

Retributive and Corrective Justice, Criminal and Private Law¹

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1 Introduction

Some see criminal law as essentially or predominantly an exercise in retributive justice. And some see private law as essentially or predominantly an exercise in corrective justice. There is considerable discussion of the relation between retributive and distributive justice in criminal law theory. Likewise, there is considerable discussion of the relation between corrective and distributive justice in private law theory. However, there is comparatively little discussion of the relation between retributive justice and corrective justice, whether in criminal law theory, private law theory, or legal theory generally.

There are, of course, differing views of both retributive justice and corrective justice. On some views, these two types of justice appear to overlap, even to be identical. Some views of retributive justice talk of ‘annulling’ and ‘rectifying’ wrongs, as do some views of corrective justice. There are views of retributive justice that see it as a species of distributive justice. And there are similar views of corrective justice. If, however, retributive justice and corrective justice are both concerned to ‘annul’ or ‘rectify’ wrongs - or if they both are a species (and the same species) of distributive justice - what, then, becomes of the idea that what really distinguishes criminal and private law is that the criminal law is essentially or predominantly an exercise in retributive justice, and private law is essentially or predominantly an exercise in corrective justice?

Of course, there are other views of criminal law and private law, just as there are other views of retributive justice and corrective justice. The criminal law is sometimes seen as serving both retributivist and what could be termed ‘harm-reductive’ ends,² as well as more constructive aims such as rehabilitation (of the offender), restitution (to the victim), and ‘moral education’ (of the community). (That is, the criminal law is sometimes seen as serving also these more constructive aims as independent ends, and not just as means of harm-reduction.) A widely held view is that the criminal law is essentially a harm-reductive institution, but subject to retributive and other moral constraints. Hart, for instance, held that the ‘general justifying aim’ of punishment is utilitarian, and that it is with ‘the question of distribution’, of whom to punish, and how much to punish, that retributive and other moral constraints enter in.³ However, it seems an extreme view to deny that the criminal law has any retributive element, and to argue that it is purely an institution to prevent or reduce socially harmful conduct (and perhaps to achieve one or more of the three constructive aims mentioned above). Beyond the view that retributive justice is the sole end of criminal law, there is a wide range of views that hold that retributive justice is still central to the nature of the criminal law, its moral character.

Similarly, there are other views of private law. Even if the corrective justice view of most or much of private law, or most or much tort law, is the predominant ‘justice’ view, there are others. Some adopt a distributive justice approach, or even a retributive justice approach. Some adopt a retributive justice

² On the term ‘harm-reduction’, See Wood, David, *Retribution, Crime Reduction and the Justification of Punishment*, (2002) 22 *Oxford Journal of Legal Studies* 301, n. 1.

³ Hart, H.L.A., *Prolegomenon to the Principles of Punishment*, Punishment and Responsibility: Essays in the Philosophy of Law, Ch. 1 (Clarendon, Oxford, 1968).

approach to fault liability torts and a corrective justice approach to strict liability torts; others a corrective justice approach to the former, and a distributive justice approach to the latter; and others again a retributive justice approach to the former, and a distributive justice approach to the latter. These views are further differentiated by divergent understandings of these three types of justice, the nature of fault liability and strict liability and the distinction between them. Perhaps most markedly, these views differ in their underlying legal, moral and political theories.

Nevertheless, there is a simple, familiar argument for corrective justice interpretations of tort law⁴ (and this paper concentrates on tort law, as the closest branch of private law to criminal law). Compensation accounts of tort law explain why P should be compensated, but not why P should be compensated by D. Indeed, they cannot explain why compensation should be limited to wrongful loss, why compensation should not be treated as a matter of distributive justice and social policy, and be extended to all losses, or at least to certain types of non-wrongful loss (for instance, loss caused by the agent without fault). The compensation function of tort law, then, is only ancillary or secondary. It could be fulfilled by third parties, for instance, through insurance. Furthermore, it could be fulfilled far more efficiently and with greater assurance in this way by avoiding the vagaries of private litigation, for instance, defendants who cannot be found or who cannot pay.

Conversely, deterrent accounts of tort law explain why D should suffer some sanction, for instance, a monetary penalty, but not why this should take the form of compensation to P, rather than, say, a fine paid into general revenue, or a levy paid into an insurance pool. The deterrent function of tort law could be carried out by the criminal law and what could be called 'regulatory law' – and again, criminal and 'regulatory' law could do so far more efficiently for avoiding the vagaries of private litigation, in this case victims who fail to take legal action, or settle for less than they could reasonably expect to receive (like accused persons who too readily plead guilty, whether because of poor advice, the stress and cost of continuing litigation, or numerous other factors. There is no reason why plaintiffs should be concerned with their effective, but unofficial, unrecognised and unpaid public role of 'prosecutors' invoking the deterrence function of tort law. This is especially so where deterrence is served better by a well-publicised court battle than a confidential settlement. The deterrence function, then, like the compensation function, is ancillary or secondary to tort law.

What is required, the argument continues, is a principle that explains the special nature of the 'private law relationship' between P and D, in particular its 'correlativity'. And this is, the argument concludes, the principle of corrective justice. Only this principle can explain the theoretical unity of this relationship, why it is that P should not just be compensated for his loss, but should be compensated specifically by D. Only corrective justice, that is, can explain why compensation should take place within the relationship, rather than externally,

⁴ See, for instance, Weinrib, *Legal Formalism*, in Denis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory*, 332, 333-334.

say through insurance.⁵ As for the deterrence function of tort law, this is transferred to criminal and regulatory law.

The paper returns to this argument in Part 4, as the starting point for its argument for the elimination of corrective justice. Leading up to this argument, Part 2 sets out various views of retributive justice, and Part 3 considers them as views of corrective justice. (The term ‘view’ is taken very broadly, as including conceptions, theories and accounts, and so on.) With corrective justice eliminated, tort law itself is vulnerable to the familiar argument above, as that argument purports to show that corrective justice is the only possible underlying or governing principle. (Or most or much of tort law is so vulnerable, as much as the given corrective justice theorist claims to be explained and justified through this principle. For instance, some claim that corrective justice accounts for much of accident law, but not product liability law.) What is required is a better scheme of social arrangements, freeing social policy and distributive justice from the injustices and irrationalities of tort law, and the vagaries, indeed evils, of private litigation. However, sketching this better scheme of social arrangements is beyond the scope of this paper.

2 Retributive Justice

2.1 *Three Test Questions*

To start with, consider the following three questions, which any plausible justificatory account of punishment, retributive accounts included, must be able to answer.

First, what wrongs (what forms of wrongful conduct) should be punished (that is, by the state⁶)? Some wrongs are minor (for instance, breaking an insignificant promise), and warrant no legal response. Other wrongs give rise to civil, but not criminal liability (as is usually the case with tortiously negligent conduct). There are also wrongs subject to administrative or regulatory penalties (for instance, parking offences), but again, not to criminal punishment. So how

⁵ Of course, there is extensive use of insurance against tortious liability, but this is ignored here. If tort law relies on a suitable insurance scheme to rectify its injustices and irrational results, then why not abandon it, and start afresh with a compensation system that is not a hybrid mixture of tort liability and insurance, but stands on its own two feet? Consider a New Zealand-style national insurance scheme.

It is, then, a bootstraps exercise for tort law to look to insurance to rescue it. (See Waldron, Jeremy, *Moments of Carelessness and Massive Loss*, in David G. Owen, ed., *Philosophical Foundations of Torts Law* 387, 388-9 (Clarendon, Oxford, 1995).) And this is quite apart from the fact that many cannot afford or get insurance, and that insurance companies may fail, or refuse to pay up. Insurance does not necessarily shift the risks of tort liability. Insurance does not necessarily provide assurance.

See also Coleman, Jules L., *Risks and Wrongs* 205-9 (Cambridge University Press, Cambridge, 1992), and Sheinman, Hanoch, *Tort Law and Corrective Justice*, (2003) 22 *Law and Philosophy* 21, n. 13.

⁶ Lacey, Nicola, *State Punishment: Political Principles and Community Values* (Routledge, London, 1988).

are wrongs that warrant criminal punishment to be identified? What distinguishes them from these other wrongs?

A possible objection is that the question of what wrongs warrant punishment is presupposed by, rather than provided by, a justificatory account of punishment. This may be so, according to a suitably narrow view of the justification of punishment. Nevertheless, it is not clear how any justificatory account of punishment can avoid the question of what conduct warrants punishment.⁷ The plausibility of an account of punishment, retributive or otherwise, obviously depends on the wrongs it punishes. To take an extreme case, an account of punishment that holds that double parking should be punished, but not murder, would be strange indeed. This account of punishment stands tainted by the very account of punishable wrongs it relies upon to justify any particular case of punishing.

Assuming that punishable wrongs can be identified, and can be somehow ranked according to relative seriousness,⁸ the second question any plausible account of punishment must answer is how much (and indeed 'how') such wrongs should be punished. To take one possible test (crucial for retributivists), what counts as proportionate punishment, as achieving some sort of equivalence between the severity of the penalty and the seriousness of the crime?

The third question concerns the fact that punishment involves the deliberate infliction of harm, the denial of choices, and the deprivation of rights. How can punishment then be justified, in particular as against the 'equally elementary' moral principle against deliberately harming people? Why is the singling out of the offender, a declaration of guilt, and some symbolic act of condemnation or censure, not enough?⁹ Why is punishment, taken as including 'hard treatment', required as well?

2.2 *Retributive Justice as a Basic, Unanalysable, Moral Principle*

The simplest view of retributive justice sees it as a basic, unanalysable, intuitively obvious, moral principle: 'The core of the idea of retribution is the moral notion that the wrongdoer ought to be punished';¹⁰ 'At the heart of retributivism is the contention that it is the wrongness of the criminal act that justifies the imposition of punishment on the offender';¹¹ 'Guilt deserves punishment for the sake of justice'.¹²

⁷ 'According to Hart, at least six questions about punishment need to be answered separately', the first being: "Why are certain kinds of conduct forbidden by law on pain of punishment?" (Tony Honore, *The Morality of Tort Law*, in Owen, ed., supra, 73, 73).

⁸ See, for instance, von Hirsch Andrew, and Jareborg, Nils, *Gauging Criminal Harm: A Living-Standard Analysis*, (1991) 11 Oxford Journal of Legal Studies 1.

⁹ Galligan, D.J., *The Return to Retribution in Penal Theory*, in C.F.H. Tapper, ed., *Crime, Proof and Punishment* 144, 153 (Butterworths, London, 1981).

¹⁰ Galligan, supra, 152.

¹¹ Golash, Deidre, *The Retributive Paradox*, (1994) 54 *Analysis* 72,72.

¹² Sadurski, Wojciech, *Giving Desert Its Due* 223 (D. Reidel, Dordrecht, 1985).

The basic principle view has the virtue of simplicity. It is a basic characteristic of principles that they can be stated simply, and not riddled with qualifications and exceptions. However, the simplicity of this principle is also its downfall.

This view suggests no answer to the first question, of what wrongs to punish. It provides no guidance as to how wrongful conduct must be in order to warrant punishment, as opposed to a regulatory penalty (for instance, a small fine), a civil remedy (such as compensation), or simply no legal response. Presumably, the supposed intuitive plausibility of this view of retributive justice extends to a similar supposedly intuitively plausible account of what wrongs warrant punishment (an account which avoids at least the absurd example above, of punishment for double parking but not for murder). An intuitively clear account of wrongs, some may suggest, is provided by the 'lex talionis', the principle of 'an eye for an eye, a tooth for a tooth'.¹³ But whether or not this is reflected, or was reflected in, the criminal law of its times, it reduces our criminal law to a question of causation only, a matter of strict liability or worse, with no role for 'mens rea', criminal defences, inchoate offences or complicity (to name some obvious casualties).

Nor does the basic principle view of retributive justice offer an answer to the second question, of how much (and how) to punish. If, for instance, punishment is to be proportionate, what is it to be proportionate to? It seems that on this view, it need only to be proportionate to the harm caused (again, 'an eye for an eye'), irrespective of whether it was caused intentionally, recklessly, negligently, or without fault, and irrespective of any question of self-defence, duress, provocation, insanity, automatism, or numerous other factors. The basic principle view offers no guidance as to how severe punishments should be.

Neither does this view answer the third question. Retributive justice and the principle against deliberate harm are simply two independent and inconsistent principles, with no suggestion as to whether one is to have priority over the other (and if so, which one), or how one is to be weighed against the other. Neither is it good enough to settle for what Rawls called 'intuitionism in a broad sense', where there is 'a plurality of first principles which may conflict to give contrary directives in particular types of cases', and 'no explicit method, no priority rules, for weighing these principles against one another...'.¹⁴ The basic principle view of retributive justice cannot explain why the harms intentionally inflicted as punishment are not just another set of wrongs, which compound the original wrongs, namely the crimes themselves.

¹³ Matt. 5:38.

¹⁴ Rawls, John, *A Theory of Justice* 34 (Oxford University Press, Oxford, 1972), as quoted in Joel Feinberg, *Rawls and Intuitionism*, in Norman Daniels, ed., *Reading Rawls: Critical Studies of 'A Theory of Justice'* 108,108 (Blackwell, Oxford, 1975).

2.3 *Retributive Justice as Annulling the Wrong*

‘In its essential nature, punishment is the righting of a wrong’.¹⁵ Alternatively, punishment annuls, cancels out, rectifies, or repairs the wrong. (The nuances of these terms will not be explored here.)

This view goes beyond the basic principle view by offering an explanation of sorts for why wrongdoing requires punishment - namely, because punishment annuls the crime (to select ‘annul’ from the various terms). However, how does the punishment annul the crime?

Punishment does not bring it about that the crime never occurred. On the contrary, it means there are two lots of deliberately inflicted harm, that of the punishment as well as the crime. (Ignore for convenience reckless and negligent crimes.) There is no literal annulling or cancelling out of the crime. (Perhaps ‘rectification’ is preferable to these terms, as it does not suggest that the crime in some sense no longer exists. However, ‘annul’ is the most commonly used term.) It may be suggested that genuine annulment occurs when a stolen good is returned to its rightful owner – that is, where it is not damaged, has not lost its value (as when a football season ticket is returned when the season is over), and the owner had no use for it while it was stolen. In short, the owner suffered no loss. Alternatively, any loss was repaired through compensation, in addition to restitution of the stolen item. Equally, where restitution is not possible, the victim is restored to his former position solely through compensation, that is, insofar as money is capable of doing so. (The problem of the ‘metric’ or ‘currency’ of losses, of how, for instance, to put pain and suffering in monetary terms, is not considered here.)

However, in all these cases, of restitution alone, restitution plus compensation, and compensation alone, it is only the wrongful loss, not the wrong, that is annulled. It is only in a material sense that the victim is returned to his former position. Now in many circumstances this may be enough. Annuling or repairing the harm is sufficient for corrective justice.¹⁶ But annulment of the harm alone is not sufficient for retributive justice, which requires, as does Weinrib for corrective justice, the annulment of the wrong.

But this view leaves unanswered the question of how the punishment annuls the crime – the ‘intrinsic wrongness’ of the crime, as opposed to its harmful consequences, which can be repaired through compensation, again, insofar as money is capable of doing so. Answering this question requires, it seems, a more sophisticated view of retributive justice, with more content and structure. On one reading, the distributive justice view of retributive justice attempts some explanation of how it is the punishment annuls the crime.

Nevertheless, to turn to the test questions, this view does no better in relation to the first question of what wrongs should be annulled by punishment than the basic principle view. Presumably, one again just appeals to intuition.

¹⁵ Golash, *Rights and Retribution*, American Society of Legal Philosophy Conference Paper, transcript, p. 1 (Washington, 2002), in setting out Hegel’s theory.

¹⁶ At least, this is sufficient for Coleman, whereas Weinrib requires the wrong itself to be annulled. See further Part 3, under ‘Corrective Justice as Annuling the Wrong’.

The annulment of wrongs view offers a highly abstract answer to the second question of how much (and how) to punish - namely, the appropriate type and amount of punishment is whatever is required to annul the crime. But this is as far as it goes. If one asks 'how much is that?' no answer is forthcoming. And neither can it be forthcoming, as the prior question (the first test question) of what wrongs warrant punishment, and hence are justifiably criminalised, prohibited by the criminal law, has not been answered.

As just seen (and as will be developed shortly below), a crime cannot be equated with the harm it produces. The seriousness of the wrong is not the seriousness of the harm it causes, or necessarily proportionate to it. Wrongs have a dimension of culpability as well as harm. Neither can the strength of the 'wrong-annulling' capacity or power of a form of punishment (if one can concoct such a notion) be equated with the hardness of its hard treatment. Forms of punishment have a dimension of condemnation in addition to hard treatment, or censure in addition to sanction. The 'hard treatment' of a natural event, a hurricane or earthquake, may be immense, but it is not punishment. It can only be seen as punishment if it is seen as the act of a divine being - say, divine retribution for human wickedness. Closer to home, within the realm of human agency and systems of authority, forms of punishment are not merely types of regulatory penalties. A penalty is merely a deterrent, an appeal to prudence, rational self-interest. It has no 'moral dimension', or at most it has this dimension in a limited form. A penalty is purely impersonal, having nothing to do with individual desserts. There is no suggestion of moral fault, or anything beyond minor moral fault. (Consider a parking offence, which is at most a minor distributive justice wrong, that is, if someone else wanted to use the parking space.) Punishment, however, does have a moral dimension. Punishment is for wrongdoing, breaches of one's social responsibilities, for failure to observe one's duties as an equal member of the community.¹⁷

To use a metaphor (and it is the following view of retributive justice that is rich in them), you cannot know how much water to pour into a cup until you know how big the cup is. Indeed, this metaphor oversimplifies matters. Why assume that the cup is to be filled with water? Why not wine or diesel oil?

Turning to the third question, why should crimes be annulled if this means flouting the principle against deliberate harm? How does the retributivist explain the connection between the crime and the punishment, so that even though there is more harm, the end-result is an improvement? Why give the principle of retributive justice priority over the principle against deliberate harm, and treat the 'wrong annulling' power or capacity of punishment as trumping the harm it deliberately creates through its element of hard treatment?

To continue this line of questioning, why is it better to punish than not to punish? Why are two harms, of the crime and the punishment, better than one harm and one wrong, namely the harm of the crime and the non-annulled wrong of the crime?

¹⁷ On the distinction between punishments and penalties, See Feinberg, Joel, *The Expressive Function of Punishment*, in Feinberg, Doing and Deserving: Essays in the Theory of Responsibility 95, 95-98 (Princeton University Press, Princeton, N.J., 1970).

Indeed, is this not at most a question of ‘when’ rather than ‘why’, of when, if ever, the retributive justice principle takes priority over the principle against deliberate harm? Surely the priority of the retributive justice principle depends on the theory of retributive justice in question, on how hard it holds that the hard treatment must be to annul any particular type of crime.¹⁸ Suppose a theory of retributive justice holds that execution is the fitting punishment for theft, that only the thief’s death annuls the crime. This certainly has been held in less enlightened times to be a sufficient justification for executing thieves, and presumably sometimes solely on retributive grounds.

In these circumstances, hopefully everyone today would say that the crime should not be annulled, even those who do not object to capital punishment in principle. It is better for the thief to live, even if unpunished. If this theory of retributive justice requires such drastic measures, it should be firmly rejected.

It seems, then, that there are two steps involved in answering the third question. First, it has to be shown that the principle of retributive justice should have priority over the principle against deliberate harm, either generally or in particular circumstances. Secondly, it has to be shown when, whether generally or within these particular circumstances, theories of retributive justice lose priority because of excessive hard treatment requirements.

The annulment of wrongs view of retributive justice offers no hint of an answer to either question.

2.4 The Distributive Justice View of Retributive Justice

This view of retributive justice tries to go beyond the basic principle and the annulment of wrongs views, by showing how punishment achieves retributive justice. In contrast with the basic view, on this view justice ‘inheres in maintaining a certain relationship between members of the community and does not rely on the bare doctrine that wrongdoing must be punished’.¹⁹ This view seeks to spell out the connection between the crime and the punishment, between the conduct that warrants a ‘retributive response’,²⁰ and the response itself, and so answer the second and third test questions. Admittedly, it offers no advance on the previous two views in relation to the first question, making no more of an attempt than they do to identify the wrongs that warrant punishment.

According to the distributive justice view, in committing a crime the injurer upsets a pre-existing social balance between the offender and the other law-abiding members of the community. Alternatively, he takes or gains an unfair or illicit advantage, creates a debt to society, or reaps a windfall, to mention some other metaphors used. In undergoing fair, proportionate punishment, the social balance is restored, the offender is denied his advantage, he repays his debt to

¹⁸ Kleinig, John, *The Hardness of Hard Treatment*, in Andrew Ashworth and Martin Wasik, eds., *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* 272 (Clarendon, Oxford, 1998).

¹⁹ Galligan, *supra*, 155.

²⁰ Hampton, Jean, *Correcting Harms versus Righting Wrongs: The Goal of Retribution*, (1992) 39 *UCLA Law Review* 1659, 1660.

society, or he returns the windfall. As mentioned, this view can be seen as offering an answer to the question of how the punishment annuls the crime – namely that the punishment annuls the crime by restoring the social balance that the crime upset, or by depriving the injurer of the unfair advantage he gained from the crime, and so on. Alternatively, this view can be seen as bypassing any talk of annulment (rectification, cancellation, and so on), and offering a direct answer to the question of why crimes warrant punishment – namely, to restore the social balance, deprive the injurer of his unfair advantage, and so on.

Instead of the question of how punishment annuls the crime, there is the question of how the punishment restores the social balance, deprives the injurer of his unfair advantage, and so on. For instance, does restoring the social balance justify the deliberate infliction of harm, contrary to the principle against deliberate harm? Does this view show why the principle of retributive justice should have priority over the principle against deliberate harm?

This view of retributive justice makes it a species of distributive justice. However, it has been criticised for totally mischaracterising what is wrong and objectionable about criminal conduct. To draw from Hampton's demolition of Herbert Morris's statement of this view,²¹ what is wrong and objectionable does not lie in an unfair advantage the injurer has somehow gained as against other law-abiding citizens in committing his crime. Rape is not something which everyone wishes to do, but somehow constrains himself from doing, because others are constraining themselves. Indeed, the idea is perverse. The wrong is not a distributive matter, of being unfair to one's fellow law-abiding, non-raping citizens. Rather, to rape is to wrong the victim very seriously, to cause her 'moral injury'.²² This is what is at the moral centre.

As mentioned, this view offers no answer to the first test question, no account of what wrongs warrant punishment. The answer to the second question, of how much punishment (and how to punish) is simply, if rather abstractly, whatever is required to restore the social balance, deprive the injurer of his unfair advantage, and so on.

As for the third question, of how this view justifies punishment despite its requiring the deliberate infliction of harm or deprivation of rights, the claim on the 'direct' version of the distributive justice view (unmediated by any notion of annulment) is, presumably, that restoring the social balance, depriving the injurer of his unfair advantage, and so on, is sufficient justification. But why is

²¹ Morris, *Persons and Punishment*, (1968) 52 *Monist* 475. See Hampton, *supra*, 1660-1.

²² Hampton, *supra*, 1660. The notion is explained under the next heading, 'Retributive Justice as Repairing the Moral Injury'.

Another absurd consequence on Morris's view of retributive justice is that if everyone broke the same law (and to the same extent if any question of degree arises), then there would be no unfair advantage. No individual would then benefit at the expense of his law-abiding fellow citizens, because they are all breaking this law.

Consider an illegal practice that is presumably widespread, such as fudging income declarations for the purpose of income tax. Suppose for argument's sake that every income tax payer does this, and to the extent of roughly \$100 per year each. Again, there is no unfair advantage, at least, unfair individual advantage – although income tax payers as a group may then be benefiting unfairly at the expense of those who do not pay income tax.

this sufficient justification given the flouting of the principle against deliberate harm?

As for the ‘indirect’ version of the distributive justice view of corrective justice, the answer to the question of why restore the social balance, and so on, is that this annuls the crime. But this just takes us back to the question of why annul the crime, given the harm this causes. Or more exactly, even if annulling the crime is in principle something that should be done, whether it should be done in fact depends on how much harm the annulling causes, how hard the hard treatment must be for the crime to be annulled. The ‘indirect’ version of the distributive justice view no more answers this question than does the annulment of wrongs view.

2.5 *Retributive Justice as Repairing Moral Injury*

The fourth view of retributive justice is Hampton’s own account.²³ Two preliminary points are in order. First, although Hampton sees retributive justice as a matter of repairing moral injury, her theory could also be treated as a version of the ‘annulment of wrongs’ view, because it is through the repair of the victim’s moral injury, she holds, that the retributive response ‘rights’ the victim’s wrong. Secondly, what is crucial to Hampton’s account of retributive justice as against the distributive justice view is that it shows, through the notion of ‘moral injury’, why criminal wrongs – understood as wrongs which should be prohibited by the criminal law because the only fitting retributive response must take the form of criminal punishment – are very much wrongs against victims, and only secondarily or derivatively wrongs against the community. This is especially the case with the most serious wrongs, such as murder and rape.

In contrast with the previous account of retributive justice, Hampton provides a major step towards an answer to the first question of the wrongs that warrant punishment, if not a further major step to complete the answer. (Of course, whether or not a complete answer is also the correct or best possible answer or even a reasonable answer is another question.) She distinguishes between two types of wrongs, namely those that cause harm or loss only (she uses the terms interchangeably²⁴), whether material or psychological, and those that cause moral injury as well. The former wrongs require only that the harm or loss be repaired. But the latter wrongs require a retributive response as well, to annul or right the wrong. The point of the retributive response is to compensate for and hence repair the moral injury. Hampton says that a retributive response (which punishment must be if it is to be justified) compensates for the moral injury, as civil law damages compensate for the wrongful loss.²⁵ Because retribution for Hampton is a form of compensation, it is not the case that corrective justice compensates while retributive justice punishes (quite apart from her argument

²³ As put forward in Hampton, *supra*.

²⁴ Hampton, *supra*, 1662.

²⁵ Hampton, *supra*, 1698.

that retributive responses are not necessarily punitive²⁶): 'It is rather that each compensates a different form of damage'.²⁷

Moral injury, Hampton explains, is an objective form of injury to the realisation or acknowledgment of the intrinsic, equal moral value each person possesses as a rational and autonomous being - or as she also puts it, which we possess through 'our bare humanity'.²⁸ Alternatively, to give a Christian statement of the account, each person possesses this value as a child of God made in His Image.²⁹ Moral injury is not damage or injury to the value itself, because a person cannot lose value in this sense. The value itself is only 'diminished'.³⁰ (Whether or not the distinction between damage and diminishment does the work that Hampton requires of it will not be investigated here.) A victim of rape is in no sense a lesser person, with less intrinsic moral value because of the rape. It is not the victim's intrinsic equal moral value that is damaged, but the acknowledgment of this value by others, and the victim's ability to realise this value. The value is permanent, enduring as long as a person lives. Murder does not lower the murder victim in value, but destroys what is valuable (again, that is, on the secular statement of the account). Hampton calls this 'weak permanence'. However those who believe in an afterlife, and hence deny that death destroys a person, can adopt a 'strongly permanent' view of a person's intrinsic moral value.³¹

The major step Hampton takes towards answering the question of what wrongs should be punished is to limit such wrongs to the more serious type of wrongs, that is, those that cause moral injury. That a wrong causes moral injury is necessary for the punishment to be justified, but it is not sufficient. Hampton does not, as far as I know, take the second major step, and tackle the question of sufficiency. She is not concerned to provide a criterion of criminalisation, to identify the minimum level of wrongfulness required for conduct to warrant criminal punishment, and hence prohibition by the criminal law. She does not consider whether criminalisation requires, in addition to the conduct in question causing moral injury, its causing moral injury to a certain extent or degree, its causing a certain level of harm, or some combination of the two.

Hampton provides an abstract answer to the second test question, of how much punishment (and how to punish), in that punishment must be sufficient to repair the victim's moral injury, and hence right the victim's wrong.

One query is whether, her criticism of Morris notwithstanding, Hampton does not in fact offer another version of the distributive justice view of retributive justice. Indeed is her point against Morris really that he targets the wrong moral balance? That is, does he target the 'general' moral balance between the injurer and all other, law-abiding, members of the community (where the victim only counts as just another law-abiding member of the community), instead of the

²⁶ Hampton, *supra*, 1659-1660: 'retribution includes all sorts of responses to human beings, only some of which are punitive'. (*Supra*, 1685).

²⁷ Hampton, *supra*, 1698.

²⁸ Hampton, *supra*, 1692.

²⁹ Hampton, *supra*, 1672-3.

³⁰ Hampton, *supra*, 1673-80.

³¹ Hampton, *supra*, 1673.

'local' moral balance between the injurer and the victim? Hampton still requires some moral balance between crime and punishment, between the conduct warranting the retributive response and the retributive response itself, to determine what is a proportionate retributive response – to determine, where the retributive response must take the form of punishment, how severe the punishment has to be. Just as Morris and others who see retributive justice as distributive justice adopt a general, 'community-wide' view of distributive justice, is Hampton, then, committed to seeing retributive justice as 'local' distributive justice, restricted to victim and injurer, as a 'bipolar' form of distributive justice?

A possible objection is that the injurer's and victim's background conditions are not taken into account, for instance, whether one is rich and the other poor. And so this cannot be distributive justice, local or general.

But these matters are not relevant for the general distributive justice view above. At least, they are not directly relevant. Unfavourable background conditions can provide reasons for holding that a person's culpability is diminished, and hence for judging an injurer less harshly on retributive grounds. As Hampton puts it:

'One cannot straightforwardly endorse the punishment of people whose value-denying acts are causally connected to the value-denying behaviour of others toward them'.³²

However, the distributive justice view of retributive justice still requires a pre-crime equilibrium, an equilibrium that is upset or disturbed by the crime, and restored by the punishment. That view took the relevant 'scope' of the equilibrium to embrace the whole community, at least, all its law-abiding members. The current suggestion is that Hampton is similarly committed to a 'bipolar' equilibrium, restricted to injurer and victim. It is in this sense that Hampton holds a 'local' distributive justice view of retributive justice. This is the same sense in which the view that Hampton criticises is a 'general' distributive justice view of retributive justice, general in that it is concerned with all law-abiding members of the community. (This discussion is taken further in Part 3, under the heading 'The Distributive Justice View of Corrective Justice'.)

Hampton's account of a retributive response as compensation for moral injury shows how criminal law could be moved in the direction of private law. In seeing the primary relation as that between injurer and victim, not injurer and fellow non-injuring citizens, her account of retributive justice puts the victim in the moral centre. This account enables us to see crimes first and foremost as wrongs against individual victims, and only secondly as wrongs against the community. One can refer to the 'criminal law' relationship between victim and injurer, just as corrective justice theorists speak of the 'private law' relationship between them. The 'correlativity' that corrective justice theorists see as fundamental to the private law relationship holds as much of the criminal law relationship. It may not be so manifest, because in tort law (to continue to concentrate on this branch of private law) it is the injurer that repairs the

³² Hampton, *supra*, 1699.

victim's loss, whereas in criminal law it is the state that punishes the injurer, the victim being marginalised, with no direct role.

But on Hampton's account, as has been seen, retributive justice lies in repairing the victim's moral injury through punishment (in the case of criminal wrongs), just as corrective justice lies in repairing the victim's material and psychological loss through compensation (in the case of tortious wrongs). Both retributive and corrective justice repair loss, but different types of loss. Insofar as punishment is to serve the function of retributive justice, the state ('in its capacity as impartial moral representation of the entire community'³³) can be seen as administering punishment to repair the victim's moral injury on the victim's behalf.

It would be an overstatement to say that the state acts as the victim's agent, because the victim has no control over the process. But insofar as punishment is concerned with retribution (though not necessarily in relation to other functions punishment may be held to serve, for instance, deterrence and moral education³⁴), the victim is the beneficiary – not in a material sense, but in a more important moral sense, in having his moral injury repaired. However, although this argues for greater victim involvement in the criminal justice process, the victim's role cannot undermine the essentially public role of punishment. It is only in this public role that punishment can genuinely be retributive, quite apart from the risk of degenerating into private retaliation or revenge. (See further under the heading 'The Rejection of Retributive Justice'.)

Of course, the relation between the public and private role of criminal law needs to be spelt out. But then, so does the public role of the plaintiff in a tort law case as referred to above, of invoking the deterrence capacity of tort law and hence involuntarily becoming a 'de facto' public official.

Indeed, rather than setting up an artificial divide between the private law and criminal law relationship, a more appropriate distinction is between voluntary and involuntary relations. There is something strange about considering a tort case as exemplifying the private law relationship so admired by corrective justice theorists.

In marked contrast with the contractual relationship, which is – at least, on the classical account – a voluntary agreement between free and equal agents, the tort relationship is scarcely a marriage made in heaven. It has an inauspicious start in the tort itself, which generally brings together two perfect strangers who have no wish to be in any sort of relationship whatsoever, let alone a 'private law' relationship of the tort law variety. And the relationship scarcely improves, as it only continues to exist while litigation or the threat of litigation is on foot. The tort law relationship has far more in common with the criminal law relationship than the contractual relationship. With the criminal law relationship, the crime is the equivalent of the tort (they may be one and the same event or incident), and the criminal law process can be taken as mirroring the private law process.

There are, of course, huge differences in criminal and private law processes as they stand. Tort law is currently a bilateral affair in a way that criminal law is

³³ Hampton, *supra*, 1694.

³⁴ Hampton, *supra*, 1700.

not.³⁵ But with crime as much as tort, the victim finds himself in a relationship with the injurer through no choice of his own. (And even if there was a pre-existing relationship, the crime or tort is scarcely consistent with it.³⁶) And this is quite apart from the point that the same incident can give rise to both tortious and criminal liability. Consider also the intensely and inescapably private nature of crimes against the person, in particular rape. In a sense it is the most serious personal crimes that constitute truly private law. There is no ‘metric’ or ‘currency’ to express in monetary terms the wrong of these crimes, their potentially devastating effects. That is why compensation for moral injury cannot be in terms of money, as compensation for material harm can be. Moral injury requires a retributive justice response, which in turn requires punishment, and not just a corrective justice response. These themes are taken further in Part 4.

Turning to the third question, of how Hampton’s view of retributive justice justifies deliberately harming people through the hard treatment element of punishment, the implicit claim is that this hard treatment is necessary if punishment is to constitute a retributive response which repairs the moral injury. Again, why choose this extra harm of the hard treatment element of the punishment, over just the harm and wrong of the crime? Is annulling the wrong of the crime worth the harm of the punishment?

2.6 *Rejection of Retributive Justice*

Whereas the above views of retributive justice were concerned with its content or substance, with how it justifies punishment, the balance of the part is concerned with views about its standing or weight, according to which retributive justice does not justify punishment. These views hold respectively that retributive justice does not exist, that it is merely a private principle, and that it justifies condemnation only. Obviously, the adoption of a view of retributive justice as not justifying criminal punishment may be influenced by substantive views such as those above.

The fifth view, then, is that retributive justice should be totally dismissed. Retribution has no moral standing. It is merely the desire for revenge dressed up in morally loaded language to give it a false respectability. Revenge is only a psychological or social-psychological phenomenon, an unfortunate hang-over from our evolutionary past. It is no ‘moral emotion’, as claimed by proponents of expressive or communicative theories of punishment. Revenge is in need of explanation, but beyond justification. That retribution should ground a type of justice is palpable nonsense.

³⁵ Cane, Peter, *Retribution, Proportionality, and Moral Luck*, in Cane and Jane Stapledon, eds., *The Law of Obligations: Essays in Celebration of John Fleming* 141, 146 (Clarendon, Oxford, 1998).

³⁶ Of course, both torts and crimes can occur within existing relationships. Consider the contrast that some claim between the bilateral nature of fraud and the unilateral nature of theft. (Shute, Stephen and Horder, Jeremy *Thieving and Deceiving: What is the Difference?* (1993) 56 *Modern Law Review* 548.)

On this view, of course, none of the three test questions arise in relation to retributive justice. If punishment is to be justified, it must be on non-retributivist grounds.

2.7 *Retributive Justice as a Private Principle Only*

The sixth view is, needless to say, more accommodating. It concedes that retributive justice may be justified as a private moral principle, which operates within the context of a family or small, close-knit community. However, this view denies that retribution has the moral standing to ground something of the social magnitude of a modern system of criminal law. As Galligan points out,

‘[w]e need to draw on an essential distinction between retribution as a moral principle which we might employ in our personal lives, and retribution as a social principle which justifies institutionalised state coercion of individuals’.³⁷

This view may be supported on very different grounds, not concerning the standing or weight of retributive justice, but the proper function of the state. Consider the libertarian claim that at most ‘a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contract, and so on, is justified’.³⁸ This seems to exclude a retributive justice function for the minimal state, in which case it is paradoxical that libertarians tend to be strong retributivists. Libertarians could try to argue that retributive justice can be brought in as an adjunct to the minimal state’s protective (‘law and order’) function. But this is to give retributive justice at most a secondary role of providing constraints on the carrying out of this function.

On this view, as on the previous one, the three test questions do not arise. There is no claim that retributive justice justifies criminal punishment (punishment beyond the private sphere). Again, if it is to be justified, this must be on non-retributivist grounds.

2.8 *Retributive Justice as a Public Principle, but Justifying only Condemnation, not Punishment*

In contrast with the previous view, this view sees retributive justice as a sound principle of public action, but denies that it justifies punishment, that is, punishment as involving hard treatment. Rather, it justifies only condemnation. It supports at most a system of ‘censure without sanctions’.³⁹

Again, the three test questions do not arise, because this view does not claim to justify punishment. Of course, one can ask instead of the first test question, what conduct warrants condemnation, and instead of the second question, how much (and indeed how) to condemn. However, there seems to be no equivalent

³⁷ Galligan, *supra*, 153.

³⁸ Nozick, Robert, *Anarchy, State and Utopia* ix (Basil Blackwell, Oxford, 1974).

³⁹ To draw on the title of Andrew von Hirsch’s book, *Censure and Sanctions* (Clarendon, Oxford, 1993).

to the third question, unless the condemnation or censure includes some element of hard treatment, which 'ex hypothesis' it does not. Without hard treatment there is no question of conflict with the principle against deliberate harm.

3 Corrective Justice

3.1 Three Test Questions

This part examines, in the same order, the above views of retributive justice as views of corrective justice.⁴⁰ With retributive justice, it was assumed that the relevant practical institution was state punishment (although Hampton argues that retribution need not be punitive, nor always the responsibility of the state or the law⁴¹). Views of retributive justice were also considered which held that retributive justice does not justify state punishment.

What practical institution, then, is the concern of corrective justice? There certainly is no central, organised structure to match state systems of punishment. Beyond the court system itself, there is more a decentralised practice, as one would expect with private law, whereby the state compels, in the case of tort law, those who cause wrongful losses to others to repair those losses. (In the case of contract law, this requires, in general, that the party who breaches the contract put the other, innocent party in the position he would have been in had the contract been properly performed.) Repair generally means compensation, but it can, as was seen, require restitution or a combination of restitution and compensation.

Just as one can ask whether there should be an institution of state punishment, and the content and form it should take, so similar questions can be asked of this state institution, which requires wrongdoers to repair the losses they cause others. These questions include: what count as losses? Are they limited to set-backs to legitimate interests, on some reading of 'legitimate'? What losses are wrongful? Does wrongfulness require fault on the agent's part, and if so, what counts as fault? (Suppose the agent is incapable of meeting the objective standard of negligence because of a mental impairment or brain damage, or some other factor totally beyond his control?) Suppose the agent without any fault (according to some definition of 'fault') causes the victim loss by infringing or invading his right? Must the agent cause the victim's loss, or are there circumstances in which some looser connection suffices? Can there be responsibility without causation? Can there be responsibility without fault?

These are just some of the questions that could be asked, the answers to which are often another question, or a series of questions. To move from the content and form of this institution to its overall justification, should it be retained subject to reform (or even as it stands), or abolished in favour of a broader compensation institution, not restricted or so narrowly restricted to

⁴⁰ The 'repairing the wrongful loss' view of corrective justice is the parallel to the 'repairing the moral injury' view of retributive justice. Moral injury is, for Hampton, a type of wrongful loss. The term 'moral injury' was used because it is more precise.

⁴¹ Hampton, *supra*, 1685, 1693, 1694.

wrongful losses? One alternative is a New Zealand-style system of national insurance.

For corrective justice theorists, debate about the content and form of this diffuse, ‘agent-repair of wrongful losses’ institution is very much debate about corrective justice itself, insofar as the institution is held to be explained and justified by this principle – and, again, such theorists differ on the ambit of the principle, on how much and what parts of private law it explains and justifies.

What, then, are the equivalent test questions to those on punishment?

The question of what wrongs require the state to punish the injurer becomes the question of which wrongful losses the state should compel the injurer to repair.

The second question of ‘how much’ to compensate seems straightforward. The injurer should compensate the victim sufficiently to repair the victim’s loss, to restore him to his position prior to the tort, insofar as money can do so. This question does not present the same difficulties as does the equivalent question in relation to retributive justice, of how much to punish. This is the problem of having to construct separate scales for the seriousness of crimes on the one hand, and for the severity of punishments on the other, and then having to correlate them, match them up. What is the connection, for instance, between on the crime scale, a brutal robbery, and on the punishment scale, ten years’ imprisonment?

But the difficulties with compensation for material harm are far less. There is a concrete measure of loss and a concrete measure – the same concrete measure – of repair. The wrongful loss is measured in monetary terms, precisely because this is the ‘metric’ or ‘currency’ of compensation. This does not mean, as was noted in the case of pain and suffering, that expressing all losses in monetary terms is necessarily easy. But one is not dealing here, as in the case of crime and punishment, with intangibles on both sides of the equation, the ‘wrong’ of the crime and ‘right’ of the punishment, however concrete may be the harm of the crime and of the punishment’s hard treatment.

No issue of ‘how to compensate?’ arises as did the issue of ‘how to punish?’ beyond matters already mentioned, namely the distinction between restitution and compensation, and the question of the ‘metric’ or ‘currency’ of compensation. These matters aside, it is clear how large the cup is, and what it should be filled with.

Some may deny that the third question arises, concerning conflict with the principle against deliberate harm, on the grounds that corrective justice is generally concerned with monetary transfers between parties (minus legal, administrative and other transaction costs). However, although a damages award may not generally be as bad as a custodial sentence, it is still a sanction or penalty.⁴² Indeed, if it financially ruins the defendant it may be as bad or worse. Consider Waldron’s example of ‘Fate’, who through momentary inadvertence causes ‘Hurt’ personal injuries making Fate liable for \$5m damages.⁴³

With retributive justice, it was seen that the hard treatment required to annul a wrong, according to a particular theory of retributive justice, may be so hard, so harmful to the injurer, that it is better not to annul or rectify the crime. Consider

⁴² Cane, *supra*, 141; Waldron, *supra*, 389.

⁴³ Waldron, *supra*, 387.

the example of capital punishment for theft. Similar issues can arise with corrective justice, if not quite so dramatically. It will be seen in Part 4 that any requirement on an agent to repair the wrongful loss he causes another should be read subject to constraints of retributive justice, distributive justice, and the principle against deliberate harm.

3.2 *Corrective Justice as a Basic, Unanalysable Moral Principle*

The equivalent view of retributive justice was the basic moral principle that wrongdoers should be punished. The principle here can be stated in the same terms as the description of the relevant state institution above, that those who wrongfully cause losses to others should repair those losses.

Behind the simplicity of this wording lies a host of questions, concerning both its interpretation and justification, as just seen. But as it stands, this view suggests no answer to the first question, of what wrongful losses an injurer should be compelled by the state to repair. There is no suggestion of how serious the losses must be, and neither of how wrongful. There are no set thresholds of seriousness or wrongfulness, and neither could there really be such thresholds within a tort system. The matter is left to the prospective plaintiffs, subject to court constraints on frivolous or vexatious actions.

Where it is straightforward to estimate the extent of loss (not the case with pain and suffering), the second question of how much to compensate is likewise straightforward (as mentioned in introducing the test questions for this part). The answer is simply that the injurer should compensate the victim enough to repair the wrongful loss.

The answer to the third question, concerning conflict with the principle against causing deliberate harm, depends on how serious the wrongful losses are, according to the account of wrongfulness to which the principle applies. And this is to return to the unanswered first question. Again, an issue pursued in Part 4 is whether adequate compensation, proper repair of a wrongful loss, is dealt with better at a social level, for instance, through a system of national insurance, rather than by the private law relationship.

3.3 *Corrective Justice as Annuling the Wrong*

What, according to this view, is required as a matter of corrective justice to annul the wrong? The equivalent view of retributive justice holds that annulling the wrong requires punishment (although, again, Hampton argues that retribution need not be punitive). If corrective justice requires that wrongs be annulled, it must require that they are annulled by something other than punishment. But what could this something be? Coleman argues that because annulling the wrong is the role of retributive justice, and because there is a social institution to carry it out ('in some accounts anyway'), namely punishment, corrective justice

should be restricted to repairing wrongful losses: ‘Annulling moral wrongs is a matter of justice: retributive, not corrective, justice’.⁴⁴

One suggestion is that annulling the wrong consists in repairing the wrongful loss. A parallel may be suggested with Hampton’s view of retributive justice, in that she holds that retribution repairs a victim’s moral injury, thereby righting the injurer’s wrong. So why is corrective justice not a matter of repairing the wrongful loss (material and psychological harm, rather than moral injury), thereby righting or annulling the injurer’s wrong?

However, in the case of retributive justice there is something distinct from repairing wrongful material and psychological losses that annuls the crime – namely, repairing the moral injury. But there is no counterpart with corrective justice on the annulment of wrongs view. Repairing the wrongful material and psychological loss is just that. There is no further step to be taken. Justice for victims lies in the loss being repaired by the injurer. Justice is done once the injurer has paid up.

If both punishment and repair are ruled out as ways in which wrongs are annulled in corrective justice, is there some third alternative? What about a system of state enforced apology, or censure or condemnation? But no such institution exists. So what is it that corrective justice is supposed to explain and justify? And even if such an institution were to exist, what would its role be in tort law? This would be a matter of retributive justice, not corrective justice. Hampton notes that an apology can be a sufficient retributive response to some wrongs that cause moral injury.⁴⁵ As for notions of censure and condemnation, they have no role in tort law. There is no distinction in private law like that in criminal law between condemnation and hard treatment, between censure and sanctions.⁴⁶ Private law is beyond the morally charged zone of criminal law, or at least the morally charged zone of the more serious crimes like murder, rape, robbery and kidnap. Private law is not concerned to express or affirm society’s values. There is no higher end than that victims be compensated by their injurers for the wrongful losses they have caused them.

Neither is there any question, then, of going on to annul the wrong. In terms of Hampton’s distinction between wrongs that only cause material or psychological loss, and wrongs that cause moral injury, it is only the latter that need to be annulled.

In short, of these two interpretations of the ‘annulling the wrong’ view of corrective justice, the former, which holds that annulling the wrong requires only the repair of the wrongful loss (the material and psychological harm), collapses this view into the ‘repair of the wrongful loss’ view of corrective justice; whereas the latter interpretation denies any corrective justice notion of annulling

⁴⁴ Coleman, *supra*, 325.

⁴⁵ Hampton, *supra*, 1697-8. On a public apology as a possible corrective justice response on the ‘annulment of wrongs’ view of corrective justice, *See* Coleman, *supra*, 321.

⁴⁶ The existence of punitive damages appears to contradict this. But punitive damages are controversial. This is in part because they can only be justified as retribution, and it is controversial that retributive justice should have a role in tort law. Punitive damages are also controversial because there appears to be no justification, in retributive justice or elsewhere, for why they should result in a windfall to the victim, in his undeserved enrichment.

the wrong distinct from the retributive justice notion. 'Annulling the wrong', then, is simply not a view of corrective justice. Wrongs are annulled through punishment.⁴⁷ As for a third alternative, there appears to be none.

Needless to say, this non-view of corrective justice fails to answer the three test questions.

Again, there is no answer to the first question of the wrongs that corrective justice, in contrast with retributive justice, holds should be annulled. Indeed, Hampton's own answer flatly contradicts the 'annul the wrong' view. If there is no moral injury (and with most tortious conduct there is not⁴⁸), there is no moral injury to be repaired, and so there is no wrong to annul, but only wrongful losses (material and psychological harms) to be repaired.

There is no answer to the second question either. If it is not known what annuls the wrong, it is not known how much of this unknown 'wrong-annulling' substance would be required to annul the wrong.

Similarly, there is no answer to the third question, concerning possible conflict with the principle against deliberate harm. Presumably, this view cannot require any element of hard treatment, as this would be to trespass on the territory of annulment of wrongs as a requirement of retributive justice. The idea that a distinct 'corrective justice' response could lie in some sort of act of censure or condemnation has been dismissed on the same grounds. This is effectively to dismiss the view that corrective justice requires only some symbolic response. Therefore, the treatment below of the view that corrective justice requires only a symbolic response, not compensation, is merely a formality.

3.4 *The Distributive Justice view of Corrective Justice*

The third view of retributive justice saw it as a species of distributive justice. Retributive justice requires restoring the social balance between the injurer and his fellow law-abiding citizens, or depriving the injurer of his unfair advantage, and so on. This view attempted (unsuccessfully, it was argued) to meet the criticism of the basic principle view, that it has little content or structure, and so offers no guidance about implementing the principle of retributive justice.

There seems to be no corrective justice counterpart to this view of retributive justice. Corrective justice is concerned only with the parties to a private law relationship, to restore or re-establish the pre-existing distribution between them, their relative positions. This is sometimes justified on the grounds that the pre-existing distribution accords with distributive justice. On the other hand, if the

⁴⁷ Again, on Hampton's view, a wrong may cause moral injury, but not require the appropriate retributive response to take the form of criminal punishment, presumably because the wrong is not harmful enough or the moral injury is not great enough, or some combination of the two.

⁴⁸ See Hampton, *supra*, 1664-6. Tortious conduct that is also justifiably criminal conduct on Hampton's view must cause moral injury. As mentioned, this is necessary but not sufficient. Moral injury requires a retributive response but this need not take the form of criminal punishment. See further n. 47.

pre-existing distribution does accord with distributive justice, is corrective justice not simply reduced then to distributive justice?

It is not enough for the pre-existing distribution to be morally neutral. This turns corrective justice into a principle of conservation. It sees corrective justice as restoring the 'status quo ante' for its own sake. There is no point in restoring the 'status quo ante' unless it is in some way morally positive. At least, this equilibrium must be morally preferable to the disequilibrium that results from the tort (or breach of contract) that disturbs the equilibrium. However, perhaps the pre-existing equilibrium was itself a state of disequilibrium in relation to an even earlier equilibrium. There is a danger of 'persuasive definition' here.⁴⁹ Of course, it seems good that losses are repaired. The very idea of loss implies that there should be repair, and likewise the very idea of repair implies something that is broken or damaged. One cannot repair what is fine as it is. 'Loss' and 'repair' in the corrective justice context imply that the inter-party position prior to the loss is better than the position resulting from the loss, and that the former should be restored. Consider likewise the term 'equilibrium'. By its nature it requires restoration if disturbed. Equilibrium is good, disequilibrium bad.⁵⁰

But it is not necessarily the case that a previous distribution or relative position between the parties should be restored. Whether the restored or replaced distribution or position is an improvement depends on what is the correct or best theory of distributive justice, and more broadly, on what is the correct or best theory of the good or the value of whatever it is that is to be distributed, the subject-matter of distributive justice. More specifically, it may not be clear which of two previous distributions or positions should be restored. Consider the following case.

V trades in a car he knew to be stolen for a car in which D had good title. D finds out that he has been deceived, and tricks V into selling the car back to him, paying V with a cheque D knew would be dishonoured.⁵¹ In so tricking V, is D disturbing the pre-existing equilibrium, where V had D's car as a result of V's deceit? Or is D restoring the equilibrium prior to that, before D and V had any contact, before the whole series of events began? Is D's conduct in tricking V into restoring the car to him a case of criminal fraud, or an enterprising 'self-help' initiative in corrective justice?⁵² What is the equilibrium that corrective justice is supposed to restore? To complicate matters further, suppose the parties had been involved earlier in a similar series of events, only their roles were reversed.

Indeed, the point can be taken further. If the question is one of which prior distribution or relative position to restore, why not ignore the past and choose the best distribution or position on its merits, whether or not the distribution or

⁴⁹ Stevenson, Charles L., *Ethics and Language* (Yale University Press, New Haven, Conn., 1944).

⁵⁰ 'Equilibrium' is used here in the everyday general sense of a state of balance, rather than in the strict economic sense, in which restoring equilibrium does not require returning to the same distribution or position. I thank Alice Muhlebach for this point.

⁵¹ See *Salvo, v. R.*, (1980) VR 401, although the facts have been altered here.

⁵² Consider the example Hampton gives of a non-legal retributive response, borrowed from Gallanter and Luban, (Hampton, *supra*, 1693)

position is a preceding distribution or position? Why be restricted to a short list, and a very short one at that, of distributions and positions that have actually existed, and furthermore preceded the current distribution or position resulting from the tort (or breach of contract) that one is trying to address? Moreover, merit here would be judged presumably on distributive justice grounds, possibly combined with other principles, for instance, concerning honesty, or the need to show consideration (to take Gardner's examples⁵³).

Perhaps, however, the point is that the 'status quo ante' is not distributively just, but correctively just. Coleman says:

'If sustaining or protecting a less than fully just distribution of wealth or resources can sometimes be a matter of justice, it cannot be a matter of distributive justice. Then what sort of justice is it that permits, if it does not explicitly, endorse distributive injustice?

'The answer is, corrective justice'.⁵⁴

Corrective justice is, as Waluchow says, concerned to 'correct an imbalance which has resulted from an unwarranted private transaction'.⁵⁵ But, Waluchow 'stress[es]', the unwarranted status of the transaction 'is determined independently of corrective justice'.⁵⁶ Corrective justice 'presupposes an independently definable just status quo'.⁵⁷ Similarly, John Gardner argues that Weinrib is committed to 'the idea that corrective justice only corrects corrective injustices',⁵⁸ and that this generates an infinite regress.

If corrective justice cannot correct corrective injustices, however, if some independent principle is required, then we are back to distributive justice, and the claim that corrective justice corrects distributive injustices. But is there some other source of the moral superiority of the 'status quo ante'? A third suggestion is that corrective justice corrects wrongs other than injustices, for instance, cases of dishonesty and inconsiderateness (to use Gardner's examples again). This does not help corrective justice, however, because then it just corrects breaches of these moral principles, rather than injustices, as defined by distributive justice (or the correct or best theory or set of principles of distributive justice, whatever that is). And in any case, although these other principles could conceivably extend the range of the 'correcting' power of corrective justice, it is not easy to see how they can replace correcting injustices. This must surely be 'home ground' for the principle of corrective justice. Any other 'correcting' it does is only a bonus.

⁵³ Gardner, John *The Purity and Priority of Private Law*, (1996) 46 University of Toronto Law Journal 459, 470.

⁵⁴ Coleman, *supra*, 305.

⁵⁵ Waluchow, W.J., *Professor Weinrib on Corrective Justice*, in S. Panagiotou, ed., *Justice, Law and Method in Plato and Aristotle* 153, 155 Academic Printing and Publishing, Edmonton, Alberta, 1987.

⁵⁶ *Ibid.* '...a principle of corrective justice applies only in situations where something between two subjects has already gone wrong and calls for corrections'. (Sheinman, *supra*, 24-5)

⁵⁷ Waluchow, *supra*, 156.

⁵⁸ Gardner, *supra*, 470, citing Weinrib, *supra*, 63.

So what, then, is corrective justice? ‘Corrective justice is, as its name suggests, a *corrective* measure’⁵⁹ – ‘corrective justice *corrects*’.⁶⁰ But what makes it a *principle*, and a principle *of justice*? Or is corrective justice, as it could be put, ‘all correction, and no justice’?

A similar issue arises with Nozick. He proposes three principles of justice, a principle of justice in acquisition, a principle of justice in transfer, and a principle of the rectification of injustices, that is, of injustices as ‘specified’ by, or ‘violations’ of, his principles of justice in acquisition and justice in transfer.⁶¹ The rectification principle does not identify a further type of injustices, which are not breaches of the principles of justice in acquisition and transfer. As Gardner suggests, Nozick’s principles of justice in acquisition and justice in transfer constitute his account of distributive justice, and his principle of rectification of injustices is his account of corrective justice: ‘In Nozick’s account, therefore, distributive injustice is what activates corrective justice...’.⁶²

So what makes the principle of rectification of injustices a principle of justice, as opposed to merely the practical step of rectifying injustices, as identified by the acquisition and transfer principles? Or to put it another way, why is corrective justice not just the ‘executive stage’ as opposed to the ‘deliberative stage’ of distributive justice,⁶³ or for that matter, a process which extends beyond rectifying distributive injustices, to rectifying breaches of other moral principles – to rectifying wrongs other than injustices – as well?

One suggestion is that corrective justice is a remedial rather than proscriptive duty⁶⁴ or principle. As Waluchow puts it:

‘It is a justice which guides the judge not in determining whether a defendant has unjustly impinged in some way upon the interests of a plaintiff, but in determining how to respond given that some such injustice has occurred’.⁶⁵

But what is a remedial principle? Once the extent of wrongful loss has been ascertained, corrective justice lies in repairing that loss. This may present practical problems, of the need to make allowance for overheads such as legal and administrative expenses, tax consequences and no doubt other accounting matters, some of which may be highly complex. If there is some mix of restitution and compensation, this may add to the difficulties. There may well need to be guidelines and rules of thumb to guide the process of repair or rectification. But why principles of justice? Conceptually, knowing how to rectify an injustice, to repair a wrongful loss, is no more difficult than using a

⁵⁹ Waluchow, *supra*, 155.

⁶⁰ Sheinman, *supra*, 24.

⁶¹ Nozick, *supra*, 153, 152.

⁶² Gardner, *supra*, 467-8.

⁶³ Perry, Stephen R., *On the Relationship between Corrective and Distributive Justice*, in Jeremy Horder, ed., *Oxford Essays in Jurisprudence: Fourth Series* 237, 241 (Oxford University Press, Oxford, 2000), discussing James Gordley, *Tort Law in the Aristotelian Tradition*, in David G. Owen, ed., *supra* 387, 388-9.

⁶⁴ Sheinman, *supra*, 28.

⁶⁵ Waluchow, *supra*, 155.

computer's 'undo' function. As the car dealing example illustrates, the problematic issue may be to determine which 'status quo ante' to restore, an issue which leads to the question of why not choose a distribution or position on its own merits, whether or not it was a preceding distribution or position.

Is it, then, that corrective justice, like Nozick's principle of justice in rectification, is just the executive stage of distributive justice? If Nozick's principle is his account of corrective justice,⁶⁶ this is scarcely surprising. Is corrective justice, then, 'all correction, and no justice'? More specifically, is it the executive stage of distributive justice at the local level of the private law relationship between victim and injurer?

Of course, on the executive stage view, the three test questions do not arise. But try considering corrective justice again as the application of distributive justice principles at the local level, between victim and injurer. (It could not be restoration of the local distribution, whatever it is, whether it accords with distributive justice principles or not, as this is to treat corrective justice as a conservation principle, not a principle of justice.) How does this view of corrective justice handle the questions?

The answer to the first question seems to depend on the theory of distributive justice adopted. The theory provides the independent principle or principles that Waluchow mentions. But again this means that corrective justice does not necessarily restore the previous position or distribution, because this may not be consistent with whatever theory of distributive justice is adopted. Either, then, corrective justice reduces to distributive justice; or corrective justice is, again, merely correction – the executive stage of distributive justice. The choice is between keeping the 'justice' in corrective justice, at the price of the justice being distributive justice; and keeping the 'correctiveness' of corrective justice, at the price of its not being a type of justice at all.

However, this issue of choice of a theory of distributive justice was not considered in relation to Herbert Morris's 'general' distributive justice view of retributive justice, or with the reading of Hampton's account of retributive justice as a 'local' distributive justice view of retributive justice. This does not mean that this issue was just overlooked. Rather, on the understanding of a distributive justice account of retributive justice adopted there, it did not arise.

Morris's view is not a distributive justice view at the level of the choice of a rule or standard – a rule or standard to be chosen according to the correct or best theory of distributive justice. Rather, it is a distributive justice view at the level of the application of the rule or standard.⁶⁷ The application is to be fair, producing an equitable distribution of the benefits and burdens of the rule – the burden on each individual of complying with the rule, and the benefit each individual derives from the compliance of others. Morris's concern is with the 'free loader' who enjoys the benefits of the compliance of others, without undertaking the burden of compliance himself. It is this that upsets the social moral balance - which is restored, supposedly, by the offender undergoing just and proportionate punishment.

⁶⁶ Gardner, *supra*, 469.

⁶⁷ On the distinction between a rule and its application, see Lyons, David, *Formal Justice*, (1973) 48 Cornell Law Review 833, 851-853.

On what was suggested to be Hampton's 'local' distributive justice view of retributive justice, there is similarly no issue of the choice of a distributive justice theory. This is because the relevant rule or standard is, as it could be put, insofar as the two parties to a criminal law relationship are concerned, the state of there being no damage to the acknowledgment or realisation of the equal intrinsic moral value that each person possesses through being an autonomous and rational being (in virtue of his or her sheer humanity), and hence no diminishment of the value itself. Certainly, Hampton holds that moral injury is in no sense a matter of distributive justice – this is precisely her criticism of Morris – but nevertheless there must be a moral balance, an equilibrium, that is disturbed by the moral injury, and that is restored by the appropriate retributive response, the just punishment imposed on the injurer.

But notwithstanding the earlier suggestion, can Hampton's view of retributive justice really be seen as a local distributive justice view? Is she committed to the notion of a moral equilibrium between victim and injurer? Or is it rather that what matters is that the moral injury is repaired? If the prior position is that there is no moral injury, then repairing the moral injury could be seen as a return to the prior position. But this is mere coincidence. Restoration in itself does not matter. What matters is that the moral injury be repaired.⁶⁸ Indeed, why suppose that repairing the moral injury does restore the previous position, as opposed to creating a new one? In both cases there is no moral injury – although in the one case this is because it has not yet occurred, whereas in the other this is because it has been repaired.

There are obviously issues here which need to be explored further. For the time being, however, it appears that under the 'local' distributive justice view of corrective justice either corrective justice is simply 'local' distributive justice, or it is its 'executive stage'. On the latter alternative, the three test questions do not arise, as mentioned. On the former alternative, the answer to the first test question depends on the theory of distributive justice adopted and applied at the local level. The answer to the second question, of how much D should compensate V, is simply whatever is required to restore the balance, the previous 'equilibrium'. As for the third question, which asks why corrective justice should be implemented if it conflicts with the principle against deliberate harm, the answer is that such conflict can occur when damages awards as in Waldron's case of Fate and Hurt⁶⁹ are possible.

3.5 *Corrective Justice as Repairing the Wrongful Losses*

The main issue with this view is what counts as wrongful losses. This view has been introduced as the basic principle view, but it can be taken much further, as it certainly has been, by answering questions such as those listed early in this part.

⁶⁸ Recall the absurd consequence of Morris's view spelt out in n. 22. Applied to Hampton, this becomes the absurd idea that if everyone suffers moral injury, and the same moral injury, this is not a disequilibrium because they are all then equal.

⁶⁹ Waldon, *supra*, 387.

Consider, for example, whether strict liability is compatible with corrective justice. On one account it is not. Strict liability is ‘responsibility without blame’.⁷⁰ If the injurer is not at fault, there is only loss, not wrongful loss.⁷¹ A broader account holds that loss is wrongful if it results from the invasion or infringement of the victim’s right. Because rights can be invaded or infringed without fault by the agent, corrective justice can be extended to strict liability torts.

Turning to the test questions, the answer to the first question, of what losses should the state compel the injurer to repair, depends on how the principle is filled out, for instance, whether it extends to strict liability or not.

The second question, as was seen, is relatively straightforward in relation to this view of corrective justice. This view does not give rise to the problems of what a wrong is, and how it is to be annulled, on the ‘annulment of wrongs’ view, or rather ‘non-view’, of corrective justice. So long as there is a satisfactory solution to the ‘currency’ or ‘metric’ problem, and losses can be expressed in monetary terms, the measure of repair is simply that sum of money.

The answer to the third question depends on the answer to the first question. Where considerable compensation is required (as with Waldron’s *Fate and Hurt*⁷²), this is a reason for moving beyond the private law relationship to seek a social solution (as is argued in Part 4).

3.6 *Rejection of Corrective Justice*

At this stage, Part 2 moved from views of retributive justice concerned with its substance or content, to views concerned with its standing or weight, which held that retributive justice did not justify punishment. Here, likewise, these views are considered as views of the weight or standing of corrective justice according to which corrective justice does not justify compensation.

There seems to be no view of corrective justice equivalent to the view that retributive justice, or rather just retribution, is merely revenge, and hence not to be granted any moral standing. Corrective justice has not aroused the same (or any) level of passion, has not been put to the same use as retributive justice, to justify punishment, and sometimes very harsh and brutal forms of punishment. (This is not to say that retributive justice cannot equally operate to restrict punishment – see further Part 4. Consider the normal abhorrence at punishing the innocent.) However, although the term ‘corrective justice’ (or ‘commutative justice’) is hardly part of ordinary, popular discourse, the idea that people should repair or replace what they damage or break (at least where they have acted wrongfully) certainly is, and is strongly accepted.

It was argued earlier that the ‘annulment of wrongs’ view of corrective justice either itself reduces to the ‘repair the wrongful losses’ view, or reduces

⁷⁰ Cane, *supra*, 158.

⁷¹ It does not follow that if the injurer is at fault, the loss is wrongful. The loss may be caused by D quite extraneously from the fault. See Feinberg, *Sua Culpa, Doing and Deserving*, *supra*, 187, 195-7.

⁷² See n. 43.

corrective justice to retributive justice. On the former alternative, it is this view of corrective justice that is rejected; on the latter, it is corrective justice itself that is rejected.

Another view of corrective justice treats it as not a principle of justice at all, but merely as a corrective measure, the 'executive stage' of distributive justice. A quite independent argument to reject or eliminate corrective justice is put forward in Part 4.

Obviously the three test questions do not arise in the case of views that reject corrective justice.

3.7 Corrective Justice as a Private Principle Only

The next view is that corrective justice is a private principle only, and does not warrant a state system of compelling injurers to repair the wrongful losses they cause their victims. The equivalent view of retributive justice holds that retributive justice does not justify state punishment. Nevertheless, compensation of victims by their injurers could be enforced by moral pressure within a particular private community that holds this view of corrective justice. Of course, moral pressure can be highly coercive. If by a state is understood a body that claims a monopoly on legitimate coercive power within a community, then at some point the use of moral pressure may be sufficiently coercive for the community in question to constitute a state, or at least to fulfil this condition on being a state. In this case, of course, corrective justice is no longer a private principle. However, where that line is to be drawn is not investigated here.

Weinrib's claim that 'the purpose of private law is to be private law'⁷³ does not explain why social resources should be devoted to private law. If it has no external end, serves no social function, why use public revenue and resources to establish and sustain it? Even if one goes further and says that the aim of private law is to institute corrective justice, it still has to be shown that corrective justice is important enough for the state to be concerned to implement it, and allocate the necessary resources to this end.

The three test questions do not arise on this view of corrective justice, just as they did not arise on the similar view of retributive justice. There is no question of corrective justice justifying any state institution to compel injurers to repair wrongful losses. Any such institution must be justified on other grounds, on economic or distributive justice grounds – contrary to the familiar argument in Part 1 that only corrective justice can explain the 'bipolarity' of the private law relation. There is, however, still a question parallel to the first question, of what wrongful losses, within the particular private community, warrant moral pressure to ensure that injurers repair them.

⁷³ Weinrib, Ernest J., *The Idea of Private Law* 5, Harvard University Press, Cambridge (Mass.), 1995.

3.8 Corrective Justice as Requiring Only a Symbolic Response, not Compensation

The final view of retributive justice discussed above sees retributive justice as justifying condemnation, but not punishment, hard treatment. Retributive justice warrants at best a system of ‘censure without sanctions’. Is there any equivalent view of corrective justice? It seems not, because of the practical nature of corrective justice. As noted under the heading, ‘Corrective Justice as Annulling the Wrong’, the consideration of this view here need only be a formality. This view is starkly incompatible with the ‘repair of the wrongful loss’ view of corrective justice, holding that the principle of corrective justice does not require compensation, not even at the private level.

One suggestion is that this view could combine with the ‘annulling the wrong’ view of corrective justice, if the symbolic response this view offers (whatever it is) functions to annul wrongs in corrective justice. However, it was argued above in relation to the ‘annulling the wrong’ view that, precisely because it has no regard for the practical nature of corrective justice, it is rather a ‘non-view’. So either annulling the wrong is really a matter of repairing the wrongful losses, or this is just a view of retributive justice, not corrective justice.

4 The Elimination of Corrective Justice

4.1 Exposition of the Argument

The argument of this part is put forward quite independently of argument in Part 3, under ‘The Distributive Justice View of Corrective Justice’, that corrective justice is not a genuine principle, but only the executive stage of distributive justice. Insofar as that argument is sound, and so eliminates corrective justice, the slate is nevertheless wiped clean in this part, and corrective justice is offered a fresh start.

The argument here returns to the familiar argument in Part 1, that neither compensation nor deterrence, but only corrective justice, can explain the correlativity of the private law relationship. However, the requirement of corrective justice, that the victim should be compensated by the injurer alone, raises well-known moral problems.

Suppose D’s culpability is relatively minor, but the loss is great. For instance, D drives slightly carelessly, and grazes the bumper-bar of the car in front. But the car is a Rolls-Royce,⁷⁴ and the bumper-bar is studded with diamonds. (Any question of contributory negligence can be met by increasing the overall loss to the extent required to offset the degree to which P is adjudged contributorily negligent.)

Questions arise concerning distributive justice, the principle against deliberate harm, and retributive justice.

First, if P can afford such an expensive car (plus diamonds), if he really is as rich as he portrays himself to be, then why should he not pay for the repairs (and

⁷⁴ Coleman, *supra*, 304, discusses a similar example.

lost diamonds) himself? Why see the incident in terms of the ‘bipolar’ private law relationship and corrective justice, rather than at a social level, as a matter of distributive justice, which takes into account the wealth imbalance between D and P?

Why, it may be asked, should tort law enable P to impose such a risk on D? Why should one distributive injustice, in P being able to afford a Rolls-Royce whereas D can hardly afford any car (let us suppose), be able to generate another distributive injustice, in D being able to subject P to the risk of having to pay huge compensatory damages if P were to hit D’s car? People with Rolls-Royces (with or without diamonds) are not part of D’s world. It is only in these unfortunate, coincidental circumstances, that the worlds of D and P are at all likely to cross. Why must D take the world as given, with such additional risks superimposed on existing inequalities in wealth? Why treat the risk here as having a moral standing any higher than the distributive injustice that makes it possible?

Why not hold, to start with, that if P wants to be so silly with his diamonds, he should bear all the risk himself? But change the example to remove the silliness by removing the diamonds. (Alternatively, leave the diamonds there, but make D 100% contributorily negligent in relation to them.) There is now just a common-or-garden Rolls-Royce bumper-bar. Nevertheless, it is still very costly to repair, particularly for someone with D’s limited means. Why harm D when P can easily absorb the loss?

The next question, then, is whether the fact that P can afford to own and drive such an expensive car means that P should bear the cost of repairing the bumper-bar himself. Why not make P bear the risk of driving such an expensive car, even without diamonds? Why not hold him 100% contributorily negligent for damage to the car beyond the cost of the same damage to an average car?

Secondly, quite apart from any question of distributive justice, why implement corrective justice if this is to cause D extreme financial hardship, even financial ruin? Consider again Waldron’s Fate and Hurt. There is surely conflict here with the principle against deliberate harm. What benefits are there to offset the financial hardship or ruin the \$5m damages award may cause D? Within the confines of the private law relationship, the only relevant benefits are those to P, not to third parties (such as the deterrence value of subjecting D to the award, whatever this value may be, however it may be assessed⁷⁵). Within these confines, imposing the harm on D (in the form of the damages award) is the only way to repair P’s loss – indeed, otherwise P may well be left in financial hardship or ruin, as if the personal injuries caused him by D are not enough to cope with.

This is sometimes seen as an argument for Feinberg’s ‘weak retributivist’ principle, which asserts ‘the simple moral priority, *ceteris paribus*, of the innocent party’⁷⁶ – or what will be understood here (whether or not Feinberg took it this far) as the principle that the less innocent of the two parties should bear the cost. Hurt is totally innocent, but Fate is not. He caused Fate’s injury,

⁷⁵ But consider also the flow-on costs to the community of D’s financial hardship or ruin, for instance, possible effects on his health and ability to work.

⁷⁶ Feinberg, *Sua Culpa*, supra, 218, and also 220.

and was slightly negligent in doing so. Indeed, this principle could be called in to support strict liability. But here it seems to prove too much. Consider Fletcher's example of D accidentally treading on a mine, causing it to explode, thus injuring P. He says that Anglo-American common law would never impose liability on D in these circumstances.⁷⁷ Nevertheless, D is the 'less innocent' party, purely in virtue of having caused, or played some contributory role in P's injury.

Or suppose, to return to the Rolls-Royce case, P wants D to repair the bumper bar not out of any financial need, but purely out of jealousy. D is a successful novelist (artistically if not financially), whereas all P's manuscripts have been rejected. And P wants D to suffer for it. Why should tort law in such circumstances unwittingly serve as a mechanism for P to implement his malicious desires? P's wish to get his own back scarcely helps justify or offset the hardship to D. Rather, it merely exacerbates the hardship.

A further claim is that corrective justice should be implemented for its own sake, because of its intrinsic merit. But is this sufficient to justify state implementation of corrective justice? Or should there be retreat to the private principle view of corrective justice, discussed earlier? How is this intrinsic goodness to be measured against actual harm? How is doing right to be balanced against causing harm? (This issue arose with retributive justice - see Part 2, especially the discussion of the third test question under 'Three Test Questions'.) When is the price of justice, whether retributive or corrective, not worth paying?

Consider the example above of the retributive justice theory that holds that capital punishment is the fitting punishment for thieves. The case of Fate and Hurt could well be a tort law equivalent. Why financially ruin a person because of a minor error, just momentary inadvertence, even if the consequences were major and disastrous?⁷⁸ (Certainly, criminal law would never do so, and probably not regulatory law.)

Thirdly, a damages award is a sanction, a penalty – or so some claim.⁷⁹ Both in Fate and Hurt, and the Rolls-Royce cases, D's fault is minor. Does enforcing corrective justice in such circumstances amount, then, to a breach of retributive justice? In order to repair P's loss, corrective justice imposes a sanction or penalty quite disproportionate to D's culpability. This appears to be a case of excessive punishment, even if the 'expressive' or 'censure' element of punishment is missing. As quoted above, Coleman admits that corrective justice could conflict with distributive justice.⁸⁰ (And where it does, the question arises of which is to take priority.) It seems even clearer that corrective justice can conflict with retributive justice – in which case the question of priority arises here too.

If enforcing corrective justice becomes in the circumstances an exercise in retributive injustice, in unfair punishment, why is tort law doing this? And why

⁷⁷ Fletcher, George, *Book Review: Corrective Justice for Moderns*, (1992-3) 106 *Harvard Law Review* 1658, 1661.

⁷⁸ See Waldron, *supra*, n. 4, quoting Prosser.

⁷⁹ See n. 42.

⁸⁰ See text at n. 54.

should P be in the position of ‘de facto’ prosecutor of D for his wrongdoing?⁸¹ For P to have the ‘de facto’ role of implementing the deterrent function of tort law is one thing. But for P to have this quasi- (or anti-) retributive justice role is quite another.

Furthermore, in stark contrast with the structured discretions that constrain public officials,⁸² P has complete licence to use this power and ‘de facto’ authority as he likes, subject only to the minimal constraints against frivolous and vexatious actions, and malicious prosecution. He may ‘prosecute’ D out of jealousy (so long as he is reasonably discreet about his motive), or toss a coin to decide whether to sue.

Suppose now that the car D grazes in front of him is a ‘jalopy’. The very slight dent D puts in the bumper bar merely adds to a host of others. P suffers no economic loss, however dented may be his pride. D does not have to pay anything. (Indeed, the terms ‘P’ and ‘D’ are not really appropriate, as there is no question of litigation.) In this situation, D has luck on his side, in that the car he hit was not an average car, where the cost may be a couple of hundred dollars, let alone a Rolls-Royce. He fares no worse under tort law than if he drove recklessly, but hit nothing. Again, he pays nothing, although in the case of driving recklessly he may be fined (if caught).

In all three cases, of the average, very expensive, and very cheap car, it seems fair to expect that D should pay a couple of hundred dollars or so. Such a sum seems roughly and intuitively proportionate to his culpability, his carelessness. (Certainly, others may have different estimates, and such differences of opinion are familiar in sentencing contexts.) In the case of hitting the average car, the sum broadly covers P’s loss. Where P drives a jalopy, the money could be directed into an insurance pool, to help cover repair costs where D cannot be found, or has no money. This seems the obvious solution where D is lucky and no car is hit. And if the money were to go to P in the ‘jalopy’ case, he would be ‘unjustly enriched’, as he suffers no loss. Finally, where D hits the Rolls-Royce, the money could be a contribution to P’s costs of repairs, or again, go into an insurance pool.

In short, tort law treats culpable non-injurers (those at fault, but who cause no loss) too generously, as it does culpable injurers who cause minimal harm but with considerable culpability – or, more generally, where the culpability is ‘greater than’ the harm. Equally, tort law treats non-culpable injurers (those not at fault, but who nevertheless cause loss) too harshly, as it does culpable injurers, where the culpability is minimal, but the harm is considerable – or, more generally, where the harm is ‘greater than’ the culpability. In short, ‘the wrong can be very slight and the damage enormous, or the wrong can be grave and the damage miniscule’.⁸³

Only in the coincidental, intermediate case, where P’s loss is equivalent or proportionate to D’s culpability – where the lines of P’s loss and D’s culpability intersect – does tort law ‘get it right’. Only at this point is what P requires to

⁸¹ See n. 46.

⁸² See, for instance, Galligan, D.J., *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon, Oxford, 1986).

⁸³ Coleman, *supra*, 235, as cited in Waldron, *supra*, n. 3.

repair his loss equal or proportionate to D's culpability, and therefore what D should pay. It is only here that the 'grounds of recovery' and the 'grounds of liability'⁸⁴ coincide.

In the other two types of cases, tort law 'gets it wrong': either D pays P too much, beyond the extent of his culpability, to repair P's losses fully; or D pays only to the extent of his culpability (because this just happens to be all the money D has), and so P is not fully compensated; or some point between these limiting cases is arrived at, so that D pays beyond the extent of his culpability yet P is not fully compensated.

The objection, then, is that if corrective justice is to justify tort law (or most or much of tort law, whatever the corrective justice theorist in question holds), tort cases (or the relevant tort cases) must be assimilated to the coincidental, intermediate case, where the grounds of recovery and of liability coincide. And there is no reason to suppose that this should be done. In short, corrective justice does no real work. It is the passive observer of the point at which P's loss and D's culpability intersect – where the grounds of liability and recovery coincide. The notion is better dispensed with.

Before considering the corrective justice theorist's response, a final, clarificatory point is in order. Of course, the notion of culpability and loss being equivalent or proportionate requires explanation. This notion is obviously used in sentencing, in assigning penalties to crimes. The main problem is that although retributive justice can achieve a measure of internal consistency by ranking crimes for comparative seriousness, and penalties for comparative severity, and although retributive justice can tell you that, whatever the most severe penalty is, it should be assigned to the most serious crime, there is something vital it cannot do. Retributive justice theory does not have the resources to 'anchor' the penalty scale, by determining the most severe penalty it should include. Should this be capital punishment, life imprisonment, twenty years' imprisonment, ten years', five years', or a fine?⁸⁵ Retributive justice theorists are forced here to rely on conventional intuitions and views on the relative seriousness of different crimes, and the relative severity of different penalties – intuitions and views that are no doubt strongly influenced by current sentencing practices, and also the belief, widespread in Anglo-Saxon countries at least, that sentencers are too lenient, that sentences should be stronger, more harsh.

However, damages awards face no such 'anchoring' problem. There is no similar issue, once the problem of the 'metric' or 'currency' of harm and loss is overcome (consider again pain and suffering), of how to represent harms and losses in monetary terms. There is no question that corresponds to the question of what is the fitting punishment for any particular crime. Repairing the wrongful loss or harm is achieved (putting restitution to one side) by transferring

⁸⁴ Coleman, *supra*, 285-7. 'The former specify the reasons for providing someone with compensation for a loss, while the latter specify the reasons for imposing such costs on a particular person'. (Perry, *Comment on Coleman's "Corrective Justice"*, (1992) 67 *Indiana Law Journal* 381, 384.)

⁸⁵ Von Hirsch, *supra*, 38.

to P an equivalent sum to his loss (allowing for overheads), so as to repair the loss, and restore P to his previous position.⁸⁶

4.2 *The Corrective Justice Theorist's Response*

But the last point merely clarifies and confirms, the corrective justice theorist will respond, what is fundamentally mistaken about the whole argument. It presupposes a retributive frame of mind, and is riddled with retributive conceptions (or misconceptions). The above argument totally ignores the private law perspective, and the 'bipolarity' and correlativity of the private law relationship. This relationship is simply disaggregated into its component parts. The argument does no more than to dismiss corrective justice for not being retributive justice.

Furthermore, the corrective justice theorist may continue, any question of the proportionality of a damages award to D's culpability is quite misplaced. Proportionality is a retributive justice notion, not a corrective justice notion. The main reason assessing compensation is much easier than assessing punishment is that no question arises of proportionality to culpability. Some may try to liken a damages award to a sanction or penalty, but this is only metaphorical talk. This mistake is exacerbated by often seeing a damages award as an *unfair* sanction or penalty, and then, despite lacking the elements or aspects of censure or condemnation, seeing it as unfair *punishment*.

Culpability is equally irrelevant to corrective justice. Corrective justice requires that P's wrongful losses are repaired, and repaired by D. Any financial hardship it may cause D is a 'unilateral' matter beyond the bipolarity of the private law relationship. Such financial hardship is D's problem, not P's, and neither anyone else's. It is beyond the private law relationship just as is the community benefit or gain of any deterrence value from the litigation. D's culpability, whether high, low or non-existent, is similarly a 'unilateral' matter beyond the relationship.

To admit conflict between retributive and corrective justice, the corrective justice theorist may well say, is to fail to recognise that they operate in separate spheres, the former in the criminal law, and the latter in private law (or tort law, or most or much of tort law as the corrective justice theorist in question holds). Alternatively, if retributive justice is not confined to criminal law, at least it does not extend to private law, or those parts of private law that the corrective justice theorist in question holds are explained by corrective justice. Realise this point, embrace the private law relationship, and the conflict disappears.

4.3 *Reply to the Corrective Justice Theorist*

So can the private law relationship exclude retributive justice and its concerns with proportionality and culpability, or more precisely with proportionality to culpability? It seems not. Retributive justice is not restricted to criminal law.

⁸⁶ See Part 2, discussion of the second test question under 'Three Test Questions'.

This is certainly the case with its positive function, of justifying or purporting to justify punishment. (At least, this is the case with those views that take retributive justice to justify punishment. On other views, as seen in Part 2, retributive justice justifies condemnation only, for instance, or justifies punishment only in private contexts, not by the state.)

State punishment is the domain solely of the criminal law. It is not the role of other state agencies, for instance the immigration system or the mental health system, to punish – although they may have an ancillary penalty-imposing function, to deter breaches of their internal rules and requirements.⁸⁷ Similarly, it is not the role of private law, and in particular tort law, to punish (which is what creates the problem with punitive damages⁸⁸) – even though it may have an ancillary deterrence function. If state punishment is to be restricted to the criminal law system, then the positive function of retributive justice should likewise be restricted.

But even more important is the negative function of retributive justice, in making clear the limits to justified punishment, by excluding punishment disproportionate to the defendant's culpability,⁸⁹ and so excluding some forms of punishment altogether. Consider retributive justice arguments against capital punishment, on the grounds that, whatever D may have done, he does not deserve execution.

In addition to limiting punishment within the criminal law or justice system, retributive justice serves a further vital negative function in excluding other institutions and systems of state power and authority from illicitly taking on a punishment role. All sorts of objectionable and inhumane practices could flourish under the guise of not being punishment.⁹⁰ (This is not to say that all

⁸⁷ This is not to say that the criminal law cannot be extended to other agencies. Consider, for instance, criminal provisions in tax or social security or health insurance legislation.

⁸⁸ See n. 46.

⁸⁹ Walker, Nigel, *Punishment, Danger and Stigma* 25-6 (Blackwell, Oxford, 1980).

⁹⁰ For a recent shocking and shameful example, see *Al-Kateb v Godwin* [2004] HCA 37 (6 August 2004). By a 4-3 majority, the High Court of Australia held that under section 196 of the Commonwealth of Australia's Migration Act 1958, a person could be detained indefinitely, even for the rest of his life, if he is subject to deportation under section 198 of the Act and no country is willing to accept him. Mr. Al-Kateb is a stateless Palestinian who arrived in Australia by boat in December 2000.

In one of the leading majority judgments, Justice Hayne emphasised that Mr. Al-Kateb had not been convicted of any offence. His classification as an 'unlawful non-citizen' under the Migration Act 1958 merely followed from his not being an Australian citizen, and not having valid permission to remain in Australia (para 207). The 'epithet' 'unlawful': 'did not refer to any breach of a law which expressly prohibited the conduct of entering or remaining in Australia without permission'. (para 208)

Justice Hayne held that the consequences to Mr. Al-Kateb (who is referred to throughout the judgment as 'the non-citizen') of the possibility of remaining in an Australian detention centre for the rest of his life was not 'punitive', as those consequences were not inflicted on him 'as punishment for any actual or assumed wrongdoing'. Rather those consequences had 'come about as a result of a combination of circumstance'. (para 261)

These circumstances included Mr. Al-Kateb's entering or remaining in Australia without permission, the unwillingness of the executive to give him that permission, and the unwillingness of other nations to receive him or to allow him to travel across their territory. The first of these considerations, Justice Hayne says, 'may be laid at the feet of the unlawful

sorts of such practices could flourish under the guise of being just punishment.) There is little point in restricting retributive justice to the system of criminal law if other systems of state power and authority, for instance, the mental health system or the immigration system, can impose hard treatment on individuals so harsh and severe that the only possible justification could be retribution. That is, there is little point in so restricting retributive justice if the treatment could only be justified, if at all, in virtue of the recipient's culpability resulting from something dreadful or appalling that he has done.

However such a retributive justice justification is precisely not what is being offered. Rather, an inferior justification is all that is on offer, on grounds of, say, psychiatric and medical assessments of the individual, or his adverse classification under relevant immigration legislation. But it is no defence to say that this is not punishment because it is not being carried out under the criminal law system, and then draw the false conclusion that considerations of retributive justice are irrelevant. This is to misunderstand punishment completely, to put the cart before the horse. Rather, one starts with the hard treatment, and asks what can justify it. Because of their nature or their severity (for instance, indefinite detention possibly for life⁹¹), some forms of hard treatment can only be justified, if at all, on retributivist grounds. Desert is a stronger form of justification

non-citizen concerned'. (Ibid) There seems more than the hint that Justice Hayne thought that whatever treatment Mr. Al-Kateb may receive at the hands of the Australian executive is his own fault, that he had brought it on himself.

Justice Hayne goes on to cite Hart's well-known definition of punishment (para 265, and Hart, *supra*, 4-5). (As Hart quite openly acknowledges, a similar definition was used by Anthony Flew and Stanley Benn. (Hart, *supra*, n. 5)) One of Hart's five elements is that punishment 'must be for an offence against legal rules'. Justice Hayne points out that: 'immigration detention is not detention for an offence. There is now no offence of entering or being found within Australia as a prohibited immigrant'. (para 266) Justice Hayne's reasoning appears to be: 'because there is no offence, Mr. Al-Kateb is not being punished. And because he is not being punished, this cannot be unfair punishment'. Is this not precisely the 'definitional stop' argument that Hart warns about? (*See* further text below.)

Note that Justice Hayne's immediate concern is not with moral justifiability, but with the question of whether the indefinite detention of Mr. Al-Kateb is contrary to the separation of judicial power under the Australian Constitution, on the grounds that it amounts to the executive exercising judicial power. But this merely compounds a jurisprudential mistake into a constitutional law mistake.

Finally, for present purposes, Justice Hayne says:

'It is essential to confront the contention that, because the time at which detention will end cannot be predicted, its indefinite duration (even, so it is said, for the life of the detainee) is or will become punitive. The answer to that is simple but must be made. If that is the result, it comes about because the non-citizen came to or remained in this country without permission'. (para 268)

Although, then, Mr. Al-Kateb's continued (possibly life long) detention is the result of a 'combination of circumstances', he himself was responsible for the first of them, and so he has no moral right to complain. He is morally guilty, if not legally so. This appears to be what Justice Hayne is saying. The answer he says is 'simple' is no answer at all.

This is to return to an earlier point. If Mr. Al-Kateb's treatment is to be justified by his moral guilt, not legal guilt, why then cannot we *see* this treatment (possibly lifelong detention) as unfair punishment? Not the least of all because he has not been convicted of any offence. And not to mention that few convicted murderers in Australia face what Mr. Al-Kateb faces, the possibility of incarceration for the rest of his life.

⁹¹ *See* n. 90.

because it is individualised to the recipient, rather than seeing him as a means to a general end, such as harm-reduction.⁹²

But worse is in store. As no retributive justice justification is being offered for the hard treatment – it is not being imposed in virtue of any criminal conviction, and there is no other sufficient justification (reasons of harm-reduction, including community protection, being inherently inferior) – the treatment constitutes not just a case of causing the recipient serious harm, but a case of seriously wronging the recipient, causing him moral injury. There is no paradox in saying that it is something for which the state should be punished.

Quite apart from these objections, non-criminal law institutions and systems of state power and authority are ill-equipped to punish individuals, because they do not provide the procedural safeguards the criminal law provides, and neither the substantive constraints it has developed through its requirement of ‘mens rea’, and a rich array of criminal defences. It is not just that there may be no guarantee of a fair trial or hearing. There may be no trial or hearing at all.⁹³

Consider debate on the moral justifiability of preventive or extended sentences for offenders perceived to be dangerous, to present a particular risk to the community if released at the end of a normal, proportionate, sentence.⁹⁴ Retributivists argue that offenders must not be imprisoned for a period longer than their culpability warrants. Retributive justice limits sentences to the extent of the defendant’s culpability.⁹⁵ Proponents of preventive detention argue that although retributive justice constrains the answer to the question of who to punish (namely, only the guilty), it does not constrain the answer to the question of how much to punish as much as the requirement of proportionality does. Once a person has been (correctly) singled out and condemned, the amount of punishment can then be determined by other considerations, by reasons of social policy, such as the (supposed) need to protect the community from offenders considered particularly dangerous, the (supposed) need sometimes to impose particularly harsh sentences for deterrence purposes, and the rehabilitation needs of offenders. Given these other reasons for punishing, it is irrational to limit punishment to proportionality with D’s culpability.⁹⁶

Indeed, why not go further? If a serious criminal record of violent or sexual offences only plays an evidentiary role in assessing whether a person is

⁹² Wood, ‘Retribution, Crime Reduction, etc.’, *supra*, 309-310.

⁹³ *See* n. 90.

⁹⁴ *See* Floud, Jean and Young, Warren *Dangerousness and Criminal Justice*, esp. Ch. 3 (Heinemann, London, 1981), Wood, ‘Dangerous Offenders and the Morality of Protective Sentencing’, [1988] *Criminal Law Review* 424, reprinted in Andrew von Hirsch and Andrew Ashworth, eds., *Principled Sentencing* 129 (Edinburgh University Press, Edinburgh, 1992), and in Jill Peay, ed., *Criminal Justice and the Mentally Disordered* 419 (Ashgate, Aldershot, 1998), Wood, *Dangerous Offenders and Civil Detention*, (1989) 13 *Criminal Law Journal* 324, Wood, *Reductivism, Retributivism, and the Civil Detention of Dangerous Offenders*, (1997) 9 *Utilitas* 131.

⁹⁵ *See* Walker, *supra*, n. 89.

⁹⁶ *See* Walker, *Unscientific, Unwise, Unprofitable or Unjust?*, (1982) 22 *British Journal of Criminology* 176, and Wood, *Dangerous Offenders and the Morality of Protective Sentencing*, *Criminal Law Review*, *supra*, 425-9.

dangerous,⁹⁷ why not ‘civilly detain’ persons who present just the same risk, but on the basis of different, but equally reliable evidence⁹⁸ – that is, why not detain dangerous ‘non-offenders’?⁹⁹ The matter cannot be pursued here, but whatever criticisms there may be of retributivist claims (including claims to limit hard treatment for the reason that it is *not* deserved, or alternatively imposing it for the reason that it *is* deserved), retributive justice considerations, to repeat, cannot be ruled out of court on the grounds that this is not the criminal law, but a separate (proposed) system of state power and authority of civil detention. Similarly, it is no answer to say that, in Waldron’s case of Fate and Hurt, retributive justice is irrelevant, solely because it is a tort law case, not a criminal law case.

As seen in relation to the third test question, implementing retributive justice may not be worth the price of the harm that righting or annulling the wrong requires. (Consider the example of capital punishment for theft.) And the same may be the case with corrective justice - as in, say, Waldron’s case of Fate and Hurt, or the Rolls Royce case, especially where P sues D purely out of jealousy.

4.4 *Developing the Case for Eliminating Corrective Justice*

Seeing wrongful losses and their repair as a matter of the bipolar, private law relationship that connects the injurer and victim can result in the injurer being subjected to a hard treatment measure that is retributively and distributively unjust, and contrary to the principle against deliberate harm. And the victim can be left not fully compensated, and perhaps without any compensation at all. The real possibility of such arbitrary and unfair results stands as a powerful reason for seeing the issue of wrongful losses and their repair in a broader context – for seeing the injurer and defendant not as parties to an involuntary, bipolar, private law relationship, but as participants in a broader community committed to basic standards of justice and fair treatment.

Such a community will recognise a number of basic points. One is that social activities, enterprises, and practices (such as use of the private motor car) that create great benefits for all or most people, also create huge risks (as no doubt Hurt would attest). Also, it is a major issue of distributive justice which any responsible and humane community must come to grips with, how these risks are to be allocated, so that those who are harmed (the unfortunate individuals for whom the risks materialise) are assured the compensation required to repair their losses (insofar as money can do so). Ensuring that the victim is properly

⁹⁷ Floud and Young deny this. They distinguish the two cases on the grounds that the dangerous offender has lost the right to be presumed harmless, whereas the dangerous non-offender has not. (Floud and Young, *supra*, 44.) For criticism, *See* Wood, *Dangerous Offenders and the Morality of Protective Sentencing*, *Criminal Law Review*, *supra*, 429-433.

⁹⁸ And this may not be very reliable. The concern here is with the moral justifiability of preventive detention only, and neither with the conceptual and definitional issues concerning what dangerousness is, nor with the epistemological issues of how to identify an individual as dangerous.

⁹⁹ Wood, *Dangerous Offenders and the Morality of Protective Sentencing*, *Criminal Law Review*, *supra*, 426.

compensated, that his loss is repaired, should be seen as a social responsibility that goes beyond the injurer's responsibility. If society is to force the injurer to repair the loss, if this is to be a legitimate state activity, then it is only consistent that the state take on the responsibility of ensuring that the victim is compensated when, for any of a large number of reasons, it cannot make the injurer do so. If the state is to operate a system of tort law, it is the state's responsibility to save people from becoming victims of that system, and to rescue them when it fails.

What is almost as important is to free injurers from the risks of suffering extreme financial hardship as a result of having to repair the victim's loss (as Fate may well attest). This can in itself constitute a breach of the principle against deliberate harm, as well as a distributive injustice, and more importantly, a retributive injustice.

Whatever its virtues may be, the private law relationship labours under the serious disability of generating the injustices and irrational results already discussed.

If adopting a broader social approach can get rid of those injustices and irrational results, why not abandon the idea of seeing wrongful losses and their repair in the context of the private law relationship, and see it in these broader terms?¹⁰⁰ To choose a private over a public solution may be to desert the victims and injurers, to make both potentially victims. And in the case of the victim, this is potentially double victimisation: first, by the injurer in causing loss, and secondly, by tort law for pitting the victim against the injurer as the only means of repair.

The private law relationship may be the appropriate viewpoint in some contexts, perhaps in small, tight-knit communities, which are not marked by the extreme inequalities that can give rise to the Rolls Royce case, or the huge medical, legal, administrative and other costs that can be imposed on individuals (including, most significantly, the cost of no longer being able to work), and so give rise to the Fate and Hurt case. Corrective justice may be appropriate as a private principle. But it is not appropriate in modern highly technological societies where repairing some losses (as in the case of some personal injuries) is extremely expensive. The most that can reasonably be expected is that injurers make a contribution fitting to their culpability and their means – a contribution consistent with the demands of retributive justice, distributive justice, and the principle against deliberate harm. No single injurer (natural person if not corporation) can be expected to bear the risk of such costs. No single victim can expect to look to the injurer as the sole source of repair. Only by spreading or 'socialising' these risks through insurance, private or public, can they be fairly borne.

Corrective justice theorists, then, cannot appeal to a distinct morality of private law relationships, as there is no reason to treat parties as separated or isolated from society, like the sole inhabitants of a desert island. The logic of the private law relationship is precisely that it is for the two of them, victim and injurer, to sort matters out themselves. Third party assistance is denied. Society may as well be a thousand miles away. As Coleman puts it: 'The question is not:

¹⁰⁰ Waldron, *supra*, 397.

who in the world should bear this loss? Instead, it is: should the injurer or the victim, bear it?’¹⁰¹ But suppose P will receive no compensation from D because he cannot be found. Or suppose D can only adequately compensate P at the cost of considerable hardship (because D has limited means), or through suffering a serious distributive injustice (for instance, P is very rich and does not need the money that he can legally demand from D) or a serious retributive injustice (where P’s loss is out of proportion to D’s culpability). Why persist in seeing the incident through the myopic lens of the private law relationship? Contrary to Coleman, if the private law relationship can produce such injustices and irrational results, is this not the time to turn to ‘the world’?¹⁰²

There is no particular virtue in the private law relationship where it is created involuntarily (as suggested in Part 2). There is no more virtue in the tort law variety of the private law relationship than there is in the ‘criminal law’ relationship (also mentioned in Part 2). It is just that tort law deals with a much broader range of harms or losses. Only the more serious torts are crimes as well. Indeed, the beneficiaries of this type of private law relationship are precisely those who are external to it, namely culpable non-injurers. They get all the moral luck – the ‘benefit’ of their culpability (e.g. driving recklessly), without the misfortune of hitting anyone and causing loss. In contrast, the non-culpable injurer gets no moral luck – despite being as careful as he is capable of being, he can face a damages award that could ruin him financially.

There is an analogy with the criminal defence of self-defence. D may be put in the position where he has either to kill V or be killed by him. This has a similar ‘bipolar’ structure. But there is nothing to recommend it. It arises because there is no other alternative. For all intents and purposes, V and D are completely alone. The logic of (justified) self-defence, as it is in the private law relationship, is that it is ‘either you or me’ – either I kill you, and become D, or allow you to kill me, and I become V. It is one or the other. There is no third choice.

At the less dramatic level of threats to financial interests rather than one’s very existence, this is how tort law operates. In a case like *Fate and Hurt*, either Hurt imposes enormous financial hardship on Fate, or he has to suffer the financial hardship himself. (After all, the \$5m damages award to Hurt is not spending money. It is to cover the costs he has incurred, and will continue to incur, for the rest of his life.) And why should Hurt suffer that hardship himself? Are not the personal injuries that give rise to the need for so much compensation bad enough? And as a corrective justice matter, it was Fate who caused the injuries, put Hurt in this predicament, so as between the two of them, why should Fate not pay?¹⁰³

It is not the aim here to defend a national insurance scheme, but such a scheme could in principle ensure justice for both victim and injurer. On the one hand, it could ensure that the victim is compensated, and without the pain and suffering of the lottery of private litigation. On the other hand, such a scheme could ensure that the injurer is freed from the risk of being subjected to a

¹⁰¹ Coleman, *supra*, 198.

¹⁰² Waldron, *supra*, 397.

¹⁰³ Note Feinberg’s ‘weak retributive principle’. *See* text at n. 76.

damages award that he cannot pay, or at least not without considerable financial hardship, which may well constitute a distributive injustice, a wrong contrary to the principle against deliberate harm, and also a serious retributive injustice, where the sanction or penalty is out of proportion to his wrongdoing.

The case for a national insurance scheme is strengthened if the only obstacle, insofar as 'justice' considerations as opposed to 'economic' considerations are concerned, is the corrective justice requirement that the injurer repair the victim's loss. But is this really such a large concession? The injurer may, in any case, not repair the victim's loss, because he cannot be found or cannot afford to pay, or cannot be made to pay, because of the legal barriers he has created to protect his assets. And if the injurer does not pay, then the victim is left to bear the loss himself, a prisoner of a private law relationship he never asked to join.

There are, then, two overriding concerns, namely that of the victim and that of the injurer. One concern is that the victim be properly compensated, that his loss be repaired, and that he not become doubly victimised, first by the injury, and then by the process of trying to obtain repair of the injury. The other concern is that the injurer is not turned into a victim of the process of obtaining repair, by having a huge financial burden placed on him which amounts to a breach of the principle against deliberate harm, or a serious distributive injustice (the risk of running into a Rolls Royce exists only because Rolls-Royces exist), or a serious retributive injustice, where the damages award amounts to a sanction out of all proportion to his culpability.

In comparison with these two overriding concerns, the private law relationship counts for little. It matters little whether the loss is repaired by the injurer or someone else. Indeed, the private law relationship may be considered as having negative value, where it inhibits or even imperils the capacity to meet these two concerns. In these circumstances, it is for the good, indeed it may be a moral duty, to disaggregate the relationship into its component parts. Whether or not the injurer is the source of the victim's compensation, whether or not it is the injurer that repairs the victim's loss is very much a secondary matter. That is, corrective justice itself is very much a secondary matter.

Indeed, corrective justice may not even be that. If it is only where the wrongful loss consists in moral injury, and not material or psychological harm, that it is morally imperative that the injurer rather than a third party repair the victim's loss, then corrective justice is not even a secondary matter. Repairing moral injury is a matter of retributive justice, not corrective justice. According to this suggestion (which is not developed here), where the loss is material or psychological harm, it does not really matter whether the injurer or a third party repairs it. It is only in the case of moral injury that it is essential for the injurer to suffer the retributive response, that is, the punishment, because it is only through his 'receipt' of this response, through suffering the punishment, that the victim's moral injury is repaired. As suggested above, it is perhaps only in the criminal law relationship (at least, with the most serious crimes like murder and rape), that one finds true 'bipolarity'.

5 Conclusion

This paper has set out various views of retributive justice (Part 2) and considered them also as views of corrective justice. (Part 3) Part 2 concentrated on Hampton's account of retributive justice, which was the most promising of those considered, purporting to justify state punishment. This view sees retributive justice, like corrective justice, as a matter of repairing wrongful loss, but wrongful loss of a special type, namely moral injury, not material and psychological harm, which is the responsibility of corrective justice. It is through repairing the moral injury that the 'intrinsic wrongfulness' of the crime is righted or annulled.

It was seen in Part 3 that either the 'annul the wrong' view of corrective justice collapses into the 'repair the wrongful loss' view (however it may be filled out) or turns out to be a view only of retributive justice. The distributive justice view of corrective justice appears to collapse into the view that corrective justice is 'all correction, no justice', only the executive stage of distributive justice – either that, or it turns corrective justice into a type of distributive justice.

Part 4 puts forward quite separately an argument for the elimination of corrective justice. Recognising the need to subject corrective justice to constraints of distributive justice, the principle against deliberate harm, and retributive justice leads to the conclusion that corrective justice does no work, has no real role. It is the passive observer of the point where the lines of the injurer's culpability and the victim's loss cross, of the area of overlap between the grounds of recovery and the grounds of liability.

Given the injustices and irrational results of confining the issue of repair of wrongful losses to the private law relationship (P not being compensated, at least, in full, and D only compensating P, even if not fully, at the price of suffering distributive injustice, the victim of a breach of the principle against deliberate harm, and retributive injustice), it is better to seek a 'social' solution which brings in third parties, in particular, the community, for instance through a national insurance scheme. If this means abandoning the requirement that the injurer repair the wrongful loss he causes the victim – abandoning corrective justice – then this is a small price to pay, indeed, no price at all on the above argument.

It was suggested that the elimination of corrective justice opened the door to the elimination of tort law itself, at least, to those parts of tort law (indeed, those parts of private law generally) that the corrective justice theorist in question holds are explained and justified by the principle of corrective justice. Tort law hardly appears to be a fair practice, because of the distributive and retributive injustices it can create, and also breaches of the principle against deliberate harm. Neither does tort law appear to be an efficient practice, because the compensation and deterrence functions can be performed better by other institutions. However, the elimination of tort law must be left to another time (not that this is a new topic¹⁰⁴), and with it further consideration of some system of national insurance (not that this is a new topic either) as its replacement.

¹⁰⁴ See, for instance, Sugarman, Stephen D., *Doing Away with Tort Law*, (1985) 73 California Law Review 555.

