

Tort Law and its Theory

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For the best part of fifty years, theoretical reflection on the law of torts has been afflicted by a schism between ‘economic’ and ‘moral’ approaches. More than an affliction, the schism has become an obsession among many who place themselves on the ‘moral’ side. On the ‘moral’ side, many write with embarrassing defensiveness as if their main task were to see off the economic threat. Those on the ‘economic’ side who react at all tend to react condescendingly. As this cartoon suggests, the economists hold greater cultural sway, and this lends them a certain swagger in their work that their adversaries generally lack.

In saying this, I am thinking mainly of the United States and in particular of the intellectually impatient climate of many US law schools. In the rest of the common-law world, economic analyses of law, including tort law, enjoy less attention and less prestige. That is not, however, because of any greater cachet attaching to the ‘moral’ approach. It is because, elsewhere in the common law world, the whole idea of a unified explanation of tort law, or of any other area of law, tends to be regarded with greater suspicion. Where I come from, the famous put-down ‘it takes a theory to beat a theory’, usually attributed to Richard Epstein,¹ has little resonance; theories are disposed of a lot more easily than that. No, the main reason why the great schism in theoretical reflection on tort law matters for the rest of us is that the US law school is where modern ‘tort theory’ was born, and

¹ Its first appearance in print seems to be in Epstein, ‘Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler’, *Yale Law Journal* 92 (1983), 1435 at 1435.

where the most important theoretical puzzles of the subject were first laid bare. Works by Guido Calabresi,² Richard Posner,³ Richard Epstein,⁴ George Fletcher,⁵ Jules Coleman,⁶ Stephen Perry,⁷ and (just over the northern border) Ernest Weinrib⁸ are among the major *ur*-writings of the subject, and in all of them the schism is already evident, not to say conspicuous. It could be said that the subject was polarized at birth. And while much the same polarization now afflicts the theoretical treatment of other areas of law, or at least of private law, it was here in the great 'tort theory' essays of the 1970s and 1980s that it first took hold.

I am talking of the polarization as an affliction because, in spite of the great service that the original schismatics provided by helping to isolate puzzles and animate discussions, they also encouraged fundamentalist patterns of thought that were destined to become the enemies of open-minded reflection. Today the original schism often plays out in straw men, equivocations, excluded middles, red herrings, and other argumentative fallacies. It has also led, predictably, to sub-factionalization within each of the two factions. Rival orthodoxies have divided the moralists in particular. My own view, alas far from an orthodoxy, is that all sides in these rivalries, be they economic or moralistic, capture some important truths about tort law, and that refusing to countenance this possibility

² *The Costs of Accidents: A Legal and Economic Analysis* (New Haven 1970); with A Douglas Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral', *Harvard Law Review*, 85 (1972), 1089.

³ 'A Theory of Negligence', *Journal of Legal Studies* 1 (1972), 29.

⁴ 'A Theory of Strict Liability' *Journal of Legal Studies*, 2 (1973), 151.

⁵ 'Fairness and Utility in Tort Theory', *Harvard Law Review*, 85 (1972), 537.

⁶ 'The Morality of Strict Tort Liability', *William and Mary Law Review* 18 (1976), 259; 'Corrective Justice and Wrongful Gain', *Journal of Legal Studies* 11 (1982), 421.

⁷ 'The Moral Foundations of Tort Law', *Iowa Law Review* 77 (1982), 449.

⁸ 'Toward a Moral Theory of Negligence Law', *Law and Philosophy* 2 (1983), 37.

has been the main enemy of progress with the subject. It is with some apprehension, therefore, that I set myself the task here of exploring, with a sceptical eye, some of the key points that have divided economists from moralists in their thinking about tort law. I risk making things even worse by doing so. Alas I see no way to show how much has gone wrong without explaining how it came to go wrong, and hence without giving yet further prominence to some debilitating pathologies of thought that we should all be working, in my view, to shake off.

1. *Explanation*

Writers in the economics-of-law tradition sometimes come over all innocent in the face of their ‘moral’ critics. Unlike you we have no normative ambitions, they say. We are only trying to *explain* the law of torts.⁹ The contrast being drawn here is vague. ‘Normative’ in this context is a technical term. It does not mean ‘dealing with norms’ or ‘using norms’, which is what it literally means. It means something more like ‘justificatory’. Economists who deny normative ambitions are claiming not to be engaged in showing tort law, or any aspect of tort law, to be either justified or unjustified. What is less clear is what kind of explanation they claim to be offering instead. Is it historical (how tort law came to be like this) or psychological (what is motivating the judges and policymakers) or doctrinal (how the legal rules interrelate) or what? The obvious though rather unhelpful answer is that economists are offering an economic explanation. Can this answer be made more helpful? Closer inspection reveals that an economic explanation is universally taken by its practitioners to

⁹ e.g. Posner, *Economic Analysis of Law* (2nd ed., Boston 1977), 17–19; 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.

be a kind of rational explanation, viz. an explanation of the law of torts in terms of the reasons that, economically speaking, militate in favour of it and against it. That already means, however, that the ambition cannot but be justificatory. The aim can only be to show what if anything the law of torts has going for it, so far as economic considerations are concerned.

Yet the words 'so far as economic considerations are concerned' do provide a certain latitude for economists to distance themselves from the conclusions that they reach. They may reasonably say that they are not personally committed to those conclusions, or to the considerations offered in support of them. They are offering them only in a detached way, for whatever they are worth. For as economists, they may say, they are merely dispassionate scientists showing what *would be* justified in tort law *if* certain axioms of their system of thought were true. This differentiates them, they might add, from moralists who cannot be similarly dispassionate. To make a moral case for anything is to give that case one's personal endorsement. It is part of the very idea of morality that coming to believe that something is morally justified is coming to believe that it is *ceteris paribus* justified. Whereas coming to believe that something is economically justified – like coming to believe that it is legally justified or astrologically justified or shamanically justified – is consistent with believing that it has nothing going for it, even *ceteris paribus*. For quite possibly, in these cases, the justification rests on the false presuppositions of a corrupt system of thought. If such an irredeemable thing as tort law is economically justified, a daring economist might even say, then so much the worse for economics. By contrast, a daring moralist in an analogous predicament could not intelligibly say 'so much the worse for morality'. If one concludes that tort law is morally justified, then one concludes that tort law is not after all irredeemable.

There is genuine space here for economists of tort law to distance themselves from the committed project of the moralists. It is another matter whether many economists of tort law actually

occupy that space. Many who write in the economics-of-law tradition give away that they are indeed personally committed to the truth of their axioms. They regard what is economically justified as at least *ceteris paribus* justified, if not justified full stop, and they regard economics as a sensible guide, at least *ceteris paribus*, for legal doctrine and policy.¹⁰ True, different economists of law endorse different axioms, and hence make different recommendations. Writers in today's 'behavioural' law-and-economics school, for example, reject the picture of human beings as bearers and pursuers of a transitively ordered set of valuing (or 'preferences'), a picture which was and remains axiomatic in what is often called 'classical' law-and-economics.¹¹ Nevertheless some axioms are more entrenched than others. It is hard to imagine someone being counted as an economist of law, for example, if she did not treat it as axiomatic that *value answers to valuing*: the value of anything, including the value of anything that the law can provide, is a function of people's valuations of that thing. To that account of the value to be pursued by tort law we will be returning in due course.

2. *The explanandum*

I spoke of those who theorize about tort law with justificatory ambitions as those who are engaged in showing tort law, or any

¹⁰ e.g. Calabresi, 'About Law and Economics: a Letter to Ronald Dworkin', *Hofstra Law Review* 8 (1980), 553; Posner, 'Utilitarianism, Economics, and Legal Theory', *Journal of Legal Studies* 8 (1979), 103, softened a bit in 'Wealth Maximization and Tort Law: A Philosophical Inquiry', in David Owen, *Philosophical Foundations of Tort Law* (Oxford 1995); 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.

¹¹ Christine Jolls, Cass Sunstein and Richard Thaler, 'A Behavioral Approach to Law and Economics' in Sunstein (ed), *Behavioral Law and Economics* (Cambridge 2000).

aspect of tort law, to be *either* justified *or* unjustified. But in fact theorists of tort law, ‘economic’ and ‘moral’ alike, tend to be strongly drawn to the first option, to showing tort law, or at least some major aspects of it, to be justified *as opposed to* unjustified. In other words, they treat fit with existing law as a badge of honour for their work. This is *prima facie* peculiar. It is surely not a prerequisite of decent theoretical reflection on tort law that one ends up finding anything to be said in favour of it.¹² Surely finding that tort law is worthless is equally a possibility. After all, anarchists do not fail to qualify as theorists of law just because they hold that all law is bad and wrong. On the other hand, anarchists may find themselves at a severe dialectical disadvantage because many of their readers do not already share the dim view they take of law. So one natural explanation for why fit with the law of torts is regarded as a desideratum by tort theorists of many different stripes is that they imagine a group of likely readers who already take tort law to be broadly justified. Thus, if any line of thought can be shown to be capable of justifying tort law then that will speak well for that line of thought.

In itself, this is not such a crazy idea. Moral philosophers routinely treat it as a desideratum of success in moral theorizing that they come out on (what they imagine their readers will take to be) the right side in concrete applications. Most utilitarians in moral philosophy, for example, aim to show that their views do not force them to arrive at repugnant verdicts in hypothetical cases. One might imagine that, if they are serious utilitarians, they would think that the repugnance of a verdict would depend solely on whether it can be defended using the principle of utility.¹³ But in fact, and understandably given what would

¹² For discussion see Adam Slavny, ‘Nonreciprocity and the Moral Basis of Liability to Compensate’, *Oxford Journal of Legal Studies* 34 (2014), 417.

¹³ Known in the trade as ‘outsmarting’, after utilitarian philosopher J.J.C Smart who preferred simply to embrace the apparently repugnant conclusions.

otherwise be a severe dialectical disadvantage, utilitarians often take the opposite tack in argument: they proceed as if whether the principle of utility is acceptable depends on whether it is capable of avoiding certain verdicts already granted to be repugnant quite apart from the principle of utility. In much the same vein, tort theorists presumably take it to be a repugnant verdict – at least among their likely readership – that tort law is total junk. Therefore they treat it as lending credibility to their own theoretical stance that it is capable of saving tort law as we already know it, i.e. that it has a good fit with tort law.

But what does that mean exactly? What counts as ‘tort law’ for these purposes? Many in the economics-of-law tradition are interested literally in *verdicts*. They regard tort law, in the relevant sense, as a long list of case outcomes binarily represented as ‘wins’ or ‘loses’ – as more or less unpatterned thumbs-ups and thumbs-downs that call for patterning. The patterning that the courts and black-letter lawyers already gave to these verdicts (in terms of clusters of legal rules and arcs of legal reasoning and lines of legal authority) is regarded, for these purposes, as a sideshow, or perhaps more often a smokescreen – less to be explained than to be explained away. Doctrinal explanation provided by legal officials themselves and their apologists does not belong to the explanandum but to the obscurantist folklore within which the true explanandum, *true* tort law, has been concealed.

In this the economists of law inherit the ‘Legal Realist’ mantle of O.W. Holmes.¹⁴ Why does this threadbare mantle appeal? Partly because the economist combines her justificatory aims (this is rational, that is irrational) with an experimental-scientist self-image (known to some outsiders as ‘physics envy’).¹⁵

See Daniel Dennett and Asbjørn Steglich-Petersen, *The Philosopher’s Lexicon* (9th ed, Aarhus 2008), <http://www.philosophicallexicon.com/>

¹⁴ From his ‘The Path of the Law’, *Harvard Law Review* 10 (1897), 457.

¹⁵ Daniel Farber, ‘Toward a New Legal Realism’, *University of Chicago Law Review* 68 (2001), 279 at 295.

The experimental scientist, it is thought, looks for predictive power in her hypotheses. Notoriously, the ostensible rules of any legal system have patchy predictive power regarding the court verdicts to which they are ostensibly relevant. All are such that competent lawyers can (and do) disagree over which verdicts these rules yield in a wide range of cases. So – thinks the economist – we had better look for something that has greater predictive power than the ostensible rules. In the explanation with the greatest predictive power we will find what Karl Llewellyn called the ‘real’ rules.¹⁶ This move, however, begs the question against the ostensible legal rules by assuming that they are *meant* to be good predictors of court verdicts. Why should we want or expect them to be that? Instead of good predictors, why should we not want or expect them to be, say, reliable guides in simpler cases but flexible tools that leave our verdictive options open in more complex ones? Why could there not be value, perhaps, in some measure of *bad* predictive power in legal norms? Indeed, why could there not sometimes be *economic* value in some measure of bad predictive power? Legal determinacy has its costs and an economist of law needs to ask whether the costs are worth incurring. Here the economist-of-law’s aim to hold everything about the law up to rational scrutiny threatens to collide with her self-image as an experimental scientist of law for whom court cases are the relevant experiments and the court verdicts in those cases are the relevant data-points.

Be that as it may, ‘cases’ and ‘verdicts’ are themselves artifacts of law. They exist only under the legal rules that constitute and individuate them. So the economist of tort law does not, in spite of first appearances, avoid a doctrinal pre-patterning of her data. She does not consistently treat the ostensible legal rules as a sideshow or a smokescreen. She does this for some legal rules but

¹⁶ Llewellyn, ‘A Realistic Jurisprudence – the Next Step’, *Columbia Law Review* 30 (1930), 432 at 448.

not for others. Why, we may wonder, is ‘the verdict’ or ‘the court’ not subjected to the same existential doubts as are ‘the tort’, ‘the duty’, ‘the breach’, ‘the cause’, and so on? Even these, on closer inspection, tend to be only very selectively placed under suspicion of non-existence. In general the cases clustered together for economic analysis are kept in their recognizable legal families, with tort cases distinguished from breach of contract cases, nuisance cases from trespass cases, and so on.¹⁷ It is merely that the features in virtue of which these cases were officially clustered together by the law – their legally relevant features – are often replaced with other features, often in ways which make an economic analysis more alluring from the start.

Perhaps the most important move of this kind in modern tort theory is the substitution of *activities* (running trains, grazing cattle, growing crops, smelting iron) for *acts* (injuring someone’s horse, damaging someone’s fence, triggering someone’s asthma attack, contaminating someone’s ginger beer) as the focus of tort law’s attention. In legal doctrine, a tort is conceptualized as an act done by one person to another. Sending out sparks from the chimney of his locomotive as he passes, for example, the steam-train driver sets fire to the farmer’s cornfield. Following a seminal article by R.H. Coase,¹⁸ economists of tort law have typically rejected this asymmetrical conceptualization (in which a defendant acts and a plaintiff is acted upon) in favour of a symmetrical one (in which plaintiff and defendant alike are engaged in activities that interfere with and potentially inhibit each other). The railway operation creates risks of loss for the corn-farming business, but simply by reallocating the costs (via tort law or otherwise) we can equally regard the corn-farming operation as creating risks of loss for the railway operation. The effect of this reconceptualization is not to eliminate the law of

¹⁷ See e.g. Kaplow and Shavell, ‘Economic Analysis of Law’ in A Auerbach and M Feldstein (eds), *Handbook of Public Economics* (Amsterdam 2002).

¹⁸ ‘The Problem of Social Cost’, *Journal of Law and Economics* 3 (1960), 1.

torts but to eliminate the idea that the law of torts is ‘really’ about torts. It is ‘really’ about the allocation of costs as between competing uses (and competing users) of resources. Labelling something ‘a tort’ is merely a fancy way of declaring the verdict that the costs are to be allocated to one activity rather than the other. So the situation is not, as the doctrinal understanding of tort law suggests, that one is liable to bear certain costs on the ground that one has committed a tort. Rather, one is *said* to have ‘committed a tort’ because one is chosen, *on other grounds*, to be the one who will be liable to bear certain costs.

Although the idea that torts occur at the interface of two activities may seem at first sight to preserve the legal idea that torts are things that are done by persons (human or corporate), that is an illusion. On the strictly Coasean view, torts are things that *happen* while *other* things are being done. That explains the temptation among economists of law to rebrand the law of torts as ‘the law of accidents’. Accidents are things that happen. Torts, as they are legally conceptualized, cannot be accidents. True, as they are legally conceptualized, torts can be the *causing* or *occasioning* of accidents, but that is another idea altogether. Causing and occasionings, unlike accidents, are clearly the kinds of things that people do. Consider an analogy. An explosion is something that happens. Causing an explosion, however, is an action, something that is done with the result that an explosion happens. (A ‘result’ is the technical term among philosophers for an outcome that is a constituent of the completed action, as death is of a killing; an outcome that is not a constituent of the action is described, by contrast, as a ‘consequence’.)

Since not all torts, as legally conceptualized, involve the causing or occasioning of accidents (many torts have no constituent outcomes at all; other torts involve the causing or occasioning of non-accidental outcomes) opponents of economic analysis are quick to jump on the economic recharacterization of the law of torts as ‘the law of accidents’ as a simple scoping error, a mistaking of part of the law of torts for the whole. The law of

negligence is treated as if it were more or less the whole of the law of torts, the critics say, while the torts of trespass, deceit, misrepresentation, defamation, conversion, inducing breach of contract, false imprisonment, malicious prosecution, and many others are ignored.¹⁹ This objection, however, underestimates the radical ambition of the economists' proposal. Their proposal – we may think of it as their signature proposal – is that even when conceptualized by the law as intentional these torts should still be reconceptualized, in a sound theoretical analysis, as accidents. The illusion-busting way to think about all of them – even when they extend to vandalism, torture, massacre, and kidnap – is as things that happen when different activities are competing for the same resources. Whether they are or necessarily involve things done by somebody is irrelevant to whether they throw up the kind of cost-allocation problem that makes them suitable for the attentions of tort law.

If this is the signature proposal of the economists of law, then its rejection is surely what first animated, and still unites, their 'moral' opponents.²⁰ In saying this I am revealing a bit more about what the word 'moral' should be taken to mean in this context. Moral assessment, as the expression is used here, is assessment of things we do to each other, where the very fact that they are things that we do to each other, as opposed to things that just happen between us, is taken to be of the essence. The main moral critique of economic writings ostensibly justifying the law of torts proceeds from the thought that economists are

¹⁹ John Goldberg and Benjamin Zipursky, 'Torts as Wrongs', *Texas Law Review* 88 (2010), 917.

²⁰ Including the works of Epstein, Coleman, Perry, and Weinrib cited in notes 4, 6, 7, and 8 above; also Coleman's later *Risks and Wrongs* (Cambridge 1992), Tony Honoré, *Responsibility and Fault* (Oxford 1999), Arthur Ripstein, 'Philosophy of Tort Law' in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford 2002), and the recent work of Goldberg and Zipursky, such as 'Torts as Wrongs', note 19 above.

surreptitiously changing the subject by reconceptualizing the law of torts as the law of accidents. They are not justifying the law of torts at all. They are justifying a wholesale replacement for the law of torts in which there are, on closer inspection, no torts. True, the court verdicts in the new system tend to come out much the same way as they did in the old system. Is this, wonder the moralists, just a piece of typical economic trickery? Doesn't everything and its opposite have a surefire economic rationale if you know how to twiddle the dials right? Even if there is no trickery, however, there is a more fundamental problem. The *reasons* for the verdicts in the new system are completely different from those in the old system. The law of torts is not a set of court verdicts, say the moralists, nor even a set of norms that pattern these verdicts. It is a body of case law, augmented by statute, in which the resident norms are used and shaped and reused and reshaped in argument, iteratively revealing the reasons why, in law, the norms are as they are. An explanation of tort law is only an explanation of tort law, according to the moralists, if it is true to the law's self-explanation delivered in this way.

In particular, the explanation must reveal how the typical arguments of tort lawyers work as arguments. One may of course reveal in the process that many of these arguments are deficient. Yet that is quite different from claiming that they are unintelligible and therefore should not, or cannot, be assessed in their own terms. And in the case of tort law, assessing them in their own terms means assessing them morally. For they are principally arguments oriented towards the identification and assessment of what the defendant did to the plaintiff – whether he caused her any relevant loss, whether he breached his duty in doing so, whether his breach of duty also violated her rights, whether he already paid all that he should have paid for the loss,

whether the breach is ongoing, etc. – and arguments about these matters are all, in the relevant sense, moral arguments.²¹

A different case can be made for the same conclusion, one that makes more concessions to the economist. Suppose we grant, *arguendo*, that the law of torts is simply a list of court verdicts in tort cases. And let these verdicts be pre-patterned to suit any economic taste you care to mention. And suppose we lift all suspicion of trickery and agree that a good economic analysis shows the verdicts, complete with their patterning, to be amply justifiable. Still the economist is not where she needs to be. Showing the verdicts to be *justifiable* is not the same as showing them to be *justified*. To be justified a verdict must not only be rationally reachable; it must also have been rationally reached. It is not enough that the reasons advanced in support of it did indeed support it if it was not arrived at *for* (one or more of) those reasons. An analogy: If I am under lethal attack, it is justifiable for me to kill my lethal attacker. But what if I kill her not because she attacking me (I have no idea that she is), but rather because, say, I don't like her politics? Then the justifiable killing is unjustified.²² Noticing this enables us to see more clearly in what sense a justification qualifies as a kind of explanation: it gives a sufficient reason for doing something that is also the sufficient reason why it was done.

The same point also enables us to see more clearly why economic analysts of tort law are so keen to show a measure of economic influence upon, as well as good economic

²¹ I am here distilling common themes from Ernest Weinrib, *The Idea of Private Law* (Cambridge, Mass. 1995) and Jules Coleman, *The Practice of Principle* (Oxford 2001), also echoed by several other writers.

²² At this point I am drawing on ideas presented at greater length in my book *Offences and Defences* (Oxford 2007), especially ch 5.

predictability of, court verdicts. Many take comfort²³ in Learned Hand's 'calculus of negligence' in *Carroll Towing*,²⁴ for example, even though Hand's words plainly do not peg the gravity of an injury to its economic cost, and so could equally be claimed on behalf of many rival moral views. The point of claiming them for law-and-economics is to establish that, in spite of the alleged smokescreen of received legal wisdom that usually blocks them from view, the economic reasons are the 'real' reasons for which judges in tort litigation act, such that their verdicts are not only economically justifiable, but economically justified as well. For anyone interested in the justification of judicial verdicts the pressure to examine the supporting judicial arguments – and to assess them in their own terms – is huge. In that task the economists find themselves at an equally huge disadvantage; for the normal terms of judicial argumentation are clearly moral terms. Even Learned Hand, it is often forgotten, was explaining which factors bear on whether a defendant *breached his duty of care* towards the plaintiff. His was a moral conceptualization.

3. Instrumentality

At this point the economists have a natural fallback position, into which they sometimes slip unnoticed. There are duties in tort law after all, they may say, and they are, just as the law says they are, duties to take care, duties not to cause losses, duties to pay damages, etc. These duties are owed by defendants to plaintiffs, who therefore hold associated rights. So the law of torts really is what is set out in the textbooks and what is used and developed by lawyers and judges in their legal arguments. These arguments

²³ e.g. Richard Posner, *The Economics of Justice* (Cambridge Mass. 1981), 5; Jonathan Macey, 'The Pervasive Influence of Economic Analysis on Legal Decisionmaking', *Harvard Journal of Law & Public Policy* 17 (1994), 107.

²⁴ 159 F 2d 169 (1947) at 173.

are accordingly intelligible in their own terms and capable of being assessed *qua* arguments. The point is only that all of the rights and duties that figure in these arguments have sound economic justifications. The economic justifications may even extend to the bigger ideas sometimes favoured by lawyers and their moralizing friends for connecting the various rights and duties into a tort-law scheme. Corrective justice? Civil recourse? These are more abstract characterizations of the normative arrangements found in tort law, or of certain conspicuous aspects of them. Responsibility, redress, reasonableness? These are concepts invoked in many norms of tort law. Like everything else about the norms of tort law, says the fallback script of the legal economist, they are amenable to economic defence. They are part of what needs to be defended by any 'tort theory'. Economists are there to provide the defence.²⁵

Economists who defend tort law in this way have taken their fight with the moralists to the moralists' backyard. Now they are rule-utilitarians (utilitarians who believe in the utility of having and using rules). Naturally, they face the usual catalogue of challenges that rule-utilitarians face in moral philosophy. However in the context of tort theory they do not face the most familiar challenge to rule-utilitarianism. They do not face the challenge that even the rule with the greatest utility must eventually come up against the extreme case in which there would be more utility in bending it. In my view this is anyway an unconvincing line of attack on rule-utilitarianism. That it allows for the diminishing hold of rules at their limits is a virtue, rather than a vice, of any explanation of the place of rules in practical thought. But be that as it may the law of torts is not a good testbed for the objection, since the law of torts is rife with rules well-suited to being adapted to novel and unforeseen

²⁵ This is the line taken by Posner in 'The Concept of Corrective Justice in Recent Theories of Tort Law', *Journal of Legal Studies* 10 (1981), 187.

circumstances. Whatever else they may do, qualifications like ‘reasonable’, ‘ordinary’, and ‘due’ that are used in formulating many tort-law rules invite the rule-user to refer back the underlying merits of the case.²⁶ And even when the rules are not already set up like this, familiar common-law techniques such as ‘distinguishing’ the earlier cases or creating an ‘equitable’ qualification to the rule can be used to bend them *ad hoc* into conformity with the underlying merits. Tort law is nothing if not pliable, as systems of rules go. So those offering a rule-utilitarian defence of tort law have nothing much to fear from the charge – if they really want to treat it as a charge – that their ethics cannot but licence a great deal of pliability in rules.

One might think that something similar would be true of another challenge to rule-utilitarianism, namely the challenge that it instrumentalizes all rules, i.e. judges them only by the consequences of having them and using them. What should the rules of tort law be if not instruments to improve what people do, namely by getting them to conform to those very rules? It might seem that, even if the rule-utilitarian defence of some *moral* rules could be criticized for excessive instrumentalization, that critique should not extend to the rule-utilitarian defence of legal rules. Indeed it might be thought that a principal vice of rule-utilitarianism as a moral doctrine is precisely that it models moral rules, in this respect, too much on legal ones. Yet the best-known moral critique of the economic defence of the rules of tort law takes aim principally against its instrumentalization of them. This is the Kantian critique, most often associated with Ernest Weinrib²⁷ and developed by Arthur Ripstein,²⁸ in which tort law falls to be defended as a system of correlative rights and duties that constitutes the parties to tort cases as equals in and

²⁶ I have discussed this point at length in ‘The Many Faces of the Reasonable Person’, *Law Quarterly Review* 131 (2015), 563.

²⁷ *The Idea of Private Law*, above note 21, 80–3, 132–3.

²⁸ *Equality, Responsibility, and the Law* (Cambridge 1999), esp. ch 3.

before the law. Personally I do not share the taste for constituting people as juridical equals that lies at the heart of this view. But be that as it may, it is not clear why defending tort law as something that constitutes us as juridical equals should be thought inconsistent with defending tort law's rules as instruments for getting people to act better. Why should the rules of tort law not be instruments for getting judges and other officials to comply with the rules of tort law, *thereby* constituting the parties before them as juridical equals? And once we have got that far, why should the rules of tort law not also be instruments for getting would-be parties to avoid committing torts in the first place, thereby (presumably) acting just as juridical equals would? So long as torts have the appropriately Kantian content (so long as the primary rights-and-duties of tort law are such that their correct application constitutes the parties as equals) why is tort-deterrence not even better, so far as Kantian considerations are concerned, than tort-correction? It is hard to see how even Kant could exempt himself from the analytical truth that, *ceteris paribus*, prevention is better than cure. So it is puzzling that the Kantians of the tort theory world should set their faces so strongly against an instrumental defence of the rules of tort law.

Possibly the solution to the puzzle lies in the fact that, in the Kantian story, law in general, including private law, is conceived as an apparatus of coercion. Since coercion entails compliance (without compliance, it is only attempted coercion), perhaps the importance of tort law as an instrument of compliance with its own rules is not being denied in Kant's name so much as taken for granted. Being built into the very idea of tort law, compliance is another part of the object to be defended and not, as the economists would have it, part of the defence. If this is the idea then the correct response is to stand with the economists and deny that tort law works to change what people do primarily by coercion. Coercion may be used on occasions, but the law of torts more often secures compliance with its rules, when it does, by other means. On the other hand, however, one should stand

with the Kantians, against the economists (or many of them), in denying that the means used can be reduced to providing incentives for compliance by putting the shifting of costs in prospect. That story drops the distinctiveness of law completely out of the picture. The law of torts, like other areas of law, indeed like any other body of rules, works by providing guidance (albeit not always highly determinate guidance) on what to do. In the case of law it purports to be the guidance of a morally legitimate authority. In this way, as Hart says, both the coercive mechanisms and the incentivizing effect of their being in prospect 'are secondary provisions for a breakdown in case the primary intended peremptory reasons [here, the rules and rulings specifying which acts are torts, and which acts count as suitably remedial of torts] are not accepted [or used] as such.'²⁹

Probably it is uncharitable to portray the Kantians as whitewashing the instrumentality of tort law in this contrived way. More charitable would be to read them as objecting, not to all instrumental defences of tort law, but rather only to those that portray tort law as an instrument of *independent* goods, where securing compliance with tort law's own rules does not count as independent in the relevant sense.³⁰ But what is the relevant sense? Return to the thought, central to the Kantian picture, that tort law *constitutes* some aspect of our moral relations. Bracketing the special Kantian emphasis on equality, let's consider the proposal that tort law constitutes some of our moral relations, in particular the moral duties that we owe to each other. This seems entirely right to me. Part of the moral case for having law at all is to help us cope with moral indeterminacy by providing morally

²⁹ H.L.A. Hart, 'Commands and Authoritative Legal Reasons' in his *Essays on Bentham* (Oxford 1982), 254. In tort law we might prefer to say that the coercive mechanisms are 'tertiary provisions' since the remedial rules and rulings may already be thought of as the 'secondary' ones.

³⁰ Thus Weinrib objects only to seeing tort law as the servant of 'purposes external to itself': *The Idea of Private Law*, above note 21, 50.

authoritative guidance on what to do. When successfully provided, and hence morally binding, this guidance makes the moral rules more determinate than they would be without the law. We already noted that in the law of torts, many of the rules leave significant moral indeterminacy unresolved. Sometimes deliberately. They include many qualifications, such as 'reasonable' and 'due' which deliberately refer us back to the underlying moral considerations. Nevertheless the rules of tort law are rules of law: they are not completely devoid of authoritative guidance. If nothing else, the law of torts takes various classes of actions that we have moral reasons not to perform but that apart from the law would defy determinate classification as breaches of duty, and it determinately classifies them as breaches of duty. That remains an important injection of authoritative determinacy even when the classes of actions affected are still quite indeterminately specified.

When is such an injection important enough to be morally legitimate?³¹ The classic scenario (I do not say it is the only one) is the co-ordination scenario. This is the scenario in which, given the underlying moral indeterminacies, people with good moral judgment may differ among themselves in how they would react to a given situation, left to their own devices. The problem is that their different reactions will tend to be at odds with each other, creating extra problems for themselves and/or for others: extra delay, extra risk, extra damage, extra confusion and anxiety, extra escalation of conflict, extra burden on others to help, extra temptation for others to take sides, etc. It is *ceteris paribus* better, in this scenario, that all are bound and judged by a common standard, whichever of the morally eligible standards that may be. In that way all may have common expectations of each other's behaviour, such that incipient problems of the kinds just listed

³¹ In this paragraph and the next I sketch an argument developed at greater length in my 'What is Tort Law For? Part 1. The Place of Corrective Justice', *Law and Philosophy* 30 (2011), 1.

may be avoided or nipped in the bud. The law of torts does a great deal of this kind of co-ordination. Even when it does a relatively light-touch job of co-ordinating the actions of potential plaintiffs and defendants at the time of their original interaction (as in the law of negligence) it still does a great deal to co-ordinate expectations of what comes next, once a tort is committed. When it does this well, it part-constitutes (by lending extra determinacy to) the moral duties involved, in particular by determining that they are indeed duties.

It is fairly easy to see how the thought that the standard must be a common standard could mutate into the thought that it must be, in some sense, an equalizing one, as the Kantians say. But that, to repeat, is not the lesson we are interested in. The lesson we are interested in is that recognizing the moral-relations-constituting role of rules of tort law is not inconsistent with making an at least partly instrumental case for their existence. Indeed, in the co-ordination scenario, if not in all scenarios, the former positively *depends upon* the latter. It is only because and to the extent that the law of torts is a good tool for securing better actions that it succeeds in adding to, or giving shape to, the moral rights and duties of those who are subject to it. Here the good that tort law instrumentally serves is not independent of tort law in the relevant sense. It is a good that tort law also helps to constitute, namely the good of people doing their duty towards each other. Tort law helps to constitute this good by determining, when it is also a good instrument of conformity with duty, what counts as doing one's duty.

It is not clear, however, how this line of thought is going to be any of use in dispatching the rule-utilitarians, including the economists of law who make rule-utilitarian moves. For it is not clear why rule-utilitarians, any more than their Kantian critics, would need to present tort law as an instrument of a good that is, in the relevant sense, independent of tort law. Many torts, recall, are actions that come complete with constituent outcomes. More specifically, they are actions of causing or occasioning loss to

another. Even those that are not outcome-constituted are nevertheless remedied, normally, by measuring the consequential loss, or some of it, that was done to another by the commission of the tort. Why should not a rule-utilitarian help herself to the natural thought that tort law is interested in these losses, and in particular in assigning different losses to different people as part of an authoritative scheme for co-ordinating people's loss-causing and loss-occasioning actions, as well as the loss-ameliorating actions that follow? When it co-ordinates well, this scheme too helps to determine what counts as doing one's duty to another (in respect of a range of loss-affecting actions) and so helps to constitute our moral relations with each another. Naturally there are big debates to be had about how exactly to cash out the 'when it co-ordinates well' condition. Does co-ordinating loss-affecting actions well equate, or even somehow approximate, to minimizing the losses themselves? And are the losses themselves to be analyzed in economic terms, or are they to be analyzed in some other terms (e.g. in terms of freedom or pleasure or security foregone) for which economic value stands as a mere proxy at the regrettable moment at which tort damages come to be calculated in money amounts? These represent deep and difficult issues in moral mathematics. They concern, respectively, the calculus and the metric of moral success, be it the success of tort law or of anything else. But any disagreement that one might have with a rule-utilitarian about the calculus or the metric of moral success does not seem to be well-captured in the claim that rule-utilitarians are wrong to instrumentalize tort law. One may be a total instrumentalist about tort law (as indeed I am proud to be myself) while insisting that what tort law is an instrument *of* is – to take just a few examples – the avoidance of injustice, the performance of moral duty, the correction of wrongs, the maintenance of reciprocity, or the upholding of juridical equality, or indeed all of these at once (and more).

These remarks help to expose what may be regarded as a strategic error in the way that moral critiques of the economic

analysis of tort law first got off the ground, and continue even now to present themselves. It was and remains common to contrast ‘efficiency’ with ‘justice’ in considering possible objectives for tort law.³² But efficiency is not a possible objective for tort law unless tort law also has some *other* objective that it is supposed to be efficiently *servicing*. Efficiency is none other than the avoidance of waste. Nobody, I hope, is in favour of waste. The disagreements are all about which goods it is most important not to waste, because they are the most important goods. The economists narrow the list of important goods down to goods that are cast in exclusively economic terms. Naturally enough they prioritize efficiency in the service of those specialized goods. The sensible response is not to say that one doesn’t favour efficiency, thereby allowing the economists to proudly claim a monopoly on the avoidance of waste. The sensible response is to reject the identification of goods in exclusively economic terms, or, to put it more tersely, to reject the idea that all value is economic value. The point is not to reject efficiency but to reject the preoccupation with merely *economic* efficiency, efficiency relative only to economic goods. What the law should be efficient *at*, the moral critic should say, is not, or not only, increasing wealth or allocating resources but (also) doing justice, preventing wrongs, protecting rights, mitigating insecurity, enabling recourse, guaranteeing freedom, aiding reconciliation, or ... you can insert any imaginable good here.

4. Value

I said earlier that we would be ‘returning in due course’ to the economist’s view that *value answers to valuing*: that the value of

³² See e.g. George Stigler, ‘Law or Economics?’, *Journal of Law & Economics* 35 (1992), 455 at 461; George Fletcher, ‘Corrective Justice for Moderns’, *Harvard Law Review* 106 (1993), 1658 at 1659.

anything is a function of people's valuations of that thing. It goes beyond my brief for this paper, alas, to show how much is wrong with this view when it is fully generalized, and why adhering to it provides a terrible (and in particular obnoxiously illiberal) basis for public policy and legal doctrine.³³ But I hope to have said enough to persuade you that it is here, in the general philosophy of value, that the theoretical study of tort law inevitably ends up. The question, I have argued, is not whether tort law should be efficient, but which values it should efficiently serve. The question is not whether there is utility in having and using tort law's rules, but what exactly their utility is, i.e. what goods they are capable of protecting and yielding. The question is not whether tort law is an instrument, but what it is an instrument of. Our valuing of the law of torts, as of everything else, answer to value that it has apart from anyone's valuing of it, and there is no escaping the ultimate question of what exactly that value is.

I already suggested that the 'moral' critics of the economic analysis of tort law got off on the wrong foot in the 1970s and 1980s in allowing the economists to parade themselves as the only true guardians of efficiency, utility, and instrumentality in the law of torts. We could well add 'rationality' and 'welfare' to the list. Failing to engage head-on with the economist's theory of value meant failing to stand up for the truth that one's welfare (or well-being) depends first on one's valuing things for value they have quite independently of anyone's valuing of them, including our own. And it also meant failing to uphold the truth that our capacity to detect such independent value and *thereby* to pursue it – not just accidentally to pursue it under the heading of preference – is what makes us rational creatures. Rejecting both of these truths makes the economists, classical and behavioural alike, the arch-parodists of our rationality and, very often, the

³³ Although overstated in places, R.M. Dworkin's critique in 'Is Wealth a Value?' *Journal of Legal Studies* 9 (1980), 191 hits many home runs.

arch-enemies of our welfare. So why were these not the first battle lines of tort theory? It is hardly surprising that the early 'moral' critics, already on the cultural defensive, tried to keep their fight with the economic analysis of tort law on what they took to be easier terrain, less rife with philosophical pitfalls. In the process, however, they created multiple new disadvantages for themselves and for their intellectual heirs. They targeted their offensive largely on the strongest points of the economic analysis while allowing the weakest points, defended mainly by flimsy newspeak, to go virtually unassailed. Tort theory today continues to suffer from the many consequences of these understandable errors. Critics too often concede the powerful concepts of efficiency, rationality, utility, and welfare to the economists, even though the economists have no special claim on them (and indeed bear a special guilt for tendentious meddling with them). Meanwhile, as we saw, critics continue to mount the ill-starred critique that tort law is not, or not mainly, an instrument of sound public policy and so is not, or not mainly, to be judged as if it were one. One wishes that they would focus instead on explaining what sound public policy would be like, and what contribution tort law would make to it, in a world in which the economists, mistaking price for value, held less cultural sway.