earnings,

[64] For powerful statements of this kind of objection, see A Burrows, "Damages and Rights" in D. Nolan and A. Robertson (eds.) *Rights and Private Law* (Oxford: Hart Publishing, 2012); E. Descheemaeker, "Unravelling Harms in Tort Law" (2016) 132 L.Q.R. 595, 595, 603–604.
[65] *Jobling v Associated Dairies* [1982] A.C. 794.

which C would have been unable to earn in any event. The House of Lords held that C was not entitled to compensatory damages in respect of lost earnings after that point. I suggested above that, in the case of wrongful destruction of property, the wrongdoer's secondary duty would require provision of means to acquire a replacement or substitute, even if the property would have been destroyed in any event. This conclusion might be thought to conflict with the decision in *Jobling*: in *Jobling* the fact that there was no counterfactual loss of earnings precluded recovery of damages. There is, however, no inconsistency. The idea of a loss of earnings is inherently counterfactual in character. It is hard to make sense of the idea of an economic loss in relation to the future except as a deprivation of an income stream that *would have occurred*. By contrast, it is possible for one's body or property to be damaged or destroyed without it being the case that one or one's property would have continued to be in an undamaged or undestroyed state. In the context, then, of damage to body or property, there is something that can be undone in the absence of counterfactual loss.

To elaborate, consider:

> *Airport*. A negligently breaks B's leg in a car accident, such that B is by coincidence prevented from boarding a flight on which both of B's legs would have been broken.

In a straightforward variant of this case, in which the flight would not have involved damage to B's legs, A has acted contrary to two different reasons. A has acted contrary to a reason not to causally contribute to a person's being in a damaged state. A has also acted contrary to a reason not to causally contribute to a person's being worse off than they would have been. In *Airport* itself, the latter reason drops out. A has only damaged, not rendered worse off, and A has no justification for this damage: A was unaware of the justifying circumstance. Consequently, A's secondary duty only relates to the damage, not any consequential worsening of B's position. In short, B should be entitled to damages to assist in curing the damage, so far as possible, but not in relation to consequential lost earnings, which are inherently comparative and counterfactual.[66]

The fairness justification identified above is a relatively narrow one. It qualifies cases like *Jobling* by setting aside the fact that a subsequent tort has or would have occurred. It allows the victim of the wrong, in effect, to posit a counterfactual in which there was no subsequent tort. But this does not undermine the general relevance of other non-wrongful circumstances – such as pre-existing conditions in the case of personal injury – which defeat the existence of counterfactual loss.

Consider, now, the idea of expressive vindication. This idea also does not entail that every violation of a right absent loss must generate a claim for substantial damages. First of all, some right infringements are trivial. For instance, in relation to wrongful use of a person's data, a threshold of seriousness must be met: "That threshold would undoubtedly exclude, for example, a claim for damages for an accidental one-off data breach that was quickly remedied".[67] Second, if the rationale of the victim's right is their being protected from *loss*, then expressive vindication is *pro tanto* achieved by compensation for counterfactual loss. Third, in relation to some types of infringement, expressive vindication appears uniquely apt,

[66] This view probably leads to a different result to the current law in cases such as *Performance Cars v Abraham* [1962] 1 Q.B. 33; [1961] 3 All E.R. 413. See J. Edelman, "The Meaning of Loss and Enrichment" in R. Chambers, P. Mitchell and J. Penner (eds.), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009), 220.
[67] *Lloyd v Google LLC* [2019] EWCA Civ 1599 at [55].

since the infringement cannot be the subject of compensation. This is particularly so in relation to the wrongs that protect people's interest in not being under the control over others. In the trespassory torts, for instance, the relevant interests in not being under the non-consensual control of another person that are setback cannot themselves be meaningfully restored or counterbalanced: the damages are merely expressive in character.[68]

A related objection made to damages without loss is that there is no coherent way of measuring the extent of an award for a wrong other than by the *consequences* of the wrong.[69] Therefore, the objection proceeds, on pain of incoherence, *loss* necessarily re-enters the picture in measuring the award. This objection fails for at least two reasons. First, if the aim of an award is, for example, to cure a breach by, for instance, undoing damage, the measure of the award is the cost of undoing the damage. This cost may vary in size. Therefore, it is possible to explain the variance in the size of an award without reference to the variance in the size of a *loss*. Second, 'consequences' is ambiguous between 'damage' and 'loss'. In *Airport*, the 'damage' could be described as a *consequence*, even if it is not a *loss*. It seems possible to make sense of different levels of damage, even if these are not losses. In *Airport*, if B had instead been paralysed by the car accident, but had avoided death in the plane, this is a worse position than if B had merely suffered a broken leg. But neither the paralysis nor the broken leg constitutes a counterfactual loss.

The law in light of these justifications

The discussion in this section has proposed a justification for breach-curing awards, and for damages in cases of causal pre-emption or overdetermination of a wrong. The remaining puzzle are damages in the rights of control cases: *Body*, *Privacy*, *Property*, and *Contract*.

Any theory of these awards needs to accommodate these facts: (1) that the damages awards vary in size; (2) counterfactual loss or benefit is not always required; (3) damages do not depend upon the degree of culpability; (4) substantial damages are not available for all infringements.

The difficulty is that the natural way to explain (1) is by reference to differences in loss or benefit or variations in culpability, but these are ruled out because of (2) and (3). Hence why Smith relies upon the *degree of wrongfulness*, independently of culpability, as a means of explaining (1), and (4). (4) is explained on the basis that there are wrongs which are trivial *qua* wrongs. But this then gives rise to problem that the considerations the law takes to bear on the degree of wrongfulness – market value, for instance – seem arbitrary.

Here is my proposal. *Body*, *Privacy*, *Property*, and *Contract* involve rights which aim to secure the existence of certain choices and ensure that those choices be respected.[70] Damages are

[68] This may also be true of awards for *loss* which have no restorative effect whatsoever: see, e.g. *H. West & Son v Shephard* [1964] A.C. 326; [1963] 2 All E.R. 625. Hence expressive vindication cannot be limited to trespassory torts. See further A. Mulligan, "A Vindicatory Approach to Tortious Liability for Mistakes in Assisted Human Reproduction (2020) 40 L.S. 55, at 63.

[69] See, again, "The Meaning of Loss and Enrichment" in R. Chambers, P. Mitchell and J. Penner (eds.), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009), at 219 – 220.

[70] This is almost the same as McBride's view in "Restitution for Wrongs" in Mitchell and Swadling (eds.), *The Restatement Third: Restitution and Unjust Enrichment* (Oxford: Hart Publishing, 2013); the only differences are: (a) I believe there are two choice-related interests: *having an opportunity to decide*, and *having one's choice respected*; (b) the damages in these cases are not based on counterfactual loss (even 'normative' loss).

awarded for the infringement of these choice-related interests, even when they are non-counterfactually set back. In essence the compensation is for the *damage* of 'infringement of a choice-related interest', even if this would have occurred in any event, and therefore does not constitute a *loss*. A choice-related interest is an interest in making a decision in relation to a subject matter (having an opportunity to decide), or in having that decision respected by another.

These choice-related interests can be set back to greater or lesser extents. For example, a decision whether to have both arms removed is generally a decision of greater importance than a decision whether to have one arm removed. A decision whether to permit the use of one's land for a year is generally a decision of greater importance than a decision to permit the use of one's land for ten minutes. The degree of interference with choice-related interests can explain (1) and (4).

Why is the detrimental impact upon a choice-related interest measured, in *Property*, and in *Contract*, by reference to the market value or a hypothetical negotiation? When the right-holder would *in fact* have licensed the infringement and cannot demonstrate what the agreed upon sum would have been, the market value is a reasonable presumption. When it is clear that the right-holder would *not* have licensed the infringement at all, because they had a strong preference against the infringement, then some monetary value needs to be placed upon this frustrated preference. Perhaps the market value can be defended as a simple, workable, rule. Ideally, however, it ought to be defeasible: if damages aim to reflect the value of the choice or preference to the right-holder, and it is shown that the right-holder would have given a licence for less than the market value, then this is relevant to the assessment. If the right-holder would have licensed the infringement for no fee, the correct position is less clear to me. It seems right to allow the possibility that the right-holder had a preference that the use not have occurred without consent, and that there ought to be some value attached to the possibility of the consensual use as such.

The deeper justification of this kind of protection of choice-related interests remains somewhat unclear. In *Body*, damages in no way restore the choice-related interest, and so it is unclear why any secondary duty on the part of the wrongdoer to serve the goal of the original duty should take this form. In cases in which the wrong was culpable, there is an expressive case for damages, as outlined above, and this account may be extendable to innocent wrongs when the innocent wrongdoer culpably fails to appropriately recognise this wrong: here the damages are for the culpable failure to recognise an (innocent) wrong.

In *Property*, *Privacy* and *Contract*, in cases in which there would have been no hypothetical bargain struck, it is, again, difficult to describe the damages as reparative of the damaged choice-related interest, and thus justified by a secondary moral duty on the part of the wrongdoer to serve the goal of the original duty. When the reason a bargain would not have been struck is that the right-holder had a strong preference against the infringement, such that the infringement impacts upon their welfare, damages could serve to counterbalance that impact, and this may be justified as a highly imperfect way of serving the goal of the original duty. But the law does not require proof of any welfare-impact upon the right-holder. It may be possible to explain *this* on the basis that the wrongdoer's duty is to bring the world as close as possible to the closest world in which the wrong did not occur, and this is the licence-fee paying world, rather than the gratuitous permission world, in cases in which there is a strong preference against the infringement. In this way, a combination of duty-based and expressive arguments may generally justify the shape of the current law.

IV. Conclusion

Generally, compensatory damages are damages for loss. Loss occurs when one is caused to be worse off than one would have been. This article has aimed to show that not all awards generally grouped under 'compensation' are awards for loss in this sense. It was argued that each of these categories permits damages without loss: breach-curing awards, damages in situations of causal overdetermination and pre-emption involving multiple wrongs, and damages for interference with rights of control.

The article also provided some normative support for the possibility of damages without loss. In cases in which the wrongdoer can still serve the goal of the obligation breached, and that goal is not simply the protection from loss, the wrongdoer may justifiably be required to pay damages in the absence of loss. In addition, considerations of fairness and expressively affirming rights justify substantial non-loss-based awards in circumstances in which a person would be left worse off than had only one person behaved wrongfully towards them, and in cases in which a right of control has been culpably invaded or its infringement culpably not recognised.