On the Idea of Private Law

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Law is but let me explain it once more
Law is The Law.
—W.H. Auden

1. This essay endeavors to comment on the main themes of Ernest J. Weinrib’s The Idea of Private Law. Weinrib’s primary example of private law, and the example I shall pursue here, is tort law. In a typical torts case, the plaintiff complains that he has been injured as the proximate result of the wrongdoing (usually the negligence) of the defendant. This, the plaintiff says, is a breach of legal duty for which the defendant is liable. Questions about the foundations of tort law are questions about the significance of the terms in this story and about why, when it is proven that a transaction characterizable in these terms has occurred, the plaintiff is entitled to what he asks for, namely, compensation.

One contemporary answer to these questions—functionalism—presents tort law as “public law in disguise.” The adjudication of the plaintiff’s claim is a way of favorably redistributing the cost of an accident or creating incentives for investment in safety. These goals—broadly compensation and deterrence—mediate the relation between the parties, supplying the reasons for joining them together. On this view, the foundations of tort law are admittedly obscured by the legal idiom itself. But the alternative to fetishizing this idiom, the thought goes, is to analyze it in terms of certain basic goods. The intelligibility to be hoped for, when the analysis goes...
well, is that of recognizing tort law as a means to the ends associated with public schemes of regulation and compensation. These are schemes in which inter-personal liability plays no role at all.

Another contemporary idea is that tort law is the pursuit of justice between two parties, “corrective justice” in Aristotle’s words. But what the law must be if this is true—hence whether, if true, this would get in the way of the functionalist’s “public law” analysis—is evidently not well understood. Corrective justice does not obviate the need for a public authority to determine what is required of the parties; in this sense, all law is public law. And if it is said that corrective justice is concerned with redressing legal wrongs, this is something to which the functionalist is apparently willing to agree. He simply takes himself to be giving an account of the social interest in making certain sorts of conduct legally wrongful. Indeed, in one recent incarnation he takes himself to be providing a justification of corrective justice itself.

According to Weinrib, what is needed to secure our grasp of the idea of private law is, beside the concept of corrective justice, a set of theses which he calls—using a word designating something that legal realism and a tradition of commentary on Kant are supposed to be against—“formalism.” Formalism lays down requirements for any justification of the law. A justification must be: (1) “internal” to the law (this excludes reference to functions, purposes or goals); (2) “coherent” (this excludes any plurality of principles); and (3) grounded in a philosophical rationalism which Weinrib calls “abstract right”. Thus defended, private law will be immune to reduction—but at what cost? The “sole purpose of private law,” Weinrib declares, “is to be private law.” Apparently, we are not to ask what purposes the law has or even what good it is; private law is that kind of practical requirement which cannot coherently entertain this question. But so conceived, it must seem obscure why private law is something we should care about; and if this seems obscure, functionalism may seem like a reassuring alternative.

The functionalist says, “We make law to serve our purposes, so it is nothing more than our instrument or tool,” and the formalist, being this much in agreement, thinks that to escape the consequent he must deny the antecedent. Can we really be satisfied to see either party win this argument? My sense that we cannot might be expressed in the words of at least one notable philosopher of “abstract right,” who warned of such an obstruction in our thinking about (the complexity of) justice:

[We]elfare is not a good without right. Similarly, right is not the good without welfare (fiat justitia should not have pereat mundus as its consequence).

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Two Goals of Tort Law

2. Compensating accident victims may be thought desirable either because it alleviates a need or because it provides an opportunity to reduce accident costs by redistributing them in ways that make them easier to bear. But there is a problem with the idea that compensating accident victims, under either description, is a goal of tort law. As many advocates of social insurance point out, tort law compensates only in a meager way. All losses due to "natural" disaster (or not attributable to human agency) fall outside its purview; and past this "agency" threshold, a victim's potential sources of compensation are typically limited to (1) wrongdoers (if there are any) who (2) stand in an appropriate causal relation to the injury (they may not). But why do these two limitations exist if the point of tort law is to make available the fruits of compensation? That some proponents of tort-based "deterrence" have rejected compensation as a goal of the tort system is understandable enough. A welfare system that denied payment whenever the beneficiary's need was not the proximate result of someone's wrongdoing would surely be perverse.

It doesn't help to pare down the goal the law is supposed to be advancing, say, to compensation for wrongful (as opposed to merely undeserved) loss. The singling out of a special class of losses is part of what needs explaining: Why redistribute wrongful losses through tort liability while leaving other victims in the hands of whatever private or social assistance there may be? Even if this question were answered, a more fundamental problem would remain. Given all the ways of redistributing wrongful losses, why look exclusively to a particular person rather than to a class of persons (e.g., all careless drivers) or to society at large or to those best able to spread such losses through an increase in the price of goods and services?

Through the categories of wrongdoing and causation, tort law links the plaintiff's right to repair to a specific defendant's obligation to make repair, but apparently missing from the compensation rationale, however parred down, is anything that

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11. My argument in 2-4 below generally follows Weinrib, PL at 40-42, and Wennib, "Understanding Tort Law", supra note 8 at 486-510. A brief version of the argument is available in Weinrib, "Formalism and Its Canadian Critics" in Ken Cooper-Stephenson & Elaine Gibson, eds., Tort Theory (North York, ON: Captus University Publications, 1993) at 6-15. A premise of the argument is the commonplace that the joining of two parties through liability is a central, identifying feature of tort law. But someone might wonder whether this doesn't already load the question against the public law theorist. Might one not just as well begin by taking "tort law" to be society's response to the costs of accidents, leaving it open what institutional practices will be most serviceable? Are we perhaps inappropriately "essentializing" tort law? The answer, I think, is no. Nothing in the present starting point need imply that the current institution of tort law may not be revised in light of a new understanding of its normative foundations; nor does it imply any commitment to decide prior to such a revision whether the result would still be recognized as "tort law" or some more or less distant relation. The only point to be insisted on here is that if it makes sense to speak of an institution and its revision at all, it also makes sense to seek a description of it that (unlike the proposed "economic" starting-point) allows the question of its rational and moral interest to be raised as a question. Where the reasons for an institution are controversial (as they are in the case of tort law), that is the kind of description we need.


looks like a reason for singling out the defendant in these terms.\textsuperscript{14}

The "compensation rationale"—to generalize the idea—is an attempt to exhibit the normative interest of tort liability rules by reference to the desirability of a certain outcome, namely, the redistribution of some appropriate class of losses. Apparently, we need a different sort of reason—an "agent relative reason"—if we are to say why the defendant named in the law suit should be the one to bring about this outcome: a reason analogous to the (unshared) reason someone has to paint your house after promising, and thereby obligating himself, to do so.\textsuperscript{14} Happily, tort law does redistribute many wrongful losses. But this fact alone falls short of what is needed to recommend the institution; for, notwithstanding the qualifier "wrongful," this leaves the defendant's agency out of the picture.

3. The awkwardness of thinking of tort law as a compensation system may help to motivate the view what makes tort law worthwhile is rather the incentives it creates for avoiding accidents. Thus it is said that the function of tort law is to minimize the sum of accident and avoidance costs by creating incentives for cost-justified spending on accident prevention.\textsuperscript{16} Unlike "compensation," this "deterrence" rationale appears to place appropriate emphasis on the defendant's wrongdoing, understood as the squandering of social resources. Yet if the requirements of deterrence are a reason for penalizing certain accident-creating activities, they are not, in themselves, a reason for giving someone an exclusive claim to the proceeds. Indeed, deterrence suggests a reason for penalizing sub-standard (inefficient) behavior without waiting for it to result in injury.

Of course, allowing certain persons to claim compensation (ex post) is one way to achieve a measure of deterrence (ex ante). But it is only one way. Given that the mainspring of effective deterrence is simply an appropriate penalty (conditional on a breach of duty), and given that duties based on reducing the costs of accidents are not based on the interests or rights of any particular person (they are public duties), the way is open for consideration of what use of the proceeds collected from the defendant will do the most public good. This might require that at least a portion of them go to those with the greatest need. But it implies, in any case, that the proceeds properly belong to the state, the public's representative, to use

\textsuperscript{14} Some judges do, of course, support their application of tort liability rules by a "loss-spreading" rationale. But the search for a good spreader remains limited by the requirement that liability be placed only on a party causally related to the accident. And despite efforts to reinterpret the idea of "causal relation" along functional lines, this requirement is bound to limit the possibilities of loss-spreading. See my "Focusing the Law: What Legal Interpretation is Not" in A. Marmor, ed., \textit{Law and Interpretation: Essays in Legal Philosophy} (Oxford: Oxford University Press, 1995) at 72-80.

\textsuperscript{15} For an argument to this effect, see Jules L. Coleman, supra note 13 at ch. 16. That the idea of annulling wrongful losses is subject to the same difficulties as what I am calling the "compensation rationale" would be one way of putting one of Coleman's points. The "annulment thesis" implies that "wrongfully imposed losses are among the kinds of losses that should be compensated for, but so are (arguable) losses that result from handicaps, natural disasters, and misfortunes generally" (ibid. at 314). In acknowledging the need for "agent-relative" reasons, Coleman is here accepting a criticism of his earlier view by Stephen Perry (among others). See Stephen R. Perry, "Loss, Agency, and Responsibility for Outcomes: Three Conceptions of Corrective Justice," in \textit{Tort Theory}, supra note 11 at 26-29.

as it deems best. No doubt, tort liability has some deterrent effect. But the crux of the problem is that, in terms of deterrence, the plaintiff’s role in the lawsuit looks too accidental, just as the defendant’s does in terms of compensation. If “compensation” makes an enigma of tort rules that single out this wrongdoer for liability, “deterrence” is a strange reason for those same rules insofar as they single out this victim for recovery.

The fact that deterrence is directed towards future behavior while tort liability looks back on a completed interaction suggests another way to grasp the problem here. The proper targets of deterrent incentives are really prospective accident-preventers, not “injurers” in the conventional sense of agents who have caused accidents. Ideally, incentives should be addressed to whoever can most cheaply avoid the costs of accidents, the relevant costs ranging globally over all accidents and all preventative measures. Thus, even if private lawsuits are a means of creating deterrent incentives, it remains open to question whether the best party to bear liability will have been a party to this accident. Similarly, since, on the deterrence rationale, the plaintiff’s claim is merely a useful way of enforcing the norm of efficiency, it is hardly apparent why the person or agency given standing to sue must be a victim of this accident or even a victim at all. “Deterrence” might be thought to do better than “compensation” in making sense of tort law’s injurer-victim pairing insofar as there is at least a reason, based on deterrence, for encouraging some private party to sue the defendant. Yet the two rationales present symmetrical difficulties. Where the compensation rationale leads us to ask why losses should be singled out only in terms that connect them to a particular injurer, the deterrence rationale leads us to ask why injurers should be singled out only in terms that look

17. How well it deters is controversial. Steven Sugarman finds “little reason to believe that personal injury law today actually serves an important accident-avoidance function.” Indeed, if deterrence were the only objective, “society would be decidedly better off if it did away with private law damages for accidents.” Sugarman, Doing Away With Personal Injury Law (New York: Quorum Books, 1989) at 3.

18. Proponents of deterrence who do not allow compensation as an independent goal of tort law generally seek to take the plaintiff’s right to damages on board as a useful means of identifying inefficient conduct and bringing the requisite penalties to bear. Damages, in short, “are paid over to the plaintiff (to be divided with his lawyer) as the price of enlisting their participation in the operation of the system.” Richard Posner, “A Theory of Negligence”, supra note 12 at 33. Adequate criticism of Posner’s proposal is not possible here, but the following general point might be noted. Although this proposal does suggest a reason to penalize the inefficient defendant, on the one hand, and to pay someone to prosecute the defendant, on the other, tort liability links the parties in a much stronger way. First, the amount of the plaintiff’s recovery is identical to the amount of the defendant’s liability. Second, this common amount is based on the plaintiff’s actual loss. Third, the plaintiff’s claim to recovery is a claim against just those persons who have harmed him, while the defendant’s liability is to just those persons whom he has harmed. For doubts about Posner’s “private enforcement” argument in light of these points, see Ernest Weinrib, “Understanding Tort Law”, supra note 8 at 503-10; Jules Coleman, supra note 13 at 374-84. It should not be assumed, of course, that an explanation of tort liability must be as categorical as the rules themselves. But the appeal to efficiency seems to make the rationality of the current practice hang by a thin empirical thread.


20. In practice, the causal requirements of tort liability (implying a backward focus) preclude a (forward-looking) search for such ideal cost-avoiding parties. So the conclusion reached in one recent examination of the judicial use of economic analysis is not surprising: Most of the cases were resolved on traditional grounds. See I. Englard, The Philosophy of Tort Law (Brookfield, VT: Dartmouth Publishing Co., 1993) at 33-43.
backward from a particular person’s loss. In each case the problem is to say how a compensatory response by one party to the suffering of another could come to occupy the center of focus on the basis of considerations that attach normative significance directly to losses just as such—and then only derivatively to the two-person stories that comprise the law’s “cases.”

4. It might be objected that these problems arise only on account of the unwarranted assumption that a single goal will account for all of tort law’s elements. Properly combined, each of the foregoing goals might take up the slack of the other: deterrence would explain why liability is fixed on the defendant, compensation, why the proceeds are given to the plaintiff. Of course, if each of these goals were understood as a component of accident cost reduction, then a third species of costs, specifically those of operating the system, must be taken into account as well. Just as it would make no sense to compensate for accidents without attempting to avoid them as well, it would make no sense to pursue either of these goals without asking whether the return in accident cost reduction was worth the administrative price. So on this account, the right question to ask about tort liability rules is whether, in the light of reasonably available information, they are a reasonable means of furthering a reasonable combination of goals.

But pragmatically unfussy as this proposal may sound, it actually brings the present difficulties into sharper relief. For it is not the case that each goal, when it stood alone, gave a merely incomplete reason for liability rules: incomplete, say, in the way that a specification of the requirements of cooking (the function of the kitchen) is not yet sufficient for designing the rest of a house. In completing the house, no special problem need arise if we trade-off the size of the kitchen against the size of the common rooms. Given that it is a house we are designing, it is clear why these rooms belong under the same roof.

Contrast the present predicament. Since compensation gets its significance from the plaintiff’s exigency, why is it given only when this also happens to serve the requirements of deterrence? And since deterrence-based obligations are not based on any right of the person who might be injured if they are breached, why impose them only when this allows an injurer to answer a causally related victim’s claim for compensation? At the root of these questions is a fact about tort law’s basic structure. The defendant’s wrongdoing and the plaintiff’s injury are legally significant in tort only insofar as they are appropriately related in a particular transaction. Yet the rationality of compensation does not vary with the presence of opportunities for deterrence, and the reasons for deterrent penalties do not vary with the presence of a causally related victim requiring compensation. Why, then, are these goals brought into a common structure, namely, the liability relation, where the requirements of each must evidently check the optimal pursuit of the other? Clearly, it begs the question to say that tort liability represents a kind of

21. Guido Calabresi (see supra note 4) is, in one important respect, not the sort of pluralist imagined here. This tri-part scheme of accident cost reduction is, for him, a framework for the analysis of “accident law”; and that leaves the case for tort law to be made.

22. These questions follow Weinrib, PL at 40-42.
optimality, given the requirement that these goals be pursued in tandem. For this requirement is as yet only motivated by the pluralist’s wish to accommodate the transactional limitations of tort law. And if those limitations are in fact being taken as given (as if transactions were a natural unity, like a house), does this not suggest that, whatever favorable effects on accident costs it may have, tort law admits of a more primary explanation, one that makes perspicuous the reason for its limitations?

5. This conclusion, however, is not often drawn. As Weinrib notes (PL at 41), many critics, alert to the ways tort law’s goals limit each other, conclude that tort law is indefensible. If one started out from a blank slate, they reason, it seems unlikely that tort law, with its expensive judicial process, would be a favored means of compensating and deterring. For it the law advances these goals it also, by linking them together, frustrates their rational pursuit. Indeed, when these goals are made explicit, tort law may look, from the litigants’ perspective, like a lottery in which the treatment of one party depends on some happenstance regarding the other. If we are serious about compensation and deterrence, these critics say, tort law should be replaced by institutions that have these goals as their straightforward aims. (Their proposal is not fantastic. No-fault insurance, workman’s compensation, and, in New Zealand, a comprehensive compensation scheme are examples of the partial abolition of tort law in this century.)

Of course, nothing in the present argument absolutely precludes the possibility that a sophisticated and empirically complex analysis of incentives, costs and benefits, might show that tort liability remains, at least for some types of accidents, a reasonable alternative for allocating loss. A more modest conclusion would simply be that there are grounds for wondering whether the sort of considerations adduced by the functionalist do not in fact exhibit tort liability as unsatisfactory in light of its purported aims. (More information would be needed to resolve this question.) Weinrib rejects even this modest conclusion. In effect, he treats the abolitionist’s argument as a reductio ad absurdum, from which the proper conclusion to be drawn is that our real interest in tort law has, under the pressure of a rampant functionalism, dropped out of view. Weinrib’s complaint is not that tort law is an ineffective means of compensating and deterring. It is that these goals, being “external” to tort law, do not provide the right kind of reasons for tort law at all.

How shall we understand this?

23. See, e.g., Marc Franklin, “Replacing the Negligence Lottery: Compensation and Selective Reimbursement” (1967) 53 Va. L. Rev. 774 at 784-85: “The most that can be said for the fault system is that sometimes it compensates, sometimes it deters and sometimes it furthers good resource allocation, not from any general philosophy, but rather because it is incapable of operating beyond the individual case.” See also Stephen Sugarman, supra note 17.

24. Compare Guido Calabresi, The Cost of Accidents, supra note 4 at 14; G. Calabresi & A. Klevorick, “Four Tests for Liability in Torts” (1985) 14 J. of Legal Stud. 585 at 626. My statement of the empirical issue is oversimplified since the choices for optimal cost reduction are not limited to tort law or one of its alternatives, but, as Calabresi points out, include mixed systems as well. Given the information problem, it is not surprising that Calabresi himself makes few endorsements.
Formalism

6. We might try to bring out the nature of Weinrib's complaint against functionalism by considering the contrast between (1) coming to see something as worthwhile by seeing that it brings us closer to certain ends we deem independently worthwhile and (2) coming to see it as worthwhile through a characterization of what it is. In (2), one might, for example, see one's own act as worthwhile by coming to see it as an instance of acting "as a friend" or "honorably" or whatever, where to grasp the concept is, in part, to see actions like this as called-for when one is in circumstances like these. Of course, acting as a friend might also be good policy if it forwards one's self-interest; but that does not mean we could reconstruct the elements of friendship (or explain their value) should the material to work from be limited to their favorable effects.

Can a rule or a rule-governed practice be supported in a way similarly continuous from within? Can jurisprudence be the sort of internal specification of an ethical end that Aristotle associates with phronesis? Aristotle himself invites these questions when he remarks that "law is reason that proceeds from a sort of phronesis and noûs," and a large part of Weinrib argument aims indeed to show that tort law may plausibly be seen as a specification of a more abstract idea of justice.

This is not all, however. As a formalist, Weinrib appears to want to ground this understanding of tort law in a set of claims about what it is to understand law (or perhaps anything) tout court. Thus in describing formalism, he appears to suggest (1) that the right way to understand anything is in terms of those "characteristics that go to [the] thing's form" and that make it what it is (PL at 26); and (2) that this requirement excludes instrumental explanations of the law because (3) such explanations refer only to the law's "external" or "extrinsic" characteristics. I am not sure I have understood Weinrib correctly here. An unstated premise of his thinking seems to be that the purposes or goals ascribed to a thing are in general "external" to it. But then something must be wrong here if only because some things are, after all, tools or instruments. Their nature and value are properly grasped in terms of the purposes they serve; yet this argument from the nature of "form" leaves no room for this fact.

Should we say that measuring time is "external" to a clock? Well, perhaps if the "clock" is the shadow cast by a building. But then this presupposes some other appropriate characterization of what the thing is. If the thing in question is an instrument or tool, then an appropriate characterization of it will presumably refer to its purposes: a clock is for measuring time, a hammer for hammering, and so on. It may be granted that the law should be understood in terms of those characteristics that make it what it is. But this requirement presumably holds for instruments and tools as well. In explaining the nature of a hammer, for example, one should

26. For (1), see, e.g., *PL* at 26-28; for (2) and (3), see, e.g., *PL* at 4, 11-12, 16, 18.
generally not focus on its accidental characteristics, say, that it is black or located on top of the desk. Indeed, the question of “what something is” is often a question about a thing's purpose; it is answered by describing the ends to which the thing it is actually or characteristically (or intended to be) put.

Of course, these are platitudinous reminders. Weinrib need not deny them to hold on to the agreeable thought that there may be a reason-revealing characterization of tort law that does not refer to any purposes or goals. But it is not easy to see how the appropriateness of such a characterization is secured by the requirement that an understanding of tort law be “internal” to it. If this means simply that one must not understand the law in terms of any goals, the functionalist may rightly wonder why he should accept such a requirement. But if it means that an account of the law should refer to those characteristics that make the law what it is, the functionalist may happily, at least until more is said, grant the point; for he is not likely to have thought that, in referring to tort law’s goals, he was referring only to the law’s accidental aspects. Hence, we shall need first to exhibit the kinds of reasons present in the law in order to get a meaningful grip on whether some type of rationale is internal or external to it. This contrast gives no independent grip.

7. In fact, Weinrib appears to acknowledge this, for he rests the weight of the contrast between internal and external on something else: A rationale is internal to tort law only if it coheres with the tort law’s other features (cf. PL at 31; 29-32). Weinrib takes coherence to be a necessary condition of justification. But a proposed justification can render the law incoherent, in Weinrib’s strong sense of this word, without rendering it logically inconsistent; any attribution to the law of partially conflicting aims will suffice to render it incoherent. Coherence requires “a single integrated justification” (PL at 35), and Weinrib thinks indeed that a legal institution such as tort law is justified only if it rests on a single justification. Why?

Here is one possibility: Weinrib’s point comes to nothing more than that “a justification justifies” (PL at 39). That is, if a legal institution is justified, then it can be supported by (something that can be understood as) “a justification.” There is little here to quibble with or, for that matter, to endorse. Perhaps this is all that Weinrib would want to mean. But his way of expressing the point sounds less trivial:

The necessity for coherence arises from the nature of justification. A justification justifies: it has normative authority with respect to the material to which it applies. The point of adducing a justification is to allow that authority to govern whatever falls within its scope. Thus if a justification is to function as a justification, it must be permitted, as it were, to expand into the space that it naturally fills. Consequently, a justification sets its own limit. For an extrinsic factor to cut the justification short is normatively arbitrary (PL, 39; cf. 42).

This picture of justification—as a kind sovereign authority or self-animating force—is supposed to explain what goes wrong when justificatory purposes

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28. With Weinrib’s characteristic qualification of purposes as “external” (e.g., PL at 16) and goals as “extrinsic” (e.g., PL at 12), compare Posner, PJ at 361: “From the premise that the common law does and should seek to maximize society’s wealth, the economic analyst can deduce ... the set of legal doctrines that will express and perfect the inner nature of the common law.”
attributed to the law conflict. Say that compensation and deterrence are each “a justification.” Then the command of his excellency Compensation is continuously being restricted by the command of her majesty Deterrence, and vice versa. Neither ruler gets obeyed in the way each demands to be obeyed. Nor is there a third ruler who gives directions about how to negotiate the conflict of authorities. (But if there were would this make for three justifications or one, for coherence or incoherence?—I will return to this momentarily.) And this means that nobody here is a true ruler; neither justification “functions as a justification.”

Of course one can represent matters in this way; it presents a vivid picture. But what work is being done by the requirement, thus pictured, that a justification “function as a justification”? Doesn’t our sense of the appropriateness of this picture depend on our already having an independent grip on the inadequacy of reasons in the particular case described? Consider a different case. Bill jogs to the market to buy some needed groceries. But why jog there? Well, wanting exercise, he thought he’d kill two birds with one stone. Yet suppose he could wish for more groceries or more exercise. Then exercising is cut short because the activity is made to serve the purpose of buying groceries, and buying groceries is cut short because the activity is made to serve the purpose of exercising. Neither “justification” of Bill’s activity occupies the entire area to which it applies. Must we say that here neither one functions as a justification?

Clearly, the picture of justification is not to be applied like this. Bill may be behaving irrationally (he may unconsciously wish his activities to fail), but, equally, he may genuinely be killing two birds with one stone, even though this requires settling for smaller portions of each. But what makes the mutual limitation of compensation and deterrence any different? Why is tort law not also a happy opportunity to accomplish two objectives at once?

The problem can be met, I think, by a richer description of the features of each case and of the context in which questions about justification arise. The contemporary demand for a justification of tort law arises in the context of a widespread, if controversial, belief that various kinds of individual misfortune give rise to claims upon society. This idea of social responsibility presupposes, in turn, a number of factors that make alternatives to tort liability seem viable, e.g., the development of regulatory aspects of criminal and administrative law, the development of insurance, and the socialization of welfare through taxation. In a context where such alternatives press for consideration, could we reasonably refuse to ask how well tort law forwards the goals which make the alternatives look worthwhile?

If Bill’s case differs, it is not because his goals do not limit each other, but because there is nothing as yet to suggest that his activity isn’t a reasonable alternative given his desires, capacities and other circumstances. The nature of the case will change if either his desires or options change. What in the world was he thinking (he or others might ask) when he jogged to the store? For he wishes to prepare for the race, he needs to buy groceries for his family as well, his time is limited, and so on. Now

29. It is not clear that Weinrib himself thinks we can. See infra § 20.
his purposes really do cut each other short in the way Weinrib's picture describes.\textsuperscript{30}

The general point here is simply that the presence of trade-offs or conflicts among justificatory purposes is not a reliable guide to the insufficiency of practical reasons; so if questions of justification are understood as questions about the sufficiency of our reasons, we ought not to accept "coherence" as a necessary condition of justification.\textsuperscript{31} But why should Weinrib have missed this? Part of the reason is perhaps his counting every justificatory aim or purpose as "a justification". Consider the trouble this can create in another familiar case:

The hiring committee had three aims—to hire the most promising scholar, to hire someone who studied Milton and to hire someone liked by the students—when it unanimously compromised on $X$. All the candidates had different strengths and weaknesses. So the committee had three justifications for putting forward $X$, each limiting the scope of the others.

If we are tempted to say that none of the three justifications "functioned as a justification," it should strike us as odd that the committee could, at a stroke, enlarge the range of its justified options by distinguishing (and not un-idiomatically) between its "justification" for putting forward $X$ and its "purposes." If the absence of "a single justification" must turn on Weinrib's way of speaking, we might well take the resulting incoherence in our stride, especially in cases where purposes or principles are lexically ordered or ranked in some way. H. L. A. Hart famously proposed that the institution of criminal punishment has a general aim of deterrence, limited by principles of responsibility (governing who may be punished and to what extent) that may make deterrence fall short of an optimal result.\textsuperscript{32} Is this one justification (functioning with two ordered principles) or two justifications (each dysfunctionally cutting the other short)? How are we to answer this question if not by critical reflection on Hart's proposal? No doubt, if the proposal is found wanting, it will follow that the purported justification doesn't "function as a justification." But it is hard to see how the formal requirement of coherence offers any guidance in evaluating Hart's proposal.

8. None of these difficulties with formalism need detract, I think, from the alternative which Weinrib proposes to functionalism. According to this alternative, tort

\textsuperscript{30.} Admittedly, it can seem unclear what the point of talk of "justification" might be in many cases of "prudential" reasons for action. But the present point seems clear enough if, following Kant, we understand questions of justification to be questions about whether one's reasons for action are good ones (i.e., where the principles for assessing reasons are hypothetical, prudential and categorical imperatives). Weinrib's requirement of "coherence" purports to express a requirement practical rationality; it purports to say something about the sufficiency of reasons. But the presence of conflicting purposes or trade-offs doesn't seem to distinguish good reasons from bad ones.

\textsuperscript{31.} It cannot, for Weinrib, be a sufficient condition either, since some forms of utilitarianism obviously pass the coherence test.

\textsuperscript{32.} More generally, according to Hart, "any morally tolerable account of [criminal punishment] must exhibit it as a compromise between distinct and partly conflicting principles." "Just because the pursuit of any single social aim always has its restrictive qualifier, our main social institutions always possess a plurality of features which can only be understood as a compromise between partly discrepant principles," H. L. A. Hart, "Prolegomenon to the Principles of Punishment" in Punishment and Responsibility: Essays in the Philosophy of Law (Oxford: Oxford University Press, 1968) at 1, 10.
law advances at least one end, namely justice, simply by being a concrete realization of it, a specification of what this end, in various particular circumstances, consists in. Aristotle’s notion of corrective justice, to which Weinrib directs us, is no doubt meant to function as such an “internal” characterization of the law. But Aristotle is clearly enough no formalist. Indeed, insofar as formalism is an attempt to ground such a conception of the law, it may be said that the problem to which formalism is a response is not addressed by Aristotle at all.

Corrective Justice

9. In Nicomachean Ethics Book V, Aristotle represents corrective justice as a norm of equality between two parties, one of whom does wrong (*adikei*) and harm (*eblapsen*) which the other suffers. The doer is said to realize a gain equal to the sufferer’s loss. Parties in this relationship go to a judge, “a just ensouled” (1132a20-25) and justice requires a transfer by which the gain is disgorged and the loss rectified, something Aristotle imagines as removing from the larger part of a line cut into two unequal parts a segment that, when restored to the smaller part, makes the parts equal. Aristotle contrasts this with distributive justice which also involves a norm of equality, but a proportionate equality in the division of a benefit or burden in accordance with some criterion. Distributions can be carried out among two or a larger number of parties. Corrective justice, in contrast, involves “transactions” (*sunallagamata*), hence a relation between exactly two.

Aristotle’s most rudimentary thought here is that there is a notion of justice which pertains to the possible asymmetry present in all human action—the possibility that one person’s “doings” are instances for another of “being done to.” This thought is not unique to Aristotle; it appears in the golden rule. But Aristotle explicitly associates this notion of justice with “equality” (*ison*) and with the idea of repairing a past loss; and he endeavors to distinguish it from another no less basic notion of justice, that of sharing a benefit or burden. These conceptual associations and contrasts are what make his discussion pertinent to contemporary legal issues.

Notice, a propos the present issue, that while the repair of a wrongful loss is a central element in “corrective justice,” this is not sufficient to make corrective justice a “different species” (1130b30-1131a9; 1131b25-30) from distributive justice. As a suitable reallocation of resources, “repair of wrongful loss” might just as naturally figure as a strand in a *distributive* scheme under which some quality of the victim functions to establish a claim (just as illness or accident might establish

a claim to health care). The differentia of corrective justice are elaborated in a difficult passage which is the principal matter for commentary:

For here [in corrective justice] it does not matter if a decent person has taken from a base person, or a base person from a decent person, or if a decent or a base person has committed adultery. Rather, the law looks only at differences in the harm [inflicted], and treats the people involved as equals, when one does injustice while the other suffers it, and one has done the harm while the other has suffered it. Hence the judge tries to restore this unjust situation to equality, since it is unequal (1132a).

Here and elsewhere (cf. 1132a20-1132b20), the explanation of corrective justice notably refers to "the law" in a positive or institutional sense. This contrasts with the explanation of distributive justice where there is no such institutional reference. Aristotle is apparently inducing the notion of corrective justice from the observation that, when Attic law looks backwards on doings, it acts on considerations that are different from global considerations which embrace all persons having the relevant characteristics within a distributive scheme." But what are these considerations pertinent to evaluating "what has been done"? How is the equality of corrective justice to be understood?

10. A common suggestion subsumes corrective justice under distributive justice by cashing out the antecedent "equality" restored by the judge as the proportional equality of distributive shares. The picture is a simple one and it allows for a straightforward application of the image of the bisected line: X disturbs the equilibrium by wrongfully taking ten of Y's sheep; corrective justice corrects the wrong by ordering the return of the sheep. This makes the parties "equal" again, at least on the assumption that their antecedent holdings were in the right distributive proportion.

On this picture, the entitlements protected by corrective justice are those of an antecedently defined scheme of distribution. The application of this picture seems obscure, however, outside the case of a property taking or other unjust enrichment. Suppose that X does not steal but negligently destroys Y's sheep. If Y is now restored to the status quo ante through a transfer from X (rather than, say, through redistribution within the relevant community), X may have no sheep—a state of affairs inconsistent with X's prior distributional entitlement. To accommodate this, we

35. A similar induction seems to underlie Aristotle's distinction between three forms of rhetoric, each having "its own 'time'" and its own corresponding "end". "Judicial" [dikanikon] rhetoric is directed toward judgment concerning "what has been done" (a past happening about which disputants offer accusation and defense) and it has as its primary end "the just" [dikaiosynen]. "Deliberative" and "demonstrative" rhetoric are directed toward the future and the present respectively and have as their primary ends "the advantageous" [synepheron] and "the honorable" [kalon]. Aristotle, On Rhetoric, trans. George A. Kennedy (Oxford: Oxford University Press, 1991) at 47-49 [1358b-39a]; see also 31 [1354b].

36. See, e.g., Alasdair McIntyre, Whose Justice? Which Rationality? (London: Duckworth, 1988) at 103-04; George Fletcher, "Corrective Justice for Moderns" (1993) 106 Harv. L. Rev. 1658 at 1668; M. Hamburger, Morals and Law: The Growth of Aristotle's Legal Theory (New Haven: Yale University Press, 1951) at 46. The possibility that corrective justice refers to an absolute equality of holdings may be discounted, not because this is unlikely to be true, but because it is hard to see what significance such equality would have unless it acceded with a distributional norm; so this possibility is only a special case of proportional equality.
apparently need to explain how X’s wrongdoing altered his distributive entitlement. But this complicates the picture. It suggests that the transaction between the parties, viz., X’s wrongdoing and Y’s loss, has a significance that is not entirely captured in terms of its upsetting an antecedently just proportion of holdings. Indeed, if the point of corrective justice were to preserve a prior equality of holdings, its focus on transactions would itself seem inexplicably narrow, since, as Weinrib points out, such equality might also be disturbed by natural disasters or by transactions, like gifts or ordinary exchange, that are not wrongful. This is not to deny that wherever there are any distributive entitlements, there will be the idea of norms governing the possibility of infringement by others. What seems doubtful is that transactional norms are available only through the idea of securing a just distribution.

11. Two thoughts present in the quoted passage have in fact no obvious place in the foregoing picture of corrective justice. One is that the character of the parties doesn’t matter (“Here it does not matter if a decent person . . .”); the other is that the parties are related as the doer and sufferer of the same injury (“when one does injustice while the other suffers it, and one has done the harm while the other has suffered it”). To understand Aristotle’s suggestion that corrective justice is a distinct species of justice based on a distinct kind of equality, we might begin by asking why the law’s attention to “correlative” doing and suffering should be thought of as an alternative (“Rather, the law . . .”) to a consideration of the parties’ character.

At first glance, Aristotle’s remark about character not mattering appears to stand in tension with an idea that a commentator such as Terence Irwin finds in the discussion starting at NE at 3.1: that the actions for which an agent is responsible are open to praise or blame in a way that exhibits something about the agent’s character. It may be that corrective justice, if it really is unconcerned with character, is not part of ethics as Aristotle conceives it or is not a practice of holding agents responsible. But before reaching these drastic conclusions, it should be noted

37. See PL at 79. See also Robert Nozick, Anarchy, State and Utopia (New York: Basic Books, 1974) at 160-64.
38. Actual legal practice supports this. Suppose that when X negligently destroys Y’s sheep, the validity of the norm that entitles Y to repair is conditional on the justice of their antecedent holdings. Given this, why isn’t it an appropriate defense for X to claim that the distribution following upon the transaction is more equitable? The law does not allow this defense. It requires, and so permits, X’s liability to be established without reference to distributive justice. It may be thought that the prior justice of the parties’ holdings is present as a presumption, which is required if the rules for transactions are not to be overly complex. There is truth in this; securing background justice must largely be the province of a different set of institutions. But aren’t other simplifying presumptions possible? Is the only realistic alternative to allowing transaction-based challenges to the distribution of wealth that of excluding such challenges altogether? Cf. Weinrib, PL at 79 and Peter Benson, “The Basis of Corrective Justice and Its Relation to Distributive Justice”, supra note 34 at 530-31.
39. I follow Weinrib’s use of the word “correlative” here. See Aristotle, Rhetoric, ed., W.D. Ross (Oxford: Oxford University Press, 1959) at II.23.1397a23-27; quoted in Ernest Weinrib, “The Gains and Losses of Corrective Justice”, supra note 34 at 284 n. 15: “Another topic is derived from correlatives. If to have done rightly or justly may be predicated of one, then to have suffered similarly may be predicated of the other. . . . And if rightly or justly can be predicated of the sufferer, it can equally be predicated of the doer. . . .”
that what occupies the center of attention in corrective justice can be understood
to do so as the result of a motivated shift of focus within Aristotle's discussion.

Begin with virtue, a state of the soul that enables one to live an excellent life.
In introducing justice Aristotle says that it is "virtue in relation to another"
(1129b32). This means more than that justice is concerned with appropriate conduct
towards others, for that would not distinguish the other-directedness of justice from
that of other virtues, say, generosity (which involves giving to the right people;
1120a25) or magnanimity (which involves appropriate treatment of other people;
1124b10-1125a10). Justice, Aristotle says, is unique among the virtues, "the only
virtue that seems to be another person's good" (1130a1-5; cf. 1134b6). But if justice
uniquely puts another's good in view, does this not imply a certain relation between
the other and the one for whom the other is another? Would it not be natural, there-
fore, to ask about the aspects of justice that are specifically relational? This is in
fact just what occurs when Aristotle next distinguishes from "general justice" a
"particular justice" which seems essentially to concern the advantage of one person
relative to others (cf. 1130b1-5), hence the ways persons may be equal or unequal.
Seen in this light, corrective justice is part of a progression, and, though it looks
away from character, it may be understood as capturing something of ethical inter-
est, viz., the purely external relations between persons.42 That persons can be related
in a purely external way is something no doubt partly constitutive of the idea of
"another" in the phrase "virtue in relation to another."

Now a paraphrase of Aristotle might be this: "It doesn't matter whether the
action complained of was expressive of vice or virtue (the one will not make the
agent culpable and the other will not exculpate him); all that matters is what the
agent did, the act itself." But if justice is to evaluate "the act itself," the question
will be: "What did he do?" In particular, did he "inflict harm on another" in a sense
implying his responsibility for that harm? Suppose, to take a famous example from
tort law, a railway attendant, in the course of helping a man board a train which
has started to depart, dislodges a plain brown package which the man is carrying.
The package turns out to contain fireworks which explode, causing a scale at the
other end of the platform to fall and injure a third person, the plaintiff. The plaintiff
says that the attendant inflicted harm on her, that he is responsible. The defendant's
version of the story, however, is different. She did indeed suffer harm, but harming
her wasn't something he did. He pushed a passenger. If this was careless, it was
so only with respect to the passenger or the package; the rest was a matter of the
unhappy course of events. In the plaintiff's version of the story, the complaint is
about him; in the defendant's version, it is about the world.42

41. On the idea of such a progression in Aristotle's discussion, see Ernest Wennb. "Aristotle's Forms
of Justice" in Spiro Panagiotou, ed., Justice, Law and Method in Plato and Aristotle (Edmonton,
Aristotle's observation that justice is not a mean in the same way as the excellences of character
(NE at 1133b29-1134a).
42. See Palsgraf v. Long Island Railroad, 248 N.Y. 339, 162 N.E.99 (1928). The relation between
such problems of action description and the problems which tort lawyers call "proximate cause"
is brought out especially clearly by Clarence Morris, "Duty, Negligence, and Causation" (1952)
Insofar as we are interested in action as an expression of ethical character, it would be natural, in addressing such questions about "what has been done" (in elaborating wrongdoing), to focus on the deliberated, or anyway, the intentional or foreseen aspects of action. By revealing the agent's reasons in acting, these aspects exhibit something about his character; they come closest to him. Aristotle is thinking along these lines when he turns, after the discussion of particular justice, to questions concerning the relation of voluntary action to justice (NE at 5.8). Here the ethical interest in the voluntary (hekousious) does put the expected pressure on the notion of doing wrong (adikein), for Aristotle suggests that an action must be "defined" by features of the practical situation that the agent is aware of, i.e., the person harmed, the instrumentality of harm, and the nature or type of harm (1135a15-30; 1135b11-17). Defining action in this way opens a gap, to which Aristotle points, between something "being unjust" (hence there to be suffered) and "being an act of injustice" (1135a15-25). Someone who acts in ignorance of features of the situation that characterize the action as suffered not only has done no wrong, he has not at all, strictly speaking, done that. The doing of what turns out to be a suffered wrong does not "except coincidently" belong to him as a doing.

But if wrongdoing is thus confined to voluntary action (in Aristotle's sense, requiring awareness that the action would fall under the relevant description), it seems natural to conclude that "suffering wrong," where it figures in a description of the situation calling for corrective response (viz., the doing and suffering of wrong), will involve voluntary action on the part of the agent. This would close the aforementioned gap by making the passive form (to suffer or receive wrong) a simple reflex of the active form, with the active confined to cases where blame is appropriate (cf.1135a20-25, 1109b30-35). But if this way of closing the gap seems to be suggested by Aristotle's reference at 5.8 to something that "will be unjust without thereby being an act of injustice, if it is not also voluntary" (1135a20-25), it also seems to be blocked by it. For it is hard to see how something can really "be unjust" if there is no injustice done and hence, from the point of view of corrective justice, none to be suffered. In fact, this way of closing the gap (by making the passive reflect the active) seems objectionable in its own right. Why should the one who suffers, the one for whose sake justice is a virtue, find the agent's self-relation to (or self-consciousness of) his own action relevant or significant? Of course, when the victim is a friend, the agent's self-relation may be important for him. To be capable of friendship, one needs sometimes to understand the other's action in terms of his own view of it. ("The excellent person is related to his friend

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43. This, of course, is not true without qualification, since ignorance may itself be culpable. But from the point of view being described here, ignorance would presumably not be culpable unless it was itself, in some sense, "voluntary."


45. There can seem to be an inconsistency between what Aristotle is saying here where the conditions for "blaming" are clearly controlling—"something will be unjust without thereby being an act of injustice, if it is not also voluntary" (1135a20-25)—and the earlier point, in the context of "special justice," that corrective justice applies to a variety of voluntary and involuntary transactions (1131a1-10). However, in the latter passage, "voluntary" and "involuntary" qualify the nature of the parties' relationship, not the offending conduct.
in the same way as he is related to himself, since a friend is another himself.” But the “in relation to another” of particular justice is not the mutuality of friendship but its absence, the other as purely other. This way of closing the gap reflects our interest in action as an expression of character. But to see it as objectionable is part of what it is to grasp the ethical significance of justice in the special sense.

Of course, it can be tempting to recoil too far from such a picture of the self-elaboration of one’s own doings. What matters, it will be said, is not whether the agent is a wrongdoer (whether he does wrong knowingly) but whether he does something that is a wrong (i.e., for the person who suffers it). Here, opposing the narcissistic demand to recognize as one’s action only what one knew as one’s deed, would be a notion of responsibility that runs at greater or lesser length along the lines of causation. Now certainly it is mistaken to put another’s suffering into the category of mere happenings—something on a par with the effects of tornados—merely on account of one’s own self-relation to the action that causes suffering. But the envisioned recoil is no less one-sided: Here the active form becomes a reflex of the passive “suffering wrong”. If the scope of my wrongdoing depends in the narcissistic case on my self-relation to my action, it depends, in this recoil, on your relation to my action, on your suffering of it.

Virtue “in relation to another” opposes these one-sided possibilities of human relation, and a natural—an archetypal—way of expressing this is to say that missing from them is the point of view of a third person, the representative of the law. Aristotle in effect says this, for he presents the fact of the involvement of a third (the judge) as a confirmation of his thesis that corrective justice represents a mean: “Hence the parties to a dispute resort to a judge.... The just then is an intermediate, since the judge is so” (1132a20-25). We might now gloss this as follows. It is the potential asymmetry between human doing and suffering that gives corrective justice its interest: “when one does injustice while the other suffers it, and one has done the harm while the other has suffered it ... the judge tries to restore this unjust situation to equality” (1132a5-8). This says that the sort of disequilibrium which calls for corrective justice is present just when the wrong that is done by one person is the same wrong that is suffered by the other. And when is that? The just answer is intermediate between two descriptions of the action, one making suffering the reflex of doing, the other making doing the reflex of suffering. In corrective justice, the grounds for saying the defendant has done wrong are the same grounds (=equally appropriate) for saying the plaintiff has suffered wrong. This is the sense in which the judge, justice ensouled, “treats the parties as equals.”

12. How much does this accomplish? There is certainly no hope of extracting the content of any liability rules from the formal notion of correlativity or “sameness

46. *NE* at 1170b5-9; cf. 1155a26-29 (“If people are friends, they have no need of justice”); 1169b5-
6, 1166a30-33.

47. Or of “natural” causation. The point is that the scope of responsibility for the products of action would not depend on the sort of normative considerations by which tort law distinguishes between consequences (for which one is answerable) and mere fortuities. Whether this is coherent is another matter. 48. Cf. Aristotle, *supra* note 39.
of grounds." But before considering such an objection (§ 13), it will be helpful to consider how this notion might function alongside certain "natural" judgments.

Suppose it is possible to suffer or receive injustice without action on the part of a vicious person (a natural supposition concerning both transactions and the sharing of goods). Given this supposition—that vice on the doer's side is not determinative of whether injustice is suffered—correlativity implies that it is not determinative of wrongdoing either; it is beside the point. A similar reflection suggests that not just the person's character but motives (episodic or dispositionally rooted) are also sometimes beside the point. It may be tempting to think that justice would not reprove actions that are innocently motivated. But enlarging the focus to include the injurious consequences of action, i.e., viewing the person "in relation to another," we will surely not accept the proposition that no one, suffering injury, can have suffered a wrong except as a result of someone acting on a particular sort of motive. (X may innocently forget to [...] and therefore act on, say, no impermissible maxim; but why should this matter to Y?) Correlativity thus implies that certain characteristics of persons and their actions, e.g., those that "morally" excuse well-intended but badly turned out action, are irrelevant to the justice of transactions.49 Aristotle's remark about the irrelevance of character in corrective justice presents a contrast with one possible distributive criterion.50 But the law's familiar inattentiveness (when considering transactions) to other ways of measuring distributive worth—e.g., citizenship, wealth, good birth (see 1131a25-29)—may now be understood along the same lines: the correlativity of doing and suffering is interrupted when the treatment of one party rests on grounds that are not also appropriate grounds for the treatment of the other.

Now as a further illustration of this formal notion, consider tort law's use of a social standard of reasonableness—the "reasonable person acting under like or

49. For a classic common law articulation of the "objective" or "external" standard of negligence, see Vaughan v. Menlove, 2 Bing. (N.C.) 468, 132 Eng Rep. 490 (1837); see also Oliver Wendell Holmes Jr., The Common Law, ed. Mark DeWolfe Howe (Cambridge, MA: Harvard University Press, 1963) at 88-88. Curiously, the absence of certain kinds of "moral" excuses (i.e., those negating culpability, but not those negating agency) implied by the "objective" standard has led some commentators to view it as a form of "strict liability." See e.g., T. Honore, "Responsibility and Luck" (1988) 104 Law Quart. Rev. 530 ; J. Balkin, "The Crystalline Structure of Legal Thought" (1986) 39 Rutgers L. Rev. 1. But taking a hint from Aristotle, one might also say that the objective standard expresses the notion of fault or wrongdoing that is appropriate to the consideration of a person's action "in relation to another" rather than merely as it concerns the actor. Consider a remark from Thomas Nagel's "Moral Luck" which has a related problem about negligence in view: "If the object of moral judgment is the person, then to hold him accountable for what he has done in the broader sense is akin to strict liability, which may have its legal uses but seems irrational as a moral position." Nagel, Mortal Questions (Cambridge: Cambridge University Press, 1979) at 31. The complaint here is perhaps most clearly in focus when the frame of attention is filled by the actor's self-relation to her action; then it looks like the remedy is, in Nagel's words, "to pare down each act to it morally essential core, an inner act of pure will assessed by motive and intention" (31). But, enlarging the frame, can we rationally explain to the victim of the action that his injury lacks moral significance because all that matters is the inner quality of the actor's will? Keeping both parties in view can, in short, help us to see the "objective standard" for the consequences of one's action as itself an expression of a certain type of ethical demand (i.e., justice), not merely of legal expediency. (I do not think Nagel disagrees with this.)

50. The one favored by aristocracies. See Aristotle, Politics [published as The Politics of Aristotle], trans. Ernest Barker (Oxford: Oxford University Press, 1946) at 1278a, 1279a; see also NE at 1131a 25-29.
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similar circumstances"—as the basis for judgements about whether there has been a remediable wrong. Some undeserved suffering flowing from the action of another becomes legally insignificant under this standard. Holmes famously emphasized this, drawing a contrast between tort liability and social insurance. But this may be understood as something for which corrective justice properly leaves room, because, while the fact of a person’s suffering might call for shifting social resources in her direction, it is not, just as such, an appropriate ground for holding another liable. Why not? Because that would turn the legal significance of all “doings” into an adjunct of another’s suffering; it would make the question “What doings should he regard as his?” turn one-sidedly on the being-affected of another. On the other hand, the defendant may justifiably be liable under the reasonable person standard even when he “did his best” (in one of its slippery senses) to avoid injuring another. In a different context this might be a reason for excusing his slip; but it is not an appropriate ground for treating the resulting injury as the victim’s own misfortune. Why not? Because that would turn the legal significance of all “sufferings” into an adjunct of another’s “doing”; it would make the question “What doings should he regard as his?” turn one-sidedly on his self-relation to his action. In his defense of the reasonable person standard, Holmes also remarked that “If ... a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect.” But if this makes it sound as if the so-called “objective” standard of liability is a kind of second-best, one should ask what exactly is supposed to make the defendant’s capacity-based excuses pertinent in the conditions of Heaven. Holmes’ implication that it is the transparency of the defendant’s mind to the divine judge (a counterpart to the old evidentiary rule that “the thought of man it not triable”) doesn’t so much as begin to answer his good point about the neighbor’s suffering. It would seem that the difference-making characteristic of Heaven must really be that there are no accidents—that nothing ever happens—there.

The Gap in Corrective Justice: I

13. Corrective justice, to recapitulate, describes an abstract framework for arguments concerning the terms on which one person is answerable for the harmful effects of her actions on another. Suppose that it is plausible to see tort law as filling out part of such a framework. Then it makes sense to say that when tort law is explained solely in terms of the goals of compensation and deterrence, the distinctive sort of reasons which inform it have not yet come into view. For these goals create the sort of reasons which belong to arguments about distributive justice in

51. Oliver Wendell Holmes Jr., supra note 49 at 77.
52. As Weinrib puts it, from the point of view of corrective justice, the “subjective standard” is the mirror image of strict liability. See PL at 177-83.
53. Oliver Wendell Holmes Jr., supra note 49 at 86.
that: (1) when the resources of a community have been allocated in a certain way the goals are satisfied; (2) the reasons they create apply not just to interacting persons but to everyone in the political community; and (3) whatever grounds for claims such goals provide are not grounds for a specific person's obligation (and vice versa).

So far, perhaps, so good, at least in bringing into view an alternative to the subsumption of corrective justice under distributive justice (§ 10). But the nature of Aristotle's thought concerning corrective justice comes out more clearly in light of two contemporary objections. The objections are in fact versions (though not recognized as such) of the same thought.

First, to see an inflicted loss as raising a claim of justice, don't we need already to understand it as the violation of a norm? Your opening a shop next to mine, for example, may result in losses to me that are gains to you; but though my losses might give rise to a claim on social resources (on grounds of distributive justice), they are not losses which I am entitled to have you repair, in the absence of some specifically unlawful practice of yours. So Aristotle's talk of correlative gains and losses seems to be only a way of representing the legal obligations we have as a matter of positive law. His discussion cannot be understood as justifying legal obligations on the basis of facts about interpersonal "transactions" that are independently available. Simply put, Aristotle stands in need of a theory of justice.

A related finding of emptiness concerns the applicability of corrective justice to tort law in particular. Equivalent gains and losses, according to this second complaint, are present in only a small class of legal transactions. Perhaps some property takings (X steals Y's sheep) or some unjust exchanges (X conveys his sheep to Y and gets nothing in consideration) conform to Aristotle's pattern, but in the case of negligent injury such equivalence is fictional. Is there a corresponding gain to me when by careless driving I accidentally injure you? Perhaps there was some benefit to me, at least before the accident, in omitting to fix my brakes or in driving too fast. But even so, the unhappy consequence of this—a trifling or a catastrophic loss—is a matter of the independent course of the world. It would take Pangloss to believe that there must be some corresponding benefit. So Aristotle's conception

56. Hans Kelsen's version of this objection draws on Aristotle's description of justice as a mean between having too much and too little. Taking this to imply that the judge who grasps the concept of justice would have a decision procedure for determining what is owed by one person to another (just as the geometer has a procedure for determining the midpoint of a line), Kelsen points out that for the idea of "too much" and "too little" to get a grip in the judicial characterization of a transaction, a doctrine of entitlement is needed; but once the parties' entitlements are established, the idea of justice as the observation of a mean can drop out. Thus, for Kelsen, Aristotle's characterization of justice as a mean is a tautology and—since the mesotes formula only gets its grip through established entitlement—a glorification of positive law. See Hans Kelsen, "Aristotle's Doctrine of Justice" in Hans Kelsen, What is Justice? (Berkeley: University of California Press, 1960) at 117-36.
57. The suggestion that the plaintiff has gained, ex ante, by forgoing the burden of precautions is made by Posner, "The Concept of Corrective Justice in Recent Theories of Tort Law", supra note 7. Aquinas entertains the same idea in passing ("the assailant and the murderer have more of what is esteemed good, inasmuch as they have done their own will and so seem as it were to have gained"), but he adds that here "too little is clear." St. Thomas Aquinas, Commentary on Aristotle's Nicomachean Ethics, trans. C.I. Litzinger (South Bend, IN: Dumb Ox Books, 1993) at 952.
of corrective justice seems pointlessly limited in range.  

According to the first objection, corrective justice lacks normative bite; according to the second, it bites only on isolated fragments of private law. That the objections turn on the same point, however, is seen in the fact that we can answer the second (and preserve the range of corrective justice) if we acquiesce in the first and allow that "gain and loss" does not refer to an independent condition of liability but rather presupposes the obligations and entitlements on which liability is based. Quite simply, "gain and loss" refers, on this resolution, to what one party owes another according to the law or the best theory of it: To owe is to have gained; to be owed, to have suffered loss.  

Answering the second objection seems exegetically desirable, not just because corrective justice is said to apply to a wide range of voluntary and involuntary transactions (1131a1-9, 1131b25-27), but also because Aristotle seems to have anticipated and rejected this objection himself:

[This is Aristotle's argument as interpreted by the author.]

While extending the earlier point that it is useful in discussing particular justice to have a single name for various kinds of relational advantages (1130b2), this says that the gain and loss pertinent to corrective justice does not always come into view through an independent inspection of transactional advantages. It comes into view, sometimes, only insofar as what is suffered is measured, i.e., by the judge as the representative of justice. The question—does the attacker realize a profit?—thus embodies a misunderstanding: It confuses the measure with what it measures, a juridical form of representation with what, where the form is appropriately in place, is represented. But we must ask, if this is the answer to the second objection, whether Aristotle is not precisely acquiescing to the first.

Suppose Aristotle does wish to maintain that equivalent loss and gain is a way

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58. For this objection, see George Fletcher, "Corrective Justice For Moderns", supra note 36 at 1668; Stephen R. Perry, "The Moral Foundations of Tort Law", supra note 34 at 457; cf. David Sachs, "Notes on Unfairly Gaining More" in Rosalind Hursthouse, Gavin Lawrence & Warren Quinn, eds., Virtues and Reasons: Philippa Foot and Moral Theory (Oxford, Oxford University Press, 1995) at 214. Fletcher concludes that corrective justice does not apply in cases of risk-taking, where "there is no reason to assume that the injurer's gain, either economic or psychic, is equal to the injury that happens to materialize." However, this non-equivalence is not uniquely true of risk-taking; the point would extend to most of the transactions that Aristotle counts within the scope of his discussion (NE at 1131a1-10).

59. Weinrib offers a similar resolution when he speaks of "normative gain and loss" (PL at ch. 5). His proposal is discussed separately in the Appendix.

60. This is noted by Terence Irwin in Irwin, trans., NE at 334.

61. Note the explanatory addition in Aquinas' paraphrase: "But when passion is measured, i.e., according to the measure of justice, then what is more is called gain and what is less, loss." St. Thomas Aquinas, supra note 57 at 953 (my emphasis). The equivalence of gain and loss, as I read this, belongs to the measure of justice and not, independently of the use of such a measure, to what is measured.
of representing what one party owes the other according to some transactional norm. What would be the point of this way of representing things if it gives no independent purchase on what sorts of goings-on constitute a debt-creating "wrong"? One answer—suggested by the phrase "when what was suffered has been measured"—is that this form of representation exhibits a wrongful transaction as a reason for the payment of damages. "Picture wrongdoing as a gain by one person at another's expense," Aristotle would be saying: "Then it will be clear that compensation is the appropriate response." On this suggestion, Aristotle's account moves backward from the established legal remedy. Rather than proposing a general hypothesis about transactions to which the injurer's absence of profit would count as contrary evidence, Aristotle is seeking to develop the concept of a "transaction" partly on the basis of the observed fact that, even in cases of "non-profitable" injury, the law orders a remedial payment resembling the restitution which is ordered in cases of theft or unjust exchange. It is clear, however, that this idea will not succeed in answering the objection. For Aristotle, it will now be said, has not only presupposed an independent definition of wrongdoing, but also supposed that the wrongdoer's repair of the loss is the appropriate response to wrongdoing as defined. Positive law may indeed say so; but if the point of discussing corrective justice is to see whether the law is reasonable, one is, in referring to positive law, moving in circles.

14. Something seems right here, but something also seems wrong. We have an objection raised by Aristotle, the answer to which merely refuels the objection itself. Baldly stated, corrective justice is found to be disappointingly empty. It finds no purchase until the law recognizes a wrong and specifies a remedy; but once the law does that, there is nothing left for Aristotle's discussion to do but stamp the judicial application of the law with the name of justice. In taking the measure of this impasse, I want to look closely at a recent version of the objection by Richard Posner. The question of Aristotle's emptiness comes into sharper relief here because, as a utilitarian, Posner also claims to have the normative supplement which Aristotle needs.

"[How could] so spare and seemingly platitudinous a concept of justice," Posner asks "echo down through the centuries?" On Posner's view, Aristotle "seems to be saying little more than that there should be an impartial governmental machinery for redressing redressable wrongs" (PJ at 316). To illustrate this, Posner supposes that "the social costs of accidents would be reduced if tort liability for automobile accidents due to negligence were discarded in favor of a combination of no-fault insurance and stepped-up criminal prosecutions of dangerous drivers" (321). If the legislature did thus reclassify careless driving, no objection could

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62. The terms "loss" and "gain," as Aristotle says, "are derived from voluntary exchange." NE at 1132b11-15. The present suggestion—viz., that Aristotle's extension of these terms is to be understood in terms of the conceptual centrality of the legal remedy—is reflected in the following comment by Aquinas: "It is evident that justice is a mean between gain and loss, that justice is simply the possession of an equal amount before and after a transaction, even an involuntary one, as we see in the person who, when constrained by a judge, restores to another what he had in excess." St.Thomas Aquinas, supra note 57 at 963 (my emphasis).

63. Posner, PJ at 316.
pertain on the score of corrective justice (*PJ* at 321-22). Why not? Because “the definition of wrongs is prior to the duty of corrective justice” (*PJ* at 322). Hence “society is always free, at least as a matter of corrective justice, to alter the definition of wrongful conduct” (*PJ* at 322; cf. *PJ* at 315, 323).

Presumably more is meant here than the Calliclean thought that power can do what it likes whatever you say about justice. In speaking of society’s “freedom” to alter the definition of wrongful conduct, Posner is referring to what society may justifiably do. His point is that, absent an independent “definition of wrongs” such as his economic utilitarianism would provide, corrective justice provides no constraint. However, this does not in fact follow from the illustration he gives. What follows is only one or two weaker claims:

1. Society may justifiably, at least as a matter of corrective justice, replace some parts of tort law with regulatory and compensatory schemes.
2. Society may justifiably, at least as a matter of corrective justice, abolish tort law entirely.

Most people today accept (1). Claim (2) is stronger, but the move from even (2) to the conclusion that corrective justice is unconstraining would be a non-sequitur. The following premise is needed:

3. If corrective justice has content, then considerations of corrective justice are sufficient to create moral entitlements to the creation (or non-abolition) of tort law.

But this is doubtful; and if one is inclined to think (3)’s antecedent is true and to think (1) or (2) is true, one will in fact doubt (3). Society may well decide, for the utilitarian reason Posner mentions, not to recognize tort claims against careless drivers—an instance of (1). But without (3), it hardly follows that when society *does* recognize such claims, it is not recognizing genuine claims of corrective justice.

To establish that corrective justice is unconstraining, what needs to be shown is that

4. Society may justifiably, at least as a matter of corrective justice, alter the definition of all wrongful transactions (doing and suffering).

But this seems obscure. How could the question of whether it is wrongful to negligently or intentionally injure a person be a question up for political decision at all? Presumably what this means is:

5. Society may justifiably, at least as a matter of corrective justice, alter the definition of all legally wrongful transactions.

Yet if (5) really says something clearer than (4) yet stronger than (2), what could it be? The idea must be this: Even supposing that society has corrective justice as its end, there is nothing, at least in Aristotle’s account, for society to get right or wrong, no target for the law to hit or miss. Any liability rule would manifest the “correlativity” requisite to corrective justice because it simply belongs to the idea of what a liability rule is (to its grammar) that it specifies conditions under which
one person will be held to have wronged another.\textsuperscript{64} Consider rule (R), "Any wealthy person is strictly liable to a virtuous person he injures." If (R) definitionally conditions legal wrongdoing on the defendant's wealth and the plaintiff's virtue, it thereby also limits actionable injury. So no difficulty need arise on the score of correlativity (the unity of the grounds of liability and recovery). If anything is unreasonable about R, it is something outside of corrective justice as Aristotle describes it.

15. Mustn't we accept this? That depends, I believe, on how we understand the idea of reasons that are "outside" or not "a matter of" (PJ at 322) corrective justice. Certainly Aristotle's representation of corrective justice—"when one does injustice while the other suffers it," etc.—is not a free-standing recipe for appropriate liability rules. If that is what his account of corrective justice is supposed to be, it indeed requires some kind of normative inspiration from the outside. But this looks like a demand that is foreign to Aristotle's discussion. Suppose Aristotle were endeavoring not to give a recipe but only to make us aware of the contours of a practice in which a certain kind of case (a transaction) is central. The practice is thought to be of ethical interest because a distinctive sort of reason is in play in it; and it is through our grasping just this sort of reason that we can understand the contours of the practice.\textsuperscript{65} Here it is not at all clear what it means to go "outside" of corrective justice in order to define a legally wrongful transaction.

Consider, as an analogy, the uncertainty that may arise about what the obligations of friendship require. It seems implausible to think that anything Aristotle says about friendship (or about "disputes in friendships": 1162a30 \textit{et seq}) will function, independently of one or another view about how to resolve the uncertainty, as a recipe for the correct resolution. But that should not make it tempting to say that friendship is unconstraining or that one must go "outside" of friendship to resolve the issue. If this means that one is to bring in some independent substantive ground of decision, then, by going outside of friendship, one is often enough bound to loose sight of what the issue is about. More assiduous reflection is required on what "true friendship" requires. That is, if one wishes to be a friend, one must try to see the significance of the details of the present situation in light of a correct grasp of the concept of friendship. Here the objection running parallel to Posner's disappointment with corrective justice would amount to this: We are not rationally entitled to think of one or another resolution of such a practical issue as being genuinely

\textsuperscript{64} Thus according to Posner, the passage in \textit{NE} beginning "it makes no difference whether a good man ..." states "a procedural rather than an ethical principle": "it does not imply that [distributive] considerations should not affect the definition of rights or the determination of what sorts of act are unjust or wrongful. The point is that the judge is interested only in the character—whether it is wrongful—of the injury" (PJ at 315).

"correct" unless we have a theory of friendship that certifies its correctness from outside any of the disputed views. (For a utilitarian like Posner, such a theory would, in principle, allow one to represent the "correct" resolution of the issue as the conclusion of a demonstrative argument in which a statement of what makes friendship worthwhile—say, its maximizing certain satisfactions”—functioned as a premise.) It is hardly obvious, however, that Aristotle would accept this requirement.

Consider now the situation in which one person suffers through the doing of another. That situation has a natural saliency for human beings. It is bound to figure in the most basic thinking about what sorts of happenings can be controlled, and related to this, it produces such natural psychological responses as resentment and revenge. Posner assumes that Aristotle introduces corrective justice into this situation as something that one could use to reason one’s way into a correct account of civic obligations, even if one had as yet only such basic natural responses. And then finding that corrective justice doesn’t have the resources to be useful in this way, Posner concludes that what would be needed to start up the public machinery of law is a “definition” of wrongdoing on some independent substantive basis. So corrective justice stands in need of a prior doctrine about the social interest in regulating this recurring situation, “wealth-maximization” for example. “Wealth-maximization” is useful in this way. It is capable, in principle, of functioning in a derivation of civic obligations through a form reasoning, i.e., theoretical reasoning, which is available in advance of the practice thus derived.

But this demand for theory, I am suggesting, misses another respectable possibility, namely, that corrective justice is meant to exhibit a characteristic sort of reason already captured in the ongoing activity of argument and judgment directed towards the situation to which modern liability rules are a judicially evolved response. (That situation is now salient for us not just on account of our primitive responses but also on account of our grasping just this sort of reason.) In the case of the rule (R) mentioned earlier, the content of corrective justice might show itself in our responses. “Surely one may suffer wrong regardless of whether the agent is wealthy, etc....” Of course, we may not have such responses, or there may be reasons for having (R) anyway. Perhaps it is socially expedient, under the circumstances, to encourage virtue by implementing an injury compensation scheme funded out of taxes on the well-off. But given that we do have such responses, it may intelligibly be said that (R) fails in the dimension of corrective justice: the rule does not capture our ethical interest in this kind of case (doing and suffering).

On this reading, Aristotle’s potent thought is that the relationship of "doing and suffering" can be understood to have, simply as such, an ethical significance, i.e., without the mediation of the considerations about collective wealth that, according to Posner, ought to figure in any "definition of the wrong" (and, more generally, without the mediation of a theory concerning the appropriate social allocation of

67. Hence the premise that opens Posner’s discussion: Corrective justice is supposed to be “an overarching principle of justice, a political-ethical norm that could be used to ground legal obligations” (PJ at 313).
resources). It doesn’t follow that the significance of this relationship must be recognized in positive law (any more than it follows from the concept of friendship that one must have friends), only that when it is recognized in law, the public resolution of the case can be understood as just or unjust without being thought of as (an instance in a scheme) advancing any interests, such as the communities’ wealth, that exist independently of the relevant legal norms. Posner misses this possibility, I am suggesting, because he simply takes it for granted that one legal conception of wrongful doing and suffering must be, from the point of view of corrective justice, as good as another (“society is always free …”) unless we have a representation of corrective justice which could serve in a theoretical demonstration of the correctness of one or the other conception. But to take this for granted is, at the very least, to beg Aristotle’s questions. It is to ignore what Aristotle says about ethical content more generally, viz., that it is not capable of being fully grasped apart from the exercise of practical intelligence in the concrete situations on which ethical notions bear.  

16. Seen in light of this more general point, it makes sense that Aristotle’s account of corrective justice should refer centrally to the role of the judge, just as his account of eudaimonia refers—and exactly where a reader like Posner would expect to find a recipe for living well—to the role of the person of practical wisdom. The judge (“justice ensouled”) tries to see the concrete situation before her in light of a correct grasp of corrective justice. She does not first consult that notion in the abstract in the hope of bringing a “definition of wrong” deductively to bear in resolving the particular case. One sees a modern counterpart in legal commonplaces such as the notion of “the law working itself pure” by means of case by case judgment or, as Lon Fuller put it, by being “in quest of itself.” Such phrases have the unfortunate tendency to suggest that certain rules are already “law” before they have been judicially adopted, and they have provoked some excessive denials. But we need not deny the strong human interest in identifying law as a social institution (positivistically) in order to understand such phrases as a colorful way of saying that the judge may sometimes properly think that there is something he is trying to get right, even if its content is not expressible as a universal test that would allow him to dispense with the analogical consideration of particular cases.

Consider once more the jury’s deliberation about whether the defendant acted with the care of a “reasonable person in like or similar circumstances.” Is it possible to say what the jury is considering in a way that could be grasped in abstraction from a practical capacity to assess particular cases of action in light of a shared sense of appropriateness? Judicial rulings do clarify the reasonable person standard,  

68. On the nature of ethical content in Aristotle generally, see McDowell, note 65. For a suggestive Aristotelian picture of the relation between the understanding and application of legal concepts, see Hans Georg Gadamer, Truth and Method (New York: Crossroad Publishing Co., 1982) at 278-305.


70. For example, Holmes’ denial that the law is a “brooding omnipresence in the sky.” For a more modest approach to the common lawyers’ idea, see Joseph Raz, “The Inner Logic of the Law” in Ethics in the Public Domain: Essays in the Morality of Law and Politics (Oxford: Oxford University Press, 1994) at 222-37.
but they presuppose the possibility of judgment on the basis of it. The judge typically asks whether jurors applying the formula could, given the evidence, reasonably disagree in judgment. Suppose there is indeed no definition of "reasonable care" that could function, apart from the relevant practical capacities, as a test of whether those capacities are being exercised correctly. Must it follow that judgments concerning a particular defendant's conduct are not genuine applications of a legal standard? And if the answer is no, why should the fact that the content of corrective justice cannot be fully spelled out independently of the very same practical capacities debar us from thinking of "reasonable care" as part of a genuine specification of what corrective justice requires? Why, in other words, should the way "corrective justice" is normatively constraining be any more problematic than the way "reasonable care to prevent injury to others" is?

Anxieties of a familiar kind may arise here. Might not the whole practice be running on empty? Might not the law be treated as reason-giving without anyone having a real conviction that its concepts capture valid reasons? (In Kafka's scenario, it is always "someone else" who understands the reason for what is being done: so all normative statements are made from the perspective of some postulated other, from an "inside" point of view that no one actually occupies.) An understandable response to such anxieties would be to try to establish that the law is genuinely reason-giving by reconstructing it as the instrumentally rational pursuit of certain basic goods; and this, of course, is Posner's response:

Aristotle did not explain why he thought there was a duty of corrective justice; he merely explained what that duty was. Economic analysis supplies a reason why the duty to rectify wrongs ... is (depending on the cost of rectification) a part of the concept of justice. Corrective justice is an instrument for maximizing wealth, and in the normative economic theory of the state ... that I espouse[,] wealth maximization is the ultimate objective of the just state.91

Posner is not suggesting that juries should stop applying the formula of reasonable care, nor is he exactly denying that the duties prescribed by tort law are duties of corrective justice. But he thinks that a rational conviction that such duties are part of a correct conception of justice can only be had by way of a demonstration that justice, so conceived, maximizes some independently specifiable good. Questions will arise, of course, about whether "wealth maximization," unconstrained by any antecedent conditions of justice, is the worthwhile end Posner takes it to be.72 But even leaving this aside (and leaving aside doubts about the fit between this end and tort law's transactional structure: § 3), it is a mistake to present economic analysis as required to fill a gap in Aristotle's account of corrective justice without at least acknowledging Aristotle's apparent innocence of the assumptions that are apt to suggest there must be such a gap to be filled. Various remarks of Aristotle's might

71. Posner, "Corrective Justice in Recent Theories of Tort Law", supra note 7 at 206.
72. See Ronald Dworkin, "Is Wealth a Value?" (1980) 9 J. of Legal Stud. 191. Of course, if it is conceded that wealth-maximizing measures are only worthwhile given that antecedent conditions of justice are satisfied, then the notion of "wealth-maximization" will be in a poor position to play the validating role Posner assigns to it.
have given Posner pause, for example: "[I]t is sufficient in some cases to have 'the that' shown properly [i.e., without explaining 'the why']." This is not a counsel of complacency.Parsed in terms of the present problem, Aristotle's point might be expressed by saying that unless we take the ethical requirements of a conception of justice as our starting point or arche (cf. 1095b5-10; 1098b2), "the why" demanded by the functionalist, instead of making justice ("the that") rationally available, may in fact impede it from coming properly into view. But if this is right, would it be too bold to suggest that loosing sight of corrective justice is part of Posner's real aim? This might be so if part of what motivates his interest in economic analysis of law is the hope of being able to address legal questions by means that are no longer "practical" in any distinctive sense of the word (as opposed to technical or theoretical). With corresponding conceptual changes, this goal might be realized. But part of Aristotle's contemporary value may lie in helping us see that if it is, that will not be for want of other options.

**The Gap in Corrective Justice: II**

17. I return now to Weinrib. In directing us to Aristotle for an understanding of tort law, he is swimming outstandingly against these contemporary currents. Yet as a formalist, I want to suggest, he is also subject to their pull. Consider that he too finds a "troubling lacuna," an "omission" (PL at 76, 57) in Aristotle:

Aristotle ... does not tell us what the equality is an equality of. The omission is serious, because corrective justice remains opaque to the extent that the equality that lies at its heart is unexplained (PL at 57). Corrective justice serves a normative function: a transaction is required, on pain of rectification, to conform to its contours. Because Aristotle conceptualizes violations of corrective justice as disturbances of the equality between the parties, he rests the entire normative weight of corrective justice on that equality. Consequently, we cannot understand the normative character of corrective

73. *NE* at 1098b1-5; cf. 1095b5-10. On this remark, see M. F. Burnyeat, "Aristotle on Learning to Be Good" in *Essays on Aristotle's Ethics*, supra note 40. Burnyeat's translation.
74. Thus, instead of having to rely on practical judgment, we would have (what Kelsen mistakenly imagines Aristotle to be claiming to have: see note 56), a technical procedure for determining when one or another legal result is correct. Consider an opinion by Judge Posner:

Ordinarily, and here, the parties do not give the jury the information required to quantify the variables that the Hand Formula picks out as relevant. That is why the formula has greater analytic than operational significance. Conceptual as well as practical difficulties in monetizing personal injuries may continue to frustrate efforts to measure expected accident costs with the precision that is possible, in principle at least, in measuring the other side of the equation—the cost or burden of precaution. For many years to come juries may be forced to make rough judgements of reasonableness, intuiting rather than measuring ... [these] factors. *McCarty v. Pheasant Run, Inc.*, 826 F.2d 1554 (7 Cir. 1987). Given Posner's understanding of the Hand Formula for negligence as a device of wealth maximization, the thought here may be rendered like this: (1) judgments of reasonableness are second best to a proper economic analysis; (2) still, we can understand such judgments as aiming to get something right because economic theory gives us, in principle, an independent certification of their correctness; (3) theoretically represented, the correct result is the one that would be reached on the basis of correct calculations starting with the premise that the objective of all legal intervention is to maximize wealth. Anthony Kronman is helpfully alert to the contrast between prudential judgment and economic analysis in *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, MA: Harvard University Press, 1993) at 230-40.
justice until we elucidate the normative significance of its equality (PL at 76-77; my emphasis).... How are a normative equality and the possibility of its violation implicit in the correlativity of doing and suffering? To this Aristotle provides no answer (PL at 78).

On my reading, Aristotle takes the idea of normative "conformity" to corrective justice to be available without feeling the need to construe this as conformity to an external standard. If tort law is an expression of corrective justice, the idea would be this: The rational interest of tort law is elucidated by a characterization of it as corrective justice—i.e., as treating the parties as equals, etc. Such elucidation is not a grounding, however, because it requires the perspective of someone who already accepts that tort law expresses genuine reasons. This person starts from an acceptance of "the that" and he is to be brought, by means of Aristotle's discussion, to a better understanding of what it is he accepts. And when someone accepts that tort law expresses genuine reasons, the thought goes, what he accepts is nothing short of this: that the notion of corrective justice is normatively constraining, i.e., it is something with which a transaction may (fail to) be in accord.

Given this equivalence, it makes sense that we should find Aristotle, in offering the image of the divided line, glossing the parties' "equality" roughly like this: "Set the property of each party over the property they are entitled, in justice, not to have taken away by action of another. The ratio for each party, before the unjust transaction is 1. After the transaction, the ratio is more than 1 for one party and less than 1 for the other. Corrective justice restores the equality (1=1)." On Weinrib's reading of Aristotle, however, a crucial explanatory piece—namely, "what the equality is an equality of" or "the normative significance of its equality"—goes missing here.

There is an understandable motivation for Weinrib's reading. Clearly, the foregoing gloss takes judgments concerning the justice of transactions (including the authoritative judgments inscribed in positive law) as themselves a fleshing out of the "normative significance" of the parties' equality. The parties are equal, Aristotle would be saying, simply in their having the sorts of entitlements (not to suffer wrongful harms) protected by corrective justice. This traces a circle; and the sense that something is missing may now arise from the thought that if someone standing within this circle is really in touch with genuine matters of reason, then there must be some set of considerations to which one could appeal that would rationally compel anyone to enter the circle. Formalism is an attempt to spell out these considerations.

This sheds light on what earlier seemed equivocal about formalism. It can seem as if the idea of an "internal" understanding of law assessed by its "coherence" is simply what one is left with when one leaves aside the functionalist's reference to independently specified goods. And there is no doubt a sense of "internal" and of "coherence" (weaker than Weinrib's) in which this is both true and pertinent to ethical reflection as conceived by Aristotle. But so understood, these notions would not play any gap-filling role. They would not explain, except to someone

75. Cf. McDowell, supra note 65.
who already occupies the standpoint of corrective justice, why certain goals are merely “external” to it. That was the problem: If the notion that a certain justification is “external” to the law finds application only after the law is seen aright (§§ 6-7), then an appeal to this notion does not provide the argumentative leverage that is needed if one comes to feel that Aristotelian ethical reflection contains a gap.

When Weinrib turns to Kant for the missing piece, he says that the gap in question concerns the “grounding” of corrective justice (PL at 83, 94, 114). But here, again, we need to go carefully. It is safe to say that in Aristotle’s discussion we can see a basic feature of human agency, viz., its operation in a community of equals, each capable of making claims to be free from hindrance by others and of recognizing like claims on herself. And this feature of human agency, it might further be said, gives rise both to a basic problem of legal obligation—that of limiting freedom in the name of freedom—and to terms in which the law’s solution to the problem may be criticized, i.e., in terms of a conception of justice that the law already expresses. It is not wrong to think that corrective justice is, as Weinrib says, “inchoately Kantian” (PL at 83), for we are indeed close here to Kant’s description of Recht. But without more, this only says that Kant is inheriting and elucidating (in terms of the idea of ourselves as rational agents) what is commonplace in the concept of justice, i.e., its other-directedness, its reference to equality and to something due as a matter of right. Such an elucidation may surely deepen our sense of what is valuable or worthwhile about justice or about the law insofar as it expresses justice. But there need be no thought here of being able to derive the evaluative standpoint of justice—its requirement of “equality”—simply from considerations, available even outside that standpoint, of our nature as rational agents.

If that is what the formalist wants, then although formalism is non-reductive, it too arises out of a demand for external validation that seems not just unanswered (cf. PL at 78) but foreign to his thinking. The same demand would be satisfied by adopting a “prior definition of wrongs” that represents the relevant notion of equality as derivable from considerations concerning the efficacious advancement of some basic good. Rejecting this solution, but retaining the demand, Weinrib is bound to find a gap.

Aristotle does omit to answer the formalist’s question. But we do no justice to Aristotle if we fail to observe that he apparently lacks the formalist’s motivation for asking it. Aristotle shows no proneness, for example, to the sort of skeptical thought expressed by Kant when he asks whether the very idea of a practical requirement of reason might not be “merely a chimerical Idea,” a “mere phantom of the brain,” or when he describes legality as “an idea of reason, which nonethe-

76. See Immanuel Kant, The Metaphysics of Morals, supra note 6 at 56 [230]: “Right is ... the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.”
77. On these commonplaces, see John Finnis, supra note 34 at 161-64.
78. To be clear, I should say that I am leaving entirely aside in this essay the vexed question (though not vexed enough in Weinrib’s discussion) of Kant’s own mature position on the question of the possibility of “grounding” morality.
less has undoubted practical reality. So, despite the possibility that a Callicles or Thrasymachus may fail to ratify the standpoint of justice, Aristotle apparently feels no anxiety over the prospect that our conviction in “the that” may depend entirely on a kind of thinking that goes beyond the ordinary only in being more general and reflective, the kind of thinking inherited, for example, in a tradition of jurisprudence: “What is just is equal (ison)” — Aristotle says, referring to a Greek tradition—“as seems true to everyone even without argument” (1131a12-13). Aristotle is not averse to raising aporiai. But since the way of thinking that leads to formalism first creates the sense of a gap in ethical reflection before it endeavors to remove it, it is understandable that this is not a gap Aristotle manages to see.

Of course a perspicuous grounding of corrective justice could only be a plus by Aristotle’s or anyone else’s lights. But what should we say if formalism, no less than functionalism, were found actually to impede our understanding of corrective justice? That need not stop us from thinking that we must one day penetrate to the deeper source of Aristotle’s “equality.” But could it not also suggest, by the power of Aristotle’s example, that some of the modern ghosts we see may be not false presences but false absences or gaps needing to be filled?

18. The philosophical assistance Weinrib offers to Aristotle involves reading the latter’s observation that the law is not concerned with character as a proleptic reference to abstract personality (PL at 97-98), hence to a kind of equality-by-default. Considered in abstraction from their particular qualities, there remains nothing for the parties’ inequality to refer to; they are qualitatively identical. So conceived, the equality of the parties would be derivable from the capacity of any rational agent “to abstract from—and thus not to be determined by—the particular circumstances of his or her situation” (PL at 81; cf. PL at 83, 92). According to Weinrib, (1) persons must be conceived as capable of such self-abstraction if they are to be understood as capable of free choice; (2) once so conceived, all that remains to determine their will are universally valid principles of practical reason; and (3) private law involves coercible duties to act in conformity with these principles, which (by virtue of abstraction from everything pertaining to one person’s advantage) represent the standpoint of transactional equality. So, in short: “Private law draws its moral character from the notion of free will that it presupposes.... Because of the conceptual implications of free will, the interactions of purposive beings are inevitably subject to requirements of corrective justice” (PL at 109-10).

This schema doesn’t begin to convey the richness of Weinrib’s discussion, but it is sufficient to raise a difficulty. How, on this account, can we continue to understand tort law—which attaches normative significance to injuries affecting particular embodiments of personality—as a realization of corrective justice? Weinrib glosses Aristotle this way: “[W]hen doing and suffering are each considered solely in relation to the other the qualities particular to the doer or to the sufferer as individuals

are irrelevant" (PL at 81; cf. 126). But this looks like an odd claim about tort law, where no aspect of the plaintiff's life—her job, her income, her activities, her emotional relations with others—is irrelevant to the consideration of the wrong she has suffered. No doubt what Weinrib means is that, as a matter of corrective justice, the plaintiff's suffering has no independent relevance, no relevance, that is, except as wrongful suffering—where "wrongful" refers to a norm governing the causally related doing of another. This is true. But if the basis of such a transactional norm is a conception of the parties as purely rational agents or as equal in virtue of their indeterminacy, can we understand why the law's response to a breach of this norm attaches significance to the material consequences?

Weinrib is not unmindful of this difficulty. To meet it, he rightly points out that if rational agency is to exist at all, it must "realize itself" in an "external sphere ... comprised of everything that is devoid of, and thus categorically different from, free will" (PL at 129). Following Kant and Hegel, he takes this to mean that, as purely rational agents, persons are committed to recognizing a right to "place their will" in natural things, a right, then, to take possession both of their own body and of other objects. (The existence [Dasein] of personality, as Hegel puts this Kantian thought, is property.) And since the abstractive aspect of willing thus grounds rights to the possession of particular things, Weinrib reasons, it must also ground the law's response to the particular harms that arise when such rights are violated (PL at 129).

This conclusion comes too quickly, however. For the difficulty is not how persons could be concrete or rightfully possess things, but how this concreteness could matter in an appropriate way. If Weinrib fails to see a difficulty here, this, I shall suggest, is because he interprets the idea of "right" in light of an idea that comes into view only through the law's own rather less abstract idea of wrong. (I am elaborating here a thought of Hegel's: PR § 94R.)

Consider that, in the foregoing picture of pure agency "realizing itself" in an "external sphere," the connection between a person and even her most immediate embodiment is mediated by acts of willing. The person's abstractive capacity thus corresponds to an asymmetry between the first and second person points of view. "For others, I am in my body," as Hegel remarks, though as an abstract agent, "I can withdraw into myself from my existence" and relate to my own body as to something external (PR § 48R). But why, then, must the other's respect for my freedom necessarily be a respect for my body or my other "projects" when such an identity does not obtain from the point of view of self-consciousness, the point of view from which this derivation of right proceeds? Given that I am free only insofar as I am capable of abstracting from particularity, how can another's relation to my "embodiments" be appropriately understood as engaging my freedom? Granted,

82. See PL 126-27. The problem was raised by Stephen Perry, from whose discussion I have benefitted. See Perry, "The Moral Foundations of Tort Law", supra note 34 at 483-88.
83. PR § 51; cf. § 44. Of course, it would be implausible to think that Aristotle understood property as an expression of abstract will; his criticism of Plato's abolition of private property involves a direct appeal to "the goods [the citizens] will be deprived of." Aristotle, Politics, supra note 50 at I.5, 1263b22. Insofar as Aristotle anticipates "abstract personality," his political theory must thus seem inconsistent.
I have the right to possess things; but it must surely be the case, on the present picture, that I can be free in the relevant sense even if I am bound in chains.24

This stoical thought finds a footing in the categorical distinction between rational agency and natural things which the formalist takes to be the basis of right. But if a person's freedom may thus be something apart from her natural existence, this distinction threatens to strain the notion of infringing a right we know we possess. In Hegel's terms, a gap appears between right and wrong, i.e., between my "right" to project myself into nature and "right" in the sense that entails social norms securing my projects against interference. Indeed, we may go further. Even if it is allowed that the possibility of wrong is immanent in the idea of right as presently conceived, that idea of wrong would still fall short of the idea that appears from the standpoint of corrective justice. For as realizations of abstract agency, a person's rightful possessions comprise only so many generic instances of his formally equal will; the concrete quality of these possessions, their 'more or less', has no significance as such. But why, then, in responding to the wrong, does justice require reparation of the loss?

The institution of criminal punishment readily shows that the annulment of transactional wrongs is possible without such reparation. But the main difficulty is to see how, on the present conception, there could be any room left for reparation. Say that in specifying what justice-as-equality requires in transactions, nothing "particular to the doer or to the sufferer as individuals" is relevant. It seems that to bestow normative significance on the concrete quality of the plaintiff's holdings would be precisely to abandon this picture of equality. It would make the defendant's obligations turn not on the plaintiff's equal status as a person, but on the unequal value of her possessions.25 This not to say that there is no room in this picture for the consequences of wrongdoing—i.e., for suffering—to matter. Consequences can matter, but only, it would seem, in a restricted way, as wrongs (actions inconsistent with another's formally equal will) not as wrongful losses. And the annulment of wrong as opposed to the reparation of loss could consist, as with crimes, in a fixed penalty or perhaps in some other public recognition of what has occurred.26

84. This might be compared to the puzzle about how responsible doings are possible, given that "moral" pressures to free responsibility from contingency and luck ultimately "pare down each act to its morally essential core, an inner act of pure will ...." Thomas Nagel, "Moral Luck" in Mortal Questions (Cambridge: Cambridge University Press, 1979) at 31. Here the question is the reverse: not how, as pure agency, I can recognize myself in my doings, but how, as pure agency, I could (be made to) suffer at all. Compare PR § 91: "[T]he human being can certainly be dominated .... But the free will in and for itself cannot be coerced [gezwungen], except in so far as it fails to withdraw itself from the external dimension in which it is caught up ...."

85. In the critical terms Weinrib applies to the compensation rationale (see § 2), this would make the "normative position of the plaintiff decisive for both parties" (PL at 124).

86. Steven Perry suggests that there a further aspect of this problem. Tort law not only gives moral significance to losses affecting the person's "embodiment," but also generally makes doings wrongful only when they result in such losses. His point might be illustrated, I think, by a difficult remark of Kant's: A "failure in the duty of respect [i.e., arrogance, defamation or ridicule] infringes upon a man's lawful claim." Immanuel Kant, The Metaphysics of Morals, supra note 6 at 256 [464]. Cf. Kant, Lectures on Ethics, trans. Louis Infield (Indianapolis, ID: Hackett Publishing Co., 1930) at 214. Whatever the scope of such duties, the idea of infringing another's claim is presumably to be restricted to cases where there has been some concrete injury to feelings.
The trouble here evidently stems from the fact that, on the formalist's picture, "embodiments" come to matter only derivatively, through association with an agent whose entitlement to respect flows from its notional capacity to take up and abandon residency in so many otherwise insignificant things. But the natural embodiments and circumstances of agency apparently need to matter in a more immediate way if we are to make sense of corrective justice. For even if the respect flowing from another's formal equality as a free will must issue in an obligation to avoid wrongful treatment of his "embodiments" (as the socially recognized extension of that will), it becomes hard to see—and precisely because of the way this obligation is supposedly grounded—how it could mean anything more than just this: a purely negative obligation to respect the other's formally equal will in all of its manifold appearances. How shall we understand the way (what might be called) "the same" wrongful act can be subject to different failures which call for differentiated responses? The agent's moment of carelessness may produce a permanent concussion or a mere bump on the head. Tort law gives normative significance to the plaintiff's contingent "embodiment" when it says that a wrongdoer must "take his victim as he finds him" (read: in the concrete form in which persons are recognized or seen). But if this dictum seems correctly to apply a fundamental notion, i.e., that an appropriate way to take responsibility for one's acts is to compensate others for their injurious consequences, it also serves to bring out how queer the notion of compensation is in light of a conception of wrongdoing as action inconsistent with the formal equality of another's will. Indeed, this conception seems to present the mirror image of those consequentialist theories that represent tort liability as a means of minimizing occurrent and expected losses. A prominent difficulty for those theories was why compensatory responses to loss should be limited by linking them to the occasion of another's wrongdoing (§§ 2-4). The present difficulty comes full circle: it is how an occasion of wrongdoing could be a reason for a specifically compensatory response to loss.

Of course, matters would be clearer if rightful possession were conceived of as an element of freedom in a more positive sense (involving the flourishing of a person's projects) and not as merely an expression of a prior capacity for willing. But as matters stand, the right to have one's formally equal will respected must apparently overcome a metaphysical divide before it becomes the right to be

or reputation; where A has not only insulted B (an ambiguous expression) but B has been insulted (suffered the insult) as well. However, it will be clear that A can breach duties of respect (constraints on willings in virtue of B's status as a person) and thus insult personality, yet leave B unharmed and without any legally significant complaint. Cf. Perry, "The Moral Foundations of Tort Law", supra note 34 at 484.

87. If we follow Kant in thinking of legality as merely prohibitory, as abstracting from moral ends such as the well being of others (See PL at 96-97, 99, 111; cf. PR at § 38), then an obligation to make repair based on the differentiated value of another’s possessions looks like a detour into morality where the concern with outcomes is a concern with another’s freedom in a more positive sense. Cf. PR I 112A, 113R. See Alan Brudner, “Hegel and the Crises of Private Law” (1989) 10 Cardozo L. Rev. 949, especially 969-76, and Alan Brudner, The Unity of the Common Law: Studies in Hegelian Jurisprudence (Berkeley: University of California Press, 1995), especially 167-68.

88. The dictum is typically cited when damages are unusually high due to some peculiarity of the plaintiff. See, e.g., Bartalone v. Jeckovich, 481 N.Y.S.2d 545 (1984).
sustained in the material conditions of agency. And since the prohibitions based on abstract right make reference to others’ possessions only as an instance of their formally equal will, the same divide must be crossed before the infringement of right can matter not simply as a generic violation of personality but as a measurable loss of well being.\(^89\) Either way, a person’s formal equality must be represented by the present value of her investments.\(^90\) This might suggest a paradox. The condition of the possibility of corrective justice (viz., purely rational agency, formal equality), it might be said, is at the same time the condition of its impossibility—the impossibility of outcomes that matter as setbacks to impure interests and unequal advantages.

Formalism and Functionalism

19. In Hegel’s way of treating such paradoxes, the adequate realization of the idea of right is to require the “negation” of its own grounds of possibility: revealing itself as “untrue” (PR § 32A), abstract right is to be “superseded.”\(^\) But expressed in less exacting terms, this perhaps says that when the temptation to lay down philosophical requirements threatens to make us loose our grip on ethical commonplaces, the philosophical remedy is to bring ourselves to see that our rational entitlement to the commonplace can do well enough without its purported foundation. Here, this remedy might require a diagnosis (I have not tried to give one) of what makes us feel that Aristotle’s notion of corrective justice, if it still sheds light on aspects of the law, must contain the sort of gap which Posner and Weinrib try to fill.\(^91\)

\(^89\) As Hegel remarked, when right is based on abstract personality, the particular aspects of possession are “not yet ... identical with freedom. What and how much I possess is therefore purely contingent as far as right is concerned” (PR § 49; cf. PR § 37A). Compare PR § 230.

\(^90\) This might recall Marx’s complaint that “[equal right] is ... a right of inequality, in its content, like every right.” Karl Marx, “Critique of the Gotha Program” in David McLellan, ed., Karl Marx: Selected Writings (Oxford: Oxford University Press, 1977) at 569. I do not think there is anything mysterious here in itself. What gives the flavor of paradox here is the purported grounding of right in the equality of abstract persons. If concrete possessions are indeed external to the person, how does the obligation to respect personality come to mean an obligation to maintain the value of possessions? And if the relation between persons and concrete possessions is not to be thus prized apart, in what sense are persons equal? It looks as if the relation must be both external and internal at once.

\(^91\) On Hegel’s difficult view, the “truth” of right requires the standpoint of the “moral subject” (with its concern for the welfare of others) as it is located from the standpoint of “ethical life.”

\(^92\) As the following remark by Jules Coleman may suggest, one may find such a gap even if, unlike Weinrib and Posner, one sees no present intellectual prospect of being able to fill it:

Ultimately, no defense of a conception of corrective justice will be satisfactory in the absence of a foundation for it. Of course, there will be different views about what counts as an appropriate foundation for a principle of justice; there will even be differences of opinion about whether foundational arguments are possible. On these matters, I am partial to the wisdom ... that progress can be made on the penultimate questions in philosophy even as the ultimate ones remain unresolved. Risks and Wrongs, supra note 13 at 478. This contrast between ultimate and penultimate questions in philosophy is fleshed out by Coleman in terms of a distinction between foundational and “middle-level” theory (see ibid. at 8–9). The latter involves reflection about the law as an existing social practice, and it attempts to identify the norms of the practice at a higher level of generality, moving back and forth as need be between features of the practice and more general statements of principle. “Foundational theory” is described by Coleman simply in terms of an indefinite expectation: It will one day validate the
Given the gap, and given the perceived threat to the standpoint of justice presented by the functionalist's attempt to reconstruct that standpoint out of independently identifiable goods, it can understandably look as if the right intellectual response is to locate the grounds of justice outside "the totality of interests constitutive of well being" (PL at 130), i.e., in a rational agent's prior capacity for willing. But if formalism thus requires that the law have no purposes related to the conditions of well being, it seems bound to foster the sort of anxiety concerning the law's "why" that motivates functionalism (§ 16). Vis à vis the formalist, the functionalist has a good point: If the perpetuation of the law in social institutions is something we can rationally endorse, we ought to be able to see the law as advancing our well being, as making our life better rather than worse. The functionalist's mistake is to think that the law could meet this condition only if it were an instrument, the value of which is explained in terms of basic interests and needs. Naturally, if this were true, the plausible thought that tort law is not a mere instrument would indeed compel us toward the formalist conclusion that tort law has no purpose at all. But if we free ourselves of the pressure, operating in functionalism, to fashion a notion of well being that will be serviceable in grounding the standpoint of justice from the outside, we will be free to accept this plausible thought about tort law without commitment to the formalist conclusion.

The dialectical intimacy between functionalism and formalism can be seen rather clearly in one of the reasons Weinrib gives for embracing the formalist conclusion: "At the core of this treatment of welfare," is the idea that "private law relationships are bipolar and welfare is not" (PL at 133). But isn't it? Given what "welfare" might mean for Posner, this is perhaps true enough. But that is because, requiring a notion of "welfare" suited to play a foundational role in relation to justice, Posner thereby requires "welfare" to be composed entirely of such basic goods (e.g., wealth) as every person is presumed to want. This grounding project aside, why should one suppose that the "totality of interests constitutive of well being" could be reduced to interests that float free of the interest in justice? And if that seems implausible, results of middle level theory. It can be tempting to think that Aristotle would count as a middle level theorist in Coleman's sense. But Aristotle apparently lacks the sense—expressed by Coleman about his own middle level endeavor—that his reflections are merely second-best: Middle level theory ... lacks the power that being committed to a foundational view has. If I believed, for example, that utilitarianism was the correct political theory, then I would have a tool I could bring to the practices I hoped to understand and endorse. It would give me a kind of power that one who does middle-level theory simply does not possess (Risks and Wrongs, supra note 13 at 441).

Coleman thinks that in lacking a foundational view, he lacks a privileged form of rational insight. That does not seem to be Aristotle's view. Indeed, in Coleman's sense of the word, I do not think that Aristotle means to present a "theory" at all.

93. Another natural response to formalism would be skepticism, as can perhaps be seen in Weinrib's drawing from Roberto Unger's "critique of formalism" the very image of what he wishes to defend. See PL at 23-24, 45, 230; Roberto Mangabeira Unger, The Critical Legal Studies Movement (Cambridge, MA: Harvard University Press, 1986) at 1-14.

94. The good point and the mistake can be found side by side in Guido Calabresi, "Concerning Cause and the Law of Torts", supra note 5 at 105. My understanding of the alternative, non-reductive possibility suggested in this and the next two paragraphs has benefitted from David Wiggins, Needs, Values, Truth: Essays in the Philosophy of Value (Oxford: Basil Blackwell, 1987) especially 66-68.
why must one think that to say that “wrongful loss matters (not simply as a wrong to personality but) as a loss of well being” must be to refer to the significance such a loss would have had it occurred even outside a society valuing freedom and possessing ethical notions of justice and responsibility? The point here is not that, possessing such ethical notions, we cannot see transactional wrongs as mere squanderings of basic goods. But outside the intellectual context of a project like Posner’s, we need a reason to do so. Broadly conceived as the condition in which our lives fare well, the idea that “welfare” is not relational, or that it can be assessed without reference to ethical notions, has no obvious truth or appeal. This idea certainly seems foreign to Aristotle’s thought that faring well consists in “activity that expresses virtue” (NE at 1098a16-18) and that “in so far as virtue is related to another, it is justice” (NE at 1130a11-14). So if one does, on this basis, draw the conclusion that tort liability must be grounded outside of human well being, it must be because one has adopted the functionalist’s picture of what well being must consist in.\(^95\)

To remind ourselves of our options here, it may helpful to consider how the response to the functionalist might go in another context, where the object under consideration is not so obscured by accretions of theory. Consider Richard Posner’s suggestion, as Weinrib himself represents it, that “the point of love is to maximize efficiency by allowing for the experience of certain satisfactions while at the same time avoiding the transaction costs of repeated negotiation among the parties to the relationship.”\(^96\) A plausible response to this would be to ask whether someone who actually compared the satisfactions afforded by intimate relationships with the costs of repeated negotiation would (allowing that his life might still be rational and good) have available to him \textit{that kind} of good which can be present in relationships based on love; for like other pursuits, to be capable of certain kinds

\[^{95}\text{Consider, in this light, a typical remark of Kant’s: By the well-being of a state must not be understood the welfare of its citizens and their happiness; for happiness can perhaps come to them more easily and as they would like it to in a state of nature (as Rousseau asserts) or even under a despotic government. By the well-being of a state is understood, instead, that condition in which the constitution conforms most fully to principles of Right; it is that condition which reason, by a categorical imperative, makes it obligatory for us to strive after. The Metaphysics of Morals, supra note 6 at 129 [318]. I take it this says that the object of civic association is well being, only not that kind of well being (viz., ‘welfare,’ ‘happiness’) which is, in principle, available in the state of nature: Civic association brings about a new kind of human good. Weinrib is right, I think, to question the received contrast between Aristotle and Kant as respective instances of teleological and deontological ethics. But is this because Aristotle’s remarks on justice compel us to read him as a proto-deontologist? Or is it because Kant’s remarks on Right show him to be not only pursuing a recognizably classical inquiry into the nature of the good but also refiguring the Aristotelian thesis (see Aristotle, Politics, supra note 50 at l.ii.8-10) that a central element of the good is not available to the person who is outside the justice of the polis? These matters deserve far more attention than I can give them here.}

\[^{96}\text{PL at 5. Posner’s main concern in the passage Weinrib cites is to ask whether there is really a “fundamental inconsistency between morality and efficiency”: Not only love, but honesty and trustworthiness also “enhance an individual’s ability to maximize his satisfactions” by reducing “the costs of transactions.” Economic Analysis of Law, supra note 66 at 185-86. By “inconsistent,” Posner apparently means the possibility that moral requirements might turn out to be economically sub-optimal. But elsewhere he suggests that moral requirements also have their “roots in inefficiency.” See Posner, “A Theory of Negligence”; supra note 12 at 33.}
of relationship one must be unwilling to trade them off against money. But should one also say that love or friendship, being irreducibly mutual, is not a component of human well being? Perhaps one might say this in addressing Posner, but for more general purposes it obviously concedes too much. The better course would be to challenge the picture of well being, or its rational pursuit, that makes it look as if the disengagement of love from human interests and needs is required to resist functionalism. Like justice, love is sometimes said to be beyond “price.” But surely this means not that love has no value, but that one would be hard pressed to say what value it has—how life is better with it than without it—by trying to cash this out entirely in terms of something else.

In the case of love, Weinrib evidently has no difficulty seeing the available options. But although he suggests that private law is, in a relevant respect, “just like love” (PL at 6), his conclusions regarding the former suggest that he is held captive by the reductive tendencies he wishes to escape. His analogy might have suggested another possibility. If the value of love is not to be forged from materials in which it does not already figure, and if love seems to be no less a part our well being for all that, might we not take on board the naturally attractive expectation that private law is the sort of thing we can expect to further our well-being: say, our freedom and autonomy, that is, our ability to plan our lives and to pursue successfully our own projects, all while living in just relations with others? On this view, the difficulties with functionalism, rather than leading us to a legal theory that eschews all considerations of well being, would simply help to confirm the implausibility of the reductionist assumptions that make it look as if these are our only alternatives.

20. It might be objected, however, that once well being is allowed to make even such a modest claim on tort law as this, it may be difficult to prove that tort law is worth preserving in the face of the abolitionists’ assertion that our well being might better be pursued by other means (§ 5). But if there really is something objectionable in this (must there be?), the point is not one on which the formalist can claim any advantage. In the end, Weinrib also leaves it open whether accidents should be regulated by tort law or by some mix of alternatives. Formalism “does not itself choose between distributive and corrective arrangements; it requires only that whatever mode of ordering a jurisdiction adopts conform to the rationality immanent in that mode of ordering.” That formalism leaves such options open is hardly surprising. For even if tort law were properly represented as indifferent to well being, how could it be supposed that that would put contemporary questions about the value of tort law versus its alternatives, politically speaking, to rest?

98. Alan Brudner suggests, rightly I think, that the case for tort law would involve seeing that, on any appropriately expansive notion of well being, the idea of unlimited social insurance against loss is, without any independent notion of wrongdoing, self-defeating. See Alan Brudner, The Unity of the Common Law: Studies in Hegelian Jurisprudence, supra note 87 at 204-10.
99. PL at 228; see also PL at 46 and Weinrib, “Understanding Tort Law”, supra note 8 at 492.
100. How a grounding of private law which “starts with agency and shows its necessary embodiment in a juridical order of abstractly equal agents” (PL at 83) (or again, which “obliges lawmakers”: PL at 87) can claim to leave room for such a political choice may not be easy to see. Hegel’s
But this raises a further question for Weinrib. If whether to have tort law is open to political reason, what exactly is *required* when formalism "requires that whatever mode of ordering a jurisdiction adopts conform to the rationality immanent in that mode of ordering" (*PL* at 228)? If "modes of ordering" are individuated by the kind of reasons they express (i.e., corrective or distributive justice), then this requirement seems truistically correct: a jurisdiction has whatever reasons it has. Understanding "mode of ordering" as "institution" would yield a non-truistic requirement. (It seems strange, anyway, to think of a jurisdiction as *adopting reasons.*) But now if the choice between two institutions is really open to political deliberation, mustn't the question of what makes it worthwhile to adopt one or the other institution be in some sense open as well? If not, what could there be to deliberate about? Consider the following progression of possibilities for a society $S$:

1. $S$ has tort law and understands what it has as private law, an expression of corrective justice.
2. $S$ abolishes tort law and puts in its place a public regulatory scheme intended to advance such goals as compensation and deterrence.
3. $S$ decides that the best way, among the viable alternatives, for advancing such goals as compensation and deterrence involves (in part) the adjudication of tort liability.
4. $S$ has tort law and understands what it has as a goal-based public law of accidents, one strand of distributive justice.

If the conformity of legal institutions to their own immanent rationality expresses a genuine requirement, either (1) or (4) must describe an absurdity, for they place the same institution on a different rational footing. But then, since the society described by (3) will very naturally understand its tort law in the manner of (4), and since the move from (1) to (2) is admittedly a political choice, it follows that, for the formalist, there must be an abyss between (2) and (3)—there could be no compelling reasons for moving from (2) to (3). But why not? If the institution of tort law is an efficacious means of bringing about the desired ends (see § 5), some reason would seem to be needed for not considering a move from (2) to (3). The formalist will perhaps say that a society that moves from (2) to (3)—that uses private law to advance public goals—embroils itself in "incoherence." But since "incoherence" in the formalist's strong sense involves no inconsistency, only a compromise among conflicting aims (§ 7), why shouldn't the question of the relative efficacy of (2) and (3), if the question is so much as intelligible, show that a society may have excellent reasons to support institutions that are (in the formalist's sense) incoherent?[^101]

[^101]: The difficulty seems exacerbated by Weinrib's speaking of coherence as something "valued" by sophisticated legal systems. If coherence is a necessary condition of justification (§ 7), how can it figure alongside other values in political deliberation?
A possible response would be to allow that there are no categorical impasses anywhere between (1) and (4), but then to deny that the institutions represented by (1) and by (4) are more than nominally the same. S in (4) simply doesn’t have "tort law" in the same sense as (1), hence the requirement of tort law’s conformity to an immanent rationality can be preserved. But aside from threatening to render the idea of “conformity” empty (if institutions are simply to be identified by the accepted reasons for them), this response seems to leave no room for understanding what an “institution” is. For whatever else, do we not understand an institution to be something that is identifiable and reidentifiable, within limits, without settling questions about what grounds there are for rational commitment to it? In a debate about the raison d’être of the Canadian university system, for example, one side is not simply making a mistake about what a Canadian university is; and although the disagreement may be deep, it would seem to be pointless as well if the parties were not making claims about the same enterprise, the same ongoing concern.

Of course (1) and (4) are conceptually different—nothing could be plainer. But the present point could be expressed by saying that institutions are importantly unlike concepts: to identify or define a concept just is to locate it within the space of reasons, that is, in rational relation to other concepts. Thus, nothing here tells against the view that the idea of private law or even of “tort law,” if one likes, has its basis in corrective justice, or that corrective justice gets its interest from trans-actions, or that transactions are normatively significant doing and suffering. But if “tort law” is taken to refer to one of the current social institutions of accident law, then the existence of a connection between tort law and corrective justice will require not just conceptual subsumption but practical undertaking as well.

Appendix: Are Equivalent Losses and Gains “Non-Factual”?

This Appendix considers Weinrib’s thought-provoking interpretation of the equivalence of loss and gain in corrective justice. Recall the modern objection that, outside of property takings, it is not realistic to speak of the defendant as realizing an equivalent “gain” (§ 13). Any interpretation of corrective justice should address this point. To answer it, Weinrib draws a distinction between “factual” loss and gain (where equivalence is merely contingent) and “normative” loss and gain (where equivalence cannot fail to be present). My suggestion that Aristotle is making a grammatical statement about the concept of an unjust transaction rather than describing such transactions as he happens to find them (§ 13) is perhaps implied by this. But in Weinrib’s answer, the equivocal relation, characteristic of abstract right, between the formal equality of wills and the inequality of their concrete embodiment (their facticity) gets projected onto Aristotle.

“Factual” L&G consists, straightforwardly enough, in the variation from each party’s possessions before the transaction. At times, Weinrib describes “normative” L&G as simply factual L&G insofar as it is normatively significant (insofar as it qualifies as wrongful); on this description, factual L&G is a necessary component of normative L&G. 102 At other times, however, Weinrib stresses that normative L&G

102. “Suppose ... you negligently injure me. A comparison of my present and my previous condition
may be realized quite independently of factual L&G; indeed, he counts the “gain” in standard instances of tortious injury as just such a case. Now clearly, in speaking of an equivalence of loss and gain, Aristotle could not have meant factual L&G; at best, that describes the special case of a property taking. But which variety of “normative” L&G is he supposed to have had in mind: (1) the variety that necessarily includes factual L&G as a component, or (2) the variety that is analytically independent of any factual L&G that might accompany it?

The first option (1) is not tenable. To the extent that normative L&G necessarily contains factual L&G as a component, it must suffer from the same difficulty as merely factual L&G: any equivalence between such losses and gains is merely contingent, a feature of special cases. The qualification “normative” may restrict what counts as a loss or gain (only wrongful losses and gains count) but it does nothing to ensure that those losses and gains which, given the qualification, do count, are equivalent. To preserve such equivalence, the existence of “normative” L&G must not depend on any facticity. It is not surprising, then, that Weinrib’s discussion offers a second option.

But the second option (2) is no more satisfactory. For clearly this “pure” variety of normative L&G merely refers to the breach of a norm. When facticity drops out, anything that is specific to the notions of “loss” and “gain” drops out along with it. For this reason, it is misleading to speak, as Weinrib does, of the parties “realizing” normative L&G. Ordinarily this would imply that they might have realized, say, twice that gain or loss. But there is no such thing, under (2) as opposed to (1), as one normative loss or gain being more or less than any other (or of my sharing half of my normative gain or of insurance failing to cover all of a normative loss, etc.). And if there is thus no place for statements measuring or comparing normative L&G, what sense could it make to speak of an “equivalence” of normative L&G?

If we bear these points in mind, we can understand why Weinrib’s discussion offers the first option, according to which “normative” L&G is run-of-the-mill factual L&G with a normative qualification—like “unlawful profits.”

So neither option is tenable. If the first variety of normative L&G remains too dependent on facticity to produce the required equivalence, the second variety remains too pure, too uncompromised by facticity, for the notion of equivalence (of quantity, proportion, loss, gain, etc.) to find purchase. Of course, insofar as the award of damages in tort does “measure what was suffered,” it is the impure variety of normative loss (i.e., qualified factual loss) that must be in play. But insofar as the defendant’s gain is said to be equivalent to the plaintiff’s loss, the factual component of normative loss cannot be in play. Thus, though neither variety of

reveals that I am materially worse off than I was before. This is the factual aspect of the loss. In addition, however, I am also worse off than I should be, given the norm against negligent injuring. The loss considered from the standpoint of the relevant norm is the normative aspect of the loss” (PL at 115).

103. “A party may realize: (1) a normative gain but no factual gain: if I negligently injure another, I have acted wrongly but no holding of mine has been improved by the wrong ... (3) a normative loss, but no factual loss: if someone trespasses on my property without impairing its condition, a common law court may award me nominal damages to mark the breach of a norm, despite the absence of actual damages ... “ PL at 116).
normative L&G is tenable, neither is exactly dispensable, and one may accordingly
find Weinrib attempting the compromise solution of moving back and forth between
them, as, for example, in the following summarizing passage:

The defendant realizes a normative gain through action that violates a duty correlative
to the plaintiff's right; liability causes the disgorgement of this gain ... Since the normative gain is morally correlative to the normative loss, disgorgement of the gain takes the form of reparation of the loss. And because of the mutual moral reference of the infringement of the right and the breach of the duty, the amount of the gain is necessarily identical to the amount of the loss. Hence the transfer of a single sum annuls both the defendant's normative gain and the plaintiff's normative loss (PL at 125-26).

I think this makes the correlativity of loss and gain harder, not easier, to understand. For in the sense in which the defendant may be said to "realize a normative gain" (i.e., pure normative gain), it makes no sense to speak of "the amount of the gain" or of "the disgorgement of this gain." And in the sense in which liability repairs the plaintiff's normative loss (i.e., factual loss qualified as wrongful), it is not the case that the defendant necessarily has realized a gain that is equivalent to this loss.

Another, more satisfactory, possibility should be considered, however. In speaking of the correlativity of normative loss and gain, Weinrib may mean that the defendant has in fact realized a qualified factual gain in the following sense. Under the relevant legal norms, which she has breached, the defendant owes the plaintiff compensation; so until compensation is paid, she has, factually speaking, more than she should have. Thus, given that the defendant is obliged to repair the plaintiff's loss, the defendant may be said to have an excess which is "disgorged" through the payment of compensation. On this account, Aristotle's representation of the defendant's breach of a norm as a "gain," rather than referring to a species of pure "normative gain" merely means that the defendant is liable for the plaintiff's loss. Thus understood—as a formal representation of what is owed by one party to the other—there is, of course, nothing "non-factual" about the gains and losses of corrective justice.

But the salient point about this alternative is that the following notion figures in it as fundamental or basic: an appropriate response to one's wrongdoing is to compensate others for the losses that result to them. So if this alternative is what Weinrib seems at times to have mind, he is also bound to remain dissatisfied by it. For he apparently wants the equivalence of loss and gain to function as more than the representation of an obligation to repair a loss; he wants it to function as the yet-to-be-completed explanation, "the why", of such an obligation. Consider again the words: "Since the normative gain is morally correlative to the normative loss, disgorgement of the gain takes the form of reparation of the loss." If Weinrib wishes to avail himself of the present alternative, this comment has things reversed: "Since the defendant is obliged to repair the loss"—it should say—"his wrongdoing

104. See ibid.
105. See, e.g., PL at 116-17; Weinrib, "The Gains and Losses of Corrective Justice", supra note 34 at 285-86.
takes the form (in an abstract representation of justice) of a normative gain cor-
relative to the normative loss." In truth, it would seem that Weinrib requires the
notion of equivalent gain and loss to function in two different roles. In one, it pre-
supposes the obligations of corrective justice ("Since the defendant is obliged to
repair the loss. . ."); in the other, it grounds such obligations ("Since the normative
gain is morally correlative to the normative loss . . .").

The desire that Aristotle should supply a foundation for tort obligations leads,
straightaway in some commentators to disappointment with Aristotle. Hence
Posner's conclusion that corrective justice depends for its normative force on a form
of economic utilitarianism. Weinrib is more sanguine about Aristotle because he
believes that we can "[follow] the implications of Kantian right into the interior
of corrective justice" (PL at 114). Yet, allowing the above quoted passage to have
done no less than this, the result would appear not to deepen Aristotle's thought
but either to (1) preserve its na"iveté or (2) subject it to conflicts analogous to those
of abstract right. Just as in abstract right the will must be, yet cannot be, external
to its embodiments, so here "normative" L&G must be, yet cannot be, independent
of facticity.