

# What is tort law for?

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What is tort law for? The question may seem to harbour an elementary ambiguity. After all, as Jules Coleman says:

There is an important and familiar distinction between theoretical explanations and theoretical justifications. While both can illuminate or deepen our understanding, explanations do so by telling us what the nature of a thing is, or by telling us why things are as they are; by contrast, justifications seek to defend or legitimate certain kinds of things – for example, actions, rules, courses of conduct, practices, institutions, and the like.<sup>1</sup>

In asking what tort law is for, am I asking for an explanation or a justification of tort law? The answer is that I am challenging Coleman's distinction. To justify something is to explain it rationally. It is to set out some or all of the reasons why is so. Anyone who explains anything in terms of reasons (also called 'considerations') cannot but be concerned with the justification of that thing. Coleman himself seeks to explain tort law in terms of corrective justice. Since 'corrective justice' designates a kind of reason – or more precisely, a kind of norm, a norm being a kind of reason – this is an unavoidably justificatory enterprise.

<sup>1</sup> *The Practice of Principle* (Oxford 2001), 3.

Coleman wants to deny this only because he wants to emphasize that he is remaining aloof from two questions: whether any norms of corrective justice are sound, and whether those that are sound have enough force to support the retention of tort law in the face of well-known objections to it. He wants to engage in the *noncommittal* justificatory enterprise of asking whether, *if* the relevant norms of corrective justice were sound, and *if* all else were equal, tort law would be justified.<sup>2</sup> His answer is yes. In my terms, this makes ‘corrective justice’ Coleman’s (provisional) answer to the question ‘What is tort law for?’

Coleman argues, indeed, that corrective justice can supply a *complete* answer to this question. He argues that ‘the theory’ (corrective justice) provides ‘a complete account of what it purports to explain’ (the law of torts).<sup>3</sup> In this, although in little else, Coleman’s position converges with Ernest Weinrib’s. As Weinrib puts it, ‘the analysis of tort law in terms of possible aims such as compensation or deterrence is incompatible with the understanding of tort law as the operation of corrective justice.’<sup>4</sup> This claim seems stronger than Coleman’s. But at the very least it commits Weinrib, with Coleman, to the completeness of ‘corrective justice’ as an answer to the question of what tort law is for.<sup>5</sup> This emphasis on completeness strikes me as peculiar. It seems to me that the first task of both authors, even by their own lights, is to establish necessity rather than sufficiency. Can one explain what tort law is for *without* invoking corrective justice? After all, the main challenges that both authors are trying to fend

<sup>2</sup> Ibid, 5.

<sup>3</sup> Ibid, 34.

<sup>4</sup> *The Idea of Private Law* (Cambridge, Mass. 1995), 212.

<sup>5</sup> Weinrib might resist the formulation ‘what is tort law for?’ because it carries what he calls ‘functionalist’ overtones: *ibid*, 6–8. However my question is not meant to predispose us to think that the purpose of tort law is ‘external’ in the way that Weinrib’s ‘functionalist’ would claim. In fact, I will ultimately agree with Weinrib that tort law has ‘internal’ (constitutive) purposes.

off are from writers, such as those in the ‘law and economics’ tradition, who claim that they can provide complete rational explanations (committal or noncommittal justifications) of tort law from which considerations of corrective justice have all been excised (usually by reducing them out). One does nothing to refute this claim by showing that one can equally provide complete rational explanations (committal or noncommittal justifications) of tort law from which all considerations *but* considerations of corrective justice have been excised. What would refute the economic claim, however, is a demonstration that any complete explanation of tort law – whatever other considerations it invokes – cannot but invoke considerations of corrective justice. Such considerations cannot, for instance, be reduced out. They are necessary even if not sufficient.

In what follows I build on the work of Coleman and Weinrib to explore, and ultimately to affirm, this latter view. It turns out that one cannot answer the question ‘what is tort law for?’ without invoking norms of corrective justice. My main lingering doubt will be whether one can do this job noncommittally, in the way that Coleman hopes. I suggest that this is a case in which one either does the job committally or not at all. So I make some preliminary moves towards a committal justification, one that includes an attempt to explain the *soundness* of the norms of corrective justice that it necessarily invokes.

### *1. Corrective justice as a form of justice*

Norms of justice are moral norms of a distinctive type. They are norms for tackling *allocative* moral questions, questions about who is to get how much of what. Some people think of all moral questions, or at least all moral questions relevant to politics and law, as allocative. But that is a mistake. Allocative questions arise only when people have competing claims to scarce and assignable goods. Many morally significant goods, including many relevant to politics and law, are either not scarce or not assignable. They

include goods such as living in a peaceful world and not being tortured. If one of us lives in a peaceful world then we all do, so this good is not assignable. And in principle there is an unlimited amount of non-torture to go round, so this good is not scarce. Of course it does not follow that there are no questions of justice that bear on the resort to torture or on the quest for a peaceful world. The point is only that many moral questions about the resort to torture and the quest for a peaceful world are not questions of justice. If we say to someone who was tortured by the secret police that her treatment was unjust, she might well say, if her moral sensitivity is intact, that this misses the point and marginalizes her grievance. She is not complaining that she was the wrong person to be picked out for torture, that she was a victim of some kind of misallocation by the secret police, that she of all people should not have been tortured. She is complaining that torture should not have been used at all. Her complaint is one of barbarity, never mind injustice.<sup>6</sup>

Norms of justice, norms specifically for tackling allocative moral questions, come in various types. Aristotle famously taught us to distinguish norms of corrective justice from norms of distributive justice.<sup>7</sup> One may well doubt Aristotle's view that every norm of justice is either a norm of distributive justice or a norm of corrective justice. Don't norms of procedural justice

<sup>6</sup> H.L.A. Hart extended this line of thought to punishment. He argued that only the question of how to distribute punishment, not the question of whether to punish at all, should be regarded as a question of justice. See 'Prolegomenon to the Principles of Punishment' in his *Punishment and Responsibility* (Oxford 1968). But arguably punishment is a special case. Arguably punishing, unlike torturing, is an essentially allocative action, such that one cannot separate the question of whether to do it at all from the question of how to distribute it. This is the thesis that Anthony Quinton was groping towards in 'On Punishment', *Analysis* 14 (1954), 512,

<sup>7</sup> EN 1130<sup>b</sup>30ff.

constitute a third type?<sup>8</sup> Be that as it may, norms of distributive justice and norms of corrective justice make an interesting contrast, which Aristotle expressed in vivid mathematical terms. Norms of distributive justice are to be understood on the ‘geometric’ model of division: there are several potential holders of certain goods and the question is how to divide the goods up among them.<sup>9</sup> Norms of corrective justice, on the other hand, are to be understood on the ‘arithmetic’ model of addition and subtraction: there are only two potential holders, one of whom has gained certain goods from or lost certain goods to the other, and the question is whether and how to reverse the transaction.<sup>10</sup> Should we (so far as possible) add what has been subtracted, subtract what has been added, or leave things as they are? Of course the result of the addition or subtraction could always still be represented as a division of the spoils: gains are divided 100:0 against the person who gained by the transaction, say, or losses are divided 60:40 in favour of the person who lost by it (imagine that she was contributorily negligent or failed to mitigate her loss). But this representation of the result as a division fails to bring out that the result depended on a special kind of norm designed to tackle a special kind of question. Something has already changed hands between the two parties. The question of corrective justice is not the question of whether and to what

<sup>8</sup> I replied with a qualified ‘yes’ in ‘The Virtue of Justice and the Character of Law’, *Current Legal Problems* 53 (2000), 1. Some think that norms of retributive justice are also *sui generis*. I share Hart’s view that they are norms of distributive justice, notwithstanding the complication mentioned in note 6 above.

<sup>9</sup> EN 1131<sup>b</sup>12-15.

<sup>10</sup> EN 1132<sup>a</sup>1-6. The holders in question may of course be collectivities, as in a tort suit by multiple plaintiffs or against multiple defendants. In such cases the resolution of a question of corrective justice tends to trigger new questions of *distributive* justice bearing on how the gains and losses that were just transferred back (or not) are to be divided up among the members of the collectivity. According to ability to pay? Causal contribution? Market share?

extent and in what form it should now be allocated *full stop*, but whether and to what extent and in what form it should now be allocated *back* to the person from whom it came.

These specifications for isolating a norm of corrective justice are notoriously hard to work with. Here is a problematic example. Some people think that it cannot be just for me to receive back, by way of reversal of some transaction, what I did not justly hold before the transaction took place. This view is at the heart of a familiar sophomoric objection to tort law. Our interest in it is different. Our interest is in asking: Is the proposed norm a norm of corrective justice? Many people feel torn. On the one hand the norm seems to regulate the allocation of something back to me. On the other hand it seems to add nothing to whatever norm of distributive justice gave me the thing in the first place. Surely it doesn't take an extra norm to make it the case that what's mine is mine? But actually it does. It does not go without saying that if I had something justly, that makes it just for me to have it back again. If this did go without saying we could never alienate anything justly. It takes a norm of corrective justice to say what I should get it back and when and why. The real problem with our proposed norm is that it may not say this. It only says that it *cannot* be just for me to receive back what I did *not* justly hold in the first place. It sets a necessary condition for the justice of an allocation back. Why would such a norm not count as a norm of corrective justice? Because norms of justice create *grounding* relationships: they mention something to be allocated and a ground – a condition that is also a reason – for its allocation.<sup>11</sup> Norms of corrective justice, in particular, mention something to be allocated back and a ground – a condition that is also a reason – for allocating it back. The proposed norm (that I am not to receive back what I did not

<sup>11</sup> Weinrib, 'Why Legal Formalism?' in Robert P George (ed.), *Natural Law Theory* (Oxford 1992), at 353–5; Coleman, *The Practice of Principle*, above note 1, at 21.

justly hold in the first place) is a norm of corrective justice only if it meets this specification. It is a norm of corrective justice only if the fact that I did not unjustly hold something in the first place is a reason that is also a condition for allocating it back to me. Possibly the proposed norm does not meet this specification. Possibly it mentions no ground for allocating back. It mentions only a condition that must be met for the soundness of any norm that mentions a ground for allocating something back. This makes it a norm that regulates norms of corrective justice. But unless it mentions a reason that is also a condition for at least some allocations back it is not, in its own right, a norm of corrective justice. Norms of justice regulate not only whether and how allocations are to be made but also why they are to be made: until we have the why that is part of it – the condition that is also a reason – we don't have the norm.

These complications make it unsurprising that misinterpretations of the contrast between corrective and distributive justice abound. One familiar misinterpretation would have it that norms of corrective justice are somehow more personal than norms of distributive justice. For some this means: Conformity with norms of distributive justice is a matter of agent-neutral concern (we are each rationally concerned with the extent of everyone's conformity); whereas conformity with norms of corrective justice is a matter of agent-relative concern (I am rationally concerned only with the extent of my own conformity).<sup>12</sup> For others it means: A norm of corrective justice only regulates the actions of the person from whom the transfer back is to be made, so only that person can conform or fail to conform with such a norm; whereas a norm of distributive justice regulates the actions of others apart from the person from whom the transfer is to be made (the state, for example, might conform or fail to conform to such a norm by transferring something from

12

me to you).<sup>13</sup> These propositions had better not be true if corrective justice is to be a possible answer to the question ‘what is tort law for?’ Only if my conformity with a norm of corrective justice can be of concern to people other than me can it be of concern to the law. And only if someone other than me can conform or fail to conform with such a norm can the law be bound by a norm of corrective justice to take something from me and transfer it back to you (e.g. by attaching my earnings or taking and selling my car). The hallmark of a norm of corrective justice is only that it regulates the transfer back of gains or losses *from me to you*, as the two parties to the transaction that is being reversed. It need not (although it might) require that the transfer be effected *by me*. Still less need it be relevant to the reasoning only of those whose conformity with it is in issue: like all injustices, and indeed all immoralities, a corrective injustice perpetrated by anyone is in principle everyone’s concern. The question is only whether and how we should pre-empt and react to injustices perpetrated by others. Should we always step in? Should the law sometimes step in on our behalf, or at our behest? If so, who should have which legal powers to invoke and enforce the relevant legal norms?<sup>14</sup> And what measures of intervention or non-intervention in corrective injustices perpetrated by others would make the law itself a perpetrator of corrective injustice? I will not be tackling these questions here. I list them because their intelligibility shows that norms of corrective justice are personal only in the sense that they regulate transfers back from one party to one other party. There is no other interesting respect in which they are more personal than their distributive counterparts.

<sup>13</sup> Coleman explains the distinction along these lines in his *Risks and Wrongs* (Cambridge 1992), 310–1 and 318.

<sup>14</sup> Ben Zipursky argues that it is a defining feature of the law of torts that such powers, or some of them, are reserved to the person wronged. No doubt. My only point is that this is not a defining feature of corrective justice.

A second and perhaps more pernicious misinterpretation of the contrast between corrective and distributive justice would have it that norms of corrective justice are sensitive to the past (they set 'backward-looking' grounds of allocation) whereas norms of distributive justice look to the future (they set 'forward-looking' grounds of allocation). The mistake here was decisively exposed by Robert Nozick. Nozick established that, on its most familiar interpretation, the everyday norm 'finders keepers' is a norm of distributive justice, not a norm of corrective justice.<sup>15</sup> True, it is a norm for dividing up goods along what Nozick called 'historical' as opposed to 'end-result' lines. It effects a division that is sensitive to the past, viz. to the accident that different people found different goods. But still the norm answers the geometric question of whether and why things should be allocated among people, not the arithmetic question of whether and why things should be allocated back from one person to another. Couldn't we, under some imaginable circumstances, turn 'finders keepers' into a norm of corrective justice? Couldn't we imagine a world in which, so far as scarce and assignable goods are concerned, there are no *res nullius* and no *res derelictae*? Everything is already someone's. Every act of finding is therefore an act of taking from another. Under these conditions wouldn't 'finders keepers' become a (negative) norm of corrective justice with the following content: 'when things are taken from someone else by finding, the transaction between them stands and is not to be reversed'? No it wouldn't. The proposed norm still wouldn't mention any ground for allocating anything back. It would merely deny that a taking is such a ground. Anyone who asserted 'finders keepers' under these conditions would not be asserting the existence of a negative norm of corrective justice. There is no such thing. She would merely be denying that any norm corrective justice applies.

<sup>15</sup> *Anarchy, State, and Utopia* (New York 1974), 153-5.

Nozick's observations are also of great value in exposing a third misinterpretation of the contrast between distributive and corrective justice. Since norms of corrective justice regulate bipartite allocations – allocations back from just one party to just one other party – it is tempting to think that all norms that regulate bipartite allocations are norms of corrective justice. Weinrib goes down this road, and he has the Thomistic reconstruction of Aristotle for company.<sup>16</sup> Yet again, however, Nozick has exposed the error. As well as 'finders keepers', his principle of justice applicable to *res nullius* and *res derelictae*, Nozick offers a further principle of justice applicable to things that have already been found. Roughly, it is the principle 'surrenderers losers'. A second way for things to be justly allocated, he says, is for them to be voluntarily sold or gifted by those who justly hold them (whether under 'finders keepers' or under 'surrenderers losers' itself). All of this, Nozick rightly points out, belongs to the theory of distributive justice. It is all about allocation *tout court*. 'Surrenderers losers' never gives us a ground for allocating anything back. On the contrary: inasmuch as it regulates allocations back, it only ever gives us a ground for *not* allocating back. And there is no such thing as a negative norm of corrective justice. 'Finders keepers' and 'surrenderers losers', as Nozick points out, only need to be supplemented by a principle of corrective justice when someone takes what I originally found without my having surrendered it. Now the question is: am I morally entitled to have it back? Nozick's own answer was famously 'yes': if I found something that was nobody's, and then someone else takes it from me by finding it again, without my having surrendered it, I am entitled to have it back because it was taken from me.<sup>17</sup> 'Finders keepers' and 'surrenderers losers' were

<sup>16</sup> *The Idea of Private Law*, above note 4, e.g. at 64–65. See similarly John Finnis's Thomistic reconstruction of corrective justice as 'commutative justice' in *Natural Law and Natural Rights* (Oxford 1981).

<sup>17</sup> *Ibid*, 230–1.

Nozick's main norms of distributive justice; 'takers returners' was his main norm of corrective justice. Yet both 'surrenders losers' and 'takers returners' regulate only bipartite allocations. This is enough to show that what distinguishes a norm of corrective justice is not that it regulates bipartite allocations.

Nozick's important insight about the difference between norms of corrective justice and norms of distributive justice has been widely ignored. Probably this is because most people doubt whether his favoured norms of justice are sound. They suspect, in my view rightly, that a simple 'finders keepers'/'surrenders losers'/'takers returners' world is a world rife with injustices. But this suspicion is irrelevant to the lesson we just learned. It is one question whether a certain norm of justice is a norm of corrective justice or a norm of distributive justice. It is a completely separate question whether it is a *sound* norm of justice, such that by relying on it and conforming to it we would, all else being equal, be acting justly. The difference between norms of distributive justice and norms of corrective justice lies in the fact that they regulate different subject matters. Norms of distributive justice regulate the allocation of goods among people together with the grounds of those allocations ('division'). Norms of corrective justice regulate the allocation of goods back from one person to another together with the grounds of such allocations back ('addition and subtraction'). But no norm is made sound or unsound simply by virtue of what it regulates. To be a sound norm it also has to do a *good job* of regulating whatever it regulates. There needs to be an adequate case for regulating that subject matter by that norm.

This brings us to our first doubt about 'corrective justice' as an answer to the question 'what is tort law for?' Possibly, to provide an adequate explanation of what tort law is for, one needs to invoke a norm of corrective justice. But that can only be the first step. The next step has to be to show what the norm of corrective justice that one invoked has going for it. One should not imagine that this task is restricted to showing what this norm

has going for it as compared with other norms of corrective justice. One also needs to be aware that possibly no norms of corrective justice are sound. Perhaps the only sound norms of justice are norms of distributive justice. Perhaps the just person is one who approaches every allocative problem as if everything were still available for first allocation and nothing has ever changed hands. This is more radical than the familiar proposal that the just person only gives back to the original holder what the original holder justly held before the transaction that is being reversed. This, we saw, is not a norm of corrective justice in its own right. It sets a condition on the soundness of norms of corrective justice. The more radical suggestion before us is that every single norm of corrective justice is unsound. Everything that is up for allocation – including the losses that are at stake in a tort case – should be regarded as *res nullius* or *res derelictae*, and should be allocated as if for the first time. True, this would be a surprising conclusion, but still one needs to show what exactly would be wrong with it. So one cannot satisfy oneself with answering the question ‘what is tort law for?’ simply by citing a norm of corrective justice. One has to go on to explain what the norm of corrective justice itself is for, what the norm has going for it, what makes it sound. And ‘corrective justice’ cannot possibly be the answer to this further question.

Possibly this concern can be deepened. On closer inspection, it may seem that the answer ‘corrective justice’ doesn’t even take us the first step in understanding what tort law is for. Once we see that norms of corrective justice are differentiated from other norms only by what they regulate, we see that some legal norms are themselves norms of corrective justice. The norm of tort law according to which (legally recognized) wrongdoers are required to pay reparative damages in respect of those (legally recognized) losses that they wrongfully occasion, because they wrongfully occasioned them, is one such. It is a norm by which losses are transferred back, in certain cases and on certain grounds, to the person from whom they came. As Coleman himself says: ‘These

features of tort law are plain to anyone without the benefit of theory.<sup>18</sup> So when people ask ‘what is tort law for?’, they are already asking, by necessary implication, what the legal norm of corrective justice is for. It is part of the law. Corrective justice is part of the *explanandum*, not part of the explanation. So how can Coleman, or anyone else, think it an explanation?

The most powerful version of this critique is owed to Richard Posner.<sup>19</sup> A ‘corrective justice’ account of tort law cannot conceivably be a rival, Posner argues, to an economic analysis of tort law. To cite corrective justice is merely to remind us of one thing that has to be accounted for when we account for tort law. It does nothing to actually account for it. An economic analysis, by contrast, actually makes some effort to account for it. It has a go at showing what such a norm of corrective justice might have going for it. So the problem with ‘corrective justice’ is not that it is an incomplete answer to the question ‘what is tort law for?’ The problem is that it is just a restatement of the question, because tort law is (on any sensible view, including the economic view) partly constituted by a legal norm of corrective justice. The question, which economic analysts grapple with but their ‘corrective justice’ opponents seem curiously reluctant even to recognize, is: Is this norm of corrective justice sound? Here, without further ado, we have a grave challenge to Coleman’s ambition of noncommittal rational explanation. If one mentions corrective justice noncommittally, one is not explaining at all but merely reminding us what remains to be explained.

<sup>18</sup> *The Practice of Principle*, above note 1, 21.

<sup>19</sup> ‘The Concept of Corrective Justice in Recent Theories of Tort Law’, *Journal of Legal Studies* 10 (1981), 187.

## 2. *Corrective justice as an instrument of corrective justice*

Posner's critique goes too far. It is true that tort law already includes a norm of corrective justice, the norm according to which (legally recognized) wrongdoers are required to pay reparative damages in respect of those (legally recognized) losses that they wrongfully occasion. But a possible view is that, in accounting for this legal norm of corrective justice, one must rely on a further norm of corrective justice the force of which is not merely legal, i.e. a *moral* norm of corrective justice. One must rely, perhaps, on a counterpart moral norm whereby wrongdoers are morally required to pay reparative damages in respect of those losses that they wrongfully occasion. Such a moral norm is what many writers seem to have in mind when they offer 'corrective justice' as an answer to the question 'what is tort law for?' Of course in giving this answer these writers haven't yet moved very far. As I just made clear, they still have to explain what their moral norm of corrective justice, in turn, is for, what it has going for it. But nor are they simply standing still, as Posner claims. They have made a preliminary explanatory move. They have mentioned something other than the *explanandum*. The *explanandum* is a legal norm of corrective justice; the proposed explanation begins, although it obviously can't end, with a counterpart moral norm of corrective justice.

How exactly could these two norms of corrective justice be related, such that the moral one needs to be relied upon in explaining the legal? Weinrib and Coleman both argue that it must be understood as a constitutive relationship. The legal norm of corrective justice serves its moral counterpart by giving shape to it, by determining at least some of its applications. Weinrib's version of this thesis is more ambitious than Coleman's. Weinrib thinks that the counterpart moral norm of corrective justice is owed entirely to the law. Morality would not contain a norm of reparation for wrongfully occasioned losses at all were there no law giving shape to it. '[W]here practical reason formulates

ethical duties,' says Weinrib, 'juridical ones have already taken hold.'<sup>20</sup> Coleman's claim is more modest. Morality would have a norm of reparation for wrongfully occasioned losses only in an inchoate form were it not for tort law's constitutive intervention. Social practices like tort law, for Coleman, 'turn abstract ideals into regulative principles; they turn virtue to duty.'<sup>21</sup> There is a significant disagreement here. The disagreement is small, however, when compared with what is agreed. Weinrib and Coleman agree that, in explaining what tort law is for, one must resist the instrumental overtone of the question, much trumpeted by legal economists. In its tackling of allocative moral questions, one must think of tort law as performing a constitutive as opposed to an instrumental role. Tort law's way of contributing to a sound moral solution to such questions is by being *part* of the solution, not by helping to make the attainment of the solution more probable or more 'efficient'.

Here begins a second doubt about 'corrective justice' as an answer to the question 'what is tort law for?' Suppose we grant Weinrib and Coleman their point that, thanks to the corrective justice norm of tort law, people often have moral obligations of reparation different from those that they would have without tort law's intervention. Let's allow, in other words, that tort law often helps to constitute the correctively just solution. What doesn't follow is that tort law's norm of corrective justice should not be evaluated as an instrument. On the contrary, to fulfill its morally constitutive role, tort law's norm of corrective justice *must* be evaluated as an instrument. It must be evaluated as an instrument of improved conformity with the moral norms that it helps to constitute. To see why, think about an analogous case.

Quite apart from the law one has a moral obligation not drive one's car dangerously. The law attempts to make this obligation

<sup>20</sup> *The Idea of Private Law*, above note 4, 110.

<sup>21</sup> *The Practice of Principle*, above note 1, 54.

more concrete by, for example, setting up traffic lights, road markings, and speed limits. If the law does this with sound judgment, the proper application of the relevant moral norm is changed in the process. A manoeuvre that would not count as dangerous driving apart from the legal force of the lane markings at the mouth of the Lincoln Tunnel may well count as dangerous driving – and hence a breach of the moral norm forbidding dangerous driving – once the lane markings are in place. But this holds only if the law proceeds with sound judgment. It holds only if relying on the lane markings really does assist in the avoidance of dangerous driving. If the mouth of the Lincoln Tunnel has profoundly confusing lane markings, reliance on which only serves to make road accidents more likely, failing to conform to the lane markings is not a legally constituted way of driving dangerously. That is because use of the lane markings does not and would not help to reduce the incidence of dangerous driving. A legal norm cannot play its partly constitutive role in relation to a moral norm unless it also plays an instrumental role, unless conformity with the legal norm helps to secure conformity with the moral norm of which the legal norm is supposed to be partly constitutive.

In the case of the confusing lane markings at the mouth of the Lincoln Tunnel, the law fails as an instrument of its own moral purpose even though (and perhaps even because) people attempt to follow it. In other cases, the law fails as an instrument of its own moral purpose because it sets up perverse incentives that tend to encourage people to violate it. Many critics think that criminal laws prohibiting drug dealing tend to exhibit this failing. The illegality of drug dealing forces it underground where excesses cannot be checked and potential profit is very high. The net result, some claim, is more drug dealing and morally worse drug dealing than would go on if such activities were decriminalized. In such a case, unlike the case of the road markings, it is possible that the law does have a constitutive effect on the moral norm that it seeks to serve. Possibly some acts that

would not be morally wrong but for the law are made morally wrong by it. But it does not follow that the legal norm escapes further instrumental scrutiny. It is not enough to say that drug dealing is morally wrong and that is what the law (with its morally constitutive extra specificity) prohibits. The question must also be asked whether the law that prohibits drug dealing actually helps to reduce the incidence of drug dealing. If not it is a failure in its own terms. Never mind that it would be a morally impeccable law if only people would comply with it. It is a self-defeating law because it encourages people not to comply with it. It retards rather than advances the cause of conformity with the very moral norms that it helps to constitute. All else being equal (i.e. in the absence of any other good consequences) it should be removed from the statute book.

No legal norm is exempt from this kind of instrumental scrutiny. Tort law's norm of corrective justice must be subjected to it too. We need to ask: Does this norm advance the cause of conformity with the moral norm of corrective justice that, according to Weinrib and Coleman, it helps to constitute? If not then one cannot make a case for the legal norm by relying on the moral norm. Giving the answer 'corrective justice' to the question 'what is tort law for?' therefore does not exempt one from showing that the law is instrumentally sound. Nor, therefore, does it exempt one from answering the empirical questions associated with its instrumental justification. Is it the case that the more one legally requires of people that they pay reparative damages for their wrongs, the more they do so? Or is there a point of diminishing, perhaps negative, returns? Notice that these are not just any old instrumental questions. We are bracketing out other consequences that tort law's norm of corrective justice may have apart from its consequences for conformity with the moral norm of corrective justice that it is supposed to help to constitute. We are querying its efficiency only relative to that moral norm. But still we are querying its efficiency. There is no possible way of looking at tort law that

escapes the question of its efficiency. It follows that ‘corrective justice’ as an answer to the question ‘what is tort law for?’ cannot be, as Weinrib and Coleman hope, an answer to *rival* ‘efficiency’. The answer ‘corrective justice’ tells us, rather, what it is that the law of torts is supposed to be efficient *at*. It is supposed to be efficient at securing that people conform to a certain (partly legally constituted) moral norm of corrective justice. If it is not efficient at this job then, from the point of view of corrective justice itself, the law of torts should be abolished.

### 3. *Prevention before correction?*

Tort law’s norm of corrective justice and its counterpart moral norm both regulate the reversal of *wrongful* transactions on the ground of their wrongfulness. The transaction was wrongful and that is why, in tort law, it calls for correction. The same is true in the law of contract: a breach of contract is a wrong and that is why, according to contract law, correction is in order. This is a feature shared by many but not all norms of corrective justice. Sometimes, as in the law of unjust enrichment, a transaction need not be wrongful in order to call for correction. In such cases the only relevant wrong is that of failing to correct the transaction, or perhaps (differently) that of transacting without correcting. In the law of unjust enrichment there is no prior wrong that explains why the correction is called for. Nevertheless correction is called for and the norm that regulates the correction is a norm of corrective justice.

This distinction between corrective justice in tort law and corrective justice in the law of unjust enrichment already hints at another problem with ‘corrective justice’ as an answer to the question ‘what is tort law for?’ In tort law, unlike the law of unjust enrichment, there are prior wrongs that call for correction. Surely tort law has some institutional responsibility in relation to these prior wrongs other than that of helping to correct them? As well as helping to secure that people conform to a certain (legally

recognized and partly legally constituted) moral norm of corrective justice, isn't there a necessary role for tort law in securing that people don't commit certain (legally recognized and partly legally constituted) wrongs in the first place, so that there is less for tort law to correct? Wouldn't it be better, even from the perspective of tort law itself, if there were *less* correcting to do thanks to the fact that fewer legally recognized wrongs, fewer torts, had been committed? So wouldn't we more naturally think of 'corrective justice' as only a secondary *raison d'être* of tort law, and only a secondary answer to the question of what tort law is for, a 'secondary provision[ ] for a breakdown in case the primary intended peremptory reasons are not accepted as such'?<sup>22</sup> Tort law, you might think, is first and foremost there to assist in the constitution of various moral norms bearing on how we should transact with each other, and in helping to see to it that we do indeed transact with each other in conformity with these moral norms. Only where that fails, you might think, does tort law need to fall back on its norm of corrective justice as a way of shifting the losses associated with the wrongful transaction back where they came from. The need to resort to a norm of corrective justice, in short, represents a partial failure for tort law, even in its own terms.

Weinrib tries to anticipate and avoid this line of criticism by suggesting that the prior wrongs – the torts themselves – are also violations of norms of corrective justice. In his words, 'corrective justice serves a normative function: a transaction is required, on pain of rectification, to conform to its contours.'<sup>23</sup> In tort law, in other words, corrective justice is only ever called upon to rectify

<sup>22</sup> The words are H.L.A. Hart's, from 'Commands and Authoritative Legal Reasons' in his *Essays on Bentham* (Oxford 1982), 254.

<sup>23</sup> *The Idea of Private Law*, above note 4, 76. Again Coleman contents himself with a more modest proposal: see *The Practice of Principle*, above note 1, 34. Coleman's proposal is sound but does not help to answer the objection currently under consideration.

a prior corrective injustice. But this is a non-starter. Most torts are not injustices at all, let alone corrective injustices. They are violations of norms of honesty, considerateness, trustworthiness, loyalty, humanity, and so on. True, one could commit a tort of conversion that consists in a wrongful failure to return an object not wrongfully acquired. In this case the tort which tort law corrects is indeed a prior corrective injustice, a wrongful failure, under the law of unjust enrichment, to return goods that had not been wrongfully acquired. But it is hard to see how a tort of nuisance, defamation, inducing breach of contract, or trespass to land could ever be a corrective injustice. The only corrective injustice, where these torts are concerned, comes later when one fails to pay the reparative damages for their commission.

But isn't Weinrib here overlooking a much more obvious answer to the criticism that corrective justice is at best a second best to the prevention of the torts themselves? The law of torts clearly does seek to reduce the commission of torts. And it clearly does so, above all, by using its norm of corrective justice. By use of this norm it shifts the losses associated with torts back to those who committed them. As well as correcting torts that have already been committed, this practice is apt systematically to deter the commission of torts that have not yet been committed. Even a casual observer cannot but see the dramatic effects of this strategy in controlling the behaviour of potential tortfeasors today. Many public bodies and corporations have become almost pathologically fixated with not committing torts, mainly because of the potential legal consequences of doing so, including but not limited to potentially vast liabilities to pay reparative damages to those whom they wrong. There is of course empirical research to be done on how well-targeted this deterrence is. Experience suggests that tort law deters many acts that are not tortious as well as many that are (the so-called 'chilling effect'). But this does not detract from the plausibility of the hypothesis that tort law's norm of corrective justice does a great deal to deter the commission of torts. This is what gives economic analysts of law

the confidence that, even without empirical research, they can explain tort law's norm of corrective justice without invoking any counterpart moral norm of corrective justice. On their view tort law's norm of corrective justice is mainly a deterrent device directed at potential tortfeasors. Its success in securing that actual tortfeasors bear the losses they have already wrongfully occasioned – its corrective success – is important mainly as a means of securing that, in future, fewer torts are committed, with the result that there will be fewer occasions, in future, for actual tortfeasors to bear the losses they wrongfully occasioned. The point of the legal norm of corrective justice is, in short, to have less need for the legal norm of corrective justice.

Now we can see that Weinrib wasn't overlooking this much more obvious answer so much as trying to preempt it. For it leads straight back to Posner's harsh criticism of 'corrective justice' as an answer to the question 'what is tort law for?' It purports to explain tort law's norm of corrective justice without mentioning any further norm of corrective justice that tort law's norm of corrective justice might exist to serve. So it leaves 'corrective justice' to play a role in tort law only as part of the *explanandum*, not as part of the explanation.

As I said before, this attack goes too far. Without a doubt the role of tort law's norm of corrective justice in deterring future torts is a morally important role. It is part of the point of tort law's indigenous norm of corrective justice. So it is part of what tort law is for. If Coleman and Weinrib deny this they are mistaken. But if Coleman and Weinrib merely claim that this deterrence story cannot be the *whole* story of what tort law is for, then they are spot on. The moral norm of corrective justice cannot so easily be sidelined. Why? Coleman and Weinrib are looking in the right direction when they stress the morally constitutive role of law. When legal norms regulate some activity with sound judgment, they cannot but help to constitute (in whole or in part) counterpart moral norms regulating the same activity. Well-placed road markings cannot but change what

counts as dangerous driving, and hence what is prohibited by the moral norm prohibiting dangerous driving. Such constitution or reconstitution of counterpart moral norms is an unavoidable by-product of sound law-making. It follows that the law of torts cannot include a sound norm of corrective justice without there also being a counterpart moral norm of corrective justice that the legal norm of corrective justice either wholly or partly constitutes. And once there is such a counterpart moral norm the legal norm cannot but answer to it. The law must be scrutinized, *inter alia*, as an instrument of conformity with the moral norm that it helps to constitute. It follows that an explanation of tort law's norm of corrective justice that by-passes that legal norm's role in securing conformity with its counterpart moral norm cannot possibly be a complete explanation.

Here we have – at last – a dash of good news here for ‘corrective justice’ as an answer to the question ‘what is tort law for?’ But before we get too carried away we should bear in mind the various criticisms of this answer that I have already outlined, and which have not gone away. In particular: Even when one has agreed that tort law's own norm of corrective justice necessarily answers to a counterpart moral norm of corrective justice, one has only taken the first step. One must still explain what this *moral* norm of corrective justice is for, such that there is a case for the law to serve it. The mere fact that it is a norm of corrective justice does not entail that it is a sound one. So what makes it sound? Couldn't it be that the prevention of wrongs comes back in here as the main case for having the *moral* norm of corrective justice? I have explored this proposal and its limitations in detail elsewhere.<sup>24</sup> In the end it is unsatisfying. It works only when several artificial assumptions are made, including the assumption that the moral norm of corrective

<sup>24</sup> In ‘Backwards and Forwards with Tort Law’, forthcoming in Michael O'Rourke and Joseph Keim-Campbell (eds), *Law and Social Justice* (Cambridge, Mass 2005).

justice is also a social norm, i.e. a norm that is widely used. To establish that the moral norm of corrective justice is sound *qua* social norm is something of a pyrrhic victory, because part of the very idea of a moral norm is that it would still bind us, albeit possibly with less determinacy at point of application, even if we all gave up following it. But what alternative is on the table? Remember that the question at this stage has become: what could any norm of corrective justice, even a moral one, possibly be for? ‘The prevention of the very wrongs that the norm would have us correct’ may be a terrible answer, but at least it is an answer. Whereas ‘corrective justice’, as I explained before, is at this point in the investigation no answer at all.

#### 4. *Corrective justice and rational remainders*

We have now encountered several interconnected problems with ‘corrective justice’ as an answer to the question ‘what is tort law for?’ At one level or another, they are all symptoms of one and the same master-problem. The master-problem is this: if we begin by thinking of a norm that requires reparation for wrongfully occasioned losses as a norm of corrective justice, then we necessarily begin by thinking of it as a *separate* norm from the one that was violated in committing the original wrong. The relevant norm of corrective justice is a new norm that comes on the scene when and because another norm has been violated. But what happened to the old norm? One common view seems to be that, so far as the wrongdoer is concerned, it just evaporated. Violation put an end to its normative force. The clock cannot literally be turned back so that violation can be replaced by conformity. It is too late for conformity. So it is also too late to worry about the original norm. Now one must worry about new norms, including norms of corrective justice, that exist to regulate the post-violation world.

This picture of the normative consequences of norm-violation is misguided. An illustration given by Neil

MacCormick helps us to see why.<sup>25</sup> I promise to take the children to the beach today, but an emergency at work intervenes and I welch on the deal. Let's say I was completely justified in doing so. One of my students, let's say, was in some kind of trouble from which only I could extricate him. Nevertheless, all else being equal, I am bound to take my children to the beach at the next available opportunity – tomorrow, if possible. Am I bound to do this under a new remedial norm that comes into play because of my violation of the first norm? Not at all. It is my original promise to take the children to the beach today that binds me to take the children to the beach tomorrow. The norm remains resolutely in force after its violation, and continues to bind me. Of course, it is too late for perfect conformity (I promised to take the children to the beach today and today is now over). But it is not too late for imperfect conformity. And it is part of the nature of norms that they bind us to do whatever would count as any kind of conformity with them, starting with the perfect and then moving to the next-to-perfect and so on until whatever I do would count as no conformity at all.

If you doubt this in the children case, think about a simpler case in which I have a 6 pm appointment to give a lecture. I turn up at 6:01 pm. It is too late for perfect conformity with the original norm requiring me to lecture at 6 pm. Yet it would be absurd to think that the norm requiring me to lecture at 6:01 pm is a new norm that binds me to lecture at 6:01 pm as a remedy or correction for my failure to lecture at 6 pm. The original norm automatically binds me to lecture at 6:01pm without further ado just because, so far as conformity with that norm is concerned, starting at 6.01 pm is the next best thing to starting at 6 pm. And

<sup>25</sup> 'The Obligation of Reparation' in MacCormick, *Legal Right and Social Democracy* (Oxford 1982), 212. MacCormick is unfortunately distracted by special features of the example – particularly that the breaking of the promise was justified – and is drawn to conclusions at odds with mine.

likewise at 6:02 pm because that is the next best thing to starting at 6:01pm, and so on. Of course the time will come, maybe around 6:30 pm, at which there is no lecturing that I can do today that would count as even partial conformity with the norm requiring me to lecture at 6 pm. The audience has drifted away, I wouldn't have time to say anything much before the building is locked, etc. Lecturing now would not constitute any kind of conformity with the original norm. So it is time to reschedule. Rescheduling creates a new norm: I will now be bound, let's say, to give my lecture at 6 pm on the same day next week. But even my creation of and adherence to this new norm is called for by way of imperfect conformity with the old norm. The old norm still binds me to give a lecture sometime. The new norm, which the old norm gave me reason to submit myself to, simply sets a new occasion for my doing what I am anyway bound to do.

How does this relate to the problem of reparation for wrongs? Like this. The normal reason to pay for the losses that one wrongfully occasioned is that this constitutes the best still-available measure of conformity with the norm that one violated in committing the wrong. Or to put it more tersely, the reason to pay for the losses that one inflicted is the very same reason not to have inflicted them.<sup>26</sup> One's reparative act is in partial conformity with the original reason, and if one was bound to conform to the original reason then one is now bound, in turn, to engage in the reparative act. This claim runs up against a familiar idea about rationality, nicely captured by Bernard Williams' remark that 'the correct perspective one one's life is

<sup>26</sup> Versions of this thesis are also defended M. Henken, 'No Way Out: Conflict, Regret and Compensation' (unpublished paper, 2002) and J. Raz, 'Personal Practical Conflicts' in P Baumann and M Betzler (eds.), *Practical Conflicts: New Philosophical Essays* (Cambridge 2004), 172

*from now*'.<sup>27</sup> According to this familiar idea facts about the past can be reasons. But at each moment their rational significance needs to be assessed afresh. One needs a further reason to dwell on the past, a reason that does not, so to speak, simply come down to one from the past but is a new reason now. Anything else is irrational. But this familiar view about rationality, like the mistaken view of the normative implications of norm-violation that comes out of it, is a corruption. To show that regret, guilt and remorse are rational one need not show that there are further reasons now why one should dwell upon the reasons that one neglected. That one did not do as the reasons would have one do means that they are still there, still exerting their pull, and still sufficient, all else being equal, to make one's regret, guilt, or remorse rational. Naturally one may still raise new rational objections to the regret, guilt, or remorse. One may object, for instance, that always dwelling on the past is painful, annoying to others, a waste of valuable time, etc. The truth in Williams' remark is that everything in one's life is subject to a rolling programme of re-assessment in terms of the ever-changing landscape of reasons for and against. All that I am adding is that through all of this the original reasons that were not satisfied when they first arose still hang around. There was something one had reason to do, it is now too late, and the reason to do it is now, without further ado, a reason to regret that one didn't do it. But often it is not too late to do *something* towards what one didn't do. And if it is not too late to do something towards what one didn't do – if it is not too late to do second or third best or even seventy-second best – then one automatically has a reason to do it. Doing that thing is, without further ado, rational, subject of course to the ebb and flow of other reinforcing and

<sup>27</sup> 'Persons, Character and Morality' in Williams, *Moral Luck* (Cambridge 1981), at 13. I have taken the remark out of context and associated it with a view that Williams himself does not hold.

conflicting reasons. It is not that new reasons don't count, but that the old ones still count too.<sup>28</sup>

The corrupt view of rationality that I am attempting to expose here is most closely associated with economists, and more broadly with the utilitarian tradition in ethics out of which the distinct discipline of economics grew. The utilitarian and economic interpretation of the idea that 'the correct perspective on one's life is *from now*' is the purest. This is the correct perspective on life because it is the correct perspective on everything. And what it entails is that regret, remorse, reparation, restitution, retribution and a thousand and one other backward-looking aspects of our lives are rationally defensible only on condition that they are *productive*. Of course there is a sense in which the rival view I am sketching also insists on productivity. The world is defective in respect of one's conformity with a certain norm and in this respect the world cries out for improvement. It cries out for whatever conformity with that norm can now, belatedly, be mustered. What one produces thereby is a greater measure of norm-conformity. This is a kind of productivity. The crucial difference between this and the productivity traditionally demanded by utilitarians and their economic fellow-travellers is that the latter look for some *further* productivity in continuing to have and to use the norm. The norm itself is one of the things, the productivity of which (and hence the soundness of which) is continually up for re-assessment. So the relevant criterion of productivity cannot be productivity relative to the norm. It must be productivity by some independent measure. A greater measure of conformity to a norm is not productive, in a way that satisfies utilitarians, unless it has a further and independent product. This doctrine reflects the

<sup>28</sup> This is indeed Williams' own view. In a typical phrase, he speaks of 'the moral remainder, the uncanceled moral disagreeableness': see 'Politics and Moral Character' in *Moral Luck*, above note 27, at 61.

utilitarian rejection of all deontic aspects of practical thought. Actions are right because good, and not good because right.

Those who stand up for 'corrective justice' as an answer to the question 'what is tort law for?' have rightly tried to resist this monomaniacal orientation towards the further productivity of norm-compliance. That is what drives their insistence that tort law is not a mere instrument, but is also morally constitutive. But still they have conceded the most important ground to the utilitarian tradition by granting its corrupt picture of rationality in a less radical form. They have granted that, in order to make reasons and norms from the past pertinent to the present, some further norm in the present is needed to make them so. This further norm is the moral norm of corrective justice that we have been discussing. True, the importance of this further norm is not to be assessed in the way that a utilitarian would assess it. The value of conformity with it does not depend, or at least does not depend entirely, on such norm-conformity's further and independent products. Conformity with it also has some intrinsic value, some value *qua* norm-conformity; there is here a deontic aspect to practical thought. And yet, according to the corrective justice view of what tort law is for, a further norm of corrective justice is still needed to provide a reason for reparation to be paid. The original norm one violated is not such a reason. We may ask: why not? If there can be intrinsic value in conforming to the further norm of corrective justice, why can't there be intrinsic value in conforming, albeit incompletely, to the original norm that one violated? And if there can be such value, why is it not already enough to make the case for reparation without the introduction of a further norm of corrective justice?

##### *5. Rational remainders in tort law: doubts and reassurances*

The normal reason to pay for the losses that one wrongfully occasioned is that this constitutes the best still-available measure of conformity with the norm that one violated in committing the

wrong. Let's call this the 'continuity thesis'. Can the continuity thesis help us to understand what tort law is for? Certainly it can. Let me mention, and attempt to allay, a few possible doubts about the thesis's suitability for this task.

*First doubt.* So far my only examples of the continuity thesis in action were examples of failures to perform promissory, or more generally voluntary, obligations. I promised to take my children to the beach, but welched on the deal. I agreed to lecture at 6 pm, but didn't show up on time. Isn't this emphasis on voluntary obligations telling? The continuity thesis works in these cases, you may think, because we naturally interpret the promise or agreement as including a fallback provision. We interpret the promise to take the children to the beach today as a promise to take them today *or* (failing that) as soon as practicable. We interpret the agreement to lecture at 6 pm as an agreement to lecture at 6pm *or* (failing that) as soon as practicable. No doubt we can interpret some contractual provisions in the same way, as undertakings, for example, not just to deliver the widgets but to deliver the widgets *or* (failing that) to cover some of the customer's costs. So perhaps we could use the continuity thesis to help explain some reparative obligations in the law of contract. But how could we extend this to the law of torts?

*First response.* True, we naturally interpret a promise or agreement as including a fallback provision. But why? The answer is because it naturally does include such a provision. When we have an obligation to  $\phi$  at  $t1$ , but do not  $\phi$  at  $t1$ , we have an obligation without further ado to come as close as we now can to  $\phi$ ing at  $t1$ . This may involve nearly  $\phi$ ing at  $t1$ , or precisely  $\phi$ ing at  $t2$ , or (eventually) doing something at  $t27$  that has something in common with  $\phi$ ing. Because different acts at different times may have different things in common with  $\phi$ ing, there may sometimes be doubts about which of several rival fallback performances we should opt for. That being so there

may sometimes (as we saw in the case of my delayed lecture) be a need for those involved to settle for one of the rival fallbacks over all others (e.g. by rescheduling). Sometimes, alternatively, one may look to the original agreement to help one identify what would be the best fallback. If, for example, a contract was made with a specified purpose, the specification of the purpose helps one to select from among various rival fallbacks: all else being equal, the next-best measure of conformity with the contract would be the one that was next-best at serving the specified purpose. Here we are interpreting the agreement.

But it is not thanks to the interpretation of the agreement that we are bound to do the next-best thing. Rather, it is because we are anyway bound to do the next-best thing that we need to interpret the agreement. We have the obligation *anyway*: we have it without needing an agreement to have it. We have it because when we violate a norm, whether a norm of our own making or not, the norm continues to apply after its violation, and continues to call for the best measure of conformity with it that remains possible. In tort law we may also face difficulties in deciding which measure of conformity is the best that remains possible. There, unlike the law of contract, we do not have original agreements to interpret. The norm that we violated was not owed to an agreement. So instead we often interpret the law of torts itself, hoping to find some clue as to *why* the tortious behaviour was tortious, from which we can draw conclusions about what would count as conformity with the norm that made it so. The asymmetries between tort and contract here are irrelevant to our present inquiry. It is the symmetry that is relevant. In both settings there can be a need for interpretation because there can be a need to work out what would be best by way of fallback conformity with the norm that was violated. But in both cases that is what one is looking for: what would be best by way of fallback conformity with the norm that was violated. The continuity thesis holds symmetrically in the two contexts.

*Second doubt.* The examples of voluntary obligations held another clear advantage in illustrating the force of the continuity thesis. They were examples of *positive* obligations, obligations to confer benefits (lecturing, taking children to the beach). So it is not hard to see how they could constitute, upon violation, positive obligations to take next-best steps. By the same token one could readily imagine a positive obligation to deliver widgets under a contract also constituting a positive obligation to pay damages in the event of non-delivery of the widgets. But the obligations that tort law places upon us are largely negative: obligations not to enter another's land without permission, obligations not to injure another by failing to take reasonable care for her safety, and so on. No conferral of benefits is called for. So how come, upon violation, the norms of tort law require the conferral of a benefit, namely the payment of reparative damages? How can a negative obligation mutate into a positive one like this?

*Second response.* The distinction between negative and positive obligations is relatively superficial. Take the obligation not to injure another by failing to take reasonable care not to injure her. We conform perfectly to the norm that imposes this obligation so long as we never injure anybody. But if we fail to conform perfectly, what would count as a second-best performance? It is too late not to injure. It is also too late to injure less. Is there something else to do? The norm itself has nothing more to suggest. At this point, we need to know more about the rationale for the norm. We need to know why we have the original obligation. Suppose that our injuring by failing to take reasonable care is regulated by the norm, in part, because of the injuries that injurers leave behind. Then (all else being equal) the fewer the injuries that an injurer leaves behind, the closer she comes to conforming to the norm. Repairing the injuries that one did is one way to leave fewer injuries behind. It is not the same as not injuring, or injuring less, but in one salient respect – according to one reason for the norm against injuring – it is the next best

thing. Of course there may be other reasons for not injuring apart from this one, and they may point towards a different kind of remedial action. Then we are back at the issues discussed in the first response above. Be that as it may, the fact that an obligation is negative does not mean that the reasons for it are incapable of being reasons for some positive action, and hence that positive action cannot constitute partial conformity with the very same norm that imposed the negative obligation.

*Third doubt.* But can there really be norms such that whether we conform to them or fail to conform to them depends on whether someone actually loses (or is injured, killed, etc.) as a result of what we do? And even if there can be, are the primary norms of tort law like this? If not, how can the payment of money damages to cover losses ever, let alone normally, count as a fallback way of conforming to the primary norms of tort law? How do the damages relate to the wrong if the wrong is not partly constituted by the resulting losses that the damages are supposed to repair?<sup>29</sup>

*Third response.* There are wrongs that are partly constituted by resulting losses, and some torts are wrongs of this type.<sup>30</sup> The tort of negligence is an example. One does not commit the tort of negligence if one merely fails to take reasonable care not to injure someone; one must actually injure someone *by* failing to

<sup>29</sup> This challenge can also be addressed to Weinrib, who divorces the plaintiff's 'factual loss' from his or her 'normative loss': *The Idea of Private Law*, above note 4, 115ff. The response that follows seems, however, to be unavailable to Weinrib (he seems to deny the factual loss both a constitutive and a justificatory role in relation to the normative loss). I am not clear what his alternative response to the challenge is.

<sup>30</sup> I defended this possibility in 'Outcomes and Obligations in the Law of Torts', in Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré on his Eightieth Birthday* (Oxford 2001) and further in 'The Wrongdoing that Gets Results', *Philosophical Perspectives* 18 (2004), 53.

take reasonable care not to injure that same someone. The resulting losses are a constituent of the tort itself; the norm regulates one's bringing them about. But it is true that many torts (trespass, libel, conspiracy, misfeasance in public office) are not constituted by their resulting losses. All the losses associated with them are *consequential* losses. And even result-constituted torts like negligence can carry additional consequential losses, some of which may be recoverable in the law of torts.

The reallocation of such consequential losses from the defendant to the plaintiff is explained by much the same considerations that were set out in the second response above. What counts as fallback conformity with a norm after its violation is not dictated solely by the constituents of the norm. It also depends on the reasons for the norm's having those constituents, which often include instrumental reasons. Consequential losses are recoverable in tort because and to the extent that the avoidance of such consequences is among the reasons for the tort's being a tort. This explains why different types of consequential losses are recoverable in respect of different torts (e.g. pure economic consequential losses are not recoverable in a suit for negligence, but they are recoverable in a suit for inducing breach of contract). Some torts are torts in order to protect against some types of consequences, and others to protect against other types. Again we are driven to investigate not only the norm that was violated, but its rationale, before we can grasp what would count as fallback conformity with it.

*Fourth doubt.* In the example of the broken promise to go to the breach, the breach was said to be justified. And yet the continuity thesis apparently still applied. In the example of the delayed lecture, it was not made clear whether the delay was justified or not. So justification seems to be irrelevant to the application of the continuity thesis: fallback conformity to the violated norm is called for irrespective of *why* the violated norm was violated. But surely justification is not irrelevant to the law of torts? Surely

damages are only due in tort law (or at any rate would only be due in morally sound law) for actions that are wrong in the sense of unjustified? Perhaps one can go further. Perhaps they are only due in law (or would only be due in morally sound law) for actions that are wrong in the sense of unjustified and unexcused (i.e. not at fault). But justification, at any rate, surely isn't irrelevant to tort liability?

*Fourth response.* That a norm-violation was justified is indeed irrelevant to the application of the continuity thesis, and at the deepest level it is equally irrelevant to the law of torts. Torts are wrongs – breaches of obligation – and one owes damages for their commission even if one's wrong was justified, never mind that it was excused. True, there are some torts, such as the tort of negligence, that are not committed if one acted with justification. That one acted reasonably means that one did not commit the tort. These are special cases. At first sight they are paradoxical, in a way that was famously pointed out by W.D. Ross.<sup>31</sup> If one did no wrong, Ross pointed out, one has nothing to justify and nothing to excuse. It follows that the question of whether one did wrong must be answered without reference to one's fault, i.e. without yet raising questions of justification and excuse. Ross was onto something here, but he overlooked various logical possibilities. Why could there not be a wrong that one commits by committing, without justification, some other, lesser, wrong? And why could there not be a wrong that one commits by acting, without justification, in a way that does not conform to some other (non-obligatory) reason? The second possibility here requires us to abandon Ross's premiss that wrongs are the only things that call for justification. But we should indeed reject this premiss. It is too strong. Both logical possibilities are indeed possible. And some torts – such as the tort of negligence – must

<sup>31</sup> *The Right and the Good* (Oxford 1930), 45.

be interpreted as realizations of one or other of them. One commits these complex torts by failing to conform to a complex norm that regulates unjustified nonconformity with some other norms or some other reasons recognized by law.

This line of thought gives justification an occasional and derivative role in the law of torts. In general one owes reparative damages for torts as wrongs, never mind whether they are unjustified. In some complex cases, however, one's action is a tortious wrong only if it is unjustified. One often encounters confusion on this score owing to the fact that we use the word 'wrong' sometimes to mean unjustified. 'I acted wrongly' usually means 'I did an unjustified thing'. But 'I committed a wrong' usually means 'I breached an obligation'. On these interpretations it is possible to commit a wrong without acting wrongly, and to act wrongly without committing a wrong. Tort law is concerned with the wrongs one committed. It is only sometimes and derivatively concerned with whether one acted wrongly (because some wrongs are committed by acting wrongly). The continuity thesis likewise. It is concerned with one's conformity to norms. A justified nonconformity is still a nonconformity, and the norm is still there waiting for conformity. It just happens that some norms regulate only unjustified nonconformity with other norms and other reasons.

*Fifth doubt.* If the continuity thesis applies to tort law, why doesn't tort law sometimes require next-best conformity other than by way of payment of money damages? Why is this regarded by law as the only possible fallback?

*Fifth response.* Notice that in the law of contract, other fallbacks are sometimes required. An order of specific performance can require a contract-breaker to start performing now a contract that she should have started performing before. By the lights of the continuity thesis, one might expect this to be the default remedy for breach of any contract in which there is still time to

perform (some of) the specific contractual obligations that were breached. In some jurisdictions specific performance is indeed the default remedy for such breaches. That it is not so at common law. One obtains specific performance only at the discretion of the court because of the relative cost and difficulty of supervision of performance as compared with the extraction of damages. Besides, time is of the essence in many contracts: by the time the matter reaches court, no time remains to perform *any* of the specific contractual obligations.

Much the same points apply, *mutatis mutandis*, in the law of torts. The last looms especially large. Most torts are over and done with by the time the matter reaches court. There is no possibility of discontinuing them. This is mainly because of the feature discussed in the second response above. The obligations imposed by the law of torts are mainly negative obligations. Once there is injury there cannot possibly be no injury. Once there is failure of care there cannot possibly be no failure of care. There can only be non-*repetition* of the failure. Positive obligations are different. Where there has been no delivery, there can still be (belated) delivery. Where there has been no singing at the opera there can still be (belated) singing at the opera. It is possible to analyze these cases as cases of non-repetition. Belated delivery is non-repetition of an undelivery, etc. But the non-repetition of an undelivery still brings a delivery. And requiring a delivery makes sense. Whereas a non-repetition of an injuring does not bring a uninjuring. Requiring an uninjuring makes no sense. The best one can usually require, by way of next-best performance of a negative obligation, is a payment of reparative damages. The distinction between positive and negative obligations is superficial, as I said, but as this shows it can be of considerable moral importance.

## 6. *Putting corrective justice in its place*

Where does the continuity thesis land us in our attempts to understand what tort law is for? It may seem to land us in deep trouble. After all, I argued earlier – in sections 1 and 2 – that tort law’s norm whereby wrongdoers are required to pay reparative damages in respect of losses that they wrongfully occasion is a norm of corrective justice. I then argued – in sections 2 and 3 – that a moral norm of corrective justice is constituted by this legal norm if the norm is sound, and that the moral norm must accordingly be relied upon in explaining what the legal norm is for. So corrective justice is essential to an explanation of what tort law is for. But now – in sections 4 and 5 – I seem to have reached the opposite conclusion. People should pay reparative damages in respect of losses that they wrongfully occasion simply because and to the extent that the norm that they originally violated still applies and requires the next best action by way of partial conformity with it, that next best thing often being payment for losses. The original norm is already enough; there is no need for a new norm of corrective justice to regulate the payment of reparative damages. So corrective justice is redundant in any explanation of what tort law is for. How can corrective justice be both essential and redundant to an explanation of what tort law is for?

Weinrib also lands himself with this problem, but does not resolve it, in the following tantalizing passage:

When the defendant thus breaches a duty correlative to the plaintiff’s right, the plaintiff is entitled to reparation. The remedy reflects the fact that even after the commission of the tort the defendant remains subject to the duty with respect to the plaintiff’s right. The defendant’s breach of the duty not to interfere with the embodiment of the plaintiff’s right does not, of course, bring the duty to an end, for if it did, the duty would – absurdly – be discharged by its breach. With the materialization of wrongful injury, the only way the defendant can discharge his or her obligation respecting the plaintiff’s right is to undo the effects of the breach of duty. Just as the plaintiff’s right constitutes

the subject matter of the defendant's duty, so the wrongful interference with the right entails the duty to repair. Thus tort law places the defendant under the obligation to restore the plaintiff, so far as possible, to the position the plaintiff would have been in had the wrong not been committed.<sup>32</sup>

Until the final sentence, Weinrib seems to be committing himself to the continuity thesis. The obligation to repair is the same obligation as the original one, breach of which constituted the tort. It merely now falls, *tant pis*, to be discharged in a second-best way, by payment of reparation. But in the last sentence, the continuity thesis seems to be abandoned. Payment of reparation is now due because the law of torts imposes a *new* obligation – an obligation of corrective justice. The 'thus' at the start of the sentence is hard to make sense of. If the obligation already exists – by entailment – how can it be imposed?

Weinrib here finds himself in the same predicament as we find ourselves in. I am not aware that he makes any serious attempt to escape from it. The continuity thesis seems to make no other appearances in his argument. So we are left to find our own way out. How are we to do it? A hint is to be found in my earlier remarks about the example of the delayed lecture. Recall that, if I am very late for my 6 pm lecture, nothing I can say today will count as even a partial performance of my obligation to lecture. In that case, as I said, it is time to reschedule. Rescheduling creates a new norm: I will now be bound, let's say, to give my lecture at 6 pm on the same day next week. But even my creation of and adherence to this new norm is called for by way of imperfect conformity with the old norm. The old norm still binds me to give a lecture sometime. The new norm, which the old norm gave me reason to submit myself to, simply sets a new occasion for my doing what I am anyway bound to do. In Weinrib's language, the fact that I did not lecture today *entails*

<sup>32</sup> *The Idea of Private Law*, above note 4, 135.

that I still have a lecture to give. But it does not entail that I have a lecture to give at 6 pm on the same day next week. I still need to be *placed* under this second (more specific) obligation.

Sometimes, I need to be placed under such a second obligation by a third party, a person in authority. One question about the payment of reparation in the wake of wrongdoing is why and when and how we should do it. Another question is why and when and how judges (and others) should get involved in our doing it. To answer the first question one need not normally mention corrective justice. Normally we should pay reparation when we have done wrong because we violated a norm and now the norm is hanging around waiting for next-best conformity. Our obligation is not a matter of justice but a simple matter of the continuing normative force of norms. But suppose that there is continuing reluctance to conform at all, or dispute about what would count as next-best conformity. I claim that I was only hired to protect your chickens, but you say the norm was implicitly intended to extend to the protection of the geese as well. I claim that you should replace my damaged car, but you insist it can still be repaired. I say that my lost little finger is worth \$1000 and you say it is worth no more than \$500 – who needs a little finger? Or I simply say: it's not my problem. In such situations there is a role for a third party, a dispute resolver. And the crucial thing for the dispute resolver is to find a just solution, a solution that treats the problem as an allocative one and accounts to each of the candidates for allocation why she won and he lost, or *vice versa*. Where the dispute is over some past transaction which one of the parties claims should be reversed, what is called for on the part of the dispute resolver is a norm of corrective justice, i.e. a norm that regulates whether and to what extent and why and in what form the relevant loss or gain should now be allocated *back* to the person from whom it came. Justice is at stake here because there is a third party – a judge – who has to be good at dispute resolution. Justice, to borrow a famous phrase, is the first virtue of the dispute-resolver, and its norms are

primarily addressed to him or her. So we see now why it was important to expose the mistake of those who think that norms of corrective justice can be conformed to or not conformed to only by the person from whom the transfer back is to be made. On the contrary: they are primarily for other people who are attempting to adjudicate the case. The person from whom the transfer back is to be made is implicated in a corrective injustice – as opposed to simply compounding her earlier wrong – only if she refuses to co-operate with the just solution.

We should not be surprised to find that the relevant norms of corrective justice, in the context of tort law, are ones that broadly retains the shape of the rational world behind them. The judge attempts a solution that echoes and respects what should have been done anyway, had there been no dispute. The relevant norm of corrective justice is justified, in short, because it works as a way of resolving certain disputes that arise in the wake of wrongdoing. And it works as a way of resolving disputes because it tracks rather than resisting an ordinary feature of rationality that applies even where justice is not called for (because there is no sign of reasonable dispute). The judge takes the idea that violation of a norm leaves the norm there waiting for second best conformity, and embodies this is a norm of justice. So at last we have an answer to the question that many who write about corrective justice in tort law studiously ignore: ‘what is the moral norm of corrective justice for?’ Answer: it is above all for resolving reasonable disputes about what ought to be done in the wake of wrongdoing in a way that harmonizes with what ought to be done in the wake of wrongdoing when there is no dispute. It is first and foremost a norm to be conformed to by people *other* than the two parties to the dispute: What they do counts as a corrective injustice when they fail to do what the dispute-resolver decided. And it is largely an instrumental norm, to be judged by its efficacy in resolving disputes. But at the same time it is not just any old norm, with any old shape and scope. It is a norm that is apt to be instrumentally successful because it is

consonant with the pressures that rationality anyway exerts upon wrongdoers. At least this is true of the moral norm of corrective justice that we need to use in explaining tort law and the law of contract. The moral norm of corrective justice that we need to use in explaining the law of unjust enrichment is another matter. To give an action for unjust enrichment, recall, no wrong need have been committed, no norm need have been violated. So there is no violated norm that hangs around demanding second-best conformity. The norm of corrective justice that applies in the law of unjust enrichment therefore needs a relatively independent account. I do not think it is too hard to come up with. But the job nevertheless remains for another day.