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[74] This argument is, in a sense, the converse of the argument discussed in the preceding section, according to which outcome-responsibility should be considered as necessary and sufficient for tort liability, and not just as necessary.

[75] 248 N.Y. 339, 162 N.E. 99 (1928).

[76] On the more general issue of the relationship between corrective and distributive justice, see Perry (2000).

[77] The criticisms of the distributive approach that are summarized in this paragraph I have set out in more detail in Perry (1992b, pp. 467–74).

[78] Cf. Keeton (1963, p. 21).

[79] Coleman (1992a, pp. 306–18). The "mixed" conception of corrective justice that Coleman defends in *Risks and Wrongs* is, in many respects, similar to the account of tort law, based on outcome-responsibility, for which I have been arguing here. See Perry (1992a). Recently, in an article coauthored with Arthur Ripstein, Coleman has adopted an apparently different, more politically-oriented, conception of responsibility for harmful outcomes (Coleman and Ripstein 1995).

[80] Recently Jules Coleman and Arthur Ripstein have argued, jointly as well as severally, that the underlying form of responsibility in tort law is not, as I have suggested, an aspect of our most fundamental understanding of moral agency, but rather a free-standing, sui generis, and ultimately political concept that does not involve a notion of control at all. Ripstein (1994); Coleman and Ripstein (1995). I have responded to Ripstein's article in the discussion at the end of Section III, and to Coleman and Ripstein's jointly authored article in Perry (1998). I hope to respond to their most recent work, and in particular to their interesting criticisms of my own approach to these matters, in future work. See Ripstein (1999, pp. 97–104); Coleman (1998b, pp. 310–16) and Coleman, "Tort Law and Tort Theory: Preliminary Reflections on Method," (this volume).

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The Significance of Doing and Suffering

MARTIN STONE*

I. Introductory: Understanding Tort Law

Nor should we make the same demand for an explanation in all cases. Rather, it is sufficient in some cases to have "the that" shown properly. This is so where "the that" is a first thing and a starting point.

Aristotle, *Nicomachean Ethics,* 1098b1

Negligence cases constitute the largest item of business on the civil side of the nation's trial courts. Yet we lack a theory to explain the social function of the negligence concept.

Posner, *A Theory of Negligence*

Modern tort law looks out on a situation which is ubiquitous in human affairs and inherent, as a possibility, in the fact of human action: a situation in which the actions of one person are connected to the misfortune of another. Nowhere does the law attach significance to this just as such. Rather, throughout the world today, tort law asks: Is the plaintiff's suffering a consequence of some impropriety on the defendant's part, or is it a mere misfortune, a case of bad luck?[1] As "mere misfortune," the plaintiff's suffering would be without legal significance, something on par with a natural event, like a destructive turn in the weather. But if there is impropriety – if, for example, the likely prospect of the plaintiff's suffering makes it "negligent" for the defendant to have acted as she did – then the plaintiff is entitled to receive, and the defendant obligated to pay, compensation.

This paper concerns the terms in which we might understand tort law – that is, make sense of it by exhibiting the reasons in play in it.[2] I argue (1) that contemporary functionalism fails to make sense of central features of the law, and (2) that the significance of what Aristotle calls "corrective justice" can come into sharp focus against the background of an understanding of the way functionalism fails.[3] To grasp the source of the trouble with functionalism is to see the need for an account of tort law which attaches direct normative significance to the relation that exists between two persons whenever it appropriately can be

said, concerning a certain injury, that one person "did it" and the other "suffered it." The doing and suffering of wrong is the key element in the situation which brings a concern for corrective justice into play.

Bound up with these claims about how to understand tort law is a further methodological issue concerning the relation we should expect to find between a reason-exhibiting account of the law (which may innocuously be called a "theory" of it) and the substantive conceptions present in the law itself. Recent tort theory offers a number of partially overlapping discussions of corrective justice. Part of my motivation for giving special attention to Aristotle's discussion is that it brings this methodological issue (concerning the relation between the law and its theory) into especially sharp relief.[4]

The issue arises, it may be said, because tort law is not just a set of results concerning who wins and loses in particular cases, but also a discursive or concept-involving practice purporting to justify those results. As Posner says, it is the "negligence concept" concerning which a theory is wanted. This means that an understanding of tort law must be an understanding of certain legal understandings: of the concepts through which the law is self-consciously organized and which figure in its everyday application. However, someone seeking to understand tort law, in the present sense, is obviously not merely wanting to learn *that* the present legal understandings are such-and-such; she is not going to be satisfied (nor should she be) by a mere recitation of legal doctrine, say along the lines of Prosser's famous hornbook (Keeton 1984). If it is sometimes enough in ethical inquiry, as Aristotle puts it, properly to exhibit *the that,* still, we might stress (what is part of the same thought), "the that" needs to be exhibited *properly.* The question is: What do we lack when we lack an appropriate theoretical understanding of a concept like negligence? Also: Is there a misunderstanding of this (a demand for explanation which misconstrues what we lack) to which we are, in such inquiries, sometimes prone?

I take it that, for anyone seeking to understand tort law, at least two things will be insufficiently perspicuous in a Prosser-like restatement. First, what good, if any, the practice touches on; second, what unity it has – is there a way of grasping which instances or strands are in keeping with it and which are mistaken departures? These two aspects of understanding the law are related. In Prosser, we have merely a kind of useful sociological report concerning everything jurists typically take the law to comprise.[5] If, however, we can see how these juridical "takings," or some main core of them, touch on some good, we become entitled to reject some purported instances of the practice as deviations (misunderstandings or mistakings) – namely, those that do not further this good. To understand tort law is thus to grasp its unity in a distinctly practical (and not merely sociological) way.[6]

How does functionalism endeavor to further an understanding of tort law in this sense? Essentially, the functionalist proposes to exhibit tort law as a means of advancing one or more independently defined goals – e.g., "deterrence" or

"compensation" – each subsumable under the more general aim of reducing accident costs.[7] Allowing that this general aim is worthwhile,[8] part of the attraction of this proposal is that it offers a standpoint for assessing the law which is independent of the law itself. That is, the goals which suit the functionalist's theoretical purposes are such that: (1) What it is to achieve them can be fully spelled-out without reference to the concepts through which the law is self-consciously organized; and (2) they can (therefore) function as part of a demonstration of the goodness (or otherwise) of particular legal doctrines, without relying on the sort of practical thinking which figures in the law's everyday application.[9] In positing goals which meet these requirements, functionalism is congruous with a familiar picture of the division of labor between the law and its theory. In this picture, theory plays a "grounding" role; it is called upon to supply an independently standing measure to which the law, if it is genuinely reason affording, will conform.

Given the independent standing of his goals, there is an intelligible tendency for the functionalist to conclude, when confronted by the ways the law might actually frustrate rather than advance such goals, "So much the worse for the law, if, by such theoretical lights, it doesn't measure up." In fact, many functionalists today embrace this conclusion. Tort law, they say, should be "repealed" in favor of other legal arrangements for deterring wrongdoing and compensating accident victims: "There is a widespread social consensus in favor of deterring wrongdoing and compensating accident victims. But . . . it is difficult to argue that tort law well serves these . . . goals. [W]ere tort law for accidents repealed, society as a whole would gain."[10] My argument aims at least to make plausible a different conclusion. Partly by understanding why functionalism is apt to become a brief for the abolition of tort law, we might come to see tort law as the expression of an ethical idea (corrective justice) which is original to it but whose content is not fully graspable in a way which will satisfy the functionalist's demand for an independent measure.

Corrective justice, I argue, can serve to identify the aim of tort law and thus provide a way of grasping its practical unity. One might even say that tort law is a means of advancing corrective justice, as long as one is clear on the essential point, viz., that no reference is made here to any goals or purposes which satisfy requirements (1) and (2) above. Rather, understanding tort law, on this account, traces a circle: the law's aim is to express the requirements of corrective justice; but fully grasping the content of corrective justice calls for the same sort of jurisprudential thinking as occurs in the elaboration of legal doctrine in the circumstances of particular cases. As will emerge, there is a tendency to object that, so construed, corrective justice does not really comprise an explanatory alternative to the functionalist's notion of cost reduction in a theory of tort. That is half-right and half-wrong. For so conceived, corrective justice comprises an alternative to the functionalist's notion of what a theoretical explanation of the law has got to be.

To develop these claims, and to consider the objections, it will be helpful to begin by sketching the main concepts of tort law. Doing so naturally risks begging the questions of someone who has a theory of these concepts. But if that meant that we could not describe tort law, would it make sense to speak of a theory which grounded it, much less to ask whether we ought to abolish it? (Coleman, 1988, pp. 1251–3). The main point to be grasped from the following sketch will be that in tort, one person has done wrong (and is therefore obliged to make compensation) if and only if another person has been wronged (and is entitled to compensation). As befits a pretheoretical description of the law, this appears merely to state a commonplace: tort law connects two particular parties through an adjudication of liability. However, the significance of this apparent commonplace will come out by way of contrast to cases in which the appropriate conception of wrongdoing involves no such bi-conditional. Functionalism, to anticipate the argument, leaves no room for such bi-conditionality; and since such bi-conditionality is basic to (what we understand as) tort law, it may be said (given that the thing to be understood here is not present apart from such basic understandings) that, in a functionalist account, tort law itself goes missing.

What then are the basic legal understandings which someone seeking to understand tort law is seeking to understand?

II. The Basic Rule

> 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. Similarly with ordering and executing an order. As Diomedon the tax-contractor said about the taxes, "if selling them is not disgraceful for you, buying them is not disgraceful for us." And if rightly or justly can be predicated of the sufferer, it can equally be predicated of the doer, and if of the doer, then also of the sufferer. (Aristotle, *Rhetoric,* 1397a23–7[11])

II.1

In tort, the plaintiff complains that she has been injured by the defendant's wrongdoing. Such wrongdoing may consist in the defendant's having acted with the intention of injuring, or having acted recklessly or negligently, or sometimes simply having engaged in an activity that, even when carefully conducted, carries a high risk of injury to others. In fact, most tort cases involve negligence, and that is the sort of case I shall focus on here.[12]

In America, whenever the answer is subject to reasonable doubt, it is almost always a jury, not a judge, which ultimately decides the question of whether the defendant acted negligently. This division of functions evinces an aspect of the law's self-understanding. It marks a distinction between questions concerning the general legal standard to be applied and questions concerning the judgment to be made in the particular case (something about which the law, in leaving the

case to the jury, appears to say that it has, appropriately, nothing to say).[13] As it turns out, the standard which the law supplies is rather general and abstract. Here is the instruction typically read to the jury:

> Negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something a reasonably prudent person would do, under circumstances similar to those shown by the evidence.
>
> It is the failure to use ordinary or reasonable care.
>
> Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence.[14]

Two points are especially apt to be underscored by the judge in explaining this instruction to the jury.

First, negligence *is the doing of something.* It is an assessment of the quality of the defendant's *conduct,* not his state of mind, much less his intentions, motives, or character. Naturally, inadvertence or indifference to the consequences of one's actions tends to result in dangerous acts. But no particular mental shortcoming is necessary (nor, of course, ever sufficient) for conduct to be negligent; negligence is consistent with concern for the plaintiff or with anxious attention to the surrounding circumstances.

Second, negligence is the doing of something which a *reasonably prudent person* would not do. The defendant's conduct is to be measured by reference to the conduct of a standard person located in the same or similar circumstances and knowing at least what the defendant knows (e.g., that a particular glass is filled with poison), if not in fact more. Such a general or non-individualized standard notably leaves out of account many aspects of the defendant's *capacity* to act without creating dangers to others – for example, his intelligence, powers of discernment, physical adroitness, or ability to appreciate risk.[15]

Summarizing these two features of the negligence standard, it is common to say that negligence is an objective standard of conduct.

There is a sense in which negligence is also a fault-based standard. Generally this means that conduct which injures another, but which is reasonable in the relevant sense, is without legal significance. Given the objectivity of the standard, however, talk of negligence as a kind of "fault" displays important asymmetries with what we might think of as distinctively moral notions of fault. To say that something is someone's fault, in that distinctive sense, is usually to say something not just about what they did but about *them* as well, for example, that they are open to blame for not doing better; and this implies the availability of blame-deflecting or mitigating excuses that speak to the individual's capacities, intentions, or motives. The objectivity of the negligence standard functions precisely to make unavailable all but a narrow class of such excuses. So one might say that if negligence involves a kind of fault, this need not be any fault in the actor, only in the act itself.

A further feature of the tort plaintiff's complaint is implicit in all of this. The defendant's wrongdoing and the plaintiff's injury are legally significant not as two discrete, coexisting items, but only as they stand in the relation of cause and effect. It follows that two actors, identical in point of their carelessness, will have different legal obligations if only one has the misfortune of causing injury, just as two victims, identical in point of their injuries, will have different entitlements to compensation if only one has the good fortune, such as it is, to identify some wrongdoing in the chain of events leading up to her injury.

In fact, the requisite liability-creating relation between wrongdoing and injury is even more stringent this. To see why, consider a now famous story. An employee of the Long Island Railroad pushes a passenger in order to help him board a train that has already started to depart.[16] In doing this, the employee dislodges a plain brown package that the passenger is carrying, a package giving no notice of its contents – fireworks. The package explodes when it hits the ground, causing a heavy scale to tip over and fall on a woman who is standing at the other end of the platform. Now assuming that the employee has done something that the 'reasonable person' would not have done,[17] a story like this exhibits something about the (tragic) nature of action[18] that is apt to suggest the following thought: If civil liability is not to be unduly extended, say, to all the upshots of faulty action, and if it is not to be unduly restricted, say, to actions only in their intended or foreseen aspects (restricted, thus, in a way that would belie the objectivity of the negligence standard), then there is bound to be a recurring question in the civil law that is not yet answered simply by placing an instance of wrongdoing and injury in the same chain of events. For lawyers, this is the question of whether the defendant's wrongdoing was a "proximate cause" of the plaintiff's injury.

Attempts to say exactly what relation the term proximate cause is looking for notoriously engender controversy – which is not to say, of course, that there are not clear or agreed-upon cases. But more important than having a particular formula is simply to see more precisely what work this concept is needed to do. A common judicial gloss says, in effect, that an appropriate specification of the type of injury (say, a concussion), of its manner of occurrence (a falling scale) and of the class of person to whom it occurred (someone standing on the platform) must be such as to exhibit the action creating the risk of just such injury as wrongful. In short, the risk or prospect of the plaintiff's injury must be part of the account of why the defendant, in acting as he did, was taking an unreasonable risk.

The meaning of this may be brought into clearer focus by seeing how the court applied it in the case at hand. The majority held that the plaintiff had not been wronged at all – there was no tort. For what made the railroad employee's conduct wrongful, in their judgment, was at most the prospect of injury to the boarding passenger or his property, not the prospect of injury to the plaintiff, the woman on the platform. To use the foregoing terms: The prospect of someone on the platform being injured by falling scales in an explosion was not the sort of thing that could figure in an appropriate specification of what made the defendant's action unreasonable, however unreasonable it may have been.[19]

To complete this survey of basic tort concepts, it should to be added that there is, in general, no legally wrongful conduct unless the defendant *acted* in a way that caused injury; it is not enough that he merely failed to confer a benefit on the plaintiff. The point of this distinction – classically, between nonfeasance and misfeasance – is sometimes described in terms of the value of choice associated with the law of contract. It marks a boundary beyond which the duties of tort law (to modify one's activity for the sake of others) do not reach, hence a sphere in which a legal entitlement to enlist another's assistance in one's own projects can come only by way of securing their consent (Epstein, 1973, p. 199). Failing to help a drowning swimmer you happen to come upon is the classic case of nonfeasance, whereas failing to assist the injured driver of a vehicle you even quite innocently crash into is apt to be considered misfeasance, an act bringing about further injury. What is the difference? The relevant distinction is not given by the grammatical distinction between doing and not-doing, as the jury instructions on negligence quoted above show. Nor obviously is the pertinent idea of an act simply that of a doing or not-doing that leaves another person worse-off than they would otherwise have been; in both of these cases, someone's failure to do something does that. Apparently what is needed here is the idea of a doing or not-doing that is causally relevant to the creation of injury by creating also the risk that materialized in injury. On this basis, we may distinguish the case of the drowning swimmer as nonfeasance by the fact that the risk of injury already exists independently of the person who merely fails to head it off.[20] This explanation represents the idea of a tortious act as part and parcel of the core idea present through the concepts of negligence and proximate cause: the idea of an agent's conduct as wrongful in virtue of the nature of the risk it creates of injury to another.

II.2

We might now draw together the elements in this discussion in the form of a rule, as follows:

Basic Rule of Negligence Liability: If D (1) acts (2) negligently (without taking the care of a reasonable person under the circumstances) and thereby (3) causes, (4) and proximately so, (5) P's injury, then P is entitled to compensation from D and D has an obligation to pay compensation to P.[21]

Still sticking close to the surface of things, two basic features of tort liability might be surmised from this rule.

1. *Correlativity.* Tort liability involves exactly two persons (it is bi-polar) who have come to stand, through previous events, in the following relation: One

has acted wrongfully and the other has been wronged by suffering the wrongful aspect of the first's action. To establish, in tort, that one has been wrongfully injured is thus to establish that another has done wrong (and vice versa); each of these – the doing and suffering of wrong – entails the other.

If doing and suffering wrong are correlatives in tort law, that would seem, however obvious, to be a not insignificant fact. For just as obviously, much of the vocabulary of human conduct, even wrongdoing, doesn't fit the pattern. To say that A insults B is not to say, or need not be, that B suffers insult from A; if A poisons the drinks, it obviously does not follow that anyone has been poisoned. Moreover, outside the scope of civil law, the expression "doing wrong" itself does not invariably fit the pattern. Many of the duties laid down by criminal law, for example, can be breached without injuring another (e.g., reckless driving) or without injuring any other person in particular (e.g., tax evasion). And so-called wide obligations – like those of benevolence or charity, or those falling upon public agencies (to act for the public benefit) – also break the pattern. Since such obligations are owed to everyone, they are not, except under special conditions, owed to anyone in particular. So the breach of such obligations sometimes presents a case in which it is correct to say that someone does wrong without anyone else *being* wronged.[22]

Doing and suffering wrong are, moreover, not the only manifestation of correlativity in tort law. At the remedial stage of the lawsuit, the defendant is obliged to pay damages just when the plaintiff is entitled to *be paid* damages.[23] Such correlativity is so familiar in civil law as to be much of the time practically invisible. But its significance appears, as will emerge, when one begins to theorize about the law.

2. *Reasonableness.* The second basic feature of tort law is its use of a norm of reasonableness, something seen not only in the explanation of negligence given to the jury (the reasonable person) but also in the idea of an appropriate specification of action (reasonable foreseeability) which, as I shall note later (Section IV.4), often informs the arguments of lawyers and judges about the application of proximate cause in the circumstances of particular cases.

So in sum: It looks as if correlativity describes the *form* of tort liability, while reasonableness, at least in the predominant case of the Basic Rule, describes its content. If one wanted a single formula, it might be this: Tort law is reasonableness as it bears on two-party transactions. As I shall argue (in Sections III and IV), to see tort law as an embodiment of corrective justice is to see its content as an expression of the formal requirement that any grounds for describing one party's doing as wrongful must also be appropriate grounds for so describing another's suffering; hence any grounds for the defendant's liability must also be appropriate grounds for the plaintiff's entitlement to recover. What is meant by this – and how it is something more than a description of any interpersonal liability rule – can begin to appear by seeing how such a formal requirement is

in fact flouted in the functionalist understanding of the Basic Rule; how the law's content comes to chafe, on such an understanding, against its form.

III. Tort Theory: Functionalism

> Law is a human construct designed to accomplish certain goals.
> Guido Calabresi, "Concerning Cause and the Law of Torts"

III.1

How does the issue raised in Section I about how to "understand" the Basic Rule come about? Some brief remarks will suffice here to motivate the endeavor of tort theory.

Necessarily, in any legal culture that has negligence law (and, as it happens, in every legal culture that has tort law), the Basic Rule is treated as reason affording, at least by legal officials in their official actions. To the question, "Why does this person have to pay compensation to that one?" an appropriately official answer would be: "Because his negligent conduct was a proximate cause of the other's injuries." But even in officialdom, there are doubts today about whether the legal rule cited in such an answer captures any genuine reasons at all.

The doubt comes out in a number of questions. First and foremost, why have a system of interpersonal liability? Why not allow all unintended losses either to lie where they fall or to be redistributed by mechanisms of social insurance? Second, if interpersonal liability, why liability on the terms the Basic Rule prescribes? Why require proof of a causal connection? Shouldn't it be enough, where such proof is hard to come by, that the defendant is a wrongdoer and the plaintiff innocently injured?[24] If not, how are we to defend the double moral luck that must apparently follow: the fact that some wrongdoers benefit (and some victims suffer) from the contingency that some unreasonable actions do not (and some reasonable actions do) complete themselves in injury? Or, leaving causation aside, consider the Basic Rule's definition of wrongdoing. In one way, the standard of reasonable care seems too permissive. Shouldn't everyone who causes injury be answerable for it? (Epstein, 1973, pp. 158–60) Yet insofar as the standard is objective, it might also seem too harsh. Is it fair to judge the defendant by a standard he may be incapable of meeting? Perhaps our reason for doing so lies in the victim's need for compensation.[25] But then doesn't that need also argue against reasonable care in favor of some stricter standard of liability? Perhaps our reason for rejecting a stricter standard is the moral unfairness of liability without fault. But then isn't that also a reason for taking into consideration a person's particular capacities in acting?[26]

In speaking of "reasonableness as it bears on two-party transactions," it may sound as if tort law is basically sound. The preceding questions suggest that

nothing about it is obviously sound. That is the moment of the theorist's call for an understanding of tort law, an account of its aim and unity (Section I).

III.2

Functionalism, as Section I suggested, presents not just a theory of tort law but also a particular kind of theoretical project. Against the background of the foregoing questions, the tendency of this project might be expressed as follows. Reasoning toward conviction in answers to these questions is not exactly lacking in tort law as we now find it. But, generally, the juridical procedures for attaining such conviction – e.g., the specification of abstract concepts ("fair," "just") through the analogical comparison of hard cases to clear or settled ones – treat the law as if it already captured, however imperfectly, reasons for action; as if it expressed genuine (and not merely purported) requirements of fairness or justice. The functionalist is apt to regard such juridical procedures as rationally second best. In Posner's call for a theory of negligence (Section I), the work to be done by theory contrasts with practice in two related ways. First, by referring to independently defined goals, a theory would connect the law to something we take (at least more easily, apparently, than we take the law) to be normatively genuine or real.[27] Second, once we accept that the law's aim is to advance such goals, then, in principle, only empirical problems (requiring for their solution only information about the effects of various legal rules), and not any traditional problems of jurisprudence (requiring the forgoing sort of juridical thinking) would stand in the way of attaining conviction in the appropriateness of this or that legal rule or judgment. On the basis of the sort of theory Posner says we lack, the appropriateness of the Basic Rule could thus be exhibited as the conclusion of an argument involving (1) independently standing normative premises, and (given sufficient information), (2) only such further steps of reasoning as do not require, for their cogency, any of the law's distinctively practical procedures.

Before turning to the details of the functionalist theory of tort, it is worth asking: Why should it be thought that rational conviction in the appropriateness of the law requires something so distinct from the kind of thinking which informs the law's everyday application? The functionalist himself does not usually see a question here. Rather, he is apt to speak as if it were obvious that an account of the law's functions is just what one has when one has something more than a merely habitual or superstitious acceptance of it. Here, for example, is Guido Calabresi toward the end of a virtuosic analysis of what he calls "the functions of causal language" in tort law:

> Causal requirements, like all other legal requirements must ultimately justify themselves in functional terms. Law is a human construct designed to accomplish certain goals. Often – perhaps most of the time – the goals are terribly complex and hard to analyze clearly, and one is properly suspicious of analysis and prescription that would discard time-honored legal terms because one cannot find immediate, clear policy justifications for them. Still, the object of law is to serve human needs, and thus legal terms (which in other contexts may have other deeper meanings) must sooner or later be linked to the service of human needs. (Calabresi 1975, p. 105)

This is meant to sound like common sense. Surely one wouldn't want to deny that law is something we make for a purpose or that its object is to serve human needs![28] Yet as an account of what compels the functionalist's program it seems quite dogmatic.

1. "Law is a human construct," to be sure. But here it seems worth bearing a distinction in mind. Some things we might call human constructs are such as to distinguish our human form of life from other things which are not human or even forms of life: counting, drawing, giving reasons, the teaching of correct ways of using words, the recognition of certain bodies as the presence of other minds, or the idea of another's suffering as something demanding acknowledgment, to name a few.[29] Whereas other things we call human constructs are such as to distinguish the life of a particular society at a particular time: an economy based on commodity exchange, the death penalty, television, and so on. The two categories are not substantively exclusive; items in the first are bound to appear, under more specific descriptions, in the second.[30] But we naturally do not expect things described by the first category to be intelligible as instruments, for the simple reason that no human goal is any more fundamental than these things; to cease to understand them, one wants to say, is no longer to find intelligible the fact of human life – everything that human beings say and do – as such.[31] Now is it so clear that there is no aspect of law which this category describes? Even granting H. L. A. Hart's suggestion that legal systems may be understood as special constructs, involving second-order rules, introduced to remedy defects (related to the needs of shared existence) in pre-legal societies that lack such rules (Hart 1961, pp. 89–96), is it so clear that all of the first-order norms that have figured in such systems (e.g., norms against intentional destruction of others, or norms of reciprocity and compensation) might similarly be explained as mere instruments (for which there might as well be other instruments) in the service of more basic human needs?[32] None of this is to imply, at any rate, that all things in the second category of human constructs *are* instruments. Calabresi must somehow be forgetting all the aspects of human culture which (though certainly "constructed by us" – who else?) do not obviously invite explanation in terms of their functions, much less a reductive account of the meanings of their central concepts.

2. "The object of law is to serve human needs," to be sure. But why suppose that a functionalist analysis is required if the law is not to appear disengaged from this object? In the context of a certain philosophical tendency to say *fiat justita, pereat mundus,* one may wish to stress a good point in what Calabresi says: If the perpetuation of the law in social institutions is rationally to commend itself to us, it ought to be possible to see the law as making human life

fare better rather than worse. But one need not question such a broad welfarist constraint as this in order to see that Calabresi has offered no reason to accede to the further requirement that it must always be possible to say *how* human life fares better in terms that make no reference to the conceptions of the law itself – e.g., to its way of expressing ideas of right and wrong. I take it that even a so-called deontologist like Kant may be understood as respecting such a welfarist constraint (rather than expressing the above mentioned philosophical tendency) when he says such things as:

> 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.[33]

The object of civic association, this says, is well-being, only not that kind of well-being (viz., "welfare," "happiness") which is already in reach in a state of nature. Civic association brings about a new kind of human good that is not just an operation (maximizing, equalizing, etc.) on more basic goods; it makes it possible for persons to live in a new way – in conformity with "principles of Right." The functionalist, in the present passage, appears as someone who dogmatically assumes that to keep one's common sense is to incur a commitment to exhibiting the latter good as just more of the same cloth. And so – ironically in the name of what passes today as "realism" about law – he lays down a new philosophical requirement: To understand the law must be to see it as bringing into reach such basic goods as every human society, independently of its developed legal and ethical forms, may be presumed to want, hence goods that require none of the law's distinctive conceptions to be concretely in view. (Of course, that is just the sort of good that is suited to function as part of a premise in the sort of theoretical argument the functionalist feels we lack.)[34]

III.3

Calabresi's principal nominee for such a basic good is "optimal accident cost-reduction." The goal that figures in Posner's theory of negligence – efficient deterrence – is in fact one component of this general idea. The main point to be argued now is that no theoretical conjuring can pull an understanding of tort law out of a hat containing only the components of this general idea (Sections III.4–III.8). But to begin with, what exactly does reducing accident costs involve?[35]

One naturally thinks first of the loss resulting from accidents themselves, their toll in human misery. But a program of minimizing just this sort of cost would paralyze human activity; it would be too expensive. Safety may be the first but it is never an absolute demand on any activity. What is needed is the

idea of a safe enough activity, or rather – since, from an optimizing point of view, an activity can be either too risky or too safe – a reasonably safe activity. An activity is reasonably safe when it is carried on in such a way as to minimize the sum of both accident costs and prevention costs, the later including the cost of specific precautionary measures as well as the cost, in pleasure or profits foregone, of eliminating certain activities entirely.

If the law's aim is to reduce accidents costs, one of its main goals must thus be to deter activities that are not safe enough without over-deterring them (i.e., creating prevention costs not worth the savings in accidents they bring). Contemporary functionalists disagree about the efficacy of various legal rules in furthering this goal. But in the case of negligence liability (the Basic Rule), the general story is this. By compelling the unreasonable actor to pay damages equal to the cost of the accident, the law creates an incentive for self-interested agents to behave in a socially efficient way, that is, to take preventative measures whenever their cost is less than the expected cost of an accident.[36] The theory of negligence thus translates the legal idiom of reasonableness into economic rationality. Reasonable care stands for the requirement that persons conduct themselves so as to maximize the value of social resources by taking cost-effective measures against accidents.

Achieving such an ideal mix of accidents and safety is not yet sufficient, however, for the broader goal of optimal accident cost reduction. For given certain economic postulates (viz., the diminishing marginal utility of money or the increasing marginal utility of accident losses), accident costs may be reduced even *after* an accident has occurred by distributing the resulting loss either more widely or into deeper pockets (Calabresi 1970, p. 39ff). Hence some functionalists say that in addition to its deterrence goal, tort law has a compensation (or loss allocation) goal as well – it aims to make accident losses easier to bear by spreading them through the price system or through liability insurance.[37] In this way, the functionalist purports to give normative underpinnings to at least one of two judicial commonplaces about tort law, namely, that its purpose is to deter accidents and to compensate the victims of accidents.

III.4

So much for the general idea of accident cost reduction. A good place to begin thinking about the prospects of this program is with one of the questions disputed among functionalists themselves, namely, whether tort law has, besides a deterrence goal, a compensation or loss allocation goal as well. No one supposes that tort law is merely a compensation system; if the overall aim is cost reduction, it can hardly make sense to reallocate accident losses without trying to prevent them as well. But given that reallocating accident losses is one way of reducing accident costs, why would anyone deny that tort law might *at least* be assigned a compensatory aim?

The answer is not hard to see. Rather than advancing compensation for accident victims, tort law mainly frustrates it: The Basic Rule restricts compensation to losses proximately caused by another's wrongdoing. Of course, given that compensating or reallocating accident losses is one way of reducing accident costs, this severe restriction bears not just on the issue dividing functionalists (concerning whether tort law has a compensatory aim), but also on the prospects of functionalism (as an account of tort law in terms of accident cost reduction) *tout court.* In denying compensation, tort law systematically forgoes opportunities to reduce accident costs by diffusing the losses of individual victims.[38]

It is possible to miss the depth of the problem here. The functionalist might grant that the ground he supplies for tort law (accident cost reduction) requires more loss reallocation than the law – given its restricted focus on wrongful losses – can deliver. But, he will say, that doesn't impede our thinking that cost reduction is an appropriate ground for tort law's treatment of *this* class of losses. Because tort law says nothing about how other losses should be dealt with, it does not frustrate compensation; it leaves open that losses falling outside its own domain might be dealt with by other mechanisms such as social insurance.

But anyone contemplating this response needs to explain why there should be a special legal domain centered on *wrongful* losses when the significance she attributes to suffered losses (an ameliorable social cost) cuts across any such qualifier.[39] The task, moreover, is not merely to give some point to a qualifier restricting the class of compensable losses; it is to explain the law's use of a qualifier that, in restricting the class of compensable losses, thereby also restricts the sources of compensation for those losses. The qualifier "wrongful" links the plaintiff's entitlement to repair to a specific defendant's obligation to make repair; no claim arises in tort against members of society at large. But nothing in the thought that what makes even a *wrongful* loss compensation-worthy is its status as an ameliorable social *loss* gives a reason for thus limiting the many ways of ameliorating it.[40] In general, the problem is that the goal of reducing accident costs by reallocating loss creates reasons of a much too unspecific sort. Even limiting the domain to wrongful loss, it creates reasons for a certain ameliorative outcome to be brought about, rather than reasons why one particular person, the properly identified defendant, should be the one to bring about that outcome.[41]

These considerations make it understandable why some functionalists should view tort law as a system of pure deterrence. In accounting for the defendant's obligation to pay damages, deterrence would presumably also account for the law's use of the qualifier "wrongful" to limit the class of compensable losses: The sort of losses singled out for compensation would be precisely those caused by activities which are worth deterring – activities which are not cost efficient from the point of view of safety. Such an account of tort obligation is only weakened, it might be supposed, by attributing to the law a compensatory aim which it either frustrates or, at best, advances haphazardly. Reallocating accident losses may be an important strand in a scheme of social welfare, but a welfare scheme that withheld benefits whenever a loss did not fall under the Basic Rule would seem rather anomalous (Posner 1972, p. 31).

III.5

At first blush, deterrence looks promising in this explanatory role. For an agent-specific obligation to pay damages looks like an indispensable requirement of deterrence itself. If the obligation were anything less than agent-specific, the *ex-ante* incentive each agent has to take appropriate precautions – the very mechanism of deterrence – could not operate.

But, in fact, the idea of tort law as pure deterrence is not very promising at all. For the agent-specific obligation which deterrence is supposed to explain is not merely the obligation to pay, under certain conditions, an amount sufficient to motivate an economically rational agent, facing the future prospect of incurring such an obligation, to take steps to ensure that such conditions are never satisfied. This is the core idea of a deterrence function. But clearly what this describes – and all that deterrence, strictly speaking, requires – is a legally imposed obligation to pay an appropriately set penalty (a fine or tax), not an obligation to compensate another person, much less to compensate one particular person for the exact value of a particular loss. An agent-specific obligation to pay a penalty when future conditions are satisfied is indeed an indispensable element of any regime of deterrence; but an obligation, of the sort tort law creates, to pay compensatory damages is not. Between these two kinds of obligation there are in fact several significant asymmetries.[42]

First, and most obviously, the reasons for imposing a deterrent penalty are not reasons, just by themselves, for giving the proceeds to any particular person. Indeed, given the economic postulate that represents accident costs as greater or less depending on how they are allocated (Section III.4), it seems reasonable to think that the proceeds of deterrent penalties should be collected by the state (as happens with criminal fines) and allocated to those who need them most. In any case, there is an explanatory gap here. If deterrence is supposed to explain why tort law involves an agent-specific obligation to pay damages, the problem now is to explain why it also creates a victim-specific entitlement to collect the proceeds.

This gap provides a motivation for thinking that tort must have a compensatory aim. But among functionalists who (for the foregoing reasons: Section III.4) deny this, the basic explanation of the payment of damages to the plaintiff is that such damages are "the price of enlisting [the plaintiff's and his lawyer's] participation in the operation of the system" (Posner 1972, p.33) – in short, they are a bribe. The "system" envisioned here is one which regulates social activity on the basis of a norm of efficiency. But it is a system of private,

not public, regulation. Instead of engaging executive and administrative agencies to enforce the norm, an incentive is created for private persons to identify substandard conduct and bring the requisite penalties to bear. The incentive is that a private person who takes on this job (of ersatz public prosecutor) may, if he wins the case, pocket the proceeds of the penalty collected from the defendant. Deterrence continues here to play a solo explanatory role. Making lawyers and their clients financially better off is not a *goal* of tort law; it is simply the means the state has chosen to put a system of deterrence into effect. (Another means might be to offer the financial incentive in question to lawyers only; see below.) Thus Posner: "That the damages are paid to the plaintiff is, from an economic standpoint, a detail" (Posner 1977, p. 143). Is this a good picture of tort law? Does it close the gap between an obligation to pay a deterrent penalty and an obligation to pay compensatory damages?

As a first point, it may be noticed that, on this "private regulation" picture, the tort plaintiff has not suffered a "wrong" in any sense which allows us to see his legal entitlement to damages as vindicating any prior claim – i.e., one arising in virtue of his prior relation with the defendant – to redress. His entitlement to damages has no deeper or firmer ground than this: the state has decided to make him a conditional offer of money in order to induce him to play a regulatory role. In accepting this offer, the plaintiff seeks, in effect, to collect a bounty after fulfilling its conditions by apprehending a wrongdoer.[43] Should it matter to our acceptance of this picture that the plaintiff and his lawyer are apt to view the matter otherwise? Or that the argument before the jury will imply, on both sides, that if the plaintiff is entitled to damages, it is by virtue of what has occurred between him and the defendant, and not merely his being a useful accessory for enforcing the norm of efficiency?[44] One need not deny the possibility Posner is exploiting – viz., that a society might create private rights of action as a means of regulation[45] – in order to suspect that the possibility pictured here, missing as it does the major participant's understandings, is not a good picture of tort law. But even leaving this aside, and attaching no disadvantage to pictures of a practice that portray its participants as entirely misconceiving what they are doing, the present picture would not – for at least two reasons – close the gap between a deterrent penalty on the one hand and tort law's obligation/entitlement to repair on the other.

1. The first reason has to do with the qualifications a person must meet to play the role of plaintiff-prosecutor in a torts case. It is in the nature of bounties and other incentives to act for a public purpose that they may be offered to a wide range of persons; generally, they are thought to be most effective in that form. It may indeed be true that the needs of deterrence are well served by giving *some* private party standing to prosecute violators and collect a reward if he is successful. But why should that standing be limited exclusively to someone injured at the hands of the defendant? Here we must imagine that the regulatory authority has determined that it would not be efficacious to bribe any other person – just as if the authorities in a Western movie were to offer a reward for the apprehension of the villain, but then limit (say, to the immediate family of his victims) the right to collect it. It may be that, for certain contingent empirical reasons, this has become (in the modern accident context) a rational thing to do. But this is hardly apparent. Granted, victims are in a relatively good position to know about potential violations of the norm of efficiency. But are others never in a better position to know or find out? (Is there no use, from the point of view of efficiency, for the resources of the professional bounty hunter?) And because lawyers are always involved in bringing the actions which enforce a legal norm (and best positioned to do so), might not the state do as well or better by offering the relevant incentives in the first place to lawyers who would then hire injured plaintiffs in much the way that they currently hire expert witnesses?[46] Besides severing the connection to participant understandings of the practice, the present picture leaves the rationality of tort liability hanging by a thin empirical thread.

2. A further difficulty with this picture centers not on the tort plaintiff's exclusive entitlement to collect, but on his exclusive entitlement to collect *damages*. The reward offered to the plaintiff is supposed to comprise a sufficient incentive to sue. But we might ask: (A) What is the relation between the idea of a sufficient incentive to sue and that of an appropriate deterrent penalty? (B) Are *either* of these ideas sufficient to bring the idea of a damage payment into view? All three ideas are commingled in the present picture: The *penalty* facing the defendant who does not take cost-justified precautions is to pay a *reward* offered for his apprehension, the value of which is determined by his victim's *actual loss*. But regarding (A): The idea of a sufficient incentive to sue (or to perform any other action for a public purpose) is only externally related (as again the practice of bounties will suggest) to the idea of an appropriate penalty to be brought against an offender. A sufficient incentive certainly need not involve an offer of the entire amount required for deterrent purposes; half that amount should do as well. And regarding (B): It appears that both categories – appropriate penalty and sufficient incentive – are themselves external to the measure of damages that tort law employs and that is natural to the idea of compensation or repair, viz., the victim's actual loss.[47] Thus, Posner has stated the matter only half correctly. It is not just the fact that "damages are paid to the *plaintiff*" which is, in the private-regulation picture, "a detail" (Posner 1977, p. 143). Equally insignificant is the fact that "*damages* are paid to the plaintiff."

A system of private regulation now might be imagined in which the qualifications for becoming a quasi-public prosecutor need not involve having suffered a recent injury or being involved in any causal transaction with the defendant; in which the qualified plaintiff or attorney who succeeds in her case would be

paid, according to some established formula, an amount sufficient to insure that there will be a steady stream of similar persons willing to play this public role; and in which such payments are funded out of deterrent penalties assessed against defendants, with the difference collected by the state and used for public purposes. The tendency of current tort plaintiffs and their attorneys to think that the law vindicates entitlements to the repair of wrongful losses in some stronger sense than appears in this picture might at least be understandable when one reflects that, however worthwhile what is imagined here might be, no one would be in danger of confusing it with tort law.

III.6

The argument so far against the thesis that tort law has a deterrence goal is essentially that this thesis renders tort law unrecognizable by leaving out of account the significance which the law gives to the notion of a victim entitled to be compensated for her loss. Despite this, it might be thought that, with the idea of deterrence, at least half the equation is solved: If an account is still owing of a victim's entitlement to compensation, we have at least a good account of an injurer's liability. But this is not so. A failure to account for the way tort law compensates victims must reflect negatively on the present account of the interest it takes in the activities of injurers. The reason is that while the idea of deterrence is essentially prospective (tort liability deters insofar as the prospect of incurring it under certain conditions creates an incentive to prevent those conditions from being realized), the category of an injurer (as opposed to someone who engages in injurious activity) is a retrospective one, the salience of which falls away when the corresponding idea of a victim (one who has suffered injury) comes to look like a mere detail.

The point may be explained like this. The obligation to repair an injury one has caused is naturally an obligation possessed by an injurer, someone retrospectively identified by reference to that injury. But since obligations to pay deterrent penalties need make no reference to the person who may turn out to suffer a particular course of conduct, by the same token, the conditions which trigger such obligations need not refer to the retrospective category of an injurer. Any substandard injurious conduct is, in principle, a suitable target of deterrent penalties, regardless of whether it happens to cause injury or not. Indeed, since the foundational idea of reducing accident costs is, by its very nature, both prospective and global (the relevant costs ranging over all future accidents and all preventative measures), deterrent penalties are ideally addressed to whomever can most cheaply, through modification of their own activity, avoid certain categories of accident costs (Calabresi 1970). There is no reason to expect that person to be an injurer in the conventional sense of one who has caused an accident. Except perhaps by way of functionalist stipulation, the best prospective accident-preventer may never have been a party to an accident at all.[48]

III.7

It is time to take stock. It appears that neither the idea of a compensation nor a deterrence function (the main components of the idea of accident cost reduction: Section III.3) makes sense of the way tort law pairs injurers and victims. What is more, these functions fail in symmetrical ways. The idea of compensation affords no reason why repairing the plaintiff's loss should be the obligation of a particular injurer; the idea of deterrence affords no reason why collecting damages from the defendant should be the entitlement of a particular victim. For compensation, the problem is why losses should be singled out only in terms that connect them to a particular injurer; for deterrence, it is why injurers should be singled out only in terms that look backward from one particular person's loss. Compensation makes an enigma of the Basic Rule insofar as it singles out *this* defendant for liability; deterrence, insofar as it singles out *this* plaintiff for recovery. The common problem is this: How could a rule governing the compensatory response of one party to another emerge from considerations attaching normative significance directly to *losses* as such, and to the two-party transactions on which the law focuses only derivatively? The common problem, simply put, is the bi-polarity (Section II.2) of tort law.

Someone might be tempted to think, however, that these symmetrical failures offer the interlocking materials for explanatory success. Since no one proposes that tort law's only aim is compensation, it might be said, the foregoing argument establishes only that it is something more than a system of pure deterrence. But why should it be assumed – the thought would continue – that at most one function should account for all of tort law's features? That is to ignore an obvious alternative, namely, that deterrence affords a reason for fixing liability on the defendant, compensation, a reason for paying the proceeds to the plaintiff. Striking the one-function assumption, isn't each of these goals, given the shape of its failure in a solo role, well-suited to remedy the defect of the other?

In fact, the answer is "no" – though it might appear otherwise on an understandable misdiagnosis of how each function fails when considered alone. The present (pluralist) proposal treats each function as if it gave merely incomplete reasons. For example: Specifying the function of the kitchen – the requirements of cooking – is not yet sufficient for designing the rest of the house. And if, in completing the house, we find we need to trade-off the optimal configuration of the kitchen against that of the common rooms, no special problem need arise. For it is perfectly clear why these rooms, these functions, are to be brought under the same roof. After all, it is a house we are designing. But of course it is not like this with tort law. Under the present proposal, tort law appears as a structure in which compensation occurs only when this also serves the requirements of deterrence (and vice versa). But why bring these functions together under the same roof where the requirements of each must check the pursuit of

the other? Clearly, it only begs the question to suggest that tort liability represents a kind of optimality given the requirement that these goals be pursued in tandem. For what is wanted is precisely some way of rationally motivating this requirement.

Absent such a motivation, assigning one function to the defendant's liability and another to the plaintiff's recovery can hardly make for a pragmatically agreeable pluralism as opposed to a compounded explanatory crisis. In fact, it is not hard to see that what the pluralist has done is simply to start with the bi-polar form of tort law and then to ask what combination of welfare functions would roughly reproduce its contours. But bi-polarity cannot thus be pulled out of a hat. Because the rationality of compensating does not vary with presence of opportunities for deterring (nor vice versa), it seems implausible to think that someone starting with these goals would seize upon the bi-polar form of tort liability as a good way to implement them; that a legal structure that placed liability and recovery on the same grounds would commend itself when no such connection exists between the goals that liability and recovery are independently supposed to advance. So to be pulled out of this hat, bi-polarity must have been in it from the beginning. Which means that the first question of tort theory – What reason is there to join two parties? (Section III.1) – goes unanswered.

III.8

If the form of tort law resists the substantive grounds that functional analysis would supply for it, what conclusion should be drawn from this? If, like Calabresi, one lays it down that "all legal requirements *must* ultimately justify themselves in functional terms" (see Section III.2), then it might seem to follow that tort law is rationally indefensible. That is in fact the conclusion drawn by many functionalist critics of tort law today. Tort law, they observe, frustrates the goals of compensation and deterrence, or frustrates their rational pursuit, by linking them together.[49] So tort law, these critics conclude, should be abolished and replaced by institutions that have compensation (e.g., social insurance) and deterrence (e.g., administrative regulation) as their straightforward aims. "The key to reform," as one critic understandably puts it, "is the complete uncoupling of compensation from deterrence" (Sugarman 1985, p. 664).

But here we ought to distinguish two versions of the claim that functional analysis is inhospitable to tort law. The functionalist can agree with one version of the claim (while still professing to have a correct understanding of tort law) because inherent in his theoretical project (Section III.2) is a particular way of conceiving the object of his theory. That object is not (or at least not in the first place) tort law, but rather, as it might be called, "the legal response to the problem of accidents," where the normatively salient fact about accidents (which calls for a legal response) is that they affect whatever basic good performs the

theory's explanatory work – for example, accidents sometimes involve a preventable squandering of society's collective wealth. With such a basic good in hand, the functionalist takes himself to have the right starting point for an account of accident law,[50] and hence an appropriately external starting point for a certification (or decertification) of tort law, such certification turning ultimately on the empirical question of whether (or when, in what subset of situations) tort law is an appropriate response to the problem of accidents so conceived. Answering in the negative, the functionalist critic of tort law claims precisely to have a correct account of tort law that is also, as it turns out, inhospitable to it.[51]

But even if we are sympathetic to the functionalist's goals, and even if the best empirical information did speak against tort law as an efficacious means of advancing them, we might reasonably hesitate to embrace this claim; or to embrace it, anyway, on the basis of such an argument, whereby not just tort liability but the very idea of it would disappear, like an irrational superstition, without conceptual loss (cf. Ehrenzweig 1953, pp. 869, 871–2). For shouldn't we wonder why tort law had been dealing out judgments while keeping its reasons so secret? Perhaps, as some suggest, such secrecy is a condition of the appearance of judicial legitimacy.[52] But then shouldn't we be curious to know what it is about the law's traditional idiom that gives it so much as even the *appearance* of legitimacy? If even "time-honored legal terms" (Calabresi 1975, p. 105) must eventually be translated into welfare functions, is there not at least a good question, to which the functionalist gives no answer, as to why exactly *these* terms have been so honored by time? A similar question arises with regard to functionalist *defenses* of tort law. If it is true that the bi-polar form of tort law has been put offstage into the theorist's hat (as if tort law were a natural unity, like a house; Section III.7), does this not suggest that the form of tort law deserves a more basic explanation, one that makes perspicuous a reason for its limitations?

There is another possible conclusion which might be drawn from the argument so far, a different way of construing functionalism's apparent inhospitality to tort law. Simply put, in conceiving the object of his theory as the legal response to the problem of accidents, the functionalist never gets (what we understand as) tort law properly into view at all.[53] On the first conclusion, we find we may have good instrumental reasons, stemming from a concern with deterrence and compensation on the one hand, and from tort law's basic formal features on the other to replace tort law with forms of legal obligation and entitlement that involve no relation of interpersonal liability. On the second conclusion, tort law's basic formal features suggest that a practice of interpersonal liability is not to be understood merely as an instrument, even a bad one, for securing compensation and deterrence. Of course, it is only by the functionalist's lights that these conclusions need occlude one another.[54] But to make it plau-

sible that the functionalist misunderstands the practice he seeks either to support or revise, we need of course to say how tort law is otherwise to be understood.

In the remainder of this essay, I shall suggest that, notwithstanding his unfamiliarity with modern negligence law, Aristotle's discussion of corrective justice both motivates the law's time-honored terms and provides a contemporarily relevant diagnosis of what goes wrong in the functionalist translation of them.

IV. Corrective Justice

The just, then, is intermediate, since the judge is so.
Aristotle, *Nicomachean Ethics*

IV.1

As it bears on the present issues, the key thought in Aristotle's discussion is simply that there are two distinct notions of justice. Both involve a norm of equality or fairness (*to ison*). But the judicial concern with equality in a situation of transactional wrongdoing (the domain of corrective justice) is distinct, Aristotle says, from a concern with equality in the allocation of benefits and burdens from a common stock (the domain of distributive justice):

> 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. (Aristotle, *NE,* 1132a)

Aristotle's point may be developed like this. In a distribution, two or more parties are related only *mediately,* through some criterion of desert – e.g., "decency/baseness" – which connects them to whatever items are to be shared among them.[55] The equality to be achieved through such connections is thus one of ratios or proportions, expressible by the formula "to each and from each according to his ____." Corrective justice also aims to give each person his due. But what is due, in this case, is a function of an immediate relation between two parties, a relation which is normatively significant even apart from such criteria as would connect persons to social benefits and burdens (and thereby to each other) in a distributive scheme. Hence, rather than attending to features of the situation which such criteria would make salient, the law, as Aristotle puts it, "looks only at differences in the harm inflicted." That is, the departure from equality here is essentially a matter of the difference that wrongful doing and suffering makes – the difference between what a person has before and after a wrongful transaction – as opposed to the difference between what a person has and what is due to them according to criteria which could, in principle, operate independently of the parties' being so related.

Read in the context of the trouble with functionalism (Section III), the special interest of this should be clear. For functionalism exhibits injurers and victims as joined together only mediately, in virtue of their relation to certain social goals rather than to each other. Essentially, it construes tort law as aiming to confer burdens and benefits according to criteria rationally related to such goals: accident losses, conceived as common stock, are to be distributed so as to (1) make them easier to bear, and/or (2) create incentives for cost-effective precaution taking. The trouble is that the criteria, made relevant by these goals, for selecting persons to be benefited and burdened selects much broader classes than those of persons related as victim and injurer; and such classes therefore appear to be arbitrarily limited when the law in fact determines who is to be benefited and burdened by following the lines of particular transactions. But suppose that there are, as Aristotle suggests, concerns of equality or fairness pertaining specially to transactions; and suppose we can make out that tort law expresses such concerns. Then we would have, in the idea of corrective justice, a characterization of tort law that gives content to the thought – the second conclusion of Section III.8 – that, when the material for understanding tort law is limited to the functionalist's goals, a distinct sort of reason that informs the law is not yet in view. Compensation and deterrence, we might say, help answer the question, "How should the costs of social cooperation be distributed among the members of a political community?"[56] Such goals are satisfied – and the reasons they provide are given their full practical weight – whenever the resources of the community are allocated in a certain way; and the reasons provided apply not just to interacting pairs but to everyone in the relevant community. As an expression of corrective justice, tort law would bring a sort of reason into play which contrasts with these features of the functionalist's goals.[57]

I shall develop the claim that tort law expresses corrective justice in three stages: first, by asking how the "equality" pertinent to corrective justice is to be understood (Sections IV.2–IV.3); second, by presenting the Basic Rule as spelling out what such equality requires in a particular type of case (Section IV.4); and third, by answering an objection which arises from functionalist quarters: namely, that because the content of corrective justice is not fully available, on this account, apart from the legal practices which express it, to refer to corrective justice is to do little more than to point out that there are such-and-such legal practices rather than to rationalize or explain them (Section V).

IV.2 The Equality of Corrective Justice (A)

In the passage quoted (Section IV.1), Aristotle invokes the notion of equality in two seemingly different ways. First, some baseline condition of equality be-

tween the parties is restored through a material transfer required by justice. Second, the law treats the parties as equals. The first invocation of equality refers to a state-of-affairs to be achieved, one in which each party is given its due; the second, to an apparently formal constraint on legal judgment. This suggests two different readings of the passage, depending on which of these invocations one takes as primary. Taking "equality as baseline condition" as primary, it seems natural to understand the equality restored by the judge as the proportional equality of distributive shares. On this first reading, in saying that the judge treats the parties as equals, Aristotle means that the judge respects their initial equality as antecedently defined. He respects their equality – and thus treats them as equals – by taking their rightful holdings as the basis for judging wrongful departures. I shall first criticize this reading and then develop the second reading in Section IV.3.

The first reading has two understandable motivations. First, it honors the (for many, attractive) thought that no genuine entitlements to the repair of loss could be held in the first place except in accordance with a just scheme of distribution; the justice of repair depends, in this reading, on the justness of the parties' previous holdings. Second, this reading makes the appropriateness of repair in particular cases available for assessment in light of an independent doctrine of just holdings. It may be felt that the claim to be doing justice in a case of alleged wrongful transaction requires this – in effect, some test, independent of the possible judgments that could be rendered, of when the judge has got it right. A form of justice defined in terms of judgments that respect the equality of the parties, that is, may be felt to require some prior doctrine, capable of functioning as an external touch point, of what that equality consists in.

But however motivated,[58] it is not hard to see that this reading creates a number of insuperable problems for Aristotle's discussion. First, in *Nicomachean Ethics* 1132a quoted above, Aristotle observes that the law pays no attention to (what would elsewhere be) a pertinent distributive criterion (decency/baseness), and he then contrasts the use of such a criterion with attention to the harm inflicted and the application of a norm of equality ("Rather, the law . . . treats the people involved as equals."). How can we credit the most general point of this passage – viz., that there are two distinct forms of justice[59] – unless we are prepared to see the equality infringed by a wrongful transaction as something other than the equality of distributive shares?

In support of this, it may be noted that Aristotle's observation concerning the law's restricted focus remains universally correct. For example, the law never allows a wrongdoer to defend herself on the Robin Hood-like grounds that her actions have in fact brought about a more just allocation. If the normative basis of corrective justice were an independently defined equality of holdings, it is not easy to explain why.

Finally, the present reading seems obscure outside the case of a simple property taking, in which one person literally gains what another loses. If X wrongfully takes Y's goods, then, on the assumption that the parties' antecedent holdings were in the right proportion, the law can make the parties equal again by ordering the return of the goods. But how are we to apply this idea to the case in which X does not take, but wrongfully damages, Y's goods? If X must compensate Y for the damage, why is this any less disruptive of the antecedently just status quo than if the damage were to remain (uncompensated) with Y? To answer this question, we need either to burden Aristotle with the fantastic assumption that every wrongdoer realizes a material gain equivalent to her victim's loss, or else to explain how X's wrongdoing can alter her distributive entitlement. Clearly, however, the later course amounts to abandoning the attempt to understand the equality of corrective justice along the present lines. If a transaction consisting of X's wrongdoing and Y's loss can alter X's distributive entitlement in the amount of Y's loss, that can only mean that the transaction has a significance not entirely captured in terms of its upsetting an antecedent proportion of holdings.[60]

A clear view of these matters is doubtless made more difficult by the fact that Aristotle does portray (1) a wrongdoer as realizing a "gain" or "profit" which is quantitatively equivalent to a victim's "loss," and (2) the judge as restoring "equality" by transferring the amount the one has gained and the other lost (Aristotle, *NE,* 1132a5–1132b20). This may encourage the thought that the equality restored by the judge can be independently identified in terms of the parties' antecedent holdings, despite the unacceptable consequences of this thought: The scope of corrective justice must either be restricted to cases of property-taking, or else all other wrongful injuries must somehow be assimilated to that case. The assimilation is clearly hopeless. Even if there is always a gain in, say, driving negligently (which is doubtful), that gain would have to accrue whether loss occurs or not; and because the value of any occurring loss depends on various contingencies, its equivalence to the driver's gain in a particular case could only be fortuitous. Fortunately, Aristotle himself indicates a different way of understanding the sort of equivalence in question here, one which makes property-taking a special – and not the paradigm – case of the transactional departure from equality: Following a wrongful transaction the victim has "too little" and the injurer "too much" simply in the sense that the injurer has that which, as a matter of justice, belongs to the victim; in a case of personal injury, the loss inflicted is his (the injurer's) to bear.[61] On this understanding, we must of course give up the thought that Aristotle is even purporting to supply an independent test for identifying legal wrongs; the existence of the relevant losses and gains does not appear apart from the whole system of legal entitlements which specify the relevant notion of wrongdoing. Talk of equivalent loss and gain is a way of representing a wrongful transaction from the point of view of the remedy offered by the law; its point is simply to mark a distinction between the way this remedy vindicates equality (see Section IV.3) and the creation of such proportionate equivalences of holdings as would comprise a just distribution.[62]

This understanding of the equivalence of loss and gain leaves appropriate room for corrective justice to apply (as Aristotle claims it does: *NE,* 1131a–b) to a range of transactional wrongs. But it still leaves us, of course, in need of an explanation of the sense in which the judge, in a case of corrective justice, either restores equality or treats the parties as equals.

IV.3 The Equality of Corrective Justice (B)

The second reading reverses the direction between equality as a state-of-affairs to be restored and equality as a formal constraint on judgment. Thus when Aristotle says that the judge "tries to restore this unjust situation to equality" this should be taken to mean that he renders a judgment consistent with treating the two parties as equals; the just equilibrium, the outcome sought, is not given prior to a judgment that meets this formal constraint. So, on this reading, corrective justice would have, as Aristotle suggests, its own norm of equality; it would involve reasons to alter the parties' relation to each other that do not stem from the requirements of equality or fairness in distributions.

If the first reading were acceptable, the equality of the parties would function as an independent benchmark of when the law had got things right: to get things right (to treat the parties as equals) would be to uphold the requirements of distributive justice against transactional interferences. But taken apart from such requirements, doesn't treating the parties as equals now (on the second reading) threaten to look like a mere formalism? The problem is a familiar one. If X is entitled to restitution when Y takes his property, then it may be said that the law treats the parties as equals whenever this rule is applied evenhandedly, without any characteristics of X or Y (e.g., their status or character) modifying its application in favor of either one of them. But the notion of equal treatment does not function here as an explanation of the parties' entitlements; rather, its application presupposes them.[63] The question is: How can the idea of equal treatment comprise, just by itself, something to which legal judgment may (or may fail) to accord? This is what needs to be made out, the discussion so far suggests, if the notion of corrective justice is to find application to transactional wrongs in general and not merely to the taking of property.

The passage quoted provides two sources of help. First, Aristotle associates the relevant sort of legal judgment with a situation of correlative doing and suffering: "[T]he law . . . treats the parties as equals, when one does injustice while the other suffers it, and one has done the harm while the other has suffered it." Second, he presents the law's focus on such doing and suffering as an alternative to its consideration of either party's character: "For here it does not matter if a decent person has taken from a base person." On the reading I propose, the main point is that the law treats the parties as equals when it assesses their transaction in terms that have a correlative significance for each of them, rather than in terms (like "decency/baseness") which pick out their several qualities and are

therefore suitable for relating them (both to each other and to others) in a distributive scheme.

Here we should recall Aristotle's explanation of correlativity: If a term "can be predicated of the sufferer, it can equally be predicated of the doer, and if of the doer, then also of the sufferer."[64] The significance of the thought that treating the parties as equals involves correlativity (as an "equality of predication") is easy to miss because the later notion can be construed as merely the general *form* of interpersonal liability. Let ϕ be a term describing the nature of a transaction such that when it applies, liability follows. If a liability rule says it is wrong to ϕ, then – if we really are speaking of interpersonal liability – someone has *been wronged,* in the liability-incurring sense, whenever anyone ϕ's; so the requirement of correlativity is indifferently satisfied, it may seem, by any substantive definition of a transactional wrong.[65] However, the notion of correlativity admits of a less formal reading, whereby some instantiations of ϕ, and hence some liability rules, are more appropriate specifications of the general form of liability than others. To say of the term 'ϕ' that "if it can be predicated of the sufferer, it can *equally* be predicated of the doer" (and vice versa) would not be to say just that, according to some rule, one party is liable and another may recover whenever ϕ applies; it would be to say, in addition, that the rule in question, by making liability and recovery a matter of 'ϕ', allows one party to recover only for such *reasons* as are also no less appropriate reasons for another's liability. On the purely formal reading, we have merely the idea that a rule (whatever its content) is of such a kind as to be applicable to one party (as doer) just when it is also applicable to another party (as sufferer); obviously, very iniquitous rules can be of this kind. On the less formal reading, we have the idea that some particular rules of this kind capture a special type of reason, a consideration in favor of the recovery of one party that is equally – neither more nor less – a consideration in favor of the liability of another; the idea of correlativity or equality of predication, in other words, sorts out fair and iniquitous rules of the general kind.[66]

To make this clearer, consider the most basic question that must arise if the law is to assess whether an action complained of is wrongful or not: *What* did he do? Taking the example from Section II.1, the question might be: Did he inflict harm on the person standing on the platform, or did he merely push a passenger, the rest being a matter of the independent course of the world? Insofar as we are interested in action as an expression of a person's character, it would be natural, in answering this question, to focus on the deliberated, intentional or foreseen aspects of action; these aspects exhibit something about the person's character by revealing (i.e., either positively as his aims or negatively as considerations he did not act against) his reasons in acting. Aristotle himself seems to be thinking along these lines when he turns, after the discussion of particular justice, to questions concerning the relation of voluntary action to justice (*NE,* Section V.8). Here the special ethical interest of what is "voluntary" puts

the sort of pressure we would expect on the description of a purportedly wrongful act, for Aristotle says that an action must be "defined" by features of the practical situation that the agent is aware of – viz., the person harmed, the instrumentality of harm, and the nature or type of harm (*NE,* 1135a15–30). But now an interesting consequence emerges. Defining action in this way opens a gap, which Aristotle points out, between something "being unjust" and "there being an act of injustice" (*NE,* 1135a15–25). For someone who acts in ignorance of features of the situation that characterize the action *as suffered* has not – if the action is really to be "defined" by reference to his awareness – done wrong. He has not done wrong because he has not, strictly speaking, *done that* at all. The doing (of what turns out to be a suffered wrong) does not – "except coincidently" – belong to him, Aristotle suggests, as a doing.[67]

Answering the question, What did he do? from the point of view of an interest in action as an expression of ethical character will thus defeat the correlativity of doing and suffering wrong. For if something can "be unjust" without "there being an act of injustice," then injustice or wrong is there to be suffered without anyone having done injustice or wrong. A gap appears between doing and suffering wrong. Of course, we could easily close this gap if we were prepared to say that no one could suffer wrong unless another had done wrong in the presently circumscribed sense (involving awareness, etc.).[68] This would close the gap by making the passive (to suffer wrong) a simple reflex of the active form, with the later defined in such a way as to confine it to cases in which blame is appropriate. But this seems unfair, for it makes the status of the transaction depend on a feature of the situation that pertains to one of the parties alone. Why should the one who suffers find the agents' self-consciousness relevant at all? He too is a self-consciousness, and his relation to the action is to an injury he has suffered. Just as easily, we could close the gap in the other direction. What matters, the sufferer might say, is not whether the agent has done wrong knowingly but whether he has done something that, from the point of view of one who suffers it, is a wrong. Opposing the doer's narcissistic demand to recognize as his action only what he knew as his deed would thus be a notion of responsibility that runs at greater or less length along the lines of causation. But clearly this is no less one-sided. It closes the potential gap between doing and suffering by making the active form a reflex of the passive "suffering wrong." Why should the doer find the sufferer's self-consciousness relevant at all? He too is a self-consciousness, and his relation to the act is to something that involves no wrong.

The upshot of these reflections is that, as a matter of corrective justice, wrongdoing cannot be confined to cases involving the actor's awareness that her action might cause injury; and, by the same token, wrongful suffering cannot be extended to cases involving any undeserved misfortune connected to another's agency. (This tells us something about legally significant doing and suffering; it is not a mere formality.) Under these illegitimate conceptions, cases

of wrongful doing and wrongful suffering can be represented as the doing and suffering of the *same* wrong only at the cost of making suffering the reflex of doing or vice versa. Justice – "virtue in relation to another" (*NE,* 1129b32) – opposes these one-sided possibilities of human relation. It requires, in effect, that the transaction be assessed from the point of view of a neutral third party, a representative of the law: "The just, then, is intermediate, since the judge is so" (1132a).

To summarize: The task of judgment, on the second reading of the equality of corrective justice, is to determine when (in what circumstances) two parties stand in the relationship of having done and suffered the same wrong.[69] Insofar as he seeks justice, the judge seeks an answer intermediate between two descriptions of what was done, one making suffering the reflex of doing, the other making doing the reflex of suffering. This is to treat the parties as equals by according equal status to their interests in acting (which includes their interest in being free from injurious interferences). The departure from equality in this situation consists, then, in doings which are wrongful, not because they upset a previously just distribution, or because they threaten a communal goal, but because they are inconsistent with the equal status of other affected agents. Such wrongful doing and suffering comprises an equivalent loss and gain, i.e., a loss which, uncorrected, lies with the victim, but which ought, as a matter of justice, to be borne by the injurer. The thought expressed by such 'equivalence' is not that whenever there are materially equivalent losses and gains, there is reason for corrective action, but rather that the basic reasons for corrective action – unlike those supplied by concerns of distributive fairness or by the goals pertinent to a distributive scheme – are such that any ground for thinking that one person has less than their due is also a ground for thinking that another person has more; any ground for giving to one person is a ground for taking from another. Accordingly, the judicial restoration of equality consists neither in giving the parties the share they had before the transaction (though, in a taking of property, that may result), nor in giving them the share they ought to have as a matter of distributive fairness (or in furtherance of a communal goal), but in annulling the equality-negating wrong by transferring the loss to the party who wrongfully created it. Borne by the victim, that loss constitutes a transactional wrong; borne by the wrongdoer, it constitutes, at most, his misfortune.

Conceived thus, corrective justice might also be described as an abstract framework for arguments about the terms on which one person is responsible for the injurious consequences of her actions. But it will need to be stressed that the notion of responsibility here is one required to do a wider kind of practical work than is reflected in questions about when an agent may be blamed for her actions; it has to do with the answerability of persons, potentially indifferent to one another, living in civic association.[70] There is a philosophical tendency to think of judgments of responsibility as arising with respect to each person considered in isolation. In effect, one imagines the person standing before a god

who, as the perfect judge, will not fault the person for deeds that do not deeply express her will. But this is to imagine a scene of judgment presenting no other party whose grievances need to be answered. The notion of responsibility relevant to corrective justice, in contrast, only comes into view when we consider two persons in relation, each with an equal interest in acting and in being secure against the interferences of others. To consider persons in this way (viz., as parties) reflects an ethical concern that is distinct from other moral assessments of action; its home – the practical situation that brings this concern into play – is the situation of alleged wrongdoing in which a plaintiff and defendant appear before the law.

IV.4

How do the elements of the Basic Rule (Section II.2) express the notion of corrective justice?

(A) DAMAGES. Conceived along functionalist lines – either as a deterrent penalty or as a way of reallocating (and thereby reducing) the burden of accidental loss – the payment of damages seemed puzzling (Section III). Why does this payment follow the contours of an antecedent transaction, proceeding from the defendant-injurer to the plaintiff-victim? And why is the loss suffered by the plaintiff the measure of both what the defendant must pay and what the plaintiff should recover? Conceived as a way of annulling a wrongful (because equality-negating) transaction, these features of the standard tort remedy present no special difficulty.[71] If the payment proceeded from a source other than the defendant, it might address the plaintiff's need but it would not touch the defendant's wrongdoing. If it were based on a measure other than the plaintiff's loss, it might touch the defendant's wrongdoing, or it might advance a conception of distributive equality, but it would not redress the wrong as suffered, its manifestation as loss. The notion of corrective justice can thus help reinforce our grip on the basic features of the tort remedy, and on the standard judicial principle governing the award of damages, viz., that their purpose is to "put the party who has been injured, or who has suffered, in the same position he would have been in if he had not sustained the wrong."[72] This principle can of course be expressed by saying that tort law aims to provide compensation for wrongful injury. But this commonplace is apt to be misunderstood, as we have seen, if we try to derive the significance of compensation in tort from the normative significance of loss considered just as such, apart from the relation of wrongful doing and suffering.

(B) AGENCY, CAUSATION, AND INJURY. Prior to the question of any damages to be paid is the question of whether the defendant is liable at all. In making this conditional on a causal sequence beginning with agency and ending with injury, the Basic Rule ensures that a person's doings are legally significant (a basis of liability) only when they result in another's suffering, and that a person's suffering is legally significant (a basis for recovery) only when it results from another's doing. Hence, in making civil liability possible, the Basic Rule also limits it to just the sort of case – when "one has done the harm while the other has suffered it" – which brings a concern for corrective justice into play. Moreover, the requirement of agency (the distinction between misfeasance and nonfeasance: Section II.1) expresses the notion of equality that gives salience to this case. For if, apart from any action on his part endangering the plaintiff, a civil defendant could, as a rule, be liable for the plaintiff's suffering, then the defendant's entitlement to act in pursuit of his own projects (in potential indifference to those of others) would be determined on the basis of – would be subordinate to – the requirements of the plaintiff's welfare. Although, formally speaking, the grounds for liability would be the same as the grounds for recovery, such a rule would flout correlativity (equality of prediction) in the less-formal sense (Section IV.3). For, in the terms used previously, the plaintiff's claim to have suffered wrong in such a situation could only be construed as a case of doing and suffering the *same* wrong by making the defendant's wrongdoing a notional reflex of the plaintiff's suffering.[73]

(C) THE REASONABLE PERSON STANDARD. Tort law's use of an objective standard of reasonable conduct entails both (1) that undeserved misfortune flowing from the action of another is not, just in itself, legally significant, and (2) that a defendant may wrongfully injure another even when he tries his best to avoid it. The significance of the standard as an expression of the equality of corrective justice can be seen in these consequences. Undeserved misfortune might call for shifting social resources in someone's direction. But if the connection of such misfortune to another's agency were alone sufficient grounds of liability, the boundaries of rightful agency would be determined simply on the basis of how an action affects others. Similarly, that someone tried his best to avoid injuring others may bear upon his moral culpability. But if this could put the effects of action beyond another's entitlement to complain, the boundaries of rightful agency would be determined simply on the basis of agent's self-relation to his own action. Of course, action can appropriately be judged from different points of view. The reasonable person formula aims to express the grounds appropriate to judgments about action in which doer and sufferer weigh equally as agents. Putting this in terms of responsibility, one might say that the formula aims to answer the question, What actions should an agent justly regard as his? in a way that turns neither one-sidedly on the agent's self-conception of his action nor one-sidedly on the suffering of another.

Earlier, in motivating the call for tort theory, the question was specifically posed of how the law's use of an objective standard, its rejection of most capacity-based excuses,[74] could be consistent with liability based on wrongdoing

or fault. We might now answer: The objective standard specifies the notion of wrongdoing or fault appropriate to the assessment of action from the point of view of justice (i.e., "in relation to another") rather than, say, as an expression of a person's character or will. Similarly, we can now address the worry that the objective standard and the causation requirement beset tort law with a problem of moral luck (Section III.1). That notorious problem arises in light of the fortuitously different consequences an action may have considered from a point of view where the object of moral assessment is the person considered in isolation. Enlarging the frame – considering the person "in relation to another" – situates a different ethical concern. Whatever the paradox-inducing temptations may be, from the first point of view, to pare down every act to some inner core of pure volitional self-relation (Nagel, 1979, p. 31), it hardly seems tolerable to tell the victim of a person's action that, characterized in terms of her suffering, that action lacks normative significance because all that can appropriately concern us, morally speaking, is the actor's will. Of course, answering the victim's complaint in some other way is bound to be expedient wherever persons need to cooperate,[75] but that is no reason to deny that it also expresses sensitivity to an aspect of justice.

(D) PROXIMATE CAUSE. Whatever applicative difficulties may arise in particular cases, the basic idea of proximate cause is clear enough: not everyone who suffers the effects of someone's (otherwise) wrongful action has, in the sense relevant to tort liability, been wrongfully injured. In the case cited earlier (Section II.1), Cardozo described the requisite liability-creating relationship by saying that the plaintiff's injury must be (from the point of view of the defendant's action) reasonably foreseeable. The notion of corrective justice provides a way to understand the appropriateness of this judicially commonplace formula.

The key is to see that asking whether the plaintiff's injury was reasonably foreseeable makes the question of liability sensitive to different descriptions of that injury and hence to different descriptions of the risk created by the defendant.[76] At one end of a spectrum, it might be said that, in acting as he did, the defendant created a risk that *an* injury might occur in *one manner or another* to *someone or other.* Under such a description, we are bound to regard the plaintiff's injury as a foreseeable consequence of his action (for every action carries such a generally describable risk). At the other end of the spectrum, it might be said that the defendant created a risk of a cut with such-and-such microstructure occurring in such-and-such manner to Mr. so-and-so; and under some such fine-grained description, we shall naturally be compelled to say that the plaintiff's injury was not a foreseeable consequence of what the defendant did. Conceived, then, as a question of reasonable foreseeability, the question of proximate cause becomes essentially this: Is an appropriate specification of what makes the defendant's action wrongful – a specification of the risk he created in terms of features that pertain to any practical situation (i.e., risk of what, occurring in what manner, to whom) – such as to describe the (type of) injury that befell the plaintiff. If it is – if the plaintiff's injury is the materialization of a risk that makes the defendant's conduct wrongful – then the plaintiff has been wrongfully injured. (She has been injured, in other words, by an action which is wrongful not in general but specifically in virtue of the prospect of her suffering it.) So conceived, the requirement of proximate cause makes one person's doing and another's suffering legally significant – i.e., a basis for liability and recovery – just when they are the doing and suffering of the same wrong.

Of course, the appropriateness of liability in any particular case will depend, on this account, on an appropriate description of the defendant's creation of risk. The notion of reasonable forseeability does not function, independently of such a description, as a decision procedure for liability;[77] it simply exhibits the sort of judgment the law, as matter of justice, must make: a judgment about the appropriate description of one's person's doing in light of complaints from another for whom it is a case of "being done to." In arguments about a particular case, we can naturally expect the plaintiff to describe the defendant's risk-creation in the most general terms consistent with the action's continuing to seem wrongful (unreasonable); and we can expect the defendant to emphasize any unusual details of the situation.[78] Insofar as it is just, the law seeks a judgment that privileges the point of view of neither plaintiff nor defendant, a judgment that describes what happened neither too generally (at the limit, identifying wrongdoing with all of its fortuitous consequences) nor too specifically (at the limit, making omniscience a condition of identifying wrongdoing with any of its consequences); hence a judgment that, in the sense pertinent to transactions, treats the parties as equals.[79]

V. Theory and Practice

> But let us take it as agreed in advance that every account of the actions we must do has to be stated in outline, not exactly.
>
> Aristotle, *Nicomachean Ethics,* 1104a

V.1

On the foregoing account, the concept of corrective justice stands to the Basic Rule of tort liability (1) as the Basic Rule stands to such judicial elaborations as "reasonable care" and "reasonable foreseeability"; and (2) as these elaborations stand to the judgments which either further articulate the law or determine liability in particular cases (e.g., "reasonable care requires so-and-so in such-and-such circumstances" or "the defendant failed to exercise reasonable care"). In short, one gets from corrective justice to liability verdicts through applicative judgments which spell out what corrective justice requires in various (types of) circumstances. Since the Basic Rule spells this out in one type of circum-

stance (personal injury),[80] and since the judicial elaboration of this Rule spells this out further in particular cases of this type, it may be said that judges who elaborate the Basic Rule attempt to discern the significance of the facts of particular cases in light of a correct grasp of what justice requires. But it is no part of this account that what justice requires must be fully graspable apart from the sort of practical thinking which informs the juridical consideration of particular cases. Hence, there need be no "principle" of corrective justice which is sufficiently spelled out so as to be serviceable in a validation of legal requirements without relying on such jurisprudence.

Contemporary scholarship tends to represent efficiency and corrective justice as the central concepts in competing theories of tort law; and, in a general enough sense of "theory," that is true enough. Each account endeavors to exhibit tort law's unifying aims, and so might innocuously be called a theory, without prejudice to questions concerning the relation between such theoretically posited aims and the understandings which inform the law's everyday application. But efficiency belongs to a call for theory in a more specific sense, viz., an external grounding of legal understandings (Sections I, III.2). So the now familiar alignment of these accounts (as alternatives within a common theoretical project) is apt to make us suppose that corrective justice should play an analogous grounding role.[81] And that is apt to obscure certain possibilities concerning the way the law's self-understandings might be related to an understanding of its aim.

In this context, Aristotle's discussion seems notable because it is implausible to suppose, given its abstractness, that the relation it contemplates between corrective justice and everyday legal thinking could be anything other than a casuistic specification: A specification, in that the law's advancement of corrective justice consists not in devising means to an already understood end, but in saying how, in various circumstances, the end of justice is to be understood; and casuistic, in that this endeavor (like the application of concepts such as reasonable care or reasonable foreseeability) calls for practical thought, the appropriateness of which cannot be demonstrated simply as a matter of deductive rationality.[82] So conceived, corrective justice is really only misleadingly described as an explanatory alternative to the functionalists' notion of efficiency in a theory of tort law; for if it is that, it must be no less an alternative to the functionalist's idea of what an appropriate theoretical explanation of the law must be.

Not surprisingly, there is a tendency among functionalists to dismiss summarily, if not simply to overlook, this sort of possibility for understanding tort law. Underlying this tendency are two related objections. The first is that we are not entitled, on such an understanding, to see legal rules and judgments as normatively constrained by corrective justice, as items that can be in accord with it (or not). The second objection is that such an understanding of tort law fails,

in any case, to give us what we need from a theory, namely, reasons for continued commitment to the institution of tort law in the face of other possibly attractive ways of allocating accident losses. These objections deserve a more careful treatment elsewhere. But the present discussion would be incomplete without at least a brief consideration of them.

V.2 First Objection: Lack of Constraint

Circling Aristotle's representation of equality as something intermediate between wrongful gain (doing at the expense of another's wrongful suffering) and wrongful loss (suffering on account of another's wrongdoing), Hans Kelsen takes this to mean that a judge who grasps the concept of corrective justice has a decision procedure for determining what is owed by one party to the other, just as (to extend Aristotle's own analogy) the geometer has a procedure for determining the midpoint of a line (Kelsen 1957, p. 130; *NE,* 1132a). Kelsen correctly sees, however, that Aristotle does not afford materials for such a procedure. Before the idea of wrongful gain and loss can find application, some further specification of the party's entitlements (e.g., of what constitutes a wrongful transaction, of who owes who what, etc.) is needed. Yet once such entitlements are specified, everything relevant to settling the case is in place, Kelsen reasons, so the further characterization of such transactions as involving a departure from "equality" can fall away as an unconstraining formalism (Kelsen 1957, pp.132–6). On this view, Aristotle offers merely the "tautology" (Kelsen 1957, p. 132) that justice requires giving each person his due without the normative materials for determining what, in any particular case, is due.

Posner has recently filed a similar complaint: "The definition of wrongs is prior to the duty of corrective justice, [so] society is always free, at least as a matter of corrective justice, to alter the definition of wrongful conduct."[83] This means that a concern to realize corrective justice does not by itself constrain society's options; additional normative considerations are needed if one legal definition of wrongful conduct is to be considered better than any other. It follows that Aristotle's discussion is useless, as it stands, for understanding tort law. If one legal regime really has, absent the requisite normative supplement, no better claim to accord with corrective justice than any other, talk of the duty of corrective justice can only refer to the existing regime of positive law, not to anything that appropriately explains it:

> Aristotle did not explain *why* he thought there was a duty of corrective justice, he merely explained what that duty was. [Posner's footnote: 'In fact . . . it is unclear to what extent Aristotle thought he was doing more than describing legal concepts that happened to be prevalent in his society.'] Economic analysis [*i.e., an analysis of what the regime of legal duty needs to be if it is to promote wealth or reduce costs – my note*] 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. (Posner 1981, p. 206)

This complaint, like Kelsen's, has two prongs. First, Aristotle lacks a principle from which any legal conceptions of wrong can autonomously be derived (rather, "the definition of wrongful conduct is prior . . ."). Second, his discussion is (therefore) explanatorily empty: At best, a statement *that* – not an answer to the question *why* – such conceptions are valid legal duties. The sort of explanatory materials Aristotle lacks, on this view, is shown by Posner's offer to supply them via the principle that legal intervention should maximize wealth.[84] From this principle, one might deduce the appropriate legal duties without relying on understandings or procedures which are juridical in any distinctive sense; all that is required is an application of empirical information about the effects of this or that legal intervention.

Is this complaint compelling? The first prong surely contains an accurate perception. But must we really accept the explanatory options offered in the second? Why should it be supposed that the explanatory usefulness of "corrective justice" depends on our being able to construe it as the answer to a "why" question, conceived as a demand for reasons for the law which can appear apart from the juridical conception of the situation (viz., unreasonable conduct, foreseeable harm, etc.) which brings such reasons into play? Why should it be supposed that "corrective justice" fails normatively to constrain such juridical conceptions unless (like, e.g., "wealth-maximization") it affords an independent test of whether, in point of application (in the way such conceptions sort out particular cases), they are correct?

Someone might think that these suppositions are simply the prerequisites of any entitlement to speak of corrective justice as an aim which the law might (or might not) get right. Application of this notion requires that there be a kind of conceptual distance between anything we take as the aim of legal practice and identifiable instances of the practice that are supposed to advance it.[85] If our concept of corrective justice is such that its specific requirements are to be grasped only through the kind of thinking which, in the circumstances of particular cases, engages such juridical notions as the reasonable person and proximate cause, then – the thought goes – the distance needed to get the notion of practical correctness into play is lacking. To purport to explain the law by reference to a concept of justice that is practice-dependent in this way is thus really only to explain the law in terms of itself, and so to work an empty tautology – the law is the law.[86]

But this argument proves too much. Whatever grounds may exist for thinking that tort law is merely an instrument, it can't generally be that practical aims are distant (in the way required for them to bear explanatory weight) only when they are fully specifiable independently of the circumstantially specific actions

that advance them; otherwise, there could be no rationalizations of action other than the instrumentalist kind. What should be said here is simply that corrective justice is not instrumentally distant from the law, but distant in a different way. Instrumental distance would consist in this, that, while there is no special problem saying what it would be for the law to realize a given aim, positing the aim (e.g., compensation, deterrence, or more generally accident cost reduction) does not yet single out any of the various measures (e.g., liability rules, criminal penalties, taxation, insurance schemes, etc.) that might feasibly be adopted as a means. Here, the notion of the law's getting things right is basically that of the expected efficacy of the means adopted in bringing about the relevant aim. The present notion of corrective justice is no less distant. Positing this aim does not yet single out the appropriate legal measures because (once again) a further question needs to be answered – not about the efficacy of various measures in realizing this aim, but, in this case, about what it would be, in this or that situation, for the aim to be realized. The law gets things right not when it efficaciously brings about corrective justice (that idea has no application here), but when its particular determinations express and make known its requirements.[87]

The present objection (concerning the unconstrainingness of corrective justice) follows, it seems, only on the basis of an unsupported assumption, namely, that we can't rationally regard one legal determination as more appropriate to corrective justice than another unless the notion of corrective justice comes sufficiently equipped (e.g., with the wealth-maximizing principle) so as to afford (given only some further knowledge of the facts) an independent procedure for deciding among such determinations.[88] One way to see why this assumption is questionable (and therefore in need of support) is to remember that the basic legal conceptions – e.g., proximate cause and reasonable care – do not themselves afford such a procedure for deciding particular cases. So on the basis of the present assumption, the threat of emptiness confronting corrective justice would be invidious, affecting the law at every level except the singular judgments – which create no law and have no analogical force as precedent (Section II.1) – concerning the liability of a particular party in a particular case. Leaving the assumption unquestioned, we must either deny that we can regard some judicial elaborations and applications of proximate cause or reasonable care as being genuinely in accord with those notions, or we must expect to find some utilitarian or other normative supplement in the offing which would furnish the requisite validating procedure.

Given these alternatives, one might view the present assumption (that there must be a decision procedure) as part of the tendency of thought that can make it seem more or less obvious that "all . . . legal requirements *must* ultimately justify themselves in functional terms" (Calabresi 1975, p. 105). Not questioning the assumption, the functionalist is someone who, correctly conceiving the law as a normative practice directed toward "getting things right," feels that our entitlement to applications of this notion can come only by way of an analysis

that would, at least in principle, (1) represent the law's time-honored terms as the outcomes of independently compelling reasoning (e.g., maximizing operations on wealth), and, by the same means, (2) validate determinate applications of them in particular cases.[89] However, the trouble with functionalism (Section III) indicates that the argument should run in the opposite direction. The normativity of the law, taken together with an appreciation of its resistance to functional analysis, should provide a reason for questioning the underlying assumption that is apt to make such analysis seem like the only alternative to an uncritical acceptance of the law. Dropping the assumption, one need not feel compelled to choose between mere acceptance of "the that" (without rational entitlement to the idea of the law sometimes getting things right) on the one hand, and an answer to the question "why" (as the functionalist conceives it) on the other. (Of course, accepting "the that" as it figures in this contrast is not a serious option.)

To say that functionalism is not obligatory is not, of course, to say that the wish for an external grounding of the law – and hence disappointment with a representation of corrective justice which leaves this wish unfulfilled – is not intelligible. (The law coercively structures our everyday life, so a derivation of it from principles which carry more immediate conviction would be a good thing, in whatever doctrinal areas this is possible.) The present point is simply that a dogmatic assumption blinds the functionalist to another possibility: An explanatory role for a notion of justice can be one which does not lead but simply supports – by continuing in a more abstract way – the sort of practical thinking instinct in the law's everyday elaboration. Cast in this supporting role, corrective justice would afford a reflective awareness of the configuration of a legal practice in which a certain kind of case (involving doing and suffering and claims of right) is central, and in which a distinctive type of ethical concern, special to that case, is in play. Reflecting on the legal understandings that describe this case (action, wrongdoing, causation, etc.) brings the relevant ethical concern into focus; and it is by grasping that concern (as distinct from other concerns, e.g., distributive justice or the moral assessment of character or conduct)[90] that we can understand – i.e., grasp the aim and unity of (Section I) – the practice.[91] Such an understanding does not float free of the jurisprudential endeavor to make the content of corrective justice explicit in particular cases, so conviction in the appropriateness of particular legal requirements is advanced here only by means continuous with the internal reflection that is a source of the law's development. But that is no reason to say that corrective justice affords *no* understanding or that "all legal requirements must be analyzed in functional terms." Such felt necessity might simply remind us of the freedom we stand to gain by taking seriously an old philosopher who does not share – and can therefore help make visible – the assumptions we have come to take for granted.[92]

V.3 Second Objection: Competing Concerns

Someone who agreed that corrective justice, as presently conceived, *does* normatively constrain the legal specification of duty might still wish to object that this conception leaves us without an answer to the question, Why are there such duties? understood in a different sense. The question, it will be said, is not why the requirements of corrective justice are to be specified *thus* (reasonable care, foreseeability, etc.); it is why, in a situation of transactional loss, the sort of fairness pertinent to corrective justice, however specified, should engage our concern at all. (Posner's remark in Section V.2 can be understood as raising both of these questions.[93])

Fueling the second question is the contemporary feeling that no injustice or other evil need be involved if a society were to treat some of the natural events which currently trigger tort liability as matters of distributive justice – triggering, e.g., contributions to, and withdrawals from, a social insurance scheme – instead. So in characterizing tort law as an expression of corrective justice, the objection goes, one has not yet given a justification of the *institution* of tort law, a reason for preferring it to other institutions for allocating loss.

This second objection exhibits a different source of the functionalist's motivation. By presenting tort law as an efficacious means of reducing accident costs, functional analysis, it might be said, answers the first "why" question (why fairness between two parties should be specified *thus*) by way of addressing the second (why be concerned, as an institutional matter, with fairness between *two* parties). No special animus to practical jurisprudence need be involved here, only the competition of other practical concerns. A procedure for deciding whether the law's specification of "corrective justice" is getting things right then emerges from the need for some procedure for deciding whether "corrective justice" or some other concern should govern the law's response to transactional loss.

Something is right in this objection, but, as a motivation for functionalism, it is confused. To begin with, certain regulatory and compensatory institutions, not involving two-party liability, are correctly described as "alternatives" to tort law; and this is so even if one understands tort law as an expression of corrective justice and not merely as one instrument (among others) for deterring and compensating. The reason is that tort liability has an effect on the allocation of loss, and moreover, would seem to have a point only where the welfare of persons is vulnerable, given the scarcity of resources, to the occurrence of loss.[94] If there were no other social mechanisms for reallocating loss, then to show that tort law applies a norm of transactional equality might be to exhibit sufficient reason for it. But as things are, tort law realizes only one possibility for allocating transactional losses among many. And since these losses engage concerns of welfare (as do nontransactional misfortunes like illness or natural dis-

aster), it seems right that the present argument still leaves an open question: that some losses stem from transactions does not, on this argument, itself determine that the only appropriate institutional concern, when this occurs, is with the rightness of the transaction rather than, as in other cases, with the fact of the loss.

Still, why should the persistence of this question incur any commitment, of the sort Posner avers, to manufacturing the norms of corrective justice out of more basic considerations of welfare, or to finding a justification which would make the value of tort law commensurate with that of other loss-allocating institutions? Such reductive commitments *would* follow from the thought that there must be a neutral decision procedure for choosing between such institutions. But what reason is there to think so? Moreover, if one accepts that the concern with corrective justice is a genuine concern (constraining and not empty: Section V.2), and if one accepts that tort law expresses such a concern, it can't simply be assumed that one could help oneself to such a (commensurate-making) justification of tort law and still be making contact with *that* concern. In the passage quoted, Posner speaks as if "corrective justice" described merely the formal (bi-polar) structure of an institution, leaving the question, Why have an institution with *that* structure open to whatever (other) reasons might be found.[95] But that is just to suppose that "corrective justice" merely represents the fact that the Basic Rule of a certain institution is an interpersonal liability rule ("X must compensate Y for wrongfully causing him harm"). And this fails to capture – clearly it misses – the point of the claim that tort law expresses corrective justice. Anyone passingly familiar with tort law knows that, under the institution's Basic Rule, X must compensate Y for wrongfully causing him harm. The claim is that X must do so *because* she has wrongfully caused Y harm.[96] That is a claim, not just about what the rules of an institution are, but about a distinctive kind of reason captured in those rules. It may not follow from this claim that there must be a legal institution embodying such rules (other concerns may compete), only that when there is, the reasons for interpersonal liability derive from the requirements of transactional equality and not merely from the significance of loss (such as that may be), independently conceived.

V.4

Hence, understanding tort law as an expression of Aristotelean corrective justice does not oblige us to think that it should not be abolished; the theoretical gain is simply an appropriate understanding (which is not merely a sociology or history of legal rules: see Section I) of what it is we may have reasons to abolish. (On a functionalist view, the abolitionist proposal is essentially a proposal to abolish a practice for which no good reason can be found at all – a superstition.) On the other hand, nothing in the foregoing argument rules out the possibility that the Aristotelean notion of corrective justice could be elaborated in

ways that, without reducing it to operations on some lowest common denominator of loss, would offer more positive support to tort law where it occludes other ways of allocating the burdens of accidents. My present purpose, however, has not been to make a positive case for (or against) tort law, but to bring certain issues concerning what it is to understand it (issues apt to be obscured in the standard contrast between efficiency and corrective justice as alternatives within a theory of tort) into sharper focus. To do so, my strategy has been to take the notion of corrective justice in its original and most anemic form, and to argue for its superiority, even in that form, over functionalist goals in understanding tort law. This seems especially significant in an intellectual environment where feelings of necessity accompany the later understanding.

Wittgenstein said: "In ethics we have to keep from assuming that reasons must really be of a different sort from what they are seen to be."[97] By "ethics," Wittgenstein meant the endeavor to bring the reasons for our practices to mind. Part of what makes this endeavor difficult for us, he was suggesting, is that we are apt to see what our reasons are but then to discount what we see by thinking that those simply couldn't be our reasons: Our reasons must really be of a "different sort." This implies that we have a preconceived idea of the sort of reasons we are looking for in ethics, and that we are disappointed when what we find does not fit our idea. What sort of preconception might this be? The remark I have quoted from Book I of *Nicomachean Ethics* suggests a possible answer: "Nor should we make the same demand for an explanation in all cases. Rather, it is sufficient in some cases to have 'the that' shown properly. This is so where 'the that' is a first thing and a starting point" (*NE,* 1098b1). Aristotle calls attention to a temptation, in studying ethics, to make a certain demand for explanation. Having seen that such-and-such are reasons for our practice, we are apt, he implies, to demand an account of why our practice proceeds on such grounds. At first blush this looks like a different point than Wittgenstein's. But the two remarks come together when we see that this call for theory amounts to a demand for further reasons or grounds – some antecedent or more primordial starting point. If we make such a demand, then we are inclined to think that the real grounds of our practices lie somewhere beyond the ones we have managed to bring into view; and this involves the idea of a different sort of reason in the sense of a distinction between reasons that strike us as sufficiently explanatory of our practice and those that do not. We might express the intimacy between Aristotle's and Wittgenstein's remarks by saying that the explanatory demand against which Aristotle cautions is expressed in – it is the source of – our thinking that "our reasons must really be of a different sort from what they are seen to be." The trouble with thinking this, both authors imply, is that we thereby fail to see the significance of the grounds which lie before us.

Is the contemporary endeavor to understand tort law sometimes impeded by a form of the trouble which Wittgenstein and Aristotle had in mind? If it is, Aristotle's presentation of corrective justice is exemplary, both in its relative clarity

about the limited sense in which it comprises a theory of the law, and, by the same token, in its capacity to appear disappointingly empty, perhaps even somewhat mysterious: How could such a "spare and seemingly platitudinous concept of justice be thought an advance and . . . echo down through the centuries?" (Posner 1990, p. 316). For those who consider themselves free of the assumptions that produce this mystery, Aristotle's discussion may be exemplary in a further way. Instead of having to suppose that what that discussion provides could be "little more than a skeletal description" of corrective justice,[98] theorists of corrective justice might be challenged to consider whether Aristotle didn't in fact grasp the essential point to be made about it; namely, that corrective justice is what one grasps when one sees the law's treatment of doing and suffering as reason-involving. Of course, Aristotle's account was bound to be only an outline (*NE,* 1104a). But one might ask: Can it really be supposed that the work of fleshing out its more specific content was begun by philosophers in the last decade or two and not carried out by jurists for centuries?

Notes

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1 See Coleman and Ripstein (1995), which suggested this formulation.

2 The rest of this introductory section sketches the main claims I shall be developing later.

3 On both points, I am indebted to similar arguments by Jules Coleman and Ernest Weinrib. See esp. Coleman (1992a) and (1988); Weinrib (1989c and 1995).

4 Many legal theorists find Aristotle's discussion of justice to be disappointingly empty. See e.g., Kelsen (1957); Posner (1990, pp. 313–34). As will emerge in Section V, I take the exemplarity of Aristotle's discussion to lie partly in its capacity to provoke this sort of response.

5 In a sophisticated legal culture these understandings are themselves typically shaped by reflection on the goodness and unity of the practice. Hence, a compendium like Prosser's reflects an attempt at understanding which is at work in the practice itself; it does not merely enumerate what, say, any judge in a torts case has ever said. This does not affect the present point.

6 Of course, it may be that tort law touches on no good at all. In that case, there is no "understanding" it except – in the way we might understand a superstition – through a sociology or psychology of "takings." This general description of "understanding" resembles Dworkin's idea of a "constructive interpretation of legal practice," but (as suits my present purposes) it is much less specific. See Dworkin (1986, p. 225).

7 The classic analysis is Calabresi (1970).

8 Most functionalists appear to take this for granted. Pending further argument, the most that can be said, I think, is that having fewer accident costs is a worthwhile aim, *other things being equal.* It hardly seems obvious that even some efficacious means to cost-justified accident prevention couldn't be unattractive from the standpoint of values not well described in terms of 'costs.' See also note 27.

9 Correlatively, the functionalist's purposes would be frustrated if the goals invoked were such as to require the law to specify their content – e.g., "the function of tort liability is to protect a person's projects against *wrongful* interference" (either leaving it at that or connecting the idea of wrongful interference to such abstract values as equality, liberty, or autonomy).

10 Sugarman (1985, pp. 616–17). See also Franklin (1967) and Ison (1967).

11 Quoted in Weinrib (1994, p. 284 n. 15). In speaking of "correlativity" in this section, I am following Weinrib.

12 A complete account of tort would require discussion of other grounds of wrongdoing (e.g., intentional harm and strict liability), as well as special causes of action (e.g., trespass and nuisance). For my present purpose – viz., to suggest how corrective justice might function as a reason-revealing (but internal) characterization of the law – it is sufficient to focus on negligence. For discussion of other aspects of tort in relation to corrective justice, see Weinrib (1995, pp. 171–203).

13 Generally, whenever there is room for reasonable disagreement, the law instructs the jury in the concept to be applied and tolerates its decision. See *Illinois Pattern Jury Instructions Civil* §10.01 (3rd ed. 1990): "The law *does not say* how a reasonably careful person would act under [the] circumstances. That is for you to decide."

14 *California Model Jury Instructions* §3.10 (8th ed., 1994).

15 See *Vaughan v. Menlove,* 2 Bing. (N.C.) 468, 133 Eng. Rep. 490 (1837).

16 *Palsgraf v. Long Island Railroad,* 162 N.E. 99 (NY 1926).

17 Or assuming, at least, that there is a reasonable question (one appropriate for a jury, see Section II.1) about whether the reasonable person would have done that sort of thing.

18 "Tragic" in Aristotle's sense (*Poetics,* ch. 11), which involves the thought that the consequences attributable to a person's action exceed intention and expectation.

19 It might be maintained, as it was by the dissenting judge, that since the defendant's action was unreasonable in virtue of the risks it created to *someone,* the defendant has done something wrong, about which the plaintiff, as someone consequently injured, might legitimately complain. On this conception, proximate cause appears as a limitation, based on judicial "policy," concerning who may recover for wrongful injury. See *Palsgraf,* p. 103. On the majority's view, such a conception represents various tort plaintiffs as suing as vicarious beneficiaries of wrongs done to someone else: "Negligence, like risk . . . is a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all" (p. 101). The significance of this thought (*viz.,* that tortious wrongdoing requires an injury falling within the ambit of the defendant's unreasonable risk-taking) will become apparent later. I discuss the dissenting view briefly at note 79.

20 Clearly, the distinction between creating risk and merely failing to head one off itself depends upon certain normative expectations concerning when others may reasonably rely on our concern for them. But this shouldn't trouble us. To explain the idea of action by reference to creation of risk would be empty if the normative expectations giving content to the latter were only determined by positive declarations of law. Such expectations are *sometimes* determined by the law, but they also grow out of basic social understandings to which the law is responsive.

21 Much is left out for the sake of simplicity, e.g., limitations on duty with respect to certain types of injuries, burdens of proof, and defenses that negate or mitigate liability.

22 The wideness of the obligation is in fact one of the standard reasons for the partial tort immunity of municipal and state agencies. See, e.g., *Riss v. City of New York,* 22 N.Y.2d 579

(1968). It also figures in the judicial observation that the duty asserted by the plaintiff in a case of nonfeasance is at best a moral duty of beneficence, not a duty appropriately enforceable by law. See, e.g., *Union Pacific Ry. V. Cappier,* 66 Kan. 649 (1903).

[23] Again, this is a distinctive fact about tort, however obvious. With a social security scheme, the conditions under which one person is obliged to pay are independent of those under which another is entitled to benefits.

[24] See *Sindell v. Abbott Laboratories,* 607 P.2d 924 (1980).

[25] See Holmes (1963, p. 86) for this (mistaken) rationale.

[26] See *Breunig v. American Family Insurance Company,* 173 N.S.2d 619 (1970). Besides asking why every defendant must come up to a standard of social ordinariness, one might also ask why meeting this standard is generally sufficient to avoid liability. Shouldn't the law reflect higher ideals? Shouldn't it ask persons to be *caring,* and not leave them free to act with indifference to an imperiled neighbor? See Bender (1988). In addition, isn't it naive to suppose that such notions as reasonable care or proximate cause really determine the status of a person's conduct in a particular case? Doesn't the normative power of these notions arise only courtesy of some interpretation of them, so that, in its settled understandings of what is reasonable, the law must be depending on political considerations which are hidden from view? In Section IV.4, I will suggest how understanding tort law as an expression of corrective justice provides directions for answering these and the other questions presented in the text.

[27] There is room for doubt (not to be pursued here) about whether wealth-maximization or Kaldor-Hicks efficiency provides the right sort of item for the role of "undoubted piece of normative Reality." In what sense is "society is better off," as Posner puts it, when (only) cost-effective measures to prevent accidents are adopted? See Posner (1972). If society's welfare is simply defined as the state-of-affairs in which its collective resources are worth more rather than less, one might ask whether it is plausible to think that such a state-of-affairs is an unconditional good. See Dworkin (1980).

[28] The suspicion that a substantial assumption is masquerading here as a platitude might be brought out by asking: If the proposition "that the law is made by us to serve human needs" is really undeniable, why should Calabresi think it significantly *assertable?* Why, indeed (starting with Holmes' often-repeated remark that the law is not "a brooding omnipresence in the sky") has it has seemed somehow critical to assert, under the banner of "realism," the connection of law to "*our* purposes"? The implication is that functional analysis rejects a gratifying illusion concerning transcendent sources of law. Cf. Frank (1963, p. 277). Of course, the intelligibility of that implication requires that we at least be able to make sense of the rejected (transcendent) conceptions. Compare: "Cooking and clothing are human constructs," where the word "human" enters into an informative and nonmetaphysical contrast to things which are not human, but not thereby beyond this world.

[29] I don't mean that it would be clear what was meant by calling these "human constructs" beyond their involving certain forms of human activity. The point is that the same unclarity is present in applying the term to certain aspects of the law.

[30] This suggests a way of understanding one of Aristotle's remarks in his discussion of justice: "With us, though presumably not at all with the gods, there is such a thing as what is natural, but still all is changeable; despite the change there is such a thing as what is natural and what is not." *NE,* 1134b29.

[31] "What has to be accepted, the given, is – so one could say – forms of life" (Ludwig Wittgenstein 1958, p. 226). The present discussion of "human constructs" owes a debt to Stanley Cavell's discussion of what Wittgenstein means by "forms of life." See, e.g., Cavell (1989, pp. 40–52).

[32] Someone might wish to distinguish this question from that of the law's instrumentality by saying such norms are *moral* norms and only legal in virtue of their enforcement by legal institutions. I think of Sections IV and V as offering considerations that may lessen the temptation to say this.

[33] Immanuel Kant (1991, p. 129 [318]; see also p. 123 [311]).

[34] That the felt necessity of functional analysis of tort law is a false necessity, is something best seen after consideration of corrective justice as another possibility. I return to this claim in Section V.

[35] My brief discussion of the two main species of accident costs follows Calabresi (1970). A more complete taxonomy would also include (as Calabresi points out) the expense of administering any system which seeks – through deterrence and compensation – to reduce the first two species of costs.

[36] See Posner (1972). The expected cost of an accident is the value of the loss discounted by the probability of its occurrence.

[37] See James (1948, p. 547): "[W]hile no social good may come from the mere shifting of a loss, society does benefit from the wide and regular distribution of losses." Calabresi calls this "secondary" cost reduction. His version of the theory of accident liability is more pluralistic than Posner's, which focuses merely on reducing "primary" costs (i.e., the sum of accident and prevention costs). The idea that compensation is a way of benefiting society by reducing accident costs is not inconsistent with conceiving the value of compensation in terms of its responding to urgent needs; it merely requires the additional thought that the value of responding to needs derives from a larger concern with social costs. The criticism below of the idea of a compensation goal (Section III.4) applies to *either* conception of it.

[38] Someone might respond that it is not the Basic Rule of negligence but that of strict liability for defective products which best reflects the idea of a compensation or loss-reallocation goal. See, e.g., *Escola v. Coca-Cola Bottling Co.,* 150 P.2d 436, 440 (Justice Traynor, concurring). This (self-consciously functionalist) innovation in products liability law does not affect the present point, however. Even such liability does not eliminate the causation requirement. And the law standardly insists on the Basic Rule in the face of analogous opportunities to shift losses to those who can insure against them and/or diffuse them through market prices. See, e.g., *Hammontree v. Jenner,* 20 Cal. App. 3d 528 (1971).

[39] As one functionalist critic of tort law puts it: "If we put fault aside and concentrate on the need for compensation alone, tort victims who obtain big recoveries are not more deserving than the sick, the congenitally disabled, the elderly, people injured at work, wounded soldiers, and the unemployed, all of whom are compensated through other social mechanisms" (Sugarman 1985, pp. 595–6).

[40] Indeed, since compensation, on this account, is most desirable when its source is wealthy or has access to an insurance fund (or other means of loss-spreading), there should be reason *not* to limit the sources of compensation to a single defendant identified on the basis of wrongdoing.

[41] As Jules Coleman puts it, it looks like to account for the defendant's obligation, we need an agent-specific reason: something analogous to the unshared reason that someone would have to do something she has promised to do. See Coleman (1992a, pp. 309–26).

[42] See generally, Weinrib (1989c, pp. 503–10); Coleman (1992a, pp. 374–84).

[43] On the pertinence here of the idea of a "bounty," see Weinrib (1989c).

[44] It won't do to say that it is by virtue of the transaction that the victim is a useful accessory for enforcing the norm of efficiency. At best, this says that the transaction is *epistemically* significant: it puts the victim in a relatively good position to know of efficiency violations. (See Jules Coleman's contribution to this book.) But participant understandings accord the transaction a normative significance which is not merely epistemic.

[45] I think Weinrib mistakenly denies this. See Stone (1996).

[46] I am indebted to Arthur Ripstein for this thought, which suggests, in effect, a *reductio ad absurdum* of the private-regulation picture.

[47] For this argument, see Weinrib (1989c, pp. 506–9). The appropriate incentive to efficiency is in place whenever the defendant faces a penalty whose present value (i.e., discounted by the likelihood that he will have to pay it) is greater than the cost of efficient precautions. Posner denies that the appropriate penalty could be anything other than the plaintiff's loss, on pain of either over- or under-spending on accident prevention. But it is hard to see why. Suppose that B (the cost of precautions) is 5, L (the victim's actual damages) are 100 and P (the probability of the accident) is 1/10. Since B is less than LP, the defendant is liable for negligence. But what should the penalty against him be? Wouldn't any amount over 50 provide the right incentive to spend the required 5 on accident prevention?

[48] Naturally, such stipulation runs the risk of making the object to be theorized, tort law, disappear entirely. See Coleman (1988, pp. 1250–3).

[49] See Franklin (1967, p. 784). Nowhere is tort law's frustration of these goals more visible than in the contemporary doctrinal pressures to relax the causation requirement when doing so would make it possible to structure a compensation scheme for a needy group of plaintiffs (see, e.g., *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 1989); or in the tendency to apply causal requirements in ways that are sensitive to considerations about which party is a better conduit of loss-spreading (see, e.g., Petition of Kinsman Transit Co., 338 F.2d 708, 2d Cir., 1964). But clearly, there are limits to the extent to which such goals can be accomplished within the bi-polar setting of tort adjudication, and the price of accomplishing them there, as Franklin points out, is haphazardness.

[50] Thus, for Calabresi, it is "axiomatic that the principle function of accident law is to reduce [the cost of accidents]" Calabresi (1970, p. 26).

[51] It should be noted that Calabresi himself tends to remain agnostic on the empirical question of which legal measures are desirable from the point of view of accident cost-reduction. See, e.g., Calabresi (1970, p. 14–15).

[52] See Calabresi, (1975, p. 107): "Terms with an historical common law gloss permit us to consider goals . . . that we do not want to spell out or too obviously assign to judicial institutions."

[53] Consider an analogy: Conceiving of tort law as a legal response to the costs of accidents is like conceiving of honesty, trustworthiness and love as a way of "enhancing an individual's ability to maximize his satisfactions" by reducing the transaction costs of repeated negotiations among parties to the relationship. Posner (1977, pp. 185–6). One wants to say that here these values go missing, that someone who conceives of their appeal entirely in such terms hasn't got the relevant items in view.

[54] For others, a concern with compensation and deterrence could provide a reason for revising a legal practice which turned out to frustrate such goals (conclusion one), even if an appropriate understanding of *what* is to be thus revised is not to be manufactured entirely out of the same cloth (conclusion two). See Sections V.3 and V.4.

[55] As I read it, decency/baseness figures in the quoted passage as an example of an allocational criterion, the one appropriate to aristocracies. Cf. Aristotle, *NE,* 1131a25.

[56] Note that, alongside the point that society benefits by spreading, the functionalist's compensation goal is often given a second, and more explicitly distributive ("to each according to his ____"), rationale. Fairness, it is said, requires that the costs of a beneficial activity be distributed among all of its beneficiaries. See, e.g., James (1948, p. 550).

[57] On agent-neutral reasons as a mark of distributive as opposed to corrective justice, see Coleman (1992a, p. 355). Doesn't tort law, when it requires one person to repair another's loss, also require that the resources of a community be allocated in a certain way? The answer is "no." Tort law is indifferent, for example, to whether the defendant has entered into a contract to insure against such possible liability.

[58] I return to the idea that there ought to be a test for the correctness of judgments specifying the equality of corrective justice in Section V.

[59] See *NE,* 1130b31–1131a1, 1131b25.

[60] There are further problems for the present reading. The focus of corrective justice on wrongful transactions looks inexplicably narrow, since a distributive pattern can be disturbed by transactions that are not wrongful as well as by natural events which are not transactions. For discussion of the objections to the present reading, see Weinrib (1995, p. 79) and Benson (1992, pp. 530–1). These objections are not inconsistent with the thought that practices of corrective justice might loose their moral force against a background of serious distributive inequality. That thought does not require the idea that the justice in "corrective justice" consists in returning to a distributive *status quo ante.*

[61] See *NE,* 1132a10–14 ("we speak of profit . . . even if that is not the proper word for some cases") which indicates that in cases of personal injury the victim's loss is used as the measure of the defendant's gain. Aquinas' gloss points out that the "loss is so called from one having less than he should have." Thomas Aquinas, *Summa Theologiae* II–II, A. 62, Art. 5 (Aquinas, 1975). The same may be said about the "gain" in question: By having that which properly belongs to the victim, the injurer has more than he should have. Ernest Weinrib has helpfully shown that this structure holds in a symmetrical fashion in cases of unjust enrichment where the law requires that the defendant's gain be "at the plaintiff's expense." Just as, in a case of personal injury, talk of the defendant's gain can be a way of representing the fact that the defendant has wrongfully inflicted a loss, so, in a case where (say) the defendant profits from the unauthorized use of the plaintiff's property, talk of the plaintiff's loss can be a way of representing the fact that such profit is a wrong to the plaintiff. See Weinrib (1995, pp. 140–2). The idea that in a case of wrongful injury, the defendant gains by having that which belongs to the plaintiff is reversed in Ripstein and Coleman's account of corrective justice: the loss suffered by the victim, they say, properly belongs to the injurer. See Coleman and Ripstein (1995); Ripstein (1999, pp. 24–58). These seem to me to be equivalent ways of representing what one person owes another in a case of wrongful transaction. Heavy weather is often made of the fact that equivalent losses and gains could only be fortuitous in a case of personal injury. See, e.g., Fletcher (1993, p. 1668); Perry (1992b, pp. 457–61). But given the alternative reading favored by Aristotle, this is misconceived as an objection.

[62] Rejection of this reading of the equality of corrective justice is not inconsistent, I think, with Jules Coleman's thought (see his contribution to this volume) that corrective and distributive justice share a common concern with the allocation of losses. See also Ripstein (1999). The present point – not disputed by these authors – is simply that the norms per-

tinent to loss allocation in cases of transactions are not to be established on the basis of allocational entitlements given prior to reflection on what justice requires in such cases.

[63] Cf. Kelsen (1957); Posner (1981). I take up Kelsen's and Posner's view of Aristotle's discussion more explicitly in Section V.

[64] See p. 134 above.

[65] This captures, I think Posner's way of construing Aristotle in Posner (1981). See esp. pp 190–2, 193, 203.

[66] On this less formal reading, one might say that the problem of just transaction is related to the problems of "speaking justly," where to "speak justly" is to apply – and thus to work out the sense of – the predicates which describe a liability-incurring relation with another in light of a basic norm stemming from the fact that the other is a speaker too.

[67] I am following Ackrill (1980), esp. pp. 95–7.

[68] Cf. NE 1134a: "Since it is possible to do injustice without thereby being unjust . . . [someone might fail to be] a thief, though he stole . . . an adulterer though he committed adultery, and so on in the other cases." This seems to me to record the fact that we are not prepared to close the gap in the way presently contemplated. As I read it, the point of Aristotle's reference to something that "will be unjust without thereby being an act of injustice, if it is not also voluntary" (1135a) is not that the only sort of wrongdoing there could be is voluntary wrongdoing, but that this is the only sort of wrongdoing that appears from the point of view of the special ethical interest in blameworthy action.

[69] As Aristotle puts it, "when one is wounded and the other wounds, or one kills and the other is killed, the action and suffering are unequally divided" (*NE,* 1132a5–10) – that is, they appear as wrongful in a legal judgement that treats the parties as equals in the present sense.

[70] I do not think this is inconsistent with the thought which might be found in Aristotle's earlier discussion of responsibility (starting at *NE,* BK. III, ch. 1), namely, 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. See Stone (1996, pp. 248–9).

[71] "No special difficulty" – save perhaps that of understanding how it is so much as possible for a wrongdoer's provision of compensation not only to repair a loss but (thereby) also to cancel or annul a wrong. That this is possible, I would tentatively hazard to say, is a matter of the basic social significance of compensation, though certain ways of thinking about wrong may lead us to think that it is in fact impossible. I touch on this in Stone (1996).

[72] *Livingstone v. Rawyards Coal Co.,* 5 A.C. 25, 39 (1880, Lord Blackburn).

[73] To be sure, tort law does recognize special circumstances which constitute exceptions to the general rule that, apart from not injuring others, there is no duty to act for their benefit. These circumstances bring into play special justifications which cannot adequately be discussed here. The opposite case – liability for doing apart from suffering – is, of course, familiar to the criminal (but not the civil) law.

[74] Here again, the reasons for certain established exceptions – principally in cases involving physical incapacity, children, sudden derangement, and (more controversially) emergency – cannot adequately be discussed here.

[75] Cf. Holmes' (1963, p. 89) suggestion that expedience is the basis of the objective standard.

[76] In describing the plaintiff's injury (as one of such-and-such type, occurring in such and such manner, etc.) one is specifying at some level of generality the nature of one the risks created by the defendant's conduct (namely, the one which materialized in injury to the plaintiff).

[77] Cf. Prosser (1953) for the mistaken impression that it should function as such a decision procedure.

[78] See Morris (1952, pp. 196–8).

[79] The dissenting judge in *Palsgraf* proposed a different formulation of the requirement of proximate cause, one which is also widely used today: the plaintiff's injury must be a direct consequence of the defendant's wrongdoing, not too remote. Cardozo's preference for the idiom of "foreseeability" stems, I think, from the fact that it is naturally sensitive (in a way the idiom of "proximity" or "remoteness" is not) to just the sort of descriptions of action or risk that interest us when we are characterizing wrongdoing. Cardozo sought to represent the law's duty-limiting judgments as something more than an expedient limitation on the set of injured persons who may complain about wrongdoing; and to this end, he exploited the fact that such a limitation seemed already implicit in the way the law spoke about "negligence" itself. See, for example, the explanation of negligence in terms of foreseeability by Brett, M.R. in *Heaven v. Pender,* 11Q.B.D. 503 (1883), p. 509. By "taking reasonable foreseeability of injury" as the outer bounds of the basic tort duty to take care – Cardozo realized – no further issue of "proximity" in causation need arise; the question of proximate cause would be internal to the question of the defendant's wrongdoing.

Talk of causal proximity or remoteness is apt to convey an inappropriate image of an action as an arrow traversing an infinite space. Given the defendant's wrongdoing, the problem is to divide the space into a proximate part (the proper consequences of the action) and a more remote part (the action's fortuitous upshots). As a representation of the sort of judgments the law makes, this is not exactly wrong. But it is apt to make us think that in identifying an act of wrongdoing we have not yet mentioned any reason for drawing the line between the two spaces in one place rather than another; so it is apt to invite an inquiry into why it might be a good idea, or a good policy, either to enlarge or diminish the space of the "proper consequences" of a wrongdoer's action: "What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics" (*Palsgraf,* p. 103, Andrews J., dissenting). That every case calls for a judgment that is not deductively determined by *either* formulation of proximate cause (hence is not a matter of "logic") must be granted. But Andrews' impression that such a judgment is therefore "arbitrary" or "political" seems to be partly an effect of the way the idiom of directness has clouded the issue. That idiom makes it natural to think that some reason *over and above* the defendant's wrongdoing and the plaintiff's consequent injury is needed for holding the defendant liable and allowing the plaintiff to recover. One may say that Cardozo, in representing proximate cause as internal to the question of the defendant's wrongdoing represents it as a specification of the question of whether the defendant is responsible (in a way others are not) for the misfortunes of the plaintiff; whereas, for Andrews, the question becomes one of whether it would be a good idea to *hold* the defendant responsible (where to "hold responsible" means simply "to make liable").

[80] The focus on negligence in recent discussions of corrective justice shouldn't lead one to forget that the law's treatment of other situations (e.g., contract and unjust enrichment) might also be understood as expressing requirements of corrective justice. On contract, see Benson (1989).

[81] Thus, it has become common to contrast functionalist theories which ground the law in the principle of economic efficiency with theories which endeavor to ground the law in

some principle of corrective justice. See, for example, Coleman (1982, p. 421). Coleman is reciting a commonplace here, but I think his current view – which emphasizes the role of practice in specifying the content of corrective justice – is not in fact well described in the terms of this commonplace. Stephen Perry's view – insofar as it presents tort law as an expression of an independently-standing moral principle of "responsibility for outcomes" – could much better be described as an attempt at grounding. See Perry (1992b). In other cases, talk of a "theory" of tort which "grounds" it in a principle of corrective justice simply uses these words without the specificity they have for the functionalist.

[82] Clearly, the forgoing account of the Basic Rule (Section IV.4) was not a deduction of it from a principle of corrective justice. The argument relied on the recognition that alternatives to the Basic Rule (e.g., leaving losses where they fall, shifting losses regardless of fault or foreseeability, or excusing the injurer on the basis of his intentions) comprise forms of transactional unfairness.

[83] Posner (1990, p. 322). See also Posner (1981, pp. 190, 193, 203).

[84] Kelsen himself offers no positive fix; but he suggests that absent a procedure for concretely determining each person's due, any practical content which Aristotle discussion may seem to have must stem from its implicit reliance on positive law. See Kelsen (1957, pp. 128–36).

[85] See Jules Coleman's essay in this volume.

[86] For the complaint of tautology see Kelsen (1957, pp. 131, 132, 139); Posner (1990, p. 322). Cf. Weinrib (1995, p. 21): "[T]he purpose of private law is simply to be private law." Although such a formulation seems (against Weinrib's intentions) better designed to express the misunderstandings present in Posner's and Kelsen's reading of Aristotle than to avert them, it bears remembering that it is not compulsory to understand even the statement "the law is the law" as a "tautology." Compare: "War is war." What is intended might be something of the form "$\forall x(Fx \text{—>} Fx)$" (identity of concepts), or perhaps "a=a" (identity of objects); but, of course, it is often, familiarly enough, of the form "$\forall x(Fx \text{—>} Gx)$. Uninformative as they may be, one misunderstands such utterances if one takes them as tautologies.

[87] Cf. Hegel (1991, §211): "The principle of rightness becomes the law when . . . it is posited, i.e., when thinking makes it determinate for consciousness and makes it known as what is right and valid; and in acquiring this determinate character, the right becomes positive law in general."

[88] The assumption seems especially clear at various points in Kelsen's discussion: "[W]hat else could a 'theory' of morals present but general rules indicating that under certain conditions a certain human behavior ought to take place? And how can an acting individual know how to act morally in a concrete case if he does not know a general rule prescribing a definite conduct under definite conditions, identical with those under which he is acting? What the acting individual has to decide for himself is only the question as to whether the conditions determined by the general norm exist in his case – he has to decide the *questio facti,* not the *questio juris*" (Kelsen 1957, p. 382, note 37). The implication seems to be that moral thought moving from the general to the particular must take the form of applying rules which are sufficiently articulated in relation to particular situations such that the appropriateness of a particular action can be deduced from the rule once one sees what the facts of the situation are. (If the rule were such that the question of whether "the conditions determined by [it] exist" called for practical discernment beyond the mere recognition of what the facts are, the *questio facti* and the *questio juris* would loose their distinctness.)

[89] "At least in principle": Lack of empirical information about the effects of various legal rules may stand in the way of actually carrying out such an analysis. Note, in this regard, the following from Posner's review of Calabresi's *The Costs of Accidents:* "The book . . . furnishes a useful perspective on the problem of accident control but not a predicate for deciding between competing solutions" (Posner 1970, p. 646). Two thoughts appear here: first, a theory ought to supply a decision procedure; second, it furnishes a "useful perspective" even when it does not actually (given informational limitations) assist practical decision. More recently, in declining to replace a jury's judgment concerning "reasonableness" with a judgment derived from his own theory of negligence, Judge Posner observed:

> Ordinarily, and here, the parties do not give the jury the information required to quantify the variables that the Hand Formula [i.e., the cost of precautions and the expected cost of the accident], 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 precautions. . . . For many years to come juries may be forced to make rough judgments of reasonableness, intuiting rather than measuring the factors in the Hand Formula; and so long as their judgment is reasonable, the trial judge has no right to set it aside, let alone substitute his own judgment. *McCarty v. Pheasant Run, Inc.,* 826 F.2d 1554 (7th Cir.1987).

"Judgments of reasonableness," Posner implies, are really second best to judgments arrived at through an informed economic analysis. But because the law must continue to rely on the former, the economic theory of negligence "has greater analytic than operational significance." I take this to mean: It gives us an independent description of what makes such judgments correct. (The correct judgment is the one which would be reached on the basis of perfect information together with the premise that the objective of legal intervention is to maximize wealth.) Critics are sometimes surprised that functionalists are not more concerned with empirical questions. The speculative motivation for functionalism described here might help make this less surprising.

[90] Aristotle locates the distinctiveness of corrective justice by first distinguishing a special sense of justice (from justice as the whole of virtue), and then, within this special sense, distinguishing corrective from distributive justice. For this reason alone, it is incorrect to characterize his discussion of corrective justice as the "tautology" that each should be given his due (Kelsen 1957, p. 131). For both justice in the general sense and distributive justice also bear on what is due to persons. The contentfullness of Aristotle's discussion lies partly in these conceptual contrasts.

[91] This sentence has benefited from the discussion of related problems in McDowell (1998, p. 10). The possibility of understanding a legal practice in this way suggests one way of construing the jurists' talk of the "autonomy" of the law. The idea is not that the law is beyond human making and remaking (see Calabresi, Section III.2), but simply that its rational development might proceed in terms of an idea of justice that it already partially expresses and which is distinctively engaged by the situation with which it deals.

[92] This sentence reflects the fact that the demand for a decision procedure ought to have been

seen as especially questionable in the context of a reading of Aristotle, for it begs his questions concerning both the sort of "exactness" possible in ethics and the need for an external grounding. For Aristotle's relation to such a demand, see John McDowell, "Some Issues in Aristotle's Moral Psychology," in McDowell (1998). My discussion in the present section is especially indebted to McDowell's exploration of these issues.

[93] Because Posner takes his economic utilitarianism to answer both questions, he does not always clearly distinguish them. Hence: "If there are good reasons, grounded in considerations of social utility, for abolishing the wrong of negligently injuring another [in favor of a no-fault compensation plan], then the failure to compensate for such an injury is not a failure to compensate for *wrongful* injury. . . . [C]orrective justice is a procedural principle; the meaning of wrongful conduct must be sought elsewhere" (Posner 1981, p. 203). In calling corrective justice a "procedural principle," Posner seems to mean that it describes merely the general form of an interpersonal liability rule (see Section IV.3).

[94] See Ripstein (1999). It is not hard to understand, in this light, why a common feature of no-fault social insurance schemes (such as workman's compensation) is that the beneficiary surrenders the right to bring an action in tort.

[95] I suspect that ambiguities in terms like "institution" and "practice" in describing tort law makes it difficult to see the present issue clearly. It may be that an institution can be identified without understanding its aim or practical unity; that is not so with much of what we call "practices." These issues would need to be explored elsewhere.

[96] The claim, in effect, is that the "for" in "X must compensate Y for wrongfully causing him harm" introduces a reason and not merely a rule. Cf. Section IV.3. This is related to a point Peter Winch makes about punishment in Winch (1972, p. 218).

[97] Quoted in Rhees (1970, p. 103).

[98] Owen (1995, p. 1). Nothing in this paper should be taken to say that Aristotle's discussion of corrective justice leaves no room for useful elaboration. But it shouldn't be assumed that such elaboration must necessarily search, as Owen puts it, "for more specific content" (p. 1); the law itself, on the present argument, already does that. Such elaboration might rather relate Aristotle's notion to other abstract notions, such as ideas of personality (see Weinrib 1995), or ideals of liberalism (see Coleman and Ripstein 1996).

5

Tort Law and Tort Theory

Preliminary Reflections on Method*

JULES COLEMAN

There is a familiar and clear, if not always clearly understood, distinction between explanation and justification. Explanations seek to illuminate, or to deepen our understanding, whereas justifications seek to defend or legitimate actions, rules, institutions, practices, and the like. This could invite the mistaken view that explanation is a descriptive activity, whereas justification is a normative one. In fact, both are norm-governed activities, regulated, however, by different kinds of norms. The norms that govern explanation are theoretical ones like simplicity, coherence, elegance, and consilience, whereas the norms that govern justification are moral – norms of justice, virtue, goodness, and so on.

Some legal theorists, like Ronald Dworkin and Stephen Perry,[1] and especially the natural lawyers, believe that in the case of law, the projects of explanation and justification are deeply interdependent: that we cannot explain the concept of law without invoking at least some moral norms. While I disagree, this does not mean I believe that a philosophical explanation of the concept of law need not answer to norms of any sort. The debate may be framed in terms of the distinction between the following two kinds of claims: (1) Our concept of X depends in part on what our concept of X should be; (2) our concept of X depends in part on what X should be.[2] My view is that our concept of law depends on what that concept should be; it must, in other words, answer to theoretical norms. This does not mean that our concept of law depends on what *the law* should be. I deny, in other words, that the concept of law must answer to norms of justice, rightness, goodness, and so on.

Though the conflict between these two views lies at the heart of the current debate between the (somewhat misleadingly termed) normative and descriptive methodologies of jurisprudence, the conflict is nonetheless easily misunderstood.[3] It is important that it be made clear at the outset of my project, because my central claim in this essay – that our concept of tort law is best explained by appeal to a principle of corrective justice – could otherwise invite a natural confusion. The claim that tort law expresses and is best understood in terms of a conception of corrective justice does not rest on an endorsement of that con-