Backwards and Forwards with Tort Law (2005)

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Backwards and Forwards with Tort Law

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1. Torts as wrongs

Here is a lawyer's view of the law of torts. We might call it the 'textbook' view. A tort, on this view, is a kind of legal wrong, a breach of a legal obligation on the part of the tortfeasor. This ('primary') legal obligation, unlike a contractual obligation, is not created by the exercise of the tortfeasor's own legal power to bind herself. Rather it is imposed directly by the law. But, like a contractual obligation, it is owed to somebody in particular, some rightholder whose rights are violated by the commission of the wrong. This right-violation has legal consequences for both the tortfeasor and the rightholder. It places the tortfeasor under a new ('secondary') legal obligation towards the rightholder, namely an obligation of reparation. It also confers on the rightholder a legal power to enforce this new obligation against the tortfeasor by applying to the court for an award of damages against the tortfeasor. Such an award crystallises the tortfeasor's secondary legal obligation of reparation (by putting a money figure on it) and thereby activates further powers of enforcement

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(those available for liquidated debts). In principle the rightholder could also have enforced the original primary obligation against the tortfeasor by applying to the court for an injunction before the tort was committed. An injunction would have crystallised the primary legal obligation (by specifying more exactly which action would count as a violation of it), and would also have activated further powers of enforcement (penalties for contempt of court). But whereas a court retains discretion to deny the rightholder an injunction to crystallise and enforce the primary obligation, the court has no discretion to deny her an award of damages to crystallise and enforce the secondary obligation. If she makes out her case in tort, the court has a legal obligation to make her an award of damages, even if only a nominal one.[1] Thanks to her original (primary) legal right having been violated by the tortfeasor, to put it another way, the rightholder not only gains a new (secondary) legal right against the tortfeasor but also gains – for the first time – a legal right to be assisted by the court in the enforcement of her legal rights against the tortfeasor.

In sketching this view I have not separated the essential from the inessential nor the central from the peripheral. If the aim were to distinguish the law of torts from other parts of the law, what I have just said would be incomplete in some respects and too elaborate in others. But one feature that I picked out is clearly pivotal. Everything else turns on it. A tort, according to the textbook view, is a kind of legal wrong. It is the breach of a primary legal obligation by the tortfeasor. That somebody's (performed or anticipated) action qualifies as the breach of one of tort law's primary obligations is what lends legal consequences to that action so far as tort law is concerned. Both the rightholder

[1] Hence the practice of giving contemptuous damages – a farthing, say - to those making out unmeritorious but legally successful claims in tort. It is true of all rights (moral as well as legal) that relying on them can be unjustifiable or even inexcusable. Nevertheless they are rights and those against whom they are held remain bound by them. Cf. Aristotle *NE* 1137^{b}35 commenting on those who are 'sticklers for their rights in a bad way'.

and the court accordingly need to rely upon the legally wrongful character of the tortfeasor's (performed or anticipated) action in making the legal case for the award of damages or the issue of an injunction. They must identify it as the breach of a primary legal obligation. If they do not then they have not made out a case in the law of torts. For they have not identified a tort.

Some theorists are suspicious about the textbook view of the law of torts precisely because it makes this feature pivotal. They doubt whether there really are primary legal obligations in tort law. They say that in spite of appearances torts are not really wrongs at all. Here I will not go through all the colourful and clever but uniformly fallacious arguments that have been given for favouring this revisionist conclusion. But let me mention one particularly influential and particularly confused line of thought. It begins from the observation that many potential tortfeasors – perhaps more than ever before in this age of the ruthless multinational corporation - do not think of their so-called 'primary legal obligations' as obligatory and do not rely on them as obligations when they think about what to do. In fact they don't engage with the law of torts in terms of obligations at all, whether primary or secondary. If they give the law of torts any credence, what many potential tortfeasors worry about, and rely upon in thinking about what to do, are their potential legal *liabilities* – in other words, the legal powers that others may exercise against them. So why hold out for the view that potential tortfeasors *have* obligations in the law of torts? Why not regard all the law's talk of obligations as verbiage, and switch over to thinking of the law of torts as a system of legal liabilities, unencumbered by obligations? It is no answer to say that the liabilities that potential tortfeasors worry about are none other than liabilities to have their obligations crystallised and enforced, so that there must be obligations in the law of torts. This doesn't get us where we need to be. It leaves open that there are no obligations in the law of torts until they are crystallised by a

court. In which case a tort – not yet injuncted – is not yet a breach of any obligation, and the textbook view still fails.

This challenge to the textbook view misses something really obvious, or at any rate really obvious to lawyers. Even if few (or for that matter no) potential tortfeasors rely on the fact that they have obligations in the law of torts, plenty of other people *do* rely on that fact. In particular, those who have the associated legal powers of crystallisation and enforcement – rightholders bringing cases in tort and courts hearing cases in tort - rely extensively and systematically on the existence of the tortfeasor's primary legal obligation. For unless they identify someone's (performed or anticipated) action as the breach of such an obligation there is no case in tort for rightholders to bring or for courts to hear. A primary obligation and an action constituting its breach have to be identified to get the legal arguments started. That is the very point that is pivotal to the textbook view. So the revisionists face the following counter-challenge on behalf of the textbook view: How come what figures in the reasoning of potential tortfeasors should admittedly be regarded as pivotal to the law of torts, whereas what figures in the reasoning of the courts and those who argue cases before the courts should not be?

It is tolerably clear what the revisionists are thinking here. They are thinking of legal systems as systems of incentives, and legal obligations, in particular, as incentives to those who are bound by them. If those who are supposedly bound do not attend to their supposed obligations in their practical reasoning, the revisionist thinks, then there are no such obligations for there are none of the definitive effects of such obligations. By failing to incentivise, the law fails to obligate. But this conclusion is wide of the mark. Although legal obligations often do come bundled with incentives for their performance, legal obligations are not incentives and are not validated as obligations by their incentive effects. They are validated as obligations by their *normative* effects (including their effectiveness in furnishing legal arguments for the

creation by law of incentives for conformity with them).[2] It is no skin off the law's nose, in general, if those who have legal obligations never attend to those obligations in their reasoning. They may even be anarchists for all the law cares. So long as people do whatever they have a legal obligation to do – so long as in their actions they conform to the legal norm - it is all the same to the law whether they do so for legal reasons, for moral reasons, for prudential reasons, or indeed for no reason at all.

Normally, in short, we have no legal obligation, nor even a legal reason, to attend to legal obligations, or any other legal reasons, in our reasoning. But there are exceptions. The main exceptions are those that apply to officials of the legal system (including acting officials such as plaintiffs in civil suits). Some officials have a legal obligation to reason legally. Some have legal powers that are validly exercised only if exercised for legal reasons. Some are legally empowered to acquire further legal powers or rights only if they establish or at least assert legal reasons why they should acquire them. So if we want to know whether a certain legal obligation exists, there is normally no reason to be especially interested in the reasoning of those (non-officials) who are said to be bound by it. But there is often a reason to be interested in the reasoning of legal officials who rely on the existence of that legal obligation in fulfilling their own legal obligations or exercising their own legal powers or making a legal case for the extension of their own legal powers or rights.

The central role of official law-users in determining the incidence of legal obligations and powers was emphasised by H.L.A. Hart. Hart is most commonly remembered for the application of this point to the law of the constitution, where (he argued) all legal systems need official law-users (law-applying officials) to settle the incidence of ultimate legal obligations and

[2] On the justificatory relationship between obligations and incentives, see P.M.S. Hacker, 'Sanction Theories of Duty' in A.W.B. Simpson (ed), *Oxford Essays in Jurisprudence: Second Series* (Oxford 1973)

powers.[3] But Hart's main insight applies no less to the law of torts. If we want confirmation of the existence of primary legal obligations in the law of torts, we should be focusing not on the reasoning of potential tortfeasors but on the reasoning of the courts and the rightholders who appear before them. And in this reasoning we cannot deny the pivotal role of the tort itself. Some (performed or anticipated) action on the part of an alleged tortfeasor has to be identified as a breach of one of tort law's primary legal obligations or else a tort case never gets off the ground. The alleged tortfeasor has no case to answer.

2. Law and economics

Possibly some members of the so-called 'law and economics' movement think of legal systems as systems of incentives. If they do, then the difference between them and most other legal theorists is not that the economists are assessing the law against their own specialised economic benchmarks. The difference between them and most other legal theorists, rather, is that they are not assessing the law at all. The law has dropped out of their world. All they can see are certain accessories of the law, namely the incentives that are sometimes but not always attached to legal obligations and liabilities. Talk of legal obligations and liabilities is therefore of no interest to them except as a euphemistic (perhaps efficiently euphemistic, but still euphemistic) way of talking about threats, predictions, expectations, and deprivations.

But I doubt whether many legal economists consistently lose sight of the law in this way. More often, in the law and economics literature, the law is taken and assessed at face value. It is held to be made up of the very obligations and liabilities that legal officials rely upon in their legal reasoning and that make their way, accordingly, into the legal textbooks. The mainstream legal economists' question is whether people's having these legal

[3] *The Concept of Law* (2nd ed, Oxford 1994), 98-9

obligations and liabilities – understood not as incentives but as normative positions – is economically defensible.[4] Of course, the economic defence of a norm, like other purely instrumental defences of it, must be sensitive to the extent of conformity with it by those to whom it applies, and securing such conformity may sometimes require the addition of incentives. But this is where economists of law tend to wear their lawyers' hats for a moment. They often make the simplifying assumption, for the sake of conducting their economic assessments, that what the law says goes. The economic defensibility of a legal norm is then its economic defensibility assuming perfect, or at least very extensive, implementation. So, for example, the primary and secondary obligations of potential tortfeasors are apt to be treated as economically defensible if and only if conformity with them by all and only those who are bound by them would be economically defensible. And the enforcement powers of rightholders and courts in respect of breaches of those obligations are apt to be treated as economically defensible if and only if the valid exercise of those powers on every available occasion by all and only those who have them would be economically defensible. And so forth. If it turned out that in fact the legal norm in question were widely disregarded, its economic merits and demerits would call for radical reassessment.[5]

With or without these simplifying assumptions in place, the question of whether the law is economically defensible could of

[4] Consider the titles alone of the following articles, picked at random from a much longer list: George L. Priest, 'The Common Law Process and the Selection of Efficient Legal Rules', *Journal of Legal Studies* 6 (1977), 65; Ian Ayres and Robert Gertner, 'Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules', *Yale Law Journal* 101 (1992), 729; Louis Kaplow and Steven Shavell, 'Property Rules versus Liability Rules: an Economic Analysis', *Harvard Law Review* 109 (1996), 713.

[5] On the effects of varying the conformity assumptions in economic analysis of law, see Lewis Kornhuaser, 'The Economic Analysis of Law' in Edward N. Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (winter 2001 edition), http://plato.standford.edu/archives/win2001/entries/legal-econanalysis/

course be asked with more or less dispositive ambitions. Some who ask it may suppose that the only considerations relevant to assessing the law are economic considerations, so that all and only those legal obligations and liabilities that are economically defensible are defensible *tout court*.[6] Others may think, less embarrassingly, that discovering whether the law is economically defensible is part but only part of the job of discovering whether the law is defensible *tout court*. Some non-economic strengths in the law, on this view, might make up for its economic deficiencies.[7] Still other economists of law, out of abundant caution, may wish to keep their distance from both of these views by saying that they are invoking economic considerations entirely non-committally. For all they know, economic considerations will turn out to be irrelevant to the defence of the law, but still it is interesting to see to what extent – if they were relevant – such considerations *could* be used to defend the law. To what extent does the law say what economic thinking would have it say? Tackling this question may help to expose the blind-spots as well as the insights of economic thinking about law, and so may be interesting even to those who are sceptical about the ultimate importance of economic considerations. The question may also be interesting to those who want to investigate what considerations (for better or worse) influence law-makers, such as judges and legislators. That the law says what economic thinking would have it say does not of course show that any law-maker is thinking economically. Nor, for that matter, *vice versa*. It may all

[6] Richard Posner, 'Utilitarianism, Economics, and Legal Theory', *Journal of Legal Studies* 8 (1979), 103; Bruce Johnsen, 'Wealth *is* Value', *Journal of Legal Studies* 15 (1986), 263; Louis Kaplow and Steven Shavell, 'Fairness versus Welfare', *Harvard Law Review* 114 (2001), 961. Kaplow and Shavell have a slightly more sophisticated idea of what counts as an economic consideration.

[7] Guido Calabresi, *The Costs of Accidents* (New Haven 1970), eg at 291-2. This also seems to have become Posner's view by the time of, for example, 'Wealth Maximisation and Tort Law: a Philosophical Inquiry', in D. Owen (ed), *Philosophical Foundations of Tort Law* (Oxford 1995).

be a coincidence. But it may be a legitimate working hypothesis that how law-makers think will show up, albeit approximately, in the laws they make. Coupled with other plausible hypotheses about the institutional influence of prevailing social ideologies, this may give some scholars a reason to investigate the extent to which legal norms are amenable to an economic justification, without themselves advancing or endorsing that justification.

Legal economists in this non-committal vein sometimes like to present themselves as engaged in radically different enterprise from their more committal peers. Their work, they may say, is 'explanation' or 'analysis', not 'justification' or 'defence'. It belongs to 'positive' rather than 'normative' economics.[8] But these are notorious false contrasts. Anyone who explains or analyses legal norms in terms of 'considerations' (also known as reasons) cannot but be concerned with the justifiability or defensibility of those norms. In that sense, their project cannot be other than normative. The only caveat is that a concern with justifiability can in principle be a detached concern. Possibly some people working in the law-and-economics tradition want to know whether certain laws are economically justifiable in the same detached way that I (an atheist who sees nothing wrong with sex outside marriage and who objects to both corporal and capital punishment) might want to know whether stoning adulteresses to death really is justifiable according to Islamic teachings.[9] If it turns out that such an abhorrent action is justifiable according to Islamic teachings, then (I would say) so

[8] For invocations of this contrast aimed at insulating the 'positive' enterprise, see Richard Posner, *Economic Analysis of Law* (2nd ed., Boston 1977), 17-19; Jules Coleman, 'Efficiency, utility, and wealth maximisation' *Hofstra Law Review* 8 (1980), 509 at 547; David Friedman, 'A Positive Account of Property Rights', *Social Philosophy and Policy* 11 (1994), 1 at 15; Mark Geistfeld, 'Economics, Moral Philosophy and the Positive Analysis of Tort Law' in G. Postema (ed), *Philosophy and the Law of Torts* (Cambridge 2001), 250 at 252.

[9] This example was brought to mind by the case of Amina Lawal: 'Woman faces death by stoning "after weaning"', *The Guardian*, 20 August 2002.

much the worse for Islamic teachings. It does not follow that my interest in those teachings was not an interest in their justificatory force. On the contrary: I judge them to be deficient teachings precisely because of what is justifiable according to them.

To put it another way, the issue of whether the law of torts is economically defensible has to be kept distinct from the question of whether an economic defence of the law of torts is a defence worth wanting. Corresponding to these two distinct questions, there are two types of objections to the so-called 'economic analysis of tort law'. On the one hand (a) there are objections to the dispiriting economic theory of value that the economic analysis implicates. Are economic considerations really the only ones, or even the main ones, that matter? Isn't there a lot more to life than can be represented by anyone's 'utility function', or measured, even approximately, by their ability-and-willingness to pay? On the other hand (b) there are objections that concede for the sake of argument that economic considerations are indeed the only ones that matter, and then proceed to argue that the obligations and liabilities of tort law are not defensible in terms of such considerations, or in terms of such considerations alone, so that an economic analysis of tort law fails. Naturally a type (b) objection leaves a major hostage to fortune. Those who offer an economic analysis of tort law may reply that, since their analysis fails to show the law of torts in a defensible light, the law of torts is indefensible as it stands and calls for reform or abolition. At that point critics of the economic analysis are forced back to a type (a) objection. But at least they are forced back in a way that prevents supporters of the economic analysis from denying that they really are committed to the dispiriting theory of value that their analysis implicates. They can no longer parade the justificatory detachment of the 'mere' social scientist who does not personally endorse the values that he or she invokes. So in this way we can smoke out the disingenuous minority of legal economists who do personally advocate the dispiriting economic theory of value

even as they insist – with a hurt look on their faces - that all they are doing is 'positive' economics.

A great deal of philosophical energy and ingenuity has been invested in building type (b) objections to the economic analysis of tort law, objections that attempt to show the inadequacy of economic considerations to explain the main features of the law of torts. Some writers have strange ideas about what counts as a 'main feature' for this purpose. Many arguments rage, for example, about the adequacy of an economic analysis of the law's negligence standard, even though negligence is but one constituent among many of some but not all torts. Other arguments rage about the adequacy of an economic analysis of the legal idea of proximate causation, even though proximate causation is again just one constituent among many of some but not all torts. I will leave these distracting local difficulties on one side. They do not belong to the general part of the law of torts. They bear on what list of primary obligations would feature in the law of torts, were it economically defended. My interest here will be in a prior question: Can an economic analyst explain the pivotal role of primary obligations in the law of torts *at all*, never mind which primary obligations end up on the list?

3. Coleman's twin objections

In *The Practice of Principle* Jules Coleman sketches two important and closely-related type (b) objections to the economic analysis of tort law. Both challenge the ability of the economic analyst to accord primary obligations – never mind which particular primary obligations - their proper place relative to secondary obligations in the argumentative logic of tort law. Here are Coleman's most trenchant renditions of the two objections:

> [*First objection:*] These [economic] accounts do not use efficiency to discover an independent class of duties that are analytically prior to our liability practices. In the standard economic analysis, there is no

boundary, as it were, between what the duties are and what the liability practices should be. What counts as a 'duty' or a 'wrong' in a standard economic account depends on an assessment of what the consequences are of imposing liability in a given case. Duty and wrong, as independent categories, are doing no work in the story. So while in principle we could have an efficiency theory of duties, what economists offer is not an efficiency theory of duties at all, but an efficiency theory of liability or cost allocation.[10]

[*Second objection:*] How then does the economist account for the fact that in the typical tort suit the victim sues the injurer and not the alleged cheapest cost avoider? How does one square the forward-looking goal of tort law (on the economic model) with the backward-looking structure of tort law? The economist cannot appeal to the obvious answer that the victim believes the injurer harmed him wrongfully and in doing so incurred a duty to make good the victim's losses. In the economist's account, the victim sues the injurer because the cost of searching for those in the best position to reduce the costs of future accidents is too high.[11]

These two objections might easily be collapsed. But the first is more radical than the second, and Coleman is right to set it apart. The second objection only doubts the ability of legal economists to justify tort law's secondary obligations. As pure instrumentalists about norms, legal economists insist that a secondary obligation can only be justified by the good consequences of its being incurred. According to Coleman, this means that legal economists cannot explain the law's justification of a secondary obligation, which points not to the good consequences of its being incurred ('forward-looking'), but to the fact that a primary obligation was already violated ('backward-looking'). Coleman's first objection, however, goes further and doubts whether legal economists can properly account for the primary obligation itself. A purely instrumental

[10] *The Practice of Principle* (Oxford 2001), 35.
[11] Ibid, 18. This encapsulates an objection originally advanced by Coleman in 'The Economic Structure of Tort Law' *Yale Law Journal* 97 (1988), 1233.

justification of the primary obligation as a way of bringing optimal secondary obligations into existence cannot, claims Coleman, account for the primary obligation *as* a primary obligation. If this is true then the difficulty that economic analysts have in explaining the legal justification of a secondary obligation by reference to the breach of a primary obligation is the least of their problems. They cannot even explain why, in tort law, the primary obligation is there to breach.

You may wonder whether the first objection's greater radicalism isn't promptly surrendered in Coleman's concession that economic analysts could 'in principle' offer an economic defence of at least some primary obligations suitable for use in the law of torts ('an efficiency theory of duties'). Doesn't this concession instantly take all the sting out of his first objection, understood as a type (b) objection to the economic analysis of tort law? The problem, it seems, is not that economic analysis lacks the resources adequately to account for tort law's primary obligations. The problem is merely that legal economists 'standard[ly]' fail to use these resources, and so drop the primary obligations out of their picture of tort law. In the process they inflict unnecessary damage on their own positions. But I don't think that Coleman means to concede this much. I suspect he only means to make a more limited concession that I also made in the previous section. An economic study of the law of torts, as I mentioned, could readily tackle the following question about the tortfeasor's primary obligations: Are the tortfeasor's primary obligations economically defensible assuming perfect or at least very widespread conformity, i.e. on the footing that they are rarely if ever breached? The problem is that nobody would regard an affirmative answer to this question, without more, as an adequate economic defence of the law of torts. In addition we would need to know the answer to this follow-up question: Are tort law's *secondary* obligations (assuming perfect or at least widespread conformity with these) economically defensible as legal consequences of the breach of tort law's primary obligations

(now necessarily assuming significant nonconformity with these)? The charge against the economic analysts, as framed in Coleman's first objection, is that they cannot but let the follow-up question swallow the original question, and in the process destroy any prospect of an adequate economic defence of tort law's primary obligations. At any rate, this is the intended force that I will ascribe to the first objection in the discussion that follows. And it is with the first objection that we will begin.

4. Forwards from the primary obligation

(i) Policy and legitimacy. The impact of Coleman's first objection, if sound, goes beyond the destabilisation of the economic analysis of tort law. It also has implications for the workaday tort lawyer's reliance on 'policy arguments' in debates about where the primary obligations of tort law should begin and end. In this context 'policy argument' is a technical lawyers' expression. It refers to an argument for or against recognising certain acts as falling under certain legal norms (e.g. as meeting the legal test for causation) on the strength of the legal consequences of such recognition (e.g. a wider or narrower net of tort liabilities), and the extra-legal consequences, in turn, of those legal consequences (e.g. the possible bankrupting of local authorities or insurance companies, or the possible absence of recourse for victims of large-scale pharmaceutical accidents involving multiple manufacturers). Not all instrumental arguments about what should qualify as a primary obligation in tort law are policy arguments. Even for economists, the classification of a given action as legal obligatory may have good and bad consequences quite apart from the good and bad extra-legal consequences of the legal consequences of its classification. Nevertheless, it is hard to deny that the most important extra-legal consequences of classifying a given action as legally obligatory are those that are consequences of the legal liability that attaches to a failure to perform the obligation. So if they can't put policy arguments in

the driving seat, legal economists and others seeking a purely instrumental defence of the law of torts have little to say for themselves. This is the unhappy state of speechlessness that Coleman's first objection seeks to reduce them to.

Coleman is not the only theorist of tort law to challenge the ability of policy arguments to establish the content of tort law's primary obligations. Most familiar objections, however, are objections to the *legitimacy* of *judicial resort* to policy arguments.[12] When judges are attaching legal consequences to people's actions, the story goes, their job is to ensure that justice is done between the parties. The further non-legal consequences of their doing so (the consequent availability and cost of insurance, the consequent increases in public expenditure, the consequent shift in negotiating power between consumers and producers, etc.) are problems for other institutions, such as legislators, to worry about. Such separation-of-powers objections are open to a range of relatively straightforward replies on behalf of those who advance policy arguments. The most important is the reply made famous by John Rawls and extensively exhibited in the work of modern game theorists.[13] Justification is rarely transparent. That a certain judicial decision is ultimately justified by policy arguments in its favour does not entail that the judge should be aware of those policy arguments, still less rely on them. It suffices that the judge relies on legal or moral norms, reliance upon which is in turn justified by policy arguments. There is no reason to imagine that such norms will disclose the policy arguments that justify reliance upon them, let alone instruct or authorise judges to *use* those policy arguments. So the claim that it is illegitimate for judges to resort to policy arguments need not detract from the importance of such arguments in determining what judges are to do. In other words, the contrast between

[12] For different versions, see Ronald Dworkin, 'Principle, Policy, Procedure' in his *A Matter of Principle* (Cambridge, Mass. 1984), 72 at 73-4, and Ernest Weinrib, *The Idea of Private Law* (Cambridge, Mass. 1995), 210-4.

[13] Rawls, 'Two Concepts of Rules', *Philosophical Review* 64 (1955), 3.

policy arguments and arguments of justice is a false one: those who see to it that justice is done between the parties may well in the process be doing the very thing that, unbeknown to them, the assembled policy arguments would have them do.

We will be coming back to this line of thought when we turn to Coleman's second objection. For present purposes, however, we can make do with a simpler reply to those who offer separation-of-powers objections to the use of policy arguments in determining the content of tort law's primary obligations. The simpler reply is that there is no reason to assume that the content of tort law's primary obligations is wholly or even mainly the business of judges. True, some torts are torts at common law, which have been shaped by successive judicial decisions. But many are statutory torts, or common law torts modified by statute. Indeed one of the common law's most enduringly important torts – breach of statutory duty – is explicitly organised around the idea that the content of the relevant primary obligation should be determined, in large measure, by legislation. So if the problem with policy arguments were only a problem with the legitimacy of judicial resort to such arguments, the obvious answer would be this: Nothing about the law of torts requires that the question of what actions are to count as tortious be left wholly or mainly to judges. Indeed who should decide what actions are to count as tortious is itself a matter amenable to policy argument, turning on a determination of who is best placed to give effect to the policy arguments for and against counting certain actions as tortious (whether by relying on those policy arguments or otherwise).

(ii) A problem of circularity? Coleman knows all this. His first objection, accordingly, is not an objection to the legitimacy of judicial resort to policy arguments (or to the legitimacy of anything, for that matter). Coleman objects, rather, to something in the *logic* of policy arguments. On the simplest interpretation of what he is saying, his charge is one of vicious circularity. In the

law of torts, as I mentioned earlier, the primary obligation has justificatory priority. Its existence and breach have to be relied upon in arguing that a secondary obligation has been incurred, and hence in making a case that the right-holder is entitled to the crystallising and enforcing assistance of the court. But when policy arguments are being employed, the secondary obligation, with its attendant liabilities, seems instead to assume justificatory priority over the primary. One needs to furnish arguments for the incurring of a secondary obligation, with its attendant liabilities, in order to establish that what the defendant did should indeed be counted as a breach of a primary obligation. Can the latter order of argumentation be squared with the former? For Coleman, simply interpreted, the answer is no. There is a vicious circle in treating primary obligations as justified by the very thing that primary obligations also serve to justify.

There is something immediately paradoxical about this 'circularity' challenge. Another way to express the idea that primary obligations have justificatory priority in the law of torts is to say that, in the law of torts, the incurring of a secondary obligation, with its attendant liabilities, is a *legal consequence* of the breach of a primary obligation. When legislatures or courts create new primary obligations in the law of torts (i.e. when they hold additional actions to be tortious) they also create, by operation of law, new secondary legal obligations that arise in the event of the primary obligation's breach, and new rights for rightholders in search of judicial assistance with the crystallisation and enforcement of those secondary obligations. Legislatures and courts cannot avoid creating these legal consequences except by not creating any new primary legal obligations in the law of torts. How can it possibly be viciously circular to regard these legal consequences as relevant to the question of whether to create new primary legal obligations? And if they are relevant to *whether*, then surely also to *which*? Surely the case for or against creating a certain primary obligation cannot *but* be affected by the legal consequences of doing so? Far from casting doubt on

the logical acceptability of policy arguments, then, the justificatory priority of primary legal obligations seems to be the very thing that makes policy arguments so central to any credible debate about which primary legal obligations we should have: new primary obligations justify new secondary obligations, so the various arguments for and against having such new secondary obligations must surely be relevant to the arguments for and against having the new primary obligations.

We can make the flavour of paradox here more intense if we apply Coleman's first objection in another (non-institutional) context. Consider, for example, the morality of promising. One may well suppose that the existence of a moral power to incur moral obligations by promising is justified, at least in part, by the case for people's incurring those moral obligations by promising. How else would one go about defending the power to promise if one did not rest one's case on the defensibility of promising's having the moral consequences that promising has, viz. the incurring of new moral obligations? At the same time, the very fact that the incurring of a new moral obligation is a moral consequence of the exercise of the power means that one necessarily relies on the exercise of the power in defending the incurring of the obligation. Is this viciously circular? Coleman's first objection seems to suggest that it is. So long as one grants that the incurring of the obligation is the moral consequence of the exercise of the power, applying Coleman's first objection, the existence of the power cannot be defended in turn by pointing to the value of its giving rise to that same obligation. For in that defense one puts the obligation before the power in one's order of argumentation, but at the same time one puts the power before the obligation. They cannot both come before each other in the order of argumentation. So we are left – it seems – with a bit of a justificatory vacuum in the morality of promising. How on earth are we now going to set about justifying the existence of the moral power to promise?

Something has gone wrong here, and it does not take long to work out what it is. The existence of the power to promise is one thing, and its exercise is quite another. There is no vicious circle – no circle at all - in holding that the *existence* of the power to promise is justifiable only because the obligations incurred by promising are justifiable obligations, while also holding that each such obligation is justifiable, in return, only thanks to the *exercise* of the same (justifiable) power. So there is no logical obstacle to defending the existence of the power to promise by arguing that the moral consequences of the exercise of that power would be defensible consequences. And exactly the same point can be made regarding the primary and secondary obligations of tort law. The existence of the primary obligations is one thing, and their breach is another. There is nothing circular in holding that the *existence* of the primary obligation not to defame or cause a nuisance is justifiable only because the secondary obligations of reparation that would arise from the legal recognition of these acts as tortious would be justifiable, while also holding that tort law's secondary obligations of reparation are justifiable, in return, only thanks to the *breach* of the same (*ex hypothesi* justifiable) primary obligations. So there is no logical obstacle to defending of the primary obligations of tort law by arguing that the legal consequences of the breach of such obligations – the secondary obligations and attendant liabilities - would be (independently) defensible. One may properly begin by defending the secondary obligations and attendant liabilities, and then proceed to defend the primary obligations by showing them to be the very primary obligations, breach of which would happily have, among its legal consequences, the same secondary obligations and attendant liabilities that one just defended. That the legal justification for the secondary obligation then looks backwards to the breach of the primary obligation, while the policy justification for the secondary obligation looks forwards to its consequences is a separate problem, not a problem of circularity but a problem of

incongruity. It is the problem raised in Coleman's second objection, to which we will be turning shortly.

(iii) Moral unintelligibility. The knock-down character of this refutation leads to the suspicion that Coleman's first objection has been uncharitably interpreted. I can think of just one alternative interpretation. It is hinted at in Coleman's addition of scare-quotes around the words 'duty' and 'wrong' as, in his view, these words are used by many legal economists. On this interpretation, Coleman's first objection is not that policy arguments are circular and hence can justify *nothing* in the space of primary obligations. Rather it is that policy arguments are uncontainable and can justify *just about anything* in the space of primary obligations. In particular they can justify 'obligations' that are not obligations, hence 'wrongs' that are not wrongs, hence a law of 'torts' that is not a law of torts.[14]

How so? As ordinary non-doctrinaire observers of legal argument we naturally imagine policy arguments being used to adjudicate small-scale disagreements of the kind that tort lawyers constantly have about what action should count as a tort. (What should be the standard of care in the tort of negligence? Should the unreasonable creation of a personal risk of death be a tort even where the risk does not materialise? Should there ever be strict tort liability?) Many economic analysts of law indulge in this kind of micro-adjudication, taking the rest of the existing law of torts for granted in the background.[15] But suppose one

[14] This interpretation would bring Coleman's thinking in one respect closer to Weinrib's. Weinrib also claims that those who resort to policy arguments do not respect the very idea of a tort: *The Idea of Private Law*, above note 12, at 218-22. However Weinrib invokes a highly idealised notion of a tort, laced with common-law romanticism, to get this claim off the ground. Coleman does not need and does not use any such idealising measures.

[15] For example, Posner's famous economic defence of the law governing the tort of negligence ('A Theory of Negligence', *Journal of Legal Studies* 1 (1972), 29) proceeds as follows. Legal norm A is defended economically while norms B, C and D are held constant. Then norm B is defended economically while

takes *nothing* in the existing law of torts for granted. Instead one looks in an uncontained way for the liability norms that would have the best consequences and works back to decide what is to count as a tort. It may turn out, for all one can tell at the outset, that one or other of the following liability norms – among infinitely many alternatives - will turn out to have the best consequences: the injured rightholder's family must have reparative damages awarded against them; the person who will least miss the money must have reparative damages awarded against her; the person of whom we can make the most spectacular example must have reparative damages awarded against him. So far as policy arguments are concerned, then, we should be considering all of the following as possible torts: being a member of an injured rightholder's family, being the person who will least miss the money, being the person of whom the most spectacular example can be made. But none of these is a possible tort, because none of them is a possible breach of an obligation. And that in turn is because none of the following is a possible obligation: not being a member of an injured rightholder's family; not being the person who will least miss the money; not being the person of whom the most spectacular example can be made. What this shows is that, by pursuing policy arguments at large, we may end up not with a law of torts in which primary obligations are breached, but rather with a law of 'torts' in which 'primary obligations' are 'breached'. This is because it is a matter of indifference, so far as policy arguments are concerned, whether there are *really* any primary obligations to be breached. All that matters from the point of view of policy arguments is that there be consequentially optimal liability norms such that liabilities to pay reparative damages are always conditional upon whatever they should be conditional upon in

norms A, C and D are held constant. And so on. In a neat illustration of the fallacy of composition, these several defences of A, B, C, and D are then paraded as adding up to a defence of the system of norms A+B+C+D.

order to ensure that they are consequentially optimal, be that the breach of a primary obligation or something else altogether.

The general strategy of this objection is sound. Not just any old thing can be a legal obligation. There are limits to the law's ability, in the fashion of Humpty Dumpty, to make things legally obligatory simply by designating them as legally obligatory. Legal obligations must also satisfy what I like to call the 'moral intelligibility' condition. They must be such that, if only the law were justified, they would be moral obligations. Or to put the same point another way, it must make sense for those who regard the law as having a claim on their allegiance to regard their legal obligations as being among their moral obligations. Many theorists rely on this 'moral intelligibility' condition to attack various aspects of the law of torts as it exists today: its resort to strict liability, for instance, or its use of impersonal standards of care. There can be – it is said - no such thing as a moral obligation to avoid injuring people irrespective of how much care one takes (as in strict liability), or a moral obligation to take more care than one is personally able to take (as with impersonal standards of care). So there can be no such thing as a legal obligation to do these things either. There can only be a legal 'obligation'.[16] For myself, I do not believe that strict liability or impersonal standards of care fall foul of the moral intelligibility condition.[17] But I certainly agree that some things fall foul of it. In particular, the law cannot make something obligatory if that something is not among the conceivable actions of any rational agent. And the following are not among the conceivable actions

[16] See e.g. Stephen Perry, 'Libertarianism, Entitlement, and Responsibility', *Philosophy and Public Affairs* 26 (1997), 351 at 352 ('There can be no *ex ante* duty, except in the most formal sense, not to cause harm to others.'); Arthur Ripstein, 'Justice and Responsibility', *Canadian Journal of Law and Jurisprudence*, forthcoming ('One cannot be responsible for an unforeseeable injury because one person cannot owe another a duty to avoid them.')

[17] See my 'Obligations and Outcomes in the Law of Torts' in P. Cane and J. Gardner (eds), *Relating to Responsibility* (Oxford 2002).

of any rational agent, because they are not *actions* at all: not being a member of an injured rightholder's family; not being the person who will least miss the money; not being the person of whom the most spectacular example can be made. So any argument by which such things are advocated or even countenanced as primary obligations of the law of torts does indeed violate the moral intelligibility condition. Such an argument yields 'obligations' that are not obligations, 'wrongs' that are not wrongs, and hence 'torts' that are not torts.

So far so good for Coleman's first objection, as reinterpreted. Yet the soundness of the general strategy still leaves us asking whether it counts as a success when directed against the economist's inevitable emphasis on policy arguments as the way to justify tort law's primary obligations. Is it true that policy arguments are doomed to be indifferent as between a liability norm which makes liability to have reparative damages awarded against one a legal consequence of the prior breach of a primary obligation, and one that does not? It seems to me that the answer must depend on a study of *particular* policy arguments. If there are any policy arguments in favour of having liabilities that are legal consequences of breached primary obligations, then obviously these policy arguments are not indifferent as between a liability norm which makes liability to have reparative damages awarded against one a legal consequence of the prior breach of a primary obligation, and one that does not. We are simply looking for good non-legal (e.g. economic) consequences of making liability a legal consequence of some legal wrong done in the past. How can the existence of such good consequences be ruled out *a priori*, without even asking what they are supposed to be? How can we be sure, without detailed interrogation of the merits that are claimed for it, that there are no forward-looking merits in a legal norm that sets a backward-looking condition of liability?

Here our attempt to make good Coleman's first objection returns us once again to his second objection. Legal justification for the secondary obligation (with its attendant liabilities) looks

backwards to the breach of the primary obligation. But any economic justification of the secondary obligation (with its attendant liabilities) necessarily looks forwards to the good economic consequences of its being incurred. How can a backward-looking legal justification be squared with a forward-looking economic justification? That is the question posed in Coleman's second objection. But it is also the question on which the success of Coleman's first objection turns, no matter how we interpret it. So Coleman's first objection stands or falls with his second. Although more radical, the first objection is not autonomous: the first cannot succeed if the second fails. With that in mind, I turn now to the second objection.

4. Backwards from the secondary obligation

(i) The supposed inconstancy of the instrumentalist. In pitting the economist's 'forward-looking' preoccupations against the law's 'backward-looking' features, Coleman's second objection echoes a stock criticism of instrumental defences of tort law. But he takes pains to distance himself from the vulgar version of this criticism, which he rightly regards as confused. It is often claimed that pure instrumentalists about practical reasoning, including but not restricted to legal economists, are incapable of explaining why the incurring of a secondary obligation should be conditional (whether necessarily or sufficiently) on a primary obligation already having been committed at an earlier time. For a pure instrumentalist, an act is made wrong by its costs, meaning its actual or expected bad consequences. If these costs have not yet been incurred then the wrong has not yet been committed. The corollary is that once the wrong has been committed these costs are sunk. Nothing anyone can do will save them. But there are other costs that might still be saved, including the costs of future wrongs that might still be prevented. Instrumental rationality would have one orientate what one does entirely towards the saving of these unsunk costs. How can this

instrumental orientation towards the saving of unsunk costs be squared with making what is to be done conditional on sunk costs, as tort law does? Sometimes, to be sure, getting someone to pay reparative damages in the wake of their own wrongdoing, or maybe (vicariously) in the wake of someone else's wrongdoing, might be the least costly way of deterring or otherwise preventing future wrongs, and thereby saving further costs. But this makes the past commission of a wrong only *inconstantly* relevant to instrumental thinking. Its relevance varies from case to case. On other occasions the best way to minimise further costs may be to get someone to bear the sunk costs irrespective of whether they, or indeed anyone else, committed a wrong. So there is nothing here that could justify the kind of stance that the law of torts takes, in which the relationship between one's breach of a primary obligation and one's incurring of a secondary obligation is constant, the former being a standing condition (necessary and defeasibly sufficient) of the latter.

The confusion in this line of thought is evident. From the bold charge that pure instrumentalists cannot justify attaching legal consequences to wrongs already committed, the argument quickly retreats to the more modest allegation that they cannot do so with the law's measure of constancy, i.e. in every case to which the legal norm under discussion applies. And that more modest allegation itself turns out, on closer inspection, to be just another rehearsal of the view that pure instrumentalists about practical reasoning can't stand up for *any* constancy in norms, but must always license departure from any norm as soon as it requires or permits actions that would not be instrumentally defensible were it not for the norm's existence. I already mentioned John Rawls' famous demolition of this view.[18] I will not flog a dead horse by demolishing it again here. Suffice it to say that if it were sound it would rule out the economic analysis of *any* law, not only those with a backward-looking aspect, since

[18] Rawls, 'Two Concepts of Rules', above note 13.

every law, being a norm capable of application to more than one case, sometimes requires or permits actions that would not be economically optimal were it not for that law's existence.[19]

Coleman rightly has no truck with such overkill.[20] He sees that economists and other believers in the pure instrumentality of norms can readily account for normative constancy, including the constancy of the legal norm (which I will call the 'linking norm') whereby my breach of a primary obligation is a standing condition of my incurring of a secondary obligation. They can do this by pointing to the various extra economies that come of using this norm instead of engaging in unconstrained economic (or more broadly instrumental) reasoning. In particular, as Coleman notes, they can reduce the high cost of 'searching for those in the best position to reduce the costs of future accidents' by narrowing their search, and looking only among wrongdoers. In looking only among wrongdoers they can also, as Coleman might usefully have added, enlist aggrieved rightholders as temporary enforcement officials at reduced cost as compared with disinterested regulators.[21] Either of these considerations, or *a fortiori* both together, could in principle yield a sound economic case for the linking norm to be part of the law. Naturally, economists of law still have to do the work to show that the cost-savings involved are sufficient to justify the law's use of that norm in the face of its undoubted costs (notably the costs involved in litigation). But this is beside the point. Once we start basing our type (b) objections to the economic analysis of tort law on the accuracy of the costings used by its exponents, we have effectively conceded defeat. We are reduced to fighting economic arguments with economic arguments.

[19] With the obvious exception of a law prohibiting whatever action would not be economically optimal were it not for that law's existence.

[20] Contrast the interpretation of Coleman's position in Christopher Kutz, 'Pragmatism Regained', *Michigan Law Review* 100 (2002), 2001 at 2008-9.

[21] Cf. Posner, 'A Theory of Negligence', above note 15, at 48.

(ii) From condition to reason. Once Coleman concedes that economists of law can defend the linking norm, what is left of his second objection? Here is one tempting answer: It is not enough for legal economists to defend the linking norm. In the law of torts, the breach of a primary obligation is not only a standing condition of the incurring of the secondary obligation, but also a *reason why* the secondary obligation is incurred. And this, one might think, is a tougher nut for economists of law to crack. So far as economic thinking is concerned, reasons all lie in the future, in the consequences of what one does (including the consequences of having a norm that regulates one's doing it). But in tort law, one reason for my incurring a secondary obligation – my past breach of a primary obligation – always lies in the past at the time when the secondary obligation is incurred.

It is true that my past breach of the primary obligation is regarded by the law as a reason for, and not only a standing legal condition of, my incurring a secondary obligation. The breach is needed to make the *case* in law. But this fact alone is still not enough to put legal economists on the back foot. For the linking norm itself – now seen to be economically defensible – automatically turns the breach of the primary obligation into a reason for the incurring of the secondary obligation. If a wrongdoer says: 'Give me one good reason why I should be the one to incur a secondary obligation in the law of torts,' the economist may reply: 'Because you breached a primary obligation and an economically defensible legal norm picks those who breach primary obligations as the right people to incur secondary obligations.' Here the wrongdoer's breach of a primary obligation, his wrongdoing, is given as a reason for his incurring a secondary obligation. And the linking norm is what makes it a reason. Even though its costs are sunk, a wrong already committed is turned, by its mention in an economically defensible norm, into an economically intelligible reason for the subsequent payability of damages. So there is no incongruity to

be found here between the backward-looking legal reasons and the forward-looking economic reasons.

(iii) From reason to ground. Coleman is unsatisfied, and it seems to me rightly unsatisfied, with this way of forging a rational relationship between my breach of the primary obligation and my incurring of the secondary obligation. In the foregoing story, the breach of a primary obligation becomes a legal reason for the incurring of a secondary obligation because it is a standing legal condition of the incurring of the secondary obligation. But in the law of torts, notices Coleman, the relationship goes the other way. The breach of a primary obligation is a standing legal condition of the incurring of a secondary obligation because it is a legal reason for the incurring of the secondary. This is what is sometimes conveyed by saying that the breach of primary obligation 'grounds' the secondary obligation and its associated liabilities. The breach of primary obligation is what gets the case for the secondary obligation up and running. In the law's eyes the breach of a primary obligation is the only possible reason for a secondary obligation to be incurred, and a defeasibly sufficient reason at that. This is reflected in – as opposed to being a reflection of - the linking norm that makes the breach of a primary obligation into a standing condition (necessary and defeasibly sufficient) for the incurring of the secondary.

This, if I understand it right, is what really lies at the heart of Coleman's second objection to the economic analysis of tort law. Although it echoes the stock criticism, it avoids the traps into which vulgar versions of that criticism fall. Unfortunately, it falls into other traps of its own making. To see how, consider what Coleman offers by way of alternative to an economic analysis of tort law, namely 'the sort of explanation offered by the principle of corrective justice'.[22] The main feature such an explanation is supposed to have going for it, as against an economic analysis, is

[22] *The Practice of Principle*, above note 10, at 15.

its invulnerability to Coleman's second objection. Thanks to this invulnerability, claims Coleman, corrective justice 'can provide an account of what tort law is, in a way that economic analysis fails to do.'[23] But can it really?

What Coleman calls 'the principle of corrective justice' is the principle that 'individuals who are responsible for the wrongful losses of others have a duty to repair the losses.'[24] We could likewise designate as 'a norm of corrective justice' any norm under which those who are responsible for the wrongful losses of others have a duty to repair those losses. Applying these criteria, the linking norm is already, without further ado, a norm of corrective justice. It attaches secondary legal obligations (=duties to repair losses) to those who breach primary legal obligations, or who are vicariously liable in law for the breaching of primary legal obligations by others (=those who are responsible for wrongful losses). Now, as we saw and as Coleman concedes, economic analysts *do* have the resources to mount an adequate defence of the linking norm. It follows that at least one norm of corrective justice, namely tort law's own norm of corrective justice, is economically defensible. So in what sense is a corrective justice account, in Coleman's view, a *rival* to an economic one? Why isn't a good economic analysis of tort law *also* a corrective justice account of tort law?[25]

Coleman must mean something like this. He must mean that there is a further norm of corrective justice at work in the law of torts, quite apart from the law's own norm. This we could call the 'moral' norm of corrective justice. The law relies upon this moral norm, which it regards as a norm not of its own making, in defending its own norm of corrective justice. The moral norm, we may glean from Coleman's formulations, picks out wrongdoing as a necessary and defeasibly sufficient condition for

[23] Ibid.
[24] Ibid.
[25] For more on this theme see Posner 'The Concept of Corrective Justice in Recent Theories of Tort Law', *Journal of Legal Studies* 10 (1981), 187.

amends to be owed. So thanks to this moral norm the fact that a wrong has been committed becomes a moral reason for amends to be owed. The law in turn cites this moral reason as the reason why, by the law's own norm of corrective justice, (legally recognised) wrongdoing is a necessary and defeasibly sufficient condition for the owing of (legally specified) amends. In this 'corrective justice' story, the wrong having been committed becomes the ground of the ensuing reparative obligations in the law of torts. The wrongdoing is a moral reason for the making of amends which becomes a legal condition of the making of amends only by virtue of the law's recognition of it as a moral reason. So it is a condition because it is a reason. It is not a reason only because it is a condition. And here we have the respect in which the 'corrective justice' story rivals the economic one. The economic story cannot find a rational significance for the wrong's commission apart from that conferred by the law's own norm, whereas the 'corrective justice' story can: the wrongdoing is given rational significance by a moral norm recognised by law, invoked in the legal justification of the legal norm.

But here we come to the crunch for Coleman's first objection. Since the thoughtful economic analyst can admittedly defend the legal norm of corrective justice, why can't she equally defend its moral counterpart in much the same way? I can't think of any obstacle in principle to her doing so. Arguably the existence of such a moral norm, if it were widely conformed to, would help to reduce the duration and intensity of economically wasteful disputes. Arguably the moral norm's existence, if it were widely conformed to, would also give people greater confidence about investing in economically productive activity.[26] One can

[26] Recently the Swiss conglomerate Nestlé argued that (with or without the imprimatur of the law) the government of Ethiopia had a moral obligation to pay the company reparative damages for the nonconsensual and uncompensated (and hence according to Nestlé wrongful) expropriation of one of its Ethiopian subsidiaries in an earlier nationalisation programme: 'Nestlé claims £3.7m from famine-hit Ethiopia', *The Guardian*, 19 December

quibble about the details of here, as before, but these sample economic considerations are already enough to show that at the very least a moral norm of corrective justice is open in principle to economic defence. That being so, economic analysts of tort law plainly do have the argumentative wherewithal, *pace* Coleman, to provide a corrective justice defence of tort law's own norm of corrective justice. They can go on to defend the legal norm by relying on the (*ex hypothesi* economically defensible) moral norm and in the process provide an economic defence of the legal position whereby the commission of the wrong is a ground of, and not merely a condition of or a reason for, the payability of reparative damages. This move completely disarms Coleman's second objection. In the process his parasitic first objection is also neutralised.

5. Doing without law and economics

In an effort to re-arm Coleman's second objection you may say that the two sample economic defences of the moral norm of corrective justice that I just suggested suffer from a common weakness, namely that they are admittedly capable of defending that norm economically only 'if it were widely conformed to'. This proviso should not surprise us. I already mentioned that economic defences of legal norms tend to be conducted against

2002. The Nestlé argument for the existence of this moral obligation was a purely economic one: that any government that denied the existence of such an obligation (or failed to perform it having granted its existence) would be undermining the confidence of prospective investors and hence failing to maximise economic value. I shared with many the view that Nestlé's demand for damages was base. But this was not because the economic considerations the company mentioned were incapable of justifying the moral norm of corrective justice that it identified, nor because the norm did not apply. It was simply because there were conflicting moral norms (of mercy and humanity) which were more important in the circumstances. Nestlé was therefore being a mean-spirited stickler for its rights (see note 1 above).

the background of strong assumptions about conformity: typically, it is assumed for the sake of argument that what the law says goes. Much the same goes for economic defences of moral norms: typically, the economic defence of a moral norm is conducted on the footing that it is successfully implemented – if not completely then at least widely – as a social norm.[27]

In the case of legal norms, such an assumption turns out to be relatively innocent. One need not be a pure instrumentalist about the justification of norms to believe that the justification of a legal norm is subject to at least one instrumental condition. The condition is that the existence of the legal norm must serve to improve people's actions enough to warrant all the trouble and intrusion of regulating the matter by law. In the case of a legal norm that attempts to implement a moral norm – in the way that Coleman envisages the legal norm of corrective justice implementing the moral norm of corrective justice – the normal way to show that the moral norm meets this condition is to show that conformity to the moral norm is sufficiently improved by the existence of the legal norm. The improvement may either be direct (enough people successfully use the legal norm to help them conform to the corresponding moral norm) or indirect (the legal norm is relied upon in making a case for the application of other legal norms, such as liability norms, that in turn help to secure that enough people conform to the moral norm). All of this should be common ground to defenders of legal norms, be they pure instrumentalists or otherwise. Normally, when anyone tries to defend a legal norm they are taking its successful

[27] See e.g. Richard Posner and Eric Rasmusen, 'Creating and Enforcing Norms, with Special Reference to Sanctions', *International Review of Law and Economics* 19 (1999), 369; Saul Levmore 'Norms as Supplements', *Virginia Law Review* 86 (2000), 1989. The assumption of successful implementation is not gratuitous. When moral norms are not social norms Rawls' argument in 'Two Concepts of Rules', above note 13, does not apply. See the first few footnotes of Rawls, 'Justice as fairness', *Philosophical Review* 67 (1958), 164.

implementation for granted, and they are entitled to assume that others are doing the same.

But the same does not go for moral norms. Moral norms are not all of them social norms and many are valid irrespective of the extent to which they are implemented. I tend to think that this is true of the moral norm whereby those who commit wrongs should make amends to those whom they wrong. It applies even where nobody conforms to it, where nobody relies on it in argument, even where it has been long forgotten. So I tend to think that the economic defence of this moral norm is a fifth wheel: it defends a moral norm that remains valid quite irrespective of its economic defence. That should not surprise us. As rational agents, people (considered *en masse*) tend to want what they anyway have reason to want, although not necessarily in proportion to their reason to want it. They have reason to want reparation from wrongdoers for wrongs that were committed against them, that reason being the independently valid moral norm whereby wrongdoers should pay them such reparation. So not surprisingly people often do want reparation. And not surprisingly this shows up in the economic assessment of the very moral norm that gives people reason to want it. The moral norm has epiphenomenal economic appeal: it has appeal as a reflection of what people want, but what mainly explains their wanting it is the moral norm according to which they should anyway want it, whatever its economic appeal.

This is not the place to explain where this moral norm gets its force. That is for another day. Suffice it to say, here, that the explanation could not possibly provide any comfort for Coleman. Why not? Firstly, because Coleman himself joins the legal economists in holding that the moral norm of corrective justice is valid only where it is, in large measure, successfully implemented. 'Social practices', he says, 'turn abstract ideals into regulative principles; they turn virtue to duty.'[28] But secondly,

[28] *The Practice of Principle*, above note 22, 54.

and more importantly, because my objection to the economic analysis of law is not a type (b) objection, which is what Coleman is looking for. Coleman wants to show that an economic defence of the law of torts cannot but be inadequate to the task. The legal economist lacks the resources to account for what is going on in tort law. My own view, by contrast, is that the legal economist has all the resources she needs to account for what is going on it tort law. The real question, however, is why the law of torts needs the legal economist, except at the margins to defend it against specifically economic objections. For the law of torts has ample moral support already, assuming only that it meets the instrumental condition I mentioned, i.e. that its norms do indeed improve people's actions enough to warrant all the trouble and intrusion of regulating the matter by law.

I hope I have made it tolerably clear that, in my view, there can be no successful type (b) objection to the economic analysis of tort law. Coleman's attempts to make good such objections are the best we have, but still, as we have seen, they fail. That is because legal economists can in principle account for any norm that can be accounted for. To show that their explanation fails one is always reduced in the end to arguing that they got their costings wrong, and once the argument gets to that point the war is over. If one wants to defeat the economic analysis of tort law in a less pyrrhic way, one has no alternative but to mount a type (a) objection. One must establish that the economic analysis rests on a bad theory of value. This one does by exploring what really matters in life, for what really matters in life is also, by and large, what really matters in law. In the process of exploring this one will discover that whatever success the economic analysis of law enjoys in explaining the norms of the law of torts is mainly as follower, not as leader: what really matters is mainly tracked, not constituted, by whatever economic goods tort law may yield (and even that, I hasten to add, only very incompletely).