The Humanity of Private Law

Part I: Explanation

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Introduction

Delivered in a more self-confident age, Richard O'Sullivan KC's 1950 Hamlyn Lectures on *The Inheritance of the Common Law* begin with the ringing declaration that 'The Common Law of England is one of the great civilising forces in the world.' In this book, I want to explore whether he was right – at least so far as English private law is concerned.[1]

It must be admitted that the prospects of vindicating O'Sullivan's faith in the common law do not look good. At the level of both doctrine and theory, it might be thought easier to write a book entitled *The* In*humanity of Private Law*. In Section 1 of this introduction, I will set out five tough[2] cases that make it hard for us to think of private law as seriously concerned with promoting the welfare of its subjects. In Section 2, I will set out three currently popular explanations of private law – economic, Kantian, and moralistic – and argue that if *any* of these explanations are correct, then we cannot say that private law achieves anything that is of real value to those who are subject to it.

Having set out the obstacles in the way of thinking of private law as humanistic in its goals and aspirations, I turn in Section 3 to see what can be said in favour of a humane view of private law, which I will call 'F' for short. According to F: (1) private law is pervaded by a concern to promote the flourishing of all its subjects as human beings, (2) the particular conception of what amounts to human flourishing that underlies private law is a very familiar conception that I will call the 'R-picture', or the 'RP' for short, and (3) in trying to promote human flourishing, private law is constrained by the need to maintain its legitimacy. (3) results in private law doing both more and less than we would expect it to do if just (1) and (2) were true.

The rest of this volume is devoted to substantiating the claims that F makes about private law. But doing this only amounts to Part I of my exploration of the links between private law and human flourishing. Section 4 introduces Part II of the project, which will be published in a second, forthcoming, volume. Part II mounts a critique of English private law off the back of the claims made about private law by F. I will argue in Part II that the RP is *wrong* as an account of human flourishing and that a private law based on an authentic vision of human flourishing will look very different from the private law we have now. If this is right then we cannot endorse O'Sullivan's paean in favour of the common law. The best we can say is that private law is a noble failure – it aspires to promote human flourishing, but is betrayed in that aspiration by its failure to understand what authentic human flourishing involves.

[1] While the main focus of this book will be on English private law, references will be made from time to time to the positions in other common law jurisdictions. But it should be assumed that any reference to 'private law' *tout court* is a reference to English private law.

[2] These cases are 'tough', but not 'hard' in the sense that it is or was not clear how the law applies in these cases. Many of the 'tough' cases set out in Section 1 are 'easy' – it is clear what the legal outcome should have been in those cases. Some (though not, ultimately, me) might say that makes these cases even worse.

1. Five Tough Cases

Here are five tough cases that seem to bring into immediate question whether we can say that private law is interested in promoting or protecting genuine human needs and interests.

Nettleship v Weston[3]

Lavinia Weston asked a friend of hers, Eric Nettleship, to give her some driving lessons in her husband's car. In the third lesson, Weston crashed the car: she failed properly to drive the car round a corner with the result that it mounted the pavement and hit a lamppost. Nettleship's left knee cap was broken in the collision. Nettleship sued Weston for damages, in negligence. It was acknowledged that Weston had owed Nettleship a duty of care in driving the car. The real issue was whether she breached that duty of care. At first instance, Thesiger J found that Weston had not breached the duty of care she owed Nettleship: inexperienced as she was at driving, it would be unfair to require her to take the same level of care in driving as a fully qualified driver would. Instead, all she was required to do was do her best to avoid injuring Nettleship, and Weston had done her best in the circumstances.

The Court of Appeal reversed Thesiger J's decision and held Weston liable in negligence. The duty of care that Weston owed Nettleship, the Court held, was a duty to:

> [D]rive in as good a manner as a driver of skill, experience and care, who is sound in wind and limb, who makes no errors of judgment, has good eyesight and hearing, and is free from any infirmity …[4]

The reality was 'The learner driver may be doing his best, but his incompetent best is not good enough'.[5] Nor was it relevant that holding Weston to such a demanding standard of care – one which she may have been incapable of living up to – might result in the attribution of 'tortious liability to one who may not be morally blameworthy. For tortious liability has in many cases ceased to be based on moral blameworthiness.'[6]

The duty of care that Weston owed Nettleship was a *strict* duty – in John Gardner's happy terminology, a 'duty to succeed' in doing something (here, driving with the sort of care a reasonable, experienced driver would show in driving a car) rather than a 'duty to try' to do something.[7] Duties to succeed are very common in contract law – understandably so, as contracting parties are usually only interested in buying the assurance of success, rather than someone's best endeavours. However, as *Nettleship* v *Weston* shows, the courts also seem willing to impose such duties on people who have *not* voluntarily assumed them.

Other examples of imposed duties to succeed that exist in private law are (1) the duty not to publish to a third party a statement that is liable to cause unjustified damage to another's

[3] [1971] 2 QB 691.
[4] Ibid, 699 (per Lord Denning MR).
[5] Ibid.
[6] [1971] 2 QB 691, 709–10 (per Megaw LJ).
[7] Gardner, 'Obligations and outcomes in the law of torts' in Cane and Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré on his Eightieth Birthday* (Hart Publishing, 2001). In this essay, at least, Gardner argues that duties of care in negligence are duties *to try*, rather than duties to *succeed* (ibid, 119–20) but this does not seem consistent with *Nettleship* v *Weston*.

reputation; and (2) the duty not to convert property when that property is in another's possession or when someone else has an immediate right to possess that property. Both of these duties, being duties to succeed in achieving a particular outcome, can be breached despite a defendant's making every effort to avoid breaching them.

Many people think that *imposed* duties to succeed are unreasonable. If you have voluntarily assumed such a duty, then it is your lookout if you end up breaching it; but for the courts to foist such a duty on someone and then hold them liable should they happen to breach it seems to amount to legalised theft, particularly if the person in question suffers from some incapacity that means they are unlikely to succeed in doing whatever the courts are requiring them to succeed in doing. John Gardner disagrees. He argues that avoiding breaching an imposed duty to succeed is often very straightforward:

> [F]or the most part strict liability for φing[8] exists … only where the φing takes place in the course of some specified activity or relationship – call it ψing.[9] And in general … ψing is an activity or relationship that one cannot but know one is engaged in, and moreover that one could (with enough effort) avoid getting into. So for the most part the law … provide[s] an assurance of no liability to potential defendants … if they are willing to use it. Want to avoid strict liability for injuring people with your blasting operation? Fine: just don't go into the blasting business. Want to avoid strict liability for flooding your neighbour's land. Fine: just don't transport water onto your land … More generally, want to avoid strict liability for φing in the course of your ψing? Fine: just don't start ψing.[10]

However, this argument seems cruel where an individual is (for good reason) unable to contemplate not ψing – as is the case with learning to drive. It also seems hypocritical where society's vital interests depend on people's ψing – as is the case in all of the examples given by Gardner, and in the case of other examples of ψing that attract duties to succeed such as publishing newspapers, and dealing in property. There seems something wrong in society's egging people on to do ψ, and then arguing that it is perfectly legitimate to attach duties to succeed to the doing of ψ on the ground that breach of those duties can easily be avoided by the simple expedient of not doing ψ.

So Gardner does not succeed (no pun intended) in acquitting imposed duties to succeed of being unreasonable – where they exist in the current law, they expose people to risks of liability that can only be reliably avoided by refusing to engage in activities that people, for all intents and purposes, have to engage in or that society as a whole wants them to engage in. The existence of imposed duties to succeed in private law therefore seems to be a major blot on its record.

Four More

(1) *Michael* v *Chief Constable of South Wales Police*.[11] Joanna Michael was stabbed to death by her ex-partner, a man named Cyron Williams. Williams had discovered Joanna in bed

[8] Gardner follows the example of a lot of philosophers in using Greek letters to indicate a generic action. The Greek letter here is pronounced 'fie' – so 'φing' is pronounced 'fie-ing'.

[9] Pronounced 'sighing'.

[10] Gardner, 'Some rule-of-law anxieties about strict liability in private law' in Austin and Klimchuk (eds), *Private Law and the Rule of Law* (OUP, 2014), 219–20.

[11] [2015] AC 1732.

with another man, assaulted her, taken the man away to take him home, and told her he would be coming back to give her another beating. Joanna called the police. The phone operator who picked up the call – a Ms Mason – alerted the police in Joanna's area, but failed to mention the fact that Joanna was in fear for her life. The result was that Joanna's call was graded as a 'Grade 2' call, requiring a police response within an hour, rather than the more appropriate 'Grade 1', requiring the police to turn up immediately at Michael's house. By the time the police reached Joanna's house, she was dead, killed by Williams.

The UK Supreme Court (here, and in the rest of the book, 'UKSC') held that the police had not owed Joanna a duty of care to come to her assistance. In so ruling, the UKSC reaffirmed the traditional rule – that applies to private persons and public bodies alike, without distinction – that absent special circumstances, such as where the defendant has put the claimant in danger,[12] or has 'assumed a responsibility' to the claimant for their welfare,[13] a defendant will *not* owe a claimant a duty of care to take positive steps to save them from harm, no matter how much danger the claimant is in or how well-placed the defendant is to save them from that danger. As a result of the UKSC's decision, the law of negligence effectively takes the view that people like Joanna Michael are not *entitled* to receive decent treatment from the emergency services. Instead, as David Howarth acutely points out, such treatment is regarded as a 'gift'[14] from the State to people in need like Joanna – should the gift be withheld, as it was in *Michael*, the person who failed to receive it can have no grounds for complaint.

(2) *Combe* v *Combe*.[15] The Combes got married during World War I and separated just before World War II broke out. Mrs Combe made a petition for a divorce in 1943, and she was granted a decree nisi (a decree that the marriage would be dissolved on a certain date unless – nisi – someone showed good cause why it should not be). Mrs Combe – who was actually somewhat better off than her very soon to be ex-husband – never went to court for an order that her husband pay her maintenance because after the decree nisi was granted, he promised to pay her £100 a year (about £4,000 a year in today's money) maintenance. In fact, he never paid her a penny despite Mrs Combe's repeated attempts to get him to pay. After seven years she went to court to ask the courts to enforce Mr Combe's promise.

The Court of Appeal dismissed Mrs Combe's case. Mr Combe's promise was not contractually binding because she had not paid Mr Combe anything – any consideration – for his promise. Mrs Combe argued that the Court could still find that the promise was

[12] See, for example, *Home Office* v *Dorset Yacht Co Ltd* [1970] AC 1004 (having brought some young prisoners to stay in a camp on the Isle of Wight, the officers in charge of the prisoners owed owners of yachts and boats in the Isle of Wight harbour a duty of care to see that the prisoners did not escape because by bringing the prisoners onto an *island*, they had created a danger that if the prisoners escaped, the first thing they would try to do would be to try to get off the island by stealing a boat or yacht and – as happened – they would end up crashing and damaging the boat or yacht in question).

[13] See, for example, *Swinney* v *Chief Constable of Northumbria Police* [1997] QB 464 (having assured a confidential informant that his identity would be kept secret from the violent criminals on whom he was informing, with the result the informant spilled the beans to the police, the police owed the informant a duty of care to see that his identity was not later disclosed to those violent criminals).

[14] Howarth, 'Three forms of responsibility: on the relationship between tort law and the welfare state' (2001) 60 *CLJ* 553, 578–79; 'Public authority non-liability: spinning out of control?' (2004) 63 *CLJ* 546, 546.

[15] [1951] 2 KB 215.

binding under the law on promissory estoppel, which Denning J had held in the *High Trees* case had the effect of ensuring that 'a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply.'[16] Denning LJ – having been promoted to the Court of Appeal – ruled that the law on promissory estoppel did not go as far as Mrs Combe wanted it to go: 'the principle stated in the *High Trees* case … does not create new causes of action where none existed before. It only prevents a party from insisting on his strict legal rights, when it would be unjust to allow him to enforce them ….'[17] To extend this principle to Mrs Combe's case would result in the doctrine of consideration – that promises not made in a deed are only contractually binding if something has been given in return for them – being 'overthrown by a side-wind.'[18]

The result was, first, that Mrs Combe had no remedy for the breach of Mr Combe's promise, despite her relying on that promise. Second, an odd distinction became entrenched in English law: a gratuitous promise *not to sue* someone for money may be binding if it has been relied on, while a gratuitous promise *to pay* someone money that has been relied on will not be.

(3) *Kelly* v *Solari*.[19] Angelo Solari took out a life insurance policy with the Argus Life Assurance Company; on his death, his wife would be paid £200.[20] Four years later, Angelo died. Unfortunately, one month before his death he forgot (perhaps due to illness?) to pay the quarterly premium that was due on the insurance policy, with the result that it automatically lapsed. Neither Mrs Solari nor the directors of the Argus Life Assurance Company realised the policy had lapsed and so Mrs Solari was paid the money due to her under the insurance policy. The directors then realised their error and sued Mrs Solari for the value of the money they had paid her. The Court of Exchequer held that if the directors had genuinely made a mistake in paying Mrs Solari, then they should be able to get their money back.

Peter Birks regarded *Kelly* v *Solari* as a 'core case'[21] of liability arising out of *unjust enrichment*. Mrs Solari's liability[22] did not arise out of her agreeing to pay the insurance company its money back, or Mrs Solari's doing anything wrong to the insurance company. Her liability rested on something else, some third ground of liability, which restitution scholars identify as Mrs Solari's being *unjustly enriched* at the expense of the Argus Life Assurance Company. So to question the correctness of the decision in *Kelly* v *Solari* is to trample on the holy of holies for restitution scholars. However, if we step back a little, the decision seems, as Birks acknowledged, 'shocking'.[23] There is a very real cruelty involved in paying out money to someone in need, allowing them to believe that that money is theirs, and then snatching it back from them.[24] This cruelty – it might be thought – should have persuaded the Court

[16] *Central London Property Trust Ltd* v *High Trees House Ltd* [1947] 1 KB 130, 136.
[17] [1951] 2 KB 215, 219.
[18] Ibid, 220.
[19] (1841) 9 M & W 54.
[20] About £15,000 in today's money.
[21] Birks, *Unjust Enrichment*, 2nd ed (OUP, 2005), 10.
[22] For the sake of simplicity in the discussion, we will assume that Mrs Solari *was* held liable: the actual result of the case was an order for a trial to determine the directors' state of knowledge in paying out to Mrs Solari.
[23] Cf. Birks, *Unjust Enrichment* (n 21), 6: 'The notion of a careless insurance company recovering from a totally innocent widow is initially shocking.'
[24] The cruelty is accentuated when one realises that under current limitation rules, the insurance company would have had six years to sue Mrs Solari from the moment they could have reasonably discovered their mistake:

of Exchequer to stay its hand unless absolutely compelling grounds could be given as to why Mrs Solari should not have been allowed to retain her payout. It seems unlikely that the insurance company's mistake could provide such compelling grounds. There were, after all, two mistakes in *Kelly* v *Solari* – the mistake made by the directors of the insurance company, but also the mistake made by Angelo Solari in failing to keep up his premium payments. Had the boot been on the other foot, and Mrs Solari had been suing to enforce the insurance policy despite her husband's mistake, her claim would have had to fail: insurance companies are not charities. But in *Kelly* v *Solari* itself, it was Mrs Solari who was the defendant and the insurance company that was the claimant, and the equities between them being equal, it might be argued that it was Mrs Solari who should have won the day.

(4) *D & F Estates* v *Church Commissioners*.[25] Our final tough case is not tough in terms of the result that it reached, which was plainly correct, but in terms of what was said on the way to reaching that result. The claim in *D & F Estates* v *Church Commissioners* was for the cost of doing some replastering work in a flat. The claimants owned the flat. The defendants had been involved in building the block of flats in which the flat was located. The claimants sued the defendants in negligence, arguing that when the defendants built the block of flats, they had owed the claimants – the future owners of one of the flats in the block – a duty of care to do a good job of plastering that flat. The House of Lords dismissed the claim, and rightly so: if you want someone to provide you with a nice place to live, you should pay them for their services, and the claimants had paid nothing to the defendants and had had no contract with them until the problems with plasterwork became evident.

However, in reaching its decision in *D & F Estates* the House of Lords went out of its way to indicate that the same result would have been reached if the flat had been *dangerous* to live in, and the claimants had spent money making it safe. It is much easier to establish that the builder of a house you now live in owes you a duty to take care to see that it will not be positively dangerous to live in. However, the House of Lords indicated that even so, if it becomes apparent that a house built by *Builder* and lived in by *Occupier* is now dangerous to live in because of some fault of *Builder*'s in constructing the house, then *Occupier* should *only* be entitled to sue *Builder* for damages if the house falls down on her and is physically injured.[26] If she spends money having the house made safe, then that is on her – she cannot sue *Builder* for that *pure economic loss* because a duty of care to safeguard someone against suffering that kind of loss is only normally owed between people in some kind of special relationship, usually involving the defendant having 'assumed a responsibility' to the claimant – and we are assuming that no such relationship exists between *Builder* and *Occupier* here.

This result was confirmed in the sequel to *D & F Estates*: the House of Lords' decision in *Murphy* v *Brentwood DC*,[27] where Lord Bridge was prepared to make only one concession

Limitation Act 1980, s. 32(1). Moreover, if – ignorant of the mistake – Mrs Solari had carefully saved the money for a rainy day, then she would be liable to repay the payout in full; while if she had dissipated the money on drink and gambling then her liability would be reduced to zero via a defence of 'change of position'. So responsible behaviour would be punished, and irresponsible behaviour rewarded.

[25] [1989] 1 AC 177.

[26] Ibid, 206 (per Lord Bridge), 214 (per Lord Oliver).

[27] [1991] 1 AC 398.

to the rule against *Occupier* being able to sue *Builder* for the costs of making her house safe to live in:

> [I]f [*Occupier*'s] building stands so close to the boundary of [*Occupier*'s] land that after discovery of the dangerous defect it remains a potential source of injury to persons or property on neighbouring land or on the highway, the building owner ought, in principle, to be entitled to recover in tort from the negligent builder the cost of obviating the danger … so far as that cost is necessarily incurred in order to protect himself from potential liability to third parties.[28]

Lord Oliver, however, was 'not at the moment convinced of the basis for making such a distinction'[29] and in condemning the distinction that the Law Lords in *D & F Estates* and *Murphy were* convinced by – the distinction between (1) the case where a house, that is in a dangerous condition due to *Builder*'s carelessness in building it, falls down on *Occupier* and injures her (*Occupier* can sue) and (2) the case where a house, that is in dangerous condition due to *Builder*'s carelessness in building it, is repaired by *Occupier* (*Occupier* cannot sue) – as 'impossible',[30] Sir Robin Cooke, of the New Zealand Court of Appeal, observed that it seems 'nonsensical to say that if the owner is entitled to recoup the cost of saving from harm on adjoining properties and in the street, the same should [not] apply to the cost of protecting [*Occupier*] and [her] family.'[31] Perhaps unsurprisingly, both the New Zealand Court of Appeal[32] and the Supreme Court of Canada[33] both subsequently refused to follow the House of Lords' decisions in *D & F Estates* and *Murphy* v *Brentwood DC*.

2. Three Explanations of Private Law

The picture of private law built up in the previous section – as operating in a way that is relatively unresponsive to any reasonable view of what would best serve people's needs and interests in a particular case – is reinforced when we turn to consider the three currently most popular explanations as to *why* private law says what it says and does what it does.

The purpose of this section will not just be to set out these explanations, but to do so with a view to asking a *question of value* in relation to each explanation. The question of value that I want to ask in relation to a particular explanation is this: *If* everything this explanation tells us about private law is correct, does private law in its current shape serve any real human needs or interests? In respect of each explanation that we will consider below, the answer to our question of value seems to be 'no'.

Law and Economics

The first explanation we will look at enjoyed its greatest popularity in the 1970s and the 1980s. According to this explanation, which we will call 'LE' for short (for 'law and

[28] Ibid, 475.
[29] Ibid, 489.
[30] See Cooke, 'An impossible distinction' (1991) 107 LQR 46, quoting Lord Denning MR in *Dutton* v *Bognor Regis UDC* [1972] 1 QB 373, 396.
[31] Cooke, 'An impossible distinction' (n 30), 51–52.
[32] *Invercargill City Council* v *Hamlin* [1996] 1 NZLR 513.
[33] *Winnipeg Condominium Corp No 36* v *Bird* [1995] 1 SCR 85.

economics'), the rules and doctrines of private law are geared towards achieving the goal of *wealth maximisation*. Private law achieves this goal by: (1) encouraging the efficient production and distribution of valuable resources; and (2) discouraging the inefficient destruction of valuable resources.[34]

The *production* of a valuable resource, G, is efficient when the value attached to the existence of G – measured by how much people are willing to pay for G once it comes into existence – is greater than the costs incurred in producing G – measured by how much people are willing to pay in order to preserve, or use for an alternative purpose, those resources that will be used up in producing G. According to LE, the institution of *private property* encourages the efficient production of resources – if the producer ('P') of G is able to reap the benefits of people's being willing to pay for G after P has produced G, then P will only produce G if those benefits exceed the costs to P of producing G, where those costs are measured according to the benefits P could have obtained by making some alternative use of the resources that P ploughed into producing G.

The *distribution* of G is efficient when G ends up in the hands of whoever values G most in terms of being ready and willing to pay the most for G. According to LE, *contract law*, together with the institution of private property, encourages the efficient distribution of G by allowing G to be sold and purchased on the open market. If I currently have title to G and am ready and willing to sell it for £50, that proves I would not be ready and willing to pay *more* than £50 for it. And if you offer me £70 for G, that proves that you are ready and willing to pay *at least* £70 for G. So an efficient distribution of valuable resources would require that you and not me have G, as you value G more in terms of how much you are ready and willing to pay for G. The law of contract enables G to be transferred from me to you by providing us with a reliable mechanism by which you and I can enter into a binding deal under which I will give you G for £70.[35]

But what if, after I enter this deal but before I perform it, Jack offers me £100 for G? That does not necessarily indicate that Jack values G more than you do – you may have been ready and willing to pay up to £200 for G but got G on the cheap by making a lowball offer to me. LE indicates that in this case, I should be allowed to breach my contract and sell G to Jack – but only on condition that I pay you damages designed to cover the profit you would have made had I sold G to you. This profit will equal how much over and above £70 you would have been ready and willing to pay for G (this is known, in economic circles, as your 'consumer surplus'). So if your profit would have been £130 because you were ready and willing to pay me £200 for G, then it will make no sense for me to breach – I will get £100

[34] It should be noted that many who now work in the field of 'law and economics' are not at all interested in making out the claim (first made by the 'Chicago School' of law and economics) that I am summarising here as LE, but rather simply make *normative* recommendations as to what private law *should* say. These recommendations are not my concern here; but rather the thought that the *current* shape of private law can be best explained by reference to economic ideas. Those who are familiar with the main claims about private law made by the account of LE that I will offer below can skip the next few paragraphs. They should rejoin the text at the point where I discuss the *question of value* in relation to LE.

[35] Where there is no evidence that you value G more than I do – for example, in the case where I promise to give you G for nothing, or where I mistakenly transfer G to you – there is no reason to think that it would be more efficient for you to have G for me and this, claims LE, is why private law does not enforce gratuitous ('economically sterile') promises, and reverses mistaken transfers under the law of unjust enrichment.

from Jack for G but will have to pay you £130, causing me a loss of £30 on the deal – and I will stick with my contract with you.

This is, so far as we know, the right result economically – you valued G at £200, and so far as we know Jack is only ready and willing to pay £100 for G, so if G is to be efficiently distributed, it should go to you and not Jack. If Jack is actually ready and willing to pay more than £200 for G – thus proving that he values it more than you – then he can always come back with a new offer. If, for example, he is actually ready and willing to pay £250 for G, and he makes me a new offer of £220 for G, then it now makes sense for me to deal with Jack. I will get £220 from Jack, and have to pay you £130, giving me a net profit of £90. This is £20 more than I would have got on my original deal with you. In such a situation LE says that it will be *efficient* for me to breach my contract with you and deal with Jack – and that is exactly, LE claims, what the law allows me to do: by allowing me to break my contract and pay damages instead, the law guarantees that I will only breach when it would be efficient to do so.

The *destruction* of G will be inefficient where the costs involved in preserving G from destruction are less than the benefits obtained from destroying G. According to LE, *tort law* helps ensure that G will only be destroyed when it is efficient to do so. Let's assume that D wants to engage in an activity that will have the effect of destroying G, and that C has title to G. If it is *easy* for D and C to contract with each other – either to the effect that C will pay D not to destroy G, or that D will pay C for permission to destroy G – then it does not really matter, from the point of view of efficiency, whether the law (1) forbids D from destroying G, or (2) permits D to destroy G without compensating C for the loss of G.[36] The table below demonstrates this:

Parties' valuations	**Law does (1)**	**Law does (2)**
D values activity at £250; C values G at £100	D goes ahead with activity (having first paid C more than £100 and less than £250 for permission to do so)	D goes ahead with activity (C's best offer of £100 to D not to go ahead with his activity is not enough to persuade D to desist)
D values activity at £100; C values G at £250	D does not go ahead with activity (D's best offer of £100 to C to allow him to go ahead with his activity is not enough to persuade C not to insist on her legal rights that D not engage in his activity)	D does not go ahead with activity (C is able to offer D more than £100 and less than £250 not to go ahead and D accepts the offer)

But where D and C cannot contract with each other easily – in economists' terms, where *transaction costs* between them are high – then (according to LE), tort law employs a range of different techniques to ensure that G is not destroyed inefficiently. For example, it might hold D *strictly liable* for the loss of G, so D has to assess whether it is 'worth his while' to

[36] This known as the 'Coase Theorem', as this result was announced in Coase, 'The problem of social cost' (1960) 3 *Journal of Law and Economics* 1 – for which article (among others) Ronald Coase was awarded the Nobel Prize in Economics in 1991.

engage in his activity and compensate C for the loss of G – if it is, then D will go ahead and this is the right result economically as he will value his activity more than G; if it is not, then D will not go ahead and this is again the right result economically as D cannot have valued his activity more than G was worth if it was not worth his while to go ahead with his activity under a strict liability regime.

Alternatively, tort law might *only* hold D liable if he destroys G inefficiently. Under this regime – which adherents to LE identify with a 'liability for *negligence*' regime[37] – D will only be held liable for going ahead with his activity and destroying G if (1) the costs to him of not engaging in his activity (or the costs of modifying his activity so that it does not destroy G) were less than (2) the expected cost involved in destroying G (assessed by multiplying the value of G by the probability that D's unmodified activity would destroy G). In this way D will be deterred from engaging in his activity (or from failing to modify his activity) whenever (1) is less than (2), as he will be unable to make engaging in his activity (or failing to modify his activity) pay for him when (1) is less than (2). This is the right result economically as it would be inefficient for D to engage in his activity (or fail to modify it) whenever (1) is less than (2). So LE claims that incidences of strict liability and negligence liability in tort law are carefully designed to ensure that valuable resources are not destroyed inefficiently.

Armed with this brief sketch of LE, we can now ask the *question of value* in relation to LE: If LE is right about private law, and the rules and doctrines of private law *are* geared towards maximising wealth, does private law serve any real human need or interest? In other words, is wealth maximisation something that is of value to human beings? In a famous article, Ronald Dworkin said the answer to our question of value is 'no'.[38]

Dworkin asks us to consider the situation where 'Derek has a book that Amartya wants … Derek is poor and sick and miserable, and the book is one of his few comforts. He is willing to sell it for $2 only because he needs medicine. Amartya is rich and content. He is willing to spend $3 for the book, which is a very small part of his wealth, on the odd chance that he might someday read it, although he knows he probably will not.'[39] Dworkin imagines that a tyrant seizes the book from Derek and transfers it to Amartya. The transfer of the book has the effect of increasing the wealth of society in the sense that the book is now in the hands of someone who was ready and willing to pay more for it than the person who originally owned the book. Dworkin calls 'the situation before the forced transfer takes place "Society 1" and the situation after it takes place "Society 2"' and asks whether 'Society 2 [is] *in any respect* superior to Society 1'.[40] If the answer is no, then merely increasing the wealth of society is not of any value *at all*. Dworkin thinks the answer is clearly 'no' – there is *not one* respect in which we can say that Society 2 is better than Society 1.

It might be that our view of this situation is unduly influenced by the fact that the book was *seized* from Derek; and that Derek did not get the medicine, the prospect of getting which was the only reason he was willing to sell the book in the first place. So we can change the example to a case where Ronnie has a bowl of rice that he is willing to sell. Derek, who

[37] Others not so enamoured of LE might well argue that this is a blatant distortion of what holding a defendant liable for negligence involves.

[38] Dworkin, 'Is wealth a value?' (1980) 9 *Journal of Legal Studies* 191.

[39] Ibid, 197, 199–200.

[40] Ibid, 197 (emphasis in original).

is starving and poor and needs the rice to live, can only afford to offer Ronnie 50p for the bowl of rice. Amartya, who is very rich and fancies having the rice with his dinner, is willing to pay £10 for the bowl of rice out of his extensive riches. In 'Society 1' Ronnie takes pity on Derek and sells him the bowl of rice, thereby saving his life, and foregoing the extra £9.50 that he would have made selling the bowl of rice to Amartya. In 'Society 2' Ronnie sells the bowl of rice to Amartya. We can ask Dworkin's question again: Is there *any* respect in which Society 2 is superior to Society 1? If the answer is 'no' then this, again, shows that wealth maximisation does not serve any human value as the cause of wealth maximisation would dictate that Amartya get the bowl of rice, and not Derek.

Dworkin's argument has never been refuted; indeed, Richard Posner – the doyen of the law and economics movement – is quite happy to admit that there is no necessary connection between wealth maximisation and increases in social utility.[41] The problem lies in measuring wealth according to people's *readiness and willingness* to pay for things.[42] There is no reason to think that allocating an asset to someone who is ready and willing to pay £10 for it is more valuable than allocating it to someone who is ready and willing to pay £5 for it, especially given that how much someone is ready and willing to pay for an item will depend a great deal on how much money someone *already* has.[43]

Kantian Theories

Kantian theories of private law see private law as an outworking of Kant's Doctrine of Right (as set out in the first part of Kant's *Metaphysics of Morals*, published in 1797). The key idea underlying the Doctrine of Right is that we all have an unqualified[44] right to independence;[45] in other words, a right to determine what ends we will pursue with the means that are available to us.[46] In a 'rightful condition' – where the Doctrine of Right is given effect to – each of us will exist in a relationship of equal freedom, where my independence can only be limited in order to protect your independence.

[41] Posner, 'Utilitarianism, economics, and legal theory' (1979) 8 *Journal of Legal Studies* 103.

[42] Johnsen, 'Wealth *is* value' (1986) 15 *Journal of Legal Studies* 263 argues that if we define 'value … as willingness to forego other valued goods' then in maximising wealth (ensuring that goods go to those who are willing to forego the most other goods for them) we are increasing the value of people's holdings. But by this definition crack cocaine and methamphetamine count as the most valuable goods in the world as people who are addicted to those drugs are willing to give up *everything* for more of those drugs.

[43] Cf. Kronman, 'Wealth maximization as a normative principle' (1980) 9 *Journal of Legal Studies* 227, 242: 'the principle of wealth maximization is biased in favour of those who are already well off.'

[44] I use the term 'unqualified' here to mark the fact that when Kantians say each of us has a right to independence, they do *not* mean that each of us has an interest in being independent, which interest can be a ground of duties in others. (For this use of the term 'right to …' see pp 44–54). Instead, they mean that my independence can only be limited for the sake of preserving someone else's independence.

[45] See Kant, *Metaphysics of Morals*, 6:237 (trans. Mary Gregor): '*Freedom* (independence from being constrained by another's choice) insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only right belonging to every man by virtue of his humanity.' ('6:237' means page 237 of the sixth volume of the Prussian Academy edition of Kant's works.)

[46] This formulation is Arthur Ripstein's: see, for example, his *Force and Freedom* (Harvard UP, 2009), 14. Ernest Weinrib's recent work sees private law as centred on the idea of 'personality', which is defined as the 'capacity for purposiveness' (Weinrib, *Corrective Justice* (OUP, 2012), 25) – which seems to come to much the same thing as Ripstein's definition of 'independence'.

Various aspects of private law can be explained on this Kantian basis. Tort law imposes duties on us not to interfere with the independence of others, either by *usurping* their powers to determine what happens to the means at their disposal (as happens where I push you around; or where I take your property and dispose of it) or by *unacceptably damaging* the means at their disposal (as happens where I run you down and injure you by driving at excessive speed; or where I ruin the amenity value of your back garden by regularly enjoying barbecues on my neighbouring premises that fill your back garden with smoke).[47]

The institutions of private property and contract law arise out of the fact that my independence would be unjustifiably limited if I were prevented from acquiring a means external to me for any reason other than protecting someone else's independence.[48] So if I come across a wild rabbit, my independence would be unjustifiably compromised if I were *not* allowed, by capturing it, to make it *mine*. Limiting my independence in this way could not be justified on the basis that doing so is necessary to protect anyone else's independence.[49] And if you and I want to enter into a binding agreement, where you transfer your freedom of choice to do *x* to me so that I will then be able to decide whether or not you do *x*, my independence would be unjustifiably compromised if we were not allowed to enter into such an agreement. Limiting my independence in this way could not be justified on the basis that doing so is necessary to protect anyone else's independence (the fact that you are willing to enter into the agreement shows that it is not necessary to find that the agreement is not binding in order to protect your independence).[50]

Imposed private law duties *to benefit another* are objectionable under a Kantian view of private law as they interfere with the duty-bearer's independence, and they do so not in the name of protecting another's independence, but in the name of promoting another's welfare.[51] So Kantian theories of private law can easily account for why I will owe you no duty to rescue you if I come across you drowning in a pond, even if I could easily fish you out of the water. Imposing such a duty on me would abridge my independence to determine for myself what ends I pursue with the means that are available to me when my failure to rescue you would leave intact your (sadly limited) ability to determine for yourself what ends you pursue with the means that are available to you.

Explaining why a D who receives money mistakenly paid her by P is required, under the law on unjust enrichment, to repay the value of the money to P is trickier within a Kantian framework, as it seems here that D's ability to decide what to do with the means that are at her disposal is being abridged here to help protect P from the consequences of a mistake that she made.[52] However, Ernest Weinrib has attempted to argue that D can be required to

[47] For the distinction between 'usurping' and 'unacceptably damaging' see Ripstein, *Force and Freedom* (n 46), 44–45; also his 'Tort law in a liberal state' (2007) 1 *Journal of Tort Law* Issue 2, Article 3, 14–17, and 'Civil recourse and the separation of wrongs and remedies' (2011) 39 *Florida State ULR* 163, 172–73.

[48] Kant, *Metaphysics of Morals*, 6:246: 'it is possible to have any external object of my choice as mine'.

[49] Ripstein, *Force and Freedom* (n 46), 63–64.

[50] For accounts of Kantian 'transfer theories' of contractual obligation, see Benson, 'Contract as a transfer of ownership' (2006) 48 *William & Mary LR* 1673; Ripstein, *Force and Freedom* (n 46), chapter 5; Dedek, 'A particle of freedom: natural law thought and the Kantian theory of transfer by contract' (2012) 25 *Canadian J of Law & Jurisprudence* 313. For criticism, see Smith, *Contract Theory* (OUP, 2004), 97–103.

[51] Ripstein, 'Civil recourse and the separation of wrongs and remedies' (n 47), 173; Weinrib, *Corrective Justice* (n 46), 21–22, 50–51.

[52] Cf. Klimchuk, 'Unjust enrichment and corrective justice' in Neyers, McInnes and Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing, 2004), 135: 'the mistaken payer's claim for restitution is, in effect, a request that the payee insure the payer against her mistakes.'

make restitution here compatibly with Kant's Doctrine of Right – he argues that whenever D receives money from anyone, D does so on the basis that the money has not been given to her for nothing. So if it turns out that money transferred to D *has* been given to her for nothing (as is the case with P, as whatever the reasons were that he thought he had for giving D the money, they did not actually exist) then D has effectively agreed, in accepting the money, to make restitution to P so that the money that P transferred to D will not actually have been given to D for nothing.[53]

Weinrib was the first legal scholar to suggest that private law in common law jurisdictions could be explained along the above, Kantian, lines.[54] He was soon joined in this view by many other (mainly Canadian)[55] legal academics, most notably Arthur Ripstein, Weinrib's colleague at the University of Toronto.[56] Weinrib named his explanation of private law 'corrective justice'. This term was borrowed from Aristotle's discussion in Book V of the *Nicomachean Ethics* of the different types of justice and, in particular, Aristotle's distinction between corrective justice and distributive justice. For Weinrib, the phrase 'corrective justice' captures the way he views private law as being purely concerned, in a given case involving P and D, with recognising P and D as standing in a relationship of equality with each other and as working to maintain that relationship of equality.[57]

However, Weinrib's use of the phrase 'corrective justice' to describe his explanation of private law has created serious confusions, because other people use the phrase 'corrective justice' in other ways.[58] For example, Jules Coleman thinks that (1) the phrase 'corrective justice' describes the principle that 'individuals who are responsible for the wrongful losses of others have a duty to repair the losses'.[59] John Gardner thinks that (2) the phrase 'corrective justice' describes any norm that requires a gain or loss that A has obtained from B be reallocated back to B.[60] So if you think (1), and then encounter a Kantian scholar worrying

[53] See Weinrib, *Corrective Justice* (n 46), chapter 6.

[54] Weinrib, *The Idea of Private Law*, 2nd ed (OUP, 2012), chapter 4. Weinrib would disdain the idea – fundamental to the presentation of the various theories of private law in this section – that private law can be seen as pursuing any kind of *goal*, on the ground that 'the purpose of private law is to be private law' and that just as love 'is its own end … private law is just like love' (ibid, 5). However, what Weinrib seems to mean by 'the purpose of private law is to be private law' is that 'the purpose of the rules and doctrines of private law is to live up to the ideas that allow us to see those rules and doctrines as operating in a coherent and justified way' – which statement is both perfectly intelligible and also presents private law as seeking to achieve a particular goal. It is also not hard to find, in Weinrib's summary of his ideas at the start of the revised edition of *The Idea of Private Law*, statements about private law that present it as seeking to pursue a particular goal (emphases in the following quotes have been added by me in every case): 'Rights and their correlative obligations thereby become *the vehicles* through which private law *expresses* the relation of one free being to another' (ibid, xvi); 'corrective justice *treats* the parties as equal' (ibid, xvii); 'The idea of coherence … *requires* that the justification *occupy* the entire conceptual space to which its normative content *entitles* it' (ibid, xvii); 'Like every sophisticated system of private law, the common law *values* its own normative coherence and *strives to achieve it*' (ibid, xviii). For more on the idea of private law being 'its own end' see Gardner, 'The purity and priority of private law' (1996) 46 *U Toronto LJ* 459, 459–66.

[55] But see also, from New Zealand, Beever, *Rediscovering the Law of Negligence* (Hart Publishing, 2009), *The Law of Private Nuisance* (Hart Publishing, 2013) and *A Theory of Tort Liability* (Hart Publishing, 2016); and, from the United Kingdom, Stevens, *Torts and Rights* (OUP, 2009).

[56] See – in addition to works cited at n 46 – Ripstein, 'Beyond the harm principle' (2006) 34 *Philosophy & Public Affairs* 215, and Ripstein, *Private Wrongs* (Harvard UP, 2016).

[57] Weinrib, *The Idea of Private Law* (n 54), chapter 3.

[58] For further criticisms of Weinrib's use of the term 'corrective justice' to describe his theory, see Steel, 'Private law and justice' (2013) 33 *OJLS* 607, 617–18.

[59] Coleman, *The Practice of Principle* (OUP, 2011), 15.

[60] Gardner, 'What is tort law for? Part 1. The place of corrective justice' (2011) 30 *Law and Philosophy* 1, 9.

about whether (say) the law on the economic torts is compatible with 'corrective justice',[61] your first reaction will be puzzlement. You will think, 'How could it not be? After all, the law on the economic torts makes someone who is (according to that area of law) a wrongdoer pay compensation to the victims of his wrongs.' The puzzlement only clears when you realise that the Kantian scholar is simply using the phrase 'corrective justice' to mean 'what Kantian scholars like me think private law is up to' and is really worrying 'Is the law on the economic torts compatible with what Kantian scholars like me think private law is up to?' And someone like Gardner, who believes (2), expresses puzzlement how Weinrib can think that the idea of 'corrective justice' can be used to explain *when* someone will commit a tort when, at best, corrective justice only comes in *after* a tort has been committed to demand that whatever has passed between the victim of the tort and the tortfeasor be allocated back.[62] The only way out of the puzzlement is to acknowledge, as Weinrib does,[63] that he means something different by 'corrective justice' than what Gardner means.

Given these confusions, it would be best if no one involved in trying to explain private law used the phrase 'corrective justice' ever again, and I will not follow Weinrib in reserving that term for a Kantian explanation of private law. Instead, I will simply call such an explanation 'K', for short. With that settled, we can now turn to the *question of value* in relation to K. This question requires us to ask: If K is right about private law, and private law is geared towards ensuring that each of us enjoys an unqualified right to independence as against everyone else, does private law serve any real human need or interest?

We can address that question by considering a hypothetical situation invented by Victor Tadros: 'Suppose that I can save the lives of five people only by nudging you into a lever without your consent …'[64] Let's follow Dworkin's example by calling the society just before I nudge you into the lever 'Society 1' and the society after I nudge you into the lever (and save five people's lives) 'Society 2'. But this time we ask: 'Is Society 2 worse *in any respect* than Society 1?' It seems obvious that the answer is 'no' – there is no respect in which Society 2 is worse than Society 1, even though in Society 2 your independence has been violated in a way that it was not in Society 1. If this is right, then independence, of and in itself, is not of any value.

Reflection indicates that this *is* right. It seems that we do not value independence *of and in itself*, but rather independence *plus* – that is, independence but only in certain situations or on certain occasions. Independence seems particularly valuable when it relates to our being able to decide what sort of life we lead – we want to be able to decide that for ourselves (so far as we can), rather than have someone else allocate a life to us. So, for example, while children and slaves both lack independence in the Kantian sense, the condition of a slave is pitiable, but a child's condition is not. What seems to be the difference between them is that the slave is not free to decide what sort of life he or she will lead, but what sort of life the child will lead has still to be determined, and when the time comes it will be the child

[61] See, for example, Jason Neyers' 'Rights-based justifications for the tort of unlawful interference with economic relations' (2008) 28 *Legal Studies* 215 and 'The economic torts as corrective justice' (2009) 17 *Torts LJ* 162.

[62] Gardner, 'What is tort law for? Part 1. The place of corrective justice' (n 60), 23–24. See also Gardner, 'The purity and priority of private law' (n 54), 469–70.

[63] Weinrib, *Corrective Justice* (n 46), 336–37.

[64] Tadros, 'Independence without interests?' (2011) 31 *OJLS* 193, 199.

(then fully grown) that will decide. If we knew that the child would not enjoy such a freedom in future – for example, we know that the child's parents are absolutely determined that the child will be a concert pianist and are taking every step to ensure that that is the child's fate – then we would start to pity the child and think of the child's condition as being more akin to that of a slave.[65] But under normal circumstances, a child is not to be pitied just because it happens not to enjoy any independence.[66]

This explains why Society 2 is not worse *in any respect* than Society 1 in Tadros' example: when I nudge you into the lever, I deprive you of your independence but I do not deprive you of independence *plus* – the independence to decide what kind of life you will lead. And it is only independence *plus* that is of value. If this is right, and K is also correct in claiming that private law is geared towards ensuring that we all enjoy as against everyone else an unqualified right to independence, then private law does not seem to serve any real human need or interest.[67] Against this, it might be argued that if private law protects people's independence, then it must also (of necessity) protect their independence *plus* – and so it *does* achieve something of real value to human beings. However, no one is denying that private law does, and must, every so often (or perhaps very often) hit the mark and do some genuine good in the world. The question being addressed in this section is what the currently popular explanations of private law tell us about what private law is *supposed* to achieve. If K is correct then private law is *supposed* to achieve a goal that is, of and in itself, of no value to human beings. The fact that in achieving that goal it will *sometimes* do some other good (protecting independence *plus*) is neither here nor there.

Legal Moralism

Our third explanation of private law (or, rather, one part of private law – tort law) covers a couple of different theories – both of which see tort law as giving effect to, or as being based on, certain moral duties that we owe other people.[68] In other words, these theories explain tort law as being a form of applied morality – hence my use of the term 'legal moralism' to

[65] Cf. Jurgen Habermas' objections to genetically engineering children to give them certain advantages and skills that might steer their adult lives in a certain direction: Habermas, *The Future of Human Nature* (Polity Press, 2003), 48–66. I am grateful to Isabel Haskey for bringing these arguments to my attention.

[66] Ripstein seems to assert that children are *incapable* of enjoying any independence. See Ripstein, *Private Wrongs* (n 56), 34, fn 2:'Young children are incapable of setting their own purposes'. This does not describe any child I know above the age of two. But note the qualifier 'young' – so even Ripstein has to concede that not young children (children older than nine?) do not enjoy the independence of which they are capable. And yet we do not pity them.

[67] This conclusion should not actually be too surprising given that Kant's morality (both personal and political) is meant to prescind from (allegedly contingent) issues about what is good for human beings, and instead bases itself on the nature of human beings as necessarily being rational beings. See also Weinrib, *Corrective Justice* (n 46), 22, arguing that the rights that we enjoy under private law are not rooted in any respect in considerations of what is in our interests.

[68] These are not the only theories that adopt this kind of view. For example, Stephen A Smith's important work on the difference between duties and liabilities (see below, pp 54–55) relies heavily on the idea that legal duties are moral duties (or at least duties that the legal authorities *claim* to be moral duties) that are given effect to by the law: see Smith, 'Duties, liabilities, and damages' (2012) 125 *Harvard LR* 1727, 1744; and Smith, 'A duty to make restitution' (2013) 26 *Canadian J of Law and Jurisprudence* 157, 163. Irit Samet argues that equity, through giving effect to

describe these theories.[69] I will begin by setting out these theories. The first is a civil recourse theory of tort law (or 'CRT', for short) developed by John Goldberg and Benjamin Zipursky. The second is a theory of tort law proposed by John Gardner, which I will call 'JG', for short. I will then address the question of value in relation to each of these theories. My conclusion will be that if either CRT (or, at least, the particular form of CRT I will discuss below) or JG are correct in what they say about tort law, tort law in its current state (and, by extension, a private law that contains tort law in anything like its current form) cannot be said to serve any real human need or interest.

(1) Goldberg and Zipursky

In discussing Goldberg and Zipursky's CRT, it must be straightaway acknowledged that their accounts of CRT suffer from a deep, and frustrating, ambiguity. Take this summary of CRT offered by John Goldberg:

> (A) 'The basic idea is that tort has certain central features … that, taken together, reveal a consistent concern to enable persons who have been victimized in certain ways to respond to that victimization by obtaining a certain kind of satisfaction, through law, as against the wrongdoer. On this description there is a purpose to tort law: that of providing victims with an avenue of civil recourse against those who have wrongfully injured them.'[70]

What does Goldberg mean by 'wrongdoer' or 'wrongfully' here?

If *all* Goldberg and Zipursky mean by the word 'wrong' – and associated expressions – is 'a breach of a legal duty owed to another' or (as they would prefer to put it) 'a breach of a relational legal directive',[71] then CRT basically boils down to saying that tort law provides the victim of particular types of legal wrong with the ability to seek redress from the person who committed that wrong.[72] As such, CRT is completely underwhelming as an explanation of tort law, and consequently can be referred to as the *weak form* of CRT, or 'WCRT' for short.

WCRT says no more than we could expect a decent tort textbook to say, when what we are looking for from theories of tort law is something that will make sense of the law as set out in the textbooks.[73] In particular, it tells us nothing about *why* tort law provides the victim of particular types of legal wrong with the ability to seek redress against the

the demands of conscience, requires that people adhere to something like Kant's moral law in their dealings with others: Samet, 'What conscience can do for equity' (2012) 3 *Jurisprudence* 12.

[69] Cf. Bernard Williams' use of the term 'political moralism' to describe political theories which see 'political theory [as] something like applied morality': Williams, 'Realism and moralism in political theory' in his *In the Beginning Was the Deed* (Princeton UP, 2005), 2.

[70] Goldberg, 'Ten half-truths about tort law' (2008) 42 *Valparaiso Univ LR* 1221, 1252.

[71] Goldberg and Zipursky, 'Torts as wrongs' (2010) 88 *Texas LR* 917, 945.

[72] Ibid, 946: 'Tort law provides victims with an avenue of *civil recourse* against those who have committed relational and injurious wrongs against them.' 'Wrongs' here plainly means 'legal wrongs'. See also Zipursky, 'Rights, wrongs and recourse' (1998) 51 *Vanderbilt LR* 1, 82: 'What I shall call "the principle of civil recourse" states that a person ought to be permitted civil recourse against one who has violated her legal rights'; Zipursky, 'Civil recourse, not corrective justice' (2003) 91 *Georgetown LR* 695, 736: 'Tort law embodies the principle that one is entitled to an avenue of recourse against another who has committed a legal wrong against her.'

[73] Goldberg and Zipursky might argue that it is all very well for someone from the United Kingdom to say this given that tort academics in the UK seem 'quite comfortable sticking with the conception of torts as wrongs.

person who committed that wrong. In order to help us make sense of what tort law is up to, WCRT needs to be supplemented with further arguments, such as Goldberg and Zipursky's argument that someone, P, who has been injured by a legal wrong committed in relation to her by D, needs to be given a right of redress against D because if the law failed to give P such a right, then D would be effectively allowed to breach the legal duty he owed P with impunity.[74]

There are lots of places in Goldberg and Zipursky's work[75] where it seems that for the purpose of statements like (A), above, *all* they mean by *wrong* is 'the breach of a legal duty owed to another', with the underwhelming consequences outlined above. However, this is far from being always the case. Consider this statement:

> (B) 'Torts is about which duties of noninjury owed to others are counted as legal duties and what sorts of remedial obligations one will incur for failing to conduct oneself in accordance with those duties.'[76]

The first 'duties' in (B) cannot refer to *legal* duties because, according to (B), tort law determines *which* of those first duties count, or are recognised, as legal duties. So the first 'duties' in (B) must be *moral* duties. This – and other statements in Goldberg and Zipursky's work[77] – suggest a much more powerful account of CRT that *does* actually help us make sense of what tort law is doing. We can call this version of CRT the *strong version* of CRT, or 'SCRT' for short. If SCRT is not actually the version of CRT that Goldberg and Zipursky would endorse – because they would prefer to adopt WCRT – then the reader can simply take SCRT as being *inspired* by Goldberg and Zipursky's work, which it certainly is.

According to SCRT, then, the following is true:

(1) We owe each other a wide range of *moral* duties. If D breaches a moral duty that he has to treat P in a particular way, P *may* be *morally* entitled to seek some redress against D for what D has done. Whether this is the case will depend on the importance of the moral duty in question in terms of protecting or recognising a significant interest of P's, and whether D's breach actually had the effect of damaging that interest.

(2) If D has committed, in relation to P, the kind of a breach of a moral duty that is (we can say) *redress-worthy*, it would be unacceptable to allow P to help herself to the

However, at least in American tort theory, it is far from well accepted that torts are legal wrongs': Zipursky, 'Civil recourse and the plurality of wrongs: why torts are different' [2014] *NZLR* 145, 146. But if this is *all* Goldberg and Zipursky are trying to establish, then devoting the 5,000+ pages they must have written so far on tort law to do this seems excessive.

[74] Goldberg and Zipursky, 'Torts as wrongs' (n 71), 974.

[75] See, in particular, ibid, 947–53, and Zipursky, 'Civil recourse, not corrective justice' (n 72), 726–27, 743.

[76] Goldberg and Zipursky, 'Torts as wrongs' (n 71), 919.

[77] See in particular, Goldberg and Zipursky, 'Civil recourse defended' (2013) 88 *Indiana LJ* 569, criticising the New York Court of Appeals' refusal to find a duty of care in *Lauer* v *City of New York*, 733 NE 2d 184 (2000), in which case the claimant was prosecuted for killing his son after the defendant medical examiner's office conducted an autopsy and concluded the son had been killed by blunt force trauma to the head; the office then conducted a second autopsy and concluded the son had died of natural causes *but didn't tell anyone*. Goldberg and Zipursky observe (at 595) that once the office discovered that it had unjustifiably put the claimant in peril of being prosecuted 'the relevant office personnel surely owed a moral duty to the person whom it knew to have been wrongly imperilled by its mistake to correct the mistake. And while moral duties do not always translate into legal duties, *this* moral duty – given the context in which it arose – surely is one that had a powerful claim to recognition in the law' (emphasis in original). See also n 75.

redress that she is morally entitled to seek against D (even assuming she is in a position to extract such redress) as the interests of civil peace and order require that such redress not be sought extra-legally.[78]

(3) However, if we simply forbid P from helping herself to the redress that she is morally entitled to seek from D, this means that P's moral rights will have been sacrificed in the interests of maintaining civil peace and order. In order to ensure this does not happen, tort law arises to provide P with a peaceful means of seeking redress against those who have committed a *redress-worthy moral wrong* against her.[79]

(4) Tort law performs the function of allowing the victims of redress-worthy moral wrongs to seek a civil means of redress for what they have suffered from the people who commit those wrongs by: (i) identifying what forms of conduct are morally redress-worthy; (ii) determining which of those forms of conduct will count as *tortious* – that is, as *legally wrongful* and therefore legally redressable under the law of tort; and (iii) giving the victim of such tortious conduct the power to seek various remedies from the person who engaged in that conduct.[80]

(5) When tort law does (ii) in relation to D's doing *x* in relation to P, we say that tort law recognises that D owed P a *legal duty* not to do *x*.[81] Given point (1), above, D's doing *x* could only have been recognised by tort law as being morally redress-worthy if it affected some important interest of P's, so doing *x* must have involved doing something that injured P in a significant respect.[82] So the only legal duties tort law (if it is working well and fulfilling its function) will recognise that D owed P – at least for the purpose of giving P powers to seek remedies against D for breach of those duties – are legal duties of *non-injury*; that is, duties owed by D to P not to damage an important interest of P's by acting in a particular way. Breaches of duties of *non-injuriousness* – duties not to act in a way that *might* harm P – will not give rise to remedies in tort.[83]

Seen in this way, SCRT provides us with a very powerful explanation of why tort law does what it does. Tort law exists to provide forms of civil redress to those who are recognised by the courts as having suffered the kind of moral wrong that is both redress-worthy and

[78] See Zipursky, 'Rights, wrongs, and recourse' (1998) 51 *Vanderbilt LR* 1, 84.

[79] See Goldberg, 'The constitutional status of tort law: due process and the right to a law of the redress of wrongs' (2005) 115 *Yale LJ* 524, 541–42 (discussing John Locke's view that in the move from the state of nature to civilised society, the natural right to seek redress of (what must be moral) wrongs is replaced by a government-administered system for providing such redress); also Goldberg and Zipursky, 'Rights and responsibility in the law of torts' in Nolan and Robertson (eds), *Rights and Private Law* (Hart Publishing, 2011), 269–70.

[80] See Goldberg and Zipursky, 'Torts as wrongs' (n 71), 973.

[81] Ibid.

[82] Ibid, 937: 'Tortious wrongdoing always involves an interference with one of a set of individual interests that are significant enough aspects of a person's well-being to warrant the imposition of a duty on others not to interfere with the interest in certain ways …'

[83] For the distinction between duties of non-injury and duties of non-injuriousness, see Ripstein and Zipursky, 'Corrective justice in an age of mass torts' in Postema (ed), *Philosophy and the Law of Torts* (CUP, 2001), 222–23.

can be redressed through tort law without great inconvenience or disruption.[84] More fundamentally, tort law exists to pay a debt that the state owes people who have suffered redress-worthy moral wrongs; having taken away people's abilities to seek redress for such wrongs themselves, it is up to the state to provide an alternative, civil means of redress for such wrongs where it can.[85]

SCRT also helps explain how tort law can develop – for example, in a case like *Donoghue* v *Stevenson*,[86] where the House of Lords held that the defendant owed the claimant consumer of his goods a duty of care to see that she was not injured as a result of those goods being dangerously defective,[87] even though there was no prior authority indicating that he owed her such a duty and some authority against.[88] SCRT would say that, prior authority or no,[89] the House of Lords (or, at least, three of five Law Lords who sat in the case) recognised that if the defendant's carelessness had resulted in the claimant being injured in this case, she would have been the victim of a moral wrong that was both redress-worthy and could be redressed through the law of tort without unacceptable side effects. So English tort law would have been failing in its function if the House of Lords had *not* recognised that carelessly injuring the plaintiff in *Donoghue* v *Stevenson* amounted to a legal wrong for the purposes of the law of tort.

(2) John Gardner

JG unambiguously offers us a legal moralistic account of the foundations of tort law. Let's assume that I owe you a moral duty to do *x*. JG tells us that if I breach this duty to do *x*, then under something called the '*continuity thesis*', I will then owe you a *new* duty. This new duty is generated by the reasons that underlay my initial duty to do *x*. This new duty requires me to undo (so far as I can) any harmful consequences of my breach that my duty to do *x* was intended to avoid you suffering.[90] JG sees tort law as seeking to give legal effect to particular pairs of moral duties: a primary duty to do *x*, and a secondary duty that I will incur under the continuity thesis if I breach that primary duty and you suffer relevant harm as a result.

[84] This last point – that tort law's ability to recognise someone as having suffered a wrong is limited by whether its doing so would have any adverse consequences – is emphasised in Goldberg, 'Ten half-truths about tort law' (n 70), 1253–54.

[85] On the idea of there being a 'right' to tort law, or a right to a law empowering people to seek the redress of wrongs, see Goldberg, 'The constitutional status of tort law: due process and the right to a law of the redress of wrongs' (n 79), 606–607; Goldberg and Zipursky, 'Rights and responsibility in the law of torts' (n 79), 268–69; Goldberg and Zipursky, 'Civil recourse defended' (n 77), 572. Note that the idea of there being a right to be empowered to seek the redress of wrongs via tort law is completely incoherent if we interpret 'wrongs' to mean 'legal wrongs' because if tort law did not exist, there would be no wrongs (in the sense of 'legal wrongs') that would need to be redressed.

[86] [1932] AC 562.

[87] I have deliberately phrased the duty in a way that fits with Goldberg and Zipursky's view that the only duties given effect to by tort are duties of non-injury. Actually, Lord Atkin's famous neighbour principle asserted that 'You must take reasonable care to avoid acts or omissions that are *likely* to injure your neighbour' (ibid, 580; emphasis added).

[88] *Winterbottom* v *Wright* (1842) 10 M & W 109.

[89] See Zipursky, 'The inner morality of private law' (2013) 58 *American J of Jurisprudence* 27, 32–33 on negligence law's relative indifference to the issue of whether, in any given case, there was a prior authority indicating that the defendant owed the claimant a duty of care.

[90] Gardner, 'What is tort law for? Part 1. The place of corrective justice' (n 60), 33.

Not all such pairs of moral duties are given effect to by tort law. So, for example, John Gardner's stock example of the 'continuity thesis' at work – originally invented by Neil MacCormick[91] – is one where an emergency meant he had to breach a promise to his children to take them to the beach. His primary obligation to take the children to the beach is now unperformable. In its place arises a secondary obligation to take the children to the beach as soon as he can, and if that is not possible, to provide some other form of entertainment that will substitute for the fun his children are missing by not going to the beach and compensate them for the distress caused by the cancelled trip. Tort law will definitely *not* give effect to this particular pair of moral duties – but it does give effect to:

(1) the moral duty not to batter people and the moral duty to pay compensation to those you batter;

(2) the moral duty to take care not to injure people by driving dangerously and the moral duty to pay compensation to those you injure by driving dangerously;

(3) the moral duty not to defame other people unjustly and the moral duty to pay compensation to those you have defamed unjustly; and so on.

Which pairs of moral duties get the tort treatment so that 'public authority … is put at the disposal of the wronged person … partly at public expense'[92] obviously depends on the significance of the pairs of moral duties in question, but also on the difference giving those pairs of moral duties the tort treatment will make to how far people will comply with those duties,[93] and the need to avoid 'excessive juridification, i.e. … turning too much of our lives over to the law'.[94]

Given the above, one can see how JG can be used to explain the existence of duties to succeed in tort law. Consider a case like *Ashley* v *Chief Constable of Sussex Police*.[95] An armed police officer took part in a raid at 4 am on what he had been told was a dangerous drug dealer's house. He was the first into the bedroom of James Ashley, the owner of the house. It was dark but the police officer thought he saw Ashley (who was both not a drug dealer and was standing naked in the middle of the room having just got out of bed to see what was going on) reach for a weapon, and so the officer shot Ashley, killing him. Ashley's family subsequently sued the police, claiming that shooting Ashley amounted to a tort – a battery.

There is clearly a *sense*[96] in which we *can* say that given that the officer was *not* objectively in danger from Ashley, he had a moral duty not to shoot him. So it is not nonsensical

[91] MacCormick, 'The obligation of reparation' in his *Legal Right and Social Democracy* (OUP, 1982), 212.

[92] Gardner, 'What is tort law for? Part 2. The place of distributive justice' in Oberdiek (ed), *Philosophical Foundations of Tort Law* (OUP, 2014), 340.

[93] Gardner, 'Backwards and forwards with tort law' in O'Rourke and Keim-Campbell (eds), *Law and Social Justice* (MIT Press, 2005), 278; Gardner, 'What is tort law for? Part 1. The place of corrective justice' (n 60), 25.

[94] Gardner, 'What is tort law for? Part 2. The place of distributive justice' (n 92), 341. See also Gardner, *From Personal Life to Private Law* (OUP, 2018), 76–77.

[95] [2008] 1 AC 962.

[96] Derek Parfit calls this the 'fact-relative sense', so that 'Some act of ours would be wrong in the *fact-relative* sense just when this act would be wrong in the ordinary sense if we knew all of the morally relevant facts': Parfit, *On What Matters, Volume One* (OUP, 2011), 150.

to say that the officer in *Ashley* was under a moral duty to succeed in not shooting Ashley unjustifiably, and that breach of this duty gave rise to a secondary moral duty of repair. And it may well be that it would be justifiable for this pair of duties to be given the tort treatment. While doing this might not have helped the officer in *Ashley* comply with his primary moral duty to succeed in not shooting Ashley unjustifiably (there wasn't much he could have done to avoid breaching that),[97] it *would* help the officer comply with his secondary moral duty of repair and 'there is nothing circular in holding that the *existence* of the primary obligation [not to shoot Ashley unjustifiably] is justifiable … because the secondary obligations of reparation that arise from the legal recognition of [the shooting] as tortious would be justifiable.'[98]

(3) The Question of Value

So JG sees tort law as giving effect to certain pairs of primary and secondary moral duties, where the primary duty requires you to treat me in a certain way and the secondary duty requires you to repair the relevant consequences for me of your breach of the primary duty. SCRT sees tort law as giving you a peaceful means for seeking redress from me when I have, in tort law's eyes, committed a moral wrong in relation to you that is redress-worthy and can be redressed through the law of tort without inconvenience.

At first sight, both theories seem to allow us to say that tort law in its current state seeks to achieve goals that are of very real human value. If JG is correct, then tort law in its current state is geared towards helping us do what we have reason – in fact, compelling reason – to do. As we are 'the animals that can both understand and respond to reasons'[99] we have reason – compelling reason – to be grateful to tort law for reminding us of, and helping us to do, our duty and thereby fulfil our nature as rational beings. If SCRT is correct, the existence of tort law is part and parcel of the state's attempt to secure the undoubted goods of peace and stability in the community. In order to secure those goods it has to forbid victims of redress-worthy moral wrongs from helping themselves to the redress they are entitled to. Instead, the state supplies victims of those kinds of wrongs with a peaceful means of obtaining that redress where it can.[100]

However, I would like to dig a little deeper, and will begin by drawing a distinction between two different concepts of morality.[101] The first concept is the one we are most familiar with – it is the idea of *morality as a code*: a list of actions that people are required to do or not to do.[102] Such actions are 'morally obligatory'. The code is final in the sense the code has

[97] Not taking part in the drugs raid was not an option.

[98] Gardner, 'Backwards and forwards with tort law' (n 93), 269 (emphasis in original).

[99] Parfit, *On What Matters, Volume One* (n 96), 31.

[100] For a more comprehensive list of the goods that are supposed to be achieved by having tort law, viewed in the way CRT would have us view it, see Goldberg and Zipursky's 'Tort law and moral luck' (2007) 92 *Cornell LR* 1123, 1167, 'Torts as wrongs' (n 91), 981–82, and 'Civil recourse defended' (n 77), 592. See also Zipursky, 'Honor and civil recourse' (2012) 80 *Fordham LR Res Gestae* 59, 66.

[101] In what follows I have been heavily influenced by Bernard Williams' work, and in particular his *Ethics and the Limits of Philosophy* (Harvard UP, 1985).

[102] This conception of morality goes back to Kant, whose *Groundwork of the Metaphysics of Morals* (1785) assumes from start to finish that morality consists in *laws*. (Cf. Schopenhauer's critique of Kant's ethics in §4 of his *On the Basis of Morality* (1840), accusing Kant of offering no proof that there are such things as moral *laws*.)

the final word on how people should behave. If doing *x* is required of you under the code, you can only appeal to some other part of the code to be released from your obligation to do *x*. So, in Bernard Williams' words 'only an obligation can beat an obligation'[103] under the view of morality as a code. If no other part of the code releases you from your obligation to do *x*, then doing *x* is compulsory. The code may give rise to moral conflicts where someone is required under the code to do *x* and do *y*, but doing both *x* and *y* is not possible. In such a case the person subject to conflict has to choose whether to do *x* or *y*, and, under the 'continuity thesis', do what he or she can to make up for their failure to take the option not chosen. The code may be vague or uncertain. In such a case the law can help sharpen up the code by defining more precisely what fulfilling (say) the code's requirement that we ought to make a reasonable contribution to the cost of providing collective goods (goods that, when they exist, may be enjoyed by everyone) entails.[104]

A very different conception of morality is based on the idea of an ethical map. This map highlights certain experiences and activities and choices and institutions and people and places and achievements as ethically important or significant, in that they have some bearing on the basic question 'How should I live?', and in ways that the map explains. So, for example, the map might point to some mountainous regions, made up of various experiences and activities that are marked out as being challenging, in that engaging in them provides opportunities for growth and positive development as a person. Other areas – made up of other kinds of experiences and activities, as well as choices – might be designated as deadzones: entering them threatens to shred one's personality so completely that doing so may well amount to a form of suicide.[105] More happy regions on the map will contain experiences and activities that are designated as being worthwhile or fulfilling; their flipside are regions that contain experiences and activities that are indicated to be worthless or degrading. Various experiences, institutions, people or places might be designated on the map as being worthy of awe or reverence; others as worthy of disgust and contempt. While the map will, on occasion, strongly *suggest* a particular course of action to someone who is inclined to take the map seriously and use it as a guide to how they should live, it will be *very* rare that the map will indicate that someone *must* act in a particular way with the sort of categorical force that is routine for morality to do so when it is viewed as

Over 300 years later, some academic philosophers have reversed the compliment Kant made morality pay law and have instead identified law with morality, arguing that our legal obligations are simply moral obligations that bind us by virtue of the history of the political institutions that govern us. (See Dworkin, *Justice for Hedgehogs* (Harvard UP, 2011), chapter 19; Greenberg, 'The moral impact theory of law' (2014) 123 *Yale LJ* 1288; Hershowitz, 'The end of jurisprudence' (2015) 124 *Yale LJ* 1160.) Such a move could not be made if Kant had not first modelled morality on what he knew about law.

[103] Williams, *Ethics and the Limits of Philosophy* (n 101), 180.

[104] Cf. Honoré, 'The dependence of morality on law' (1993) 13 *OJLS* 1.

[105] See, for example, William Styron's story *Sophie's Choice* (Random House, 1979), where Sophie is given the choice by a Nazi – (1) allow both of your children to die, or (2) pick one to be sent to the gas chambers and save the other. Sophie (stupidly) opts for (2), and by making herself complicit in the death of her child she enters a deadzone and suffers the inevitable consequences. Contrast John Gardner's bathetic 'morality as code' reading of *Sophie's Choice* where Sophie faced a 'conflict between two … duties that were both, tragically, constituents of the very same special relationship', the conflicting duties in question being a duty to protect her children from harm and a duty to be impartial between her children: Gardner, *From Personal Life to Private Law* (n 94), 39. This seems to suggest that all would have been well for Sophie if only she had tossed a coin to pick which of her children went to the gas chambers.

a code. The terrain presented by any decent ethical map is too rugged and variegated to accommodate easily the simple straight lines that morality, when viewed as a code, lays down for those whom it addresses.[106]

This last fact – the rarity of categorical moral duties under morality conceived of as a map – establishes that if JG is correct and tort law seeks to give effect to various pairs of primary and secondary moral duties, or if SCRT is correct and tort law seeks to give us a way of obtaining recourse against those who have committed a breach of a moral duty to treat us in a particular way that is redress-worthy, these moral duties *must* be rooted in the idea that morality is better viewed as a code, rather than a map. This is because, *assuming* JG or SCRT is correct in the claims it makes about tort law, the large number of different torts that can be committed in any common law jurisdiction[107] indicates that the *range* of moral duties that tort law recognises us as having (under JG's view of tort law), or the *range* of moral wrongs that tort law recognises as being redress-worthy (under SCRT's view of tort law), is *very wide*. And *only* morality viewed *as a code* can accommodate the view that we can be morally required to do a wide range of different things, or the view that there is a wide range of ways in which we can commit a moral wrong in relation to another that is redress-worthy.

So if JG or SCRT are correct, then tort law does not *just* give effect to various moral duties that we have, or recognise us as having suffered serious moral wrongs – it *also*, in that process of giving effect to our moral duties, or recognising us as having suffered redress-worthy moral wrongs, takes the view that morality can be best conceptualised as a code rather than a map and draws on some understanding of how that code can be discerned, such as (purely for the sake of example) Derek Parfit's 'Kantian Contractualist Formula': 'Everyone ought to follow the principles whose universal acceptance everyone could rationally will.'[108]

So now we get to the vital question: Is morality better conceived as a code or a map? *If* the answer is 'a map' then tort law, as JG or SCRT view it, does *not* in its current state achieve any goal that is of real human value. *If* morality is better conceived as a map, then the virtues of tort law – under JG's or SCRT's view of it – that were described in the second paragraph of this section would become vices. Tort law would become like a footballer who has forgotten which side he is playing for and kicks the ball into his own goal. While he may have been aiming to score a goal for his own side, the cognitive defect under which he is labouring means that all his efforts are actually directed at benefiting the other side. If JG is correct, *but* morality is better conceived as a map, then far from helping us fulfil our moral duties and live up to our nature as rational beings, tort law in its current state actually requires us to do lots of things that we have no moral duty to do at all. And if SCRT is correct, *but* morality is better conceived as a map, then far from providing people with a means of recourse when they have suffered a moral wrong that is redress-worthy, tort law in its current state encourages people to believe they have suffered redress-worthy wrongs on all sorts of occasions when they have not, with the result that it stirs up unnecessary discord when previously there could have been peace.

[106] See Taylor, 'Perils of moralism' in his *Dilemmas and Connections: Selected Essays* (Harvard UP, 2011), 348: 'Why can't our moral/ethical life be adequately captured in a code? [One] of the reasons [is that] situations and events are unforeseeably various: no set of formulae will ever capture all of them.'

[107] A list can be found in Rudden, 'Torticles' (1991–92) 6/7 *Tulane Civil Law Forum* 105.

[108] Parfit, *On What Matters, Volume One* (n 96), 342.

But much worse can be said of tort law, *if*: (1) JG or SCRT's analysis of it is correct *and* (2) tort law, in doing what JG or SCRT say that it is doing, has been proceeding on the false assumption that morality is better conceived of as a code rather than a map. By doing (2), tort law helps to legitimate within the wider social culture (what we are currently assuming is) the false idea that morality is best thought of as a code. In so doing, tort law encourages you to think that when I do something that you do not like, it is *possible* that I am violating some moral norm that requires me not to do what I am doing. This is because there is nothing within the idea of morality as a code that *automatically* limits what kind of actions might be required of us under the code. My conduct *might* be on the list of morally prescribed actions set out by the code; it depends on what the code says.

So the idea of morality as a code always carries with it the danger of embittering social relations as under this idea virtually *any* dispute where I want you to do *x* and you do not want to do *x can* be ramped up into a *moral* dispute where I argue that you are *morally required* to do *x* for me. If the dispute is so ramped up – and I have every incentive to escalate it in this way – then I will become angry with you as your unwillingness to do *x* will become a matter of your being unwilling to give me my *due*.[109] And my anger with you – and my ability to characterise you as being morally in the wrong – will encourage me to demonise and vilify you, thus ensuring that you become as angry with me as I am with you. So in a society where the idea of morality as a code is widely endorsed, a simple conflict of interests between two parties always has the potential to turn into a source of anger, recriminations, and possibly violence. If the idea of morality as a code is correct, then the embittering of social relations that comes trailing in its wake would have to be put up with. But if (as we are assuming) morality is better seen as a map rather than a code, then this embitterment is completely unnecessary, and tort law (on JG and SCRT's view of it) has helped caused needless havoc in society by encouraging people to view morality as a code.

But all this depends on what the answer to our vital question is: Is morality better conceived as a code or a map? If the answer is 'a map' then, for the reasons just given, we have to conclude that, so long as JG or SCRT is correct in its view of what tort law is up to, then tort law – for all its good intentions – does not in its current state serve to achieve any goal that is of any real value to human beings, and is in fact positively harmful in what it does do. Unfortunately, we have a number of good reasons for thinking that the answer to our question is 'a map'. They are:

(1) Considerations that would, under the view of morality as a map, count against or give us reason (perhaps strong reason) not to act in a particular way tend to get elevated, under the view of morality as a code, to the status of duties, because that is the only way they can have any moral bite under the latter view. This gives rise to some odd locutions. For example, someone (A) who kills in self-defence would be said under the idea of morality as a map to have had reason not to kill, which reason was outweighed by other considerations. People who adopt the view of morality as a code tend to say instead that A had a *duty* not

[109] John Gardner unintentionally demonstrates exactly this point with his description of the fraught psychodramas of regret, recrimination and repair that ensue when he gets into a situation where not only does his stepdaughter *desire* that he pick her up after her next drama rehearsal, but she can colourably claim that he has a *duty* to do so as well: Gardner, *From Personal Life to Private Law* (n 94), 111, 113–16.

to kill – but was *justified* in breaching that duty.[110] The former way of looking at the situation seems far more preferable, as less puzzling.

(2) The idea of morality as a code struggles with the idea that certain choices or activities (learning a foreign language, or spending an afternoon talking to old people who are living on their own, or giving money to charity) might be commendable, but are not obligatory. The idea of morality as a map has no such problem – it can easily find room on an ethical map for such a category of choices and activities.

(3) The idea of morality as a code also struggles to explain why, to use Bernard Williams' example, we do 'not feel easy with the man who in the course of a discussion of how to deal with political or business rivals says, "Of course, we could have them killed, but we should lay that aside right from the beginning."'[111] If we view morality as a map, we are easily able to locate this man in a very dark place – someone who is willing to think thoughts that should be unthinkable.[112]

(4) The idea of morality as a code seems to make little sense in the absence of the idea of morality as a map, as only morality conceived as a map can explain why we *should* abide by certain rules or requirements. As Charles Taylor observes, 'The sense that such and such is an action we are obligated by justice to perform cannot be separated from a sense that being just is a good way to be. If we had the first without any hint of the second, we would be dealing with a compulsion, like the neurotic necessity to wash one's hands or to remove stones from the road. A moral obligation comes across as moral because it is part of a broader sense which includes the goodness, perhaps the nobility or admirability, of being someone who lives up to it.'[113] So the idea of morality as a map is indispensable, while the idea of morality as a code is not.

(5) When someone does something that they later acknowledge to have been morally 'wrong', it does not seem to be the case – contrary to what the idea of morality as a code would lead us to believe – that they acknowledge that they were subject to some moral rule and that their conduct violated that rule. As Raimond Gaita points out,[114] someone ('N') who has killed a beggar and later comes to acknowledge the terribleness of his act does *not* think, 'My God, what have I done? I have transgressed most terribly! I have violated my

[110] See, for example, Gardner, *Offences and Defences* (OUP, 2007), 77–82.

[111] Williams, *Ethics and the Limits of Philosophy* (n 101), 185.

[112] On the category of the 'unthinkable' see Frankfurt, 'Rationality and the unthinkable' in his *The Importance of What We Care About* (CUP, 1988).

[113] Taylor, 'Iris Murdoch and moral philosophy' in Antonaccio and Schweiker (eds), *Iris Murdoch and the Search for Human Goodness* (U of Chicago Press, 1996), 10–11. See also Gaita, *A Common Humanity: Thinking About Love and Truth and Justice* (Prakash, 2004), xxiii: 'If the language of love goes dead on us … if there are no examples to nourish it … then talk of inalienable natural rights or of the unconditional respect owed to rational beings will seem lame and improbable to us'; also at 26 and 32.

[114] Writing about 160 years before, Schopenhauer made the same point (*On The Basis of Morality* (n 102), §19(1)), contrasting two individuals, Caius and Titus, each of whom decide not to kill a love rival – in the case of Caius because some moral formula requires him not to, and in the case of Titus 'When it came to making the arrangements [for killing the rival] … I clearly saw for the first time what would really happen to him.' Schopenhauer argues that Titus gives us a much better idea of where the 'foundation of morality' lies than Caius does.

principles! I have shattered the ancient taboo against killing! I have transgressed against the Moral Law! What I have done would reduce social life to tatters if too many people did it! I have broken the Social Covenant!'[115] Instead, 'N's sense of the terribleness of what he did depends on the way his remorse focuses on his victim in all his individuality.'[116] Exactly as the idea of morality as a map would predict, it is only by *looking* properly at what he has done that N is brought to an awareness of what he should have done.

(6) Similarly, when someone refuses to do *x* on the ground that doing *x* would be morally 'wrong', they tend not to do so because they have assessed whether doing *x* would be compatible with some moral rule that they have in their head and determined that it would not be – as the idea of morality as a code suggests they would have to have done. Instead, they have refused to do *x* because doing *x looks* 'off' to them, or they cannot *imagine* themselves doing *x*.[117] The idea of morality as a map makes most sense of that way of thinking, and of being.

(7) To adapt Marx's eleventh thesis on Feuerbach, the task of morality conceived as a code is to change the world, while the task of morality viewed as a map is simply to interpret it. Given this, we can explain why people might come to believe that morality is best viewed as a code even though that view of morality is false – viewing morality as a code offers people the alluring prospect of being able to assert control over other people, by influencing their views as to what sorts of actions are morally forbidden or morally required.[118] On the other hand, it is hard to see why people might be happy to view morality as a map unless such a view of morality actually has something going for it.

3. A Different Picture

Like diners in a very bad restaurant, we are presented with an unappetising menu of options by the above explanations of private law. Either we endorse LE, and conclude that private law is 'asinine'[119] in pursuing the ambition of maximising wealth. Or we endorse K,

[115] Gaita, *A Common Humanity* (n 113) 32.

[116] Ibid.

[117] See Murdoch, *The Sovereignty of Good* (Routledge, 2001), 37, arguing that 'One is often compelled almost automatically by what one *can* see … [And] if we consider what the work of attention is like, how continuously it goes on, and how imperceptibly it builds up structures of value round about us, we shall not be surprised that at crucial moments of choice most of the business of choosing is already over.' (Emphasis in original.)

[118] Cf. Williams, 'Nietzsche's moral psychology' in his *The Sense of the Past* (Princeton UP, 2006), 308–309. Indeed, it is precisely this desire for control that makes abandoning the idea of morality as a code quite scary to a lot of people, and also inspires the dream of coming up with some justification of morality that will convince everyone to be moral – the dream that 'the justification of the ethical life could be a *force*' (Williams, *Ethics and the Limits of Philosophy* (n 101), 23). In response to this dream, Bernard Williams observes (ibid): 'If we are to take this seriously, then it is a real question, who is supposed to be listening. Why are they supposed to be listening? What will the professor's justification do, when they break down the door, smash his spectacles, take him away?'

[119] Gardner's phrase for LE's explanation of private law: 'What is tort law for? Part 1. The place of corrective justice' (n 68), 17.

and conclude that private law is misguided in focussing on upholding our independence to the exclusion of any other consideration. Or we endorse SCRT or JG, and conclude that tort law is deluded – seeking to do moral good, but ending up doing much more harm than good thanks to its adoption of an incorrect (though popular) way of viewing what morality is all about.

Some of the gloom induced by this choice dissipates when we realise that none of these explanations are particularly *satisfying* as explanations of private law. This is because a satisfying explanation of private law has to do two things: (1) *fit* the key features of private law that we are seeking to explain; and (2) provide a *plausible* account of how private law could have come to possess *those* features, rather than any other. For example, suppose we take the presumption against holding people liable for failures to save other people from harm as being a key feature of private law. As we have seen, the explanation of private law that K provides us fits this feature of private law – if K were correct as an explanation of private law, then we would expect private law to have his feature. However, does K provide us with a *plausible* account of how private law came to be characterised by a presumption against holding people liable for failures to save other people from harm, rather than a presumption in favour of holding such people liable?

Ronald Dworkin argued that a plausible explanation of private law has to include a 'motivational' component – a component that tells us how the judges who created private law were led (either consciously or unconsciously) to give it the features that it possesses.[120] Here K falls down as an explanation of private law – it is incapable of providing us with an account of how the judges could have been led to shape private law to take a form that fits what we would expect private law to take were K to be correct. For example, it seems widely acknowledged that it took the publication of Arthur Ripstein's landmark *Force and Freedom* in 2009 to help us properly to understand Kant's Doctrine of Right.[121] If this is right, then how is it possible that a group of disparate and philosophically untrained judges, working over hundreds of years, could be led to create a system of private law that conforms to a Doctrine of Right that even the philosophers only understood properly in 2009? It is simply not possible – it would be a miracle if it happened.[122] Perhaps because they are aware of this, proponents of K have a tendency to make definitional arguments that private law would not

[120] See Dworkin, 'Is wealth a value?' (n 38), 219–20.

[121] See, for example, Allen Wood's review of *Force and Freedom* on the Notre Dame Philosophical Reviews website (www.ndpr.nd.edu): 'nearly forty years ago, I was sitting … with Hans-Georg Gadamer … Gadamer said that the biggest single lacuna in Kant studies was the absence of a really good book on Kant's *Rechtslehre*. It ought to be a book, he declared, that did not start out from Kantian ethics, but instead expounded Kant's theory of human rights, law and politics *authentically*, solely on the ground of Kant's concept of *Recht*: external freedom according to universal law. Since then I have read many good books on Kant's legal and political philosophy … Until now, however I have never found the book Gadamer thought so badly needed to be written. But this book finally appears to be it.'

[122] This point would be a lot weaker if Kantians thought that private law was based on Kant's *moral philosophy*, as it is possible to argue that Kant's moral philosophy merely provides a basis for endorsing a lot of moral intuitions that people have anyway. (Schopenhauer's joke about Kant – in his *On the Basis of Morality* (n 102), §8 – was that Kant could be likened 'to a man at a ball, who all evening has been carrying on a love affair with a masked beauty in the hope of making a conquest, when at last she throws off her mask and reveals herself to be his wife.') However, Kantians do *not* think that private law is based on Kant's *moral philosophy*, but on his *political philosophy* – and in relation to that, it cannot be said that Kant's political philosophy (which Schopenhauer thought was 'deplorable': ibid, §3) merely systematises people's ordinary intuitions.

be private law if it did not take the shape that K tells us it should[123] – so the judges shaping private law had no choice but to make it take that shape. However, even if we grant that this is correct,[124] the question then arises: So why do we have a system of private law at all? How did a group of disparate and philosophically untrained judges, working over hundreds of years, end up creating a system of private law? And K provides us with no plausible answer to this question.[125]

If we go through all of the explanations of private law set out above, we find that each of them fails to provide us with a satisfying explanation of private law – either because of lack of fit, or lack of plausibility, as the table below shows:

Explanation	**Fit**	**Plausibility**
LE	?	x
K	?	x
SCRT	x	√
JG	√	x

I have put a question mark over whether LE or K genuinely fits the key features of private law. The reason for this is that the proponents of both theories seem keen to argue that their favoured theory *perfectly* fits *all* the features of private law. However, this is not actually an advantage in a theory. It seems highly likely that the only theory of private law that could *perfectly* explain *every* feature of private law would be so manipulable that it could be used to explain why private law says *x* but it could *also* be used to explain why private law says completely the opposite (not-*x*). And so it proves: the obscure and abstract nature of both LE and K as explanations of private law provide plenty of scope for their proponents to claim that LE or K perfectly fits the facts of private law, but also makes that claim *unfalsifiable*[126] – one could imagine them finding some way to argue that private law still fits LE or K even if it said the complete opposite of what it currently says.[127] Moreover, the

[123] See Weinrib, *The Idea of Private Law* (n 54), 20, 28; Ripstein, 'Tort law in a liberal state' (n 47), 11, 12 ('Private law regulates the interactions of separate persons setting and pursuing their own purposes, individually or cooperatively'; 'the resolution of private disputes *must* be done in a way that is consistent with their private nature. It would be *inconsistent* with the public nature of a court were it to take sides in private disputes on the basis of views about the relative significance of the competing purposes that are at issue' (emphases added)); Weinrib, *Corrective Justice* (n 46), 314–15.

[124] As we will see, it is possible to view private law as a much more 'open' system, capable of saying very different things in different jurisdictions while still retaining its character as private law.

[125] A point which is as much conceded by some recent Kantian writings on tort law, which insist that the fact that there is no plausible explanation of how tort law came to take a Kantian shape does not invalidate Kantian explanations of tort law: Beever, *A Theory of Tort Liability* (n 55), 5; Ripstein, *Private Wrongs* (n 56), 19.

[126] Cf. Brudner and Nadler, *The Unity of the Common Law*, 2nd ed (OUP, 2013) remarking of LE (at 12) that 'The economist does not expose his theory of law to disconfirmation by the object; rather, he lets the theory define the object whose voice he will alone credit.' Exactly the same could be said of the Kantian theories of private law we are calling K.

[127] For example, if there were *no* tort of inducing a breach of contract, adherents to LE would point to that fact as supporting their explanation of private law as – on their view – persuading people to commit a breach of contract is a perfectly acceptable thing to do. But there *is* a tort of inducing a breach of contract. Adherents to LE take this fact in their stride and are able to come up with various explanations of why a private law based on economic foundations would recognise a tort of inducing a breach of contract: see, for example, Landes and Posner,

obscure and abstract nature of LE and K mean that they both additionally fail to provide a *plausible* explanation of why private law says what it does.

When we turn to SCRT, that explanation of tort law scores much more highly when it comes to plausibility – we could plausibly imagine the judges who helped to shape tort law being motivated by the desire to provide some means of recourse to those who have suffered a moral wrong that is redress-worthy. The difficulty that SCRT suffers from is that it simply does not fit with what tort law counts as being a wrong under tort law. There are many injury-causing actions that are counted as torts under tort law that it is hard to see as being moral wrongs that are redress-worthy.[128] The defendant's act of negligence in *Nettleship* v *Weston*[129] would be one example.

JG suffers from the opposite defect. As, under the idea of morality as a code, virtually any act of a defendant that is not welcomed by a claimant *could be said* to breach a moral duty owed by the defendant to the claimant,[130] JG has no real problem arguing that the defendant breached a moral duty owed to the claimant in any given case where the claimant is allowed to sue the defendant in tort. So in a case like *Nettleship* v *Weston*, there is no real problem in arguing that Weston had a moral duty to succeed in coming up to the standards of an ordinary, reasonable, and experienced driver in driving her husband's car – after all, she had every reason to want to come up to that standard in her driving. And once we have established that in a case like *Nettleship* v *Weston*, Weston breached a moral duty owed to Nettleship, then thanks to the 'continuity thesis' there is also no real problem in establishing that Weston had a moral duty to make up for the fact that she broke Nettleship's knee, as avoiding damage to Nettleship's person was the primary reason she owed him a moral duty to come up to the standards of an ordinary etc. driver in driving her husband's car. Where JG encounters real problems is in relation to plausibility.

Given that, as John Gardner acknowledges, the continuity thesis suffered (before his essay) 'relative contemporary neglect'[131] and that he did not really understand the continuity thesis properly himself until reading a paper by Joseph Raz,[132] it is highly implausible that the judges who shaped tort law were motivated in doing so by a desire to give effect to the 'continuity thesis'. The suggestion that they were is made even more implausible by the problems that afflict the 'continuity thesis'. In presenting JG, Gardner considers a number of

'Joint and multiple tortfeasors: an economic analysis' (1980) 9 *J Legal Studies* 517. Similarly, if there were *no* economic torts (torts that involve the infliction of pure economic loss), adherents to K would point to that fact as supporting their explanation of private law as – on their view – a P can only complain of suffering a wrong at D's hands if D has damaged or appropriated something that belongs to them; and D does not do this when he causes P to suffer pure economic loss. But there *are plenty* of economic torts. Adherents to K take this fact in their stride and are able to come up with a variety of explanations as to why a Kantian private law would in fact recognise a wide range of economic torts: see, for example, the articles cited at n 61.

[128] It may be this that accounts for the ambiguity that affects Goldberg and Zipursky's work on what they are actually saying when they argue that tort law should be seen as providing a means for the redress of 'wrongs' (see above, pp 16–17). They are pulled between saying that 'wrongs' just means 'legal wrongs', in which case their claim is true but banal, and saying that 'wrongs' means 'moral wrongs that are redress-worthy' in which case their claim is interesting but does not seem to fit the law.

[129] [1971] 2 QB 691.

[130] See above, p 24.

[131] Gardner, 'What is tort law for? Part 1. The place of corrective justice' (n 60), 36.

[132] Ibid, 33, n 56. The paper is 'Personal practical conflicts' in Baumann and Betzler (eds), *Practical Conflicts: New Philosophical Essays* (CUP, 2004).

objections to the idea that tort law gives effect to the 'continuity thesis'[133] but does not deal with the key objection, which is that there is no real continuity between my duty (1) to take care not to injure you in driving, and my duty (2) to compensate you for the consequences of my breach of duty (1). Duty (2) will normally be so much more burdensome than duty (1) that it is not possible that the reasons that justified the existence of duty (1) can carry over to also justify the existence of duty (2).[134]

The failure of all of these theories to supply us with a satisfying explanation of private law encourages the thought that maybe there is more to private law than we are currently seeing – that maybe the basic rules and doctrines of private law *can* be explained as serving to advance and protect genuine human needs and interests. This is the thought I want to pursue in this book – in Guido Calabresi and Douglas Melamed's wonderful phrase,[135] I want to see if we can come up with a 'view of the cathedral'[136] of private law that is different from the ones we have been offered so far. In this book, I will present an explanation of private law that I will call 'F', for short. F makes three claims.

(1) *The first claim* is that the rules and doctrines of English private law are concerned to promote its subjects' flourishing as human beings.

(2) *The second claim* is that in doing this, English private law adopts a particular model of human flourishing that I will call the 'R-Picture', or 'RP' for short. The RP claims that a human being is flourishing the more he participates in certain goods, such as friendship, knowledge, aesthetic enjoyment, play, skilful performance, marriage, and practical reasonableness (knowing, and doing, what it is reasonable to do). The 'R' in 'RP' stands for *reflective* and *received*. The picture of human flourishing that the RP paints for us is *reflective* as it is the picture of human flourishing that most people would endorse if they were given time to reflect on the matter. While most people might, unthinkingly, adopt the view that a human being is doing better the more pleasure he or she experiences, and the less pain, they would quickly acknowledge how impoverished this picture of human flourishing is, and move to something like the position sketched out by the RP. The RP is also *received* as it is the picture of human flourishing that is deeply embedded in our culture – the picture of human flourishing that we drink in every day from the exemplars of human flourishing that our society presents us with.[137]

(3) *The third claim* is that English private law promotes what I will call the 'RP-flourishing' (flourishing according to the vision of what human flourishing involves provided to us by

[133] Gardner, 'What is tort law for? Part 1. The place of corrective justice' (n 60), 37–48.

[134] See Zipursky, 'Civil recourse, not corrective justice' (n 72), 727–29; McBride and Bagshaw, *Tort Law*, 6th ed (Pearson Education, 2018), 749. Gardner is presumably aware of this challenge but chooses not to deal with it in his latest discussion of the continuity thesis in Gardner, *From Personal Life to Private Law* (n 94), 120–21, 154–55. Robert Stevens effectively concedes the point in his 'Rights restricting remedies' in Robertson and Tilbury (eds), *Divergences in Private Law* (Hart Publishing, 2016), at 170 and 176, acknowledging that breach of a 'caterpillar' of a primary obligation cannot coherently give rise to a 'water buffalo' of a liability.

[135] Calabresi and Melamed, 'Property rules, liability rules, and inalienability: one view of the cathedral' (1972) 85 *Harvard LR* 1089.

[136] The phrase refers to Monet's 12 paintings (painted between 1892 and 1894) of the front of Rouen Cathedral: ibid, 1090.

[137] A small example: advertisements for a computer game console never *ever* depict one person playing alone on the console. Instead, they *always* depict groups of friends assembling together to play on the console.

the RP) of its subjects within the constraints placed on it by the need to retain its legitimacy. This book will follow Max Weber in identifying a legal system's possessing legitimacy with its enjoying the kind of 'prestige' among its subjects that allows it to influence its subjects' conduct without having to appeal to their material self-interest.[138] Given this definition,[139] it follows that a loss of legitimacy is fatal for any legal system: it is the equivalent of pouring sugar into a car's petrol tank. If you do that, the car's engine will seize up and the car will be incapable of reaching its destination. In the same way, a loss of legitimacy is liable to make a legal system incapable of achieving its goals.[140] In Chapter 6, I will discuss in greater detail what might cause a system of private law to lose legitimacy, but for the time being one example can be provided of private law operating in a legitimacy-protecting mode.

We have already seen that the standard rule in English law is that I will not have a duty to save you from harm, even if I am well-placed to do so. One exception to this standard rule is where I interfere with *other* people helping you in your hour of need – in such a case, I will then owe you a duty to provide you with the assistance that I prevented others from providing you. This explains why the defendant ambulance service owed the claimant sufferer of an asthma attack a duty of care to take her to hospital reasonably quickly in *Kent* v *Griffiths*.[141] The duty of care arose out of the fact that the defendant ambulance authority assured the claimant's doctor – who was with the claimant at the time she suffered the attack – that an ambulance was on its way, and thereby discouraged the doctor from taking other steps to get the claimant to hospital.

However, having established that a duty of care will be owed by an ambulance authority to someone like the claimant in *Kent* v *Griffiths* – someone suffering an asthma attack who has been assured an ambulance is on its way – English private law *has to* then find, if it is to preserve its legitimacy, that a duty of care will be owed to *anyone* in need who has been told that an ambulance is on its way to pick them up, *irrespective* of whether that assurance will discourage anyone else from helping them get to hospital. It would be unthinkable for the law to say that where *Ambulance Service* assured *Sick* that an ambulance was on its way to pick her up, *Ambulance Service will* have owed *Sick* a duty of care to pick her up reasonably expeditiously if *Sick*'s condition was not so serious that she had alternative means of getting to hospital open to her but *not* if *Sick*'s condition was so serious that the only way for her to get to hospital was in an ambulance. Were the law to say this, there would be a real danger that people would think that private law was arbitrarily favouring patients with less serious conditions over patients with more serious conditions, and would consequently lose all respect for private law.

As we will see, F provides us with an explanation of English private law that 'fits' most of its core doctrines, despite the existence of tough cases like the ones we began with.

[138] Weber, *The Theory of Social and Economic Organisation* (ed, Parsons; The Free Press, 1947), 326, 382. To the same effect, see Tyler, *Why People Obey the Law* (Princeton UP, 2006), at 25, identifying the law's having legitimacy with people's 'seeing adequate reason for feeling they should voluntarily obey the commands of authorities' and citing Easton, 'The perception of authority and political change' in Friedrich (ed), *Authority* (Harvard UP, 1958) in support of this definition. See also Habermas, *Legitimation Crisis* (Polity Press, 1988), 96–98.

[139] An alternative definition holds that a legal system's legitimacy turns on whether the claims it makes on or to its subjects are legitimate: that is, justified or rightful. The definition of legitimacy we will be adopting in this book has nothing to do with this more normative definition.

[140] See, for example, Hart, *The Concept of Law*, 2nd ed (OUP, 1994), 201: 'if a system of rules is to be imposed by force on any, there must be a sufficient number who accept it voluntarily.'

[141] [2001] QB 36.

What about plausibility? Is it plausible to think that a group of disparate judges, working over hundreds of years, could have created a system of private law that is concerned to do what F says private law is concerned to do? In the final chapter of this book, I will claim that it is entirely plausible to think this.

4. Evaluating Private Law

So much for Part I of this project, which is simply concerned with *explaining* private law and making out the claims that F makes about private law. However, *merely* coming up with a satisfying explanation of private law is not enough.

There is, of course, some intellectual appeal in being able finally to figure out what the point or purpose of a particular activity actually is. However, the point or purpose of engaging in *the activity of explaining activities* cannot just be the flood of intellectual satisfaction that comes when you finally figure out what people engaged in a particular activity are up to – otherwise, there would be no reason for focussing on some activities rather than others in trying to explain them. The real point or purpose of engaging in the activity of explaining activities is to *evaluate* them – and it is this which guides our choices as to which activities we seek to explain, and which we leave alone. It is the activities that seem to us most in need of justification – normally because of the human cost that they involve – that we seek most urgently to explain. It is for this reason that enormous academic efforts are directed at attempting to explain why private law does the things it does, and the same efforts are *not* directed at attempting to explain why some people hum music to themselves while working while others do not.

It might be argued, against this, that the point or purpose of explaining activities cannot be to evaluate them because we can evaluate an activity without necessarily explaining it. For example, many scholars in the 'law and economics' movement are happy nowadays to make all sorts of normative prescriptions as to what private law *should* say without spending any time on attempting to explain *why* private law takes the form it does at the moment.[142] For these scholars, evaluation without explanation is perfectly possible: in so far as private law does not, in its current form, comply with their normative prescriptions, it should be changed; in so far as it does, it should be left alone. However, evaluation without explanation is dangerous.[143] Just as you cannot possibly know whether a compass is worth keeping or not until you first know what it's for, if we do not understand a particular activity, and what characteristic goals it is directed at achieving, any judgement we make about that activity will normally be unreliable.[144] Explanation is therefore normally an indispensable preliminary to evaluation, and evaluation.

[142] See above, n 34.

[143] Cf. Chesterton, *The Thing* (1929), chapter 4 ('The drift from domesticity'): 'In the matter of reforming things… there is one plain and simple principle … There exists in such a case a certain institution or law; let us say for the sake of simplicity, a fence or gate erected across a road. The more modern type of reformer goes gaily up to it and says, "I don't see the use of this; let us clear it away." To which the more intelligent type of reformer will do well to answer: "If you don't see the use of it, I will certainly won't let you clear it away. Go away and think. Then, when you come back and tell me that you do see the use of it, I may allow you to destroy it."'

[144] The exception is where the effects of a particular activity are so atrocious that our judgement about that activity would be unaffected no matter what the goals are that it is directed at achieving.

So Part I of this project, which is concerned with explanation, must be followed by Part II, which is concerned with evaluation. Once we have a handle on a particular activity – in terms of being able to understand the characteristic goals that activity is directed at achieving – there are two *ways* in which we could reach a *negative* evaluative judgement about that activity. We could adopt an *external critique* of that activity, arguing that the goals that that activity is focussed on achieving should not be pursued for one reason or another, and so the activity should be abandoned or fundamentally reshaped. For example, if the arguments made out in Part I are correct, those of a Kantian persuasion might mount an external critique of private law, arguing that all the aspects of private law that I explain as seeking to protect and promote human flourishing should be abandoned or fundamentally reshaped, as private law should simply not be in the business of doing such things.

Alternatively, we could develop an *internal critique* of a particular activity, where we accept that the goals that that activity is directed to achieving *should* be pursued, but there is something about that activity that means it is inadequate to achieve those goals, with the result that the activity needs to be reshaped or replaced, so that those goals will be more effectively achieved.[145] Part II of this project will attempt to develop such a critique of private law, arguing that even if we assume there is nothing wrong with private law's protecting and promoting human flourishing, private law – in its current shape – is ineffective in doing this because the conception of human flourishing that it employs in protecting and promoting human flourishing (what I have called the 'RP') is *incorrect*.

In Part II, I will set out three different models of human flourishing – what I will call the *Possessions Model* (where someone can be said to be flourishing if they possess certain goods (both external, in the form of material goods, and internal, in the form of personal qualities)), the *Service Model* (where someone can be said to be flourishing insofar as they devote their life to advancing or achieving some worthy project or cause), and the *Journey Model* (where someone can be said to be flourishing insofar as their life is going in the right direction, towards a particular state or goal).

I will argue in Part II that as a model of human flourishing, the Service Model is incoherent – that it must be subsumed within either the Possessions Model or the Journey Model. I will further argue that as between the Possessions Model and the Journey Model, the Journey Model is clearly superior as it is the only model for human flourishing that is compatible with what the following four *postulates*[146] of human flourishing:

(P1) Human flourishing is within the reach of any human being and is not something that can only be enjoyed by a privileged elite.

(P2) Anyone's flourishing can be harmed by a wide range of different events.

(P3) Human flourishing is a good thing, everywhere and anywhere it exists.

(P4) Human flourishing is self-sustaining across time and across persons.

[145] For example, if SCRT or JG were correct in what they say about tort law, then the reflections on the nature of morality at pp 21–26 would provide a basis for an internal critique of tort law that would argue in favour of radically cutting back on the range of torts recognised by tort law.

[146] A postulate is a proposition that cannot be proved to be true, but is nevertheless assumed to be true for the purpose of discussion.

Unfortunately for the RP, if the Possessions Model of human flourishing is incorrect (as I will argue it is), then the RP is incorrect. This is because the RP is based on a Possessions Model of human flourishing, where someone is flourishing if they enjoy and participate in a wide range of goods.

I will go on to explore what private law would look like – in terms of protecting and promoting human flourishing, while maintaining its legitimacy – if it were based on a Journey Model of human flourishing, as opposed to the RP. I will argue that private law would look very different. It follows that if the RP is wrong, but we accept (as many, of course, do not) that it is legitimate for private law to protect and promote human flourishing, then private law is in need of major reform; as I put it on another occasion, private law 'is not so much in need of reform, as of a reformation.'[147] In making this argument, I hope that the critique of just one part of Western civilisation – the system of private law deriving from the English common law – that I will develop in Part II will lay the groundwork for a more wide-ranging critique of Western civilisation insofar as that civilisation is organised around a vision of human flourishing based on the RP. Such a vision is, in the end, damaging and destructive, and a civilisation that is based on the RP – or any other Possessions Model of human flourishing – is one that is poorly equipped to sustain itself in certain significant respects, not least in its ability physically to defend itself from its enemies.

[147] McBride, 'Tort law and human flourishing' in Pitel, Neyers, and Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing, 2013), 57.