Concerns about Corrective Justice

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Introduction

The Aristotelian principle of corrective justice, according to which an agent who is responsible for a wrongful loss or receives a wrongful gain has an obligation to make good that loss or restore that gain to its sufferer, is widely accepted as part (if not the whole) of the rational explanation for private law's remedies. We might say then that the reason why the defendant must perform a remedial act *vis-à-vis* the plaintiff is a reason of corrective justice. This paper challenges this orthodoxy; it critically explores the fitness of corrective justice as a basis for the remedial obligations of defendants in private law, *viz.*, the law of torts, contract, and unjust enrichment.[1] Corrective justice currently enjoys a habitual loyalty among private law theorists as the answer to the question of remedial justification. Rather than resolve, this blind allegiance obfuscates the fundamental concern of theorizing about private law's remedial institutions—namely, how it is the case that the defendant's remedial actions somehow rationally respond to his initial failure to respect the plaintiff's right.[2] Questioning corrective justice's role allows deeper and more fruitful engagement with this basic inquiry.

Intrinsic and extrinsic perspectives on private law's remedies

The focal private law theories for this paper are what I call *intrinsic* accounts. Broadly speaking, such theories take up an internal perspective toward private law, evaluating private law on its own terms.[3] In other words, private law is understood as explicable through its own concepts and not through an "external referent."[4]

This paper was prepared for the Obligations VI conference at Western University, London, Ontario in July 2012. The conference theme was Challenging Orthodoxy. I would like to thank the Conference's organizers, Erika Chamberlain, Jason Neyers, and Stephen Pitel, as well as its participants, in particular, Chris Essert, Andrew Gold, and Ernest Weinrib. I would also like to thank Amy Salyzyn and student editor, Odette Simone Ansell, at the Canadian Journal of Law and Jurisprudence for their helpful suggestions and edits.

1. I define private law in opposition to public law. While public law necessarily involves the state as a party, private law does not. Private law is the law between individuals and, although private actions against the state can and do occur, it does not necessarily involve the state as a direct party to its causes of action. For general agreement with this definition, see Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge: Cambridge University Press, 2003); Ernest J Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995) [Weinrib, *The Idea of Private Law*].
2. For ease of exposition, throughout I refer to defendants by male pronouns and plaintiffs by female pronouns.
3. The clearest expression and endorsement of this position is found in the opening pages of Ernest Weinrib's *The Idea of Private Law*: "one must understand private law from a perspective internal to it. / … [This] approach treats private law as an internally intelligible phenomenon by drawing on what is salient in juristic experience and by trying to make sense of legal thinking and discourse in their own terms." Weinrib, *The Idea of Private Law*, *supra* note 1 at 2-3.
4. *Ibid* at 21.

https://doi.org/10.1017/S0841820900005981 Published online by Cambridge University Press

What I mean by intrinsic, however, is slightly narrower than this; intrinsic entails an internal perspective with respect to private law's remedies and not necessarily toward private law as a whole.[5] Therefore, the intrinsic thesis maintains that the explanation of private law's remedies lies within an understanding of the original rights and duties that constitute the primary private law relations.

We may distinguish intrinsic from what I label *extrinsic* theories. Such theories approach private law from an external perspective. Its institutions and concepts are evaluated and made intelligible from without. As a result, they can (and do) take the question of remedy to be wholly separate from questions involving the original right/duty relation. Whether the plaintiff has a right and the defendant a duty is one thing, and whether the defendant has a remedial obligation and the plaintiff a remedial right is another. A clear example of this approach can be found in the literature of law and economics. Take Calabresi and Melamed's [in]famous fourth rule. Here, the plaintiff is awarded the "right" to live free of the defendant-caused nuisance, but must pay the defendant compensation for the costs she incurs in being so enjoined. While the plaintiff is awarded the right, it is the defendant in a sense who gets the remedy.[6]

Elsewhere, I have argued that private law's remedial institutions receive better interpretive treatment under an intrinsic lens.[7] In brief, this is due to certain truisms of practical reasoning. More specifically, it is about how reasons for action play out in situations where complete conformity with the initially applicable reason(s) is no longer possible. I have argued that just because the contract is breached, the tort committed, or the unjust enrichment not immediately returned does not mean that the original reason(s) to perform the contract, not to commit the tort, or not to retain the unjust enrichment disappear. To think this would render most if not all of our remedial actions unintelligible. In other words, the original relationship (contractual, tortious, or restitutionary) between the plaintiff and defendant continues to exert normative force, mandating the defendant's remedial actions. It simply doesn't make sense to say that this original reason disappears by virtue of an individual's failure to conform to it. Reasons (obligatory or otherwise) do not disappear by virtue of an individual's failure to respond appropriately to them. Instead, they stick around, demanding whatever conformity remains possible. So it is with reasons generally, and so it is with private law's remedies.[8] The logic of private law is (happily) not utterly divorced from the general structure of how we understand our world and the (practical responsibility of) agents that function within it.

Because intrinsic accounts generate remedial obligations from within—i.e.,

5. It might be the case that an internal perspective towards remedies *entails* a thoroughly internal perspective toward the whole of private law. Consideration of this lies outside the ambit of this article however.

6. Guido Calabresi & A Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85 Harv L Rev 1089.

7. Zoë Sinel, *Understanding Private Law's Remedies* (SJD Thesis, University of Toronto, Faculty of Law, 2013) [unpublished] [Sinel, *Understanding*].

8. It is beyond this article's scope to argue fully for this position. Fortunately, its thesis does not require this as it applies only to intrinsic accounts regardless of whether they are correct. As such, stipulation of the relative fitness of intrinsic accounts is sufficient.

https://doi.org/10.1017/S0841820900005981 Published online by Cambridge University Press

from the original relationship (and the reasons that constitute this relationship) of the plaintiff and defendant—they are committed to the non-necessity of an independent principle of repair. All that is normatively and logically required to justify the defendant's remedial obligation is the original relation (tortious, contractual, or restitutionary) between the plaintiff and defendant. By contrast, we may define extrinsic accounts by their endorsement of an independent principle. Compensation, for example, is owed because it will further some goal that is external to the immediate relation of the parties, for example, deterrence of wrongdoing, efficient loss-allocation, or even perhaps the necessity of a public institution of private redress.

This is just to say that in order to be consistently intrinsic, an account must be self-sufficient. If an appeal to an external principle is required, this indicates that the original relationship is insufficient to explain and justify remedial obligations. If something more comes relevantly into the picture, then something more than the relationship between the parties is needed to justify and explain the remedial relationship; the internal aspects on their own are not enough and, consequently, the account would fail to measure up to its own standards.

Corrective justice as orthodoxy

Corrective justice plays a pivotal role in intrinsic theories.[9] A close look at its origin reveals why it is the most frequently invoked brand of justice in private law scholarship. Famously, Aristotle identified two forms of (particular)[10] justice, that is, two ways in which interpersonal relationships may be regarded as just:

> Of particular justice and that which is just in the corresponding sense, (A) one kind is that which is manifested in distributions of honour or money or other things that fall to be divided among those who have a share in the constitution (for in these it is possible for one man to have a share either unequal or equal to that of another), and (B) one is that which plays a rectifying part in transactions between man and man.[11]

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9. See Weinrib, *The Idea of Private Law*, *supra* note 1; Jules Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992); Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007).

An apparent exception is civil recourse theory. Benjamin Zipursky and John Goldberg see their account as opposed to extrinsic accounts, but also reject corrective justice explanations. (See, e.g., Benjamin Zipursky, "Rights, Wrongs, and Recourse" (1998) 51 Vand L Rev 1 at 4, where he claims that civil recourse marks "a third way of understanding tort law.") Elsewhere I have argued that civil recourse theory is better understood as an extrinsic account (Sinel, *Understanding*, *supra* note 7).

Notably, even some extrinsic theorists admit the importance of corrective justice. See Richard Posner, "The Concept of Corrective Justice" (1981) 10 J Legal Stud 187.

10. That is, particular justice as distinguished from general justice. General justice, for Aristotle, is synonymous with virtue. A just person is a virtuous person. Particular justice relates to the more specific idea of desert of getting one's due. See Allan Beever, "Aristotle on Equity, Law, and Justice" (2004) 10 Legal Theory 33. For recent discussion of the nuances of just what "getting one's due" means, see John Gardner, "Finnis on Justice" in Keown & George, eds, *Reason, Morality and the Law: The Jurisprudence of John Finnis* (Oxford: Oxford University Press) [forthcoming in 2013].

11. Aristotle, *Nicomachean Ethics*, translated by WD Ross, in Richard McKeown, ed, *Introduction to Aristotle* (New York: Modern Library, 1947) 297 at Book V, Ch 2, 1130b25-1131a.

https://doi.org/10.1017/S0841820900005981 Published online by Cambridge University Press

"(A)" references distributive justice, the distribution of social goods and burdens by the state according to a principle of distribution, and "(B)" corrective justice, where the justice is transactional in nature, concerning immediate relations between persons.

The distinction between (A) and (B) further marks out two categorically different forms of equality that correspond to public and private considerations of justice, respectively.[12] To illustrate the form of equality for distributive justice, let *X* and *Y* represent two abstract persons. Alongside *X* and *Y*, let us posit an external principle to function as the criterion of distribution: public-spiritedness in the service of the *polis*, to take an appropriately Aristotelian example. The more *X* or *Y* partakes in this criterion of distribution, the larger their deserved shared of the relevant social goods (represented by the lower-case letters *x* and *y*). Thus, the form of equality for distributive justice can be represented as a ratio: $X : Y = x : y$.

By contrast, corrective justice requires no external principle of distribution for its form of equality. Its equality is the equality that exists between two parties to a transaction. Aristotle's instructive illustration for this form of equality is a series of three lines:

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    A_____E_____A'
    B___________B'
D___C_____F_____C'
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Line BB' represents the baseline, the hypothetical starting position shared by lines AA' and CC'. Imagine that CC' takes from AA' a segment, AE, and adds it to itself as represented above as segment DC. Imagine further a point F on the line DCC' such that CF is equivalent to AE. We can now say that DCC' is greater than EA by DC plus CF. To arrive at the equality necessary to return to the equal starting point of AA'=BB'=CC', one must detach DC from line DCC' and reattach it to line AA' (now the abbreviated line EA').

With AA' representing the plaintiff and CC' the defendant and with BB' functioning as a reminder of the parties' original baseline, it is clear why Aristotle's account of corrective justice appeals to private law theorists. In a tort situation where the defendant converts the plaintiff's property, the defendant (CC') takes segment AE from the plaintiff and adds it to his own rendering it the new enlarged line DCC'.[13] Corrective justice demands that DC be returned to the now

12. Weinrib, *The Idea of Private Law*, *supra* note 1.

13. Conversion works particularly well to illustrate the way in which Aristotle's corrective justice can map onto tort law. In other torts, however, it is notable that the gain of the defendant is not materially equivalent to the plaintiff's loss. If the defendant negligently drives into the plaintiff's mailbox, we would be hard pressed to say that the defendant has realized any material gain from this wrong, let alone that the gain he realized would be equivalent (or even necessarily connected to) the loss suffered by the plaintiff. Ernest Weinrib has noted that the gain we (and Aristotle) are talking about here is not a material gain, but a normative one. The gain is the defendant's extra bit of freedom he has exercised in trampling on the plaintiff's rights. This precisely mirrors the plaintiff's normative loss of having her rights trampled on. See, in particular, Ernest Weinrib, "The Gains and Losses of Corrective Justice" (1994) 44 Duke LJ 277 at 286: "corrective justice is concerned with the correlativity of normative, not material,

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wrongfully shortened line EA' so that all lines return to their pre-wrong state—that is, all are the length of BB'.

It is even easier to see why many legal scholars see corrective justice as the most fitting explanation for the duty of restitution for unjust enrichment.[14] The gist of the cause of action in unjust enrichment is that the defendant, through no necessary fault or action of his own, has come into possession of something that once belonged to the plaintiff and which the plaintiff did not transfer with true consent.[15] In legal terms, (1) the defendant receives a benefit (is enriched) (2) from the plaintiff (at the plaintiff's expense) (3) that it would be unjust for the defendant to retain.[16] In the Aristotelian language of corrective justice, the unjust

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gain and loss." For recent criticism of this, see Scott Hershovitz, "Corrective Justice for Civil Recourse Theorists" (2011) 39 Fla St UL Rev 107 at 114-15.

14. The at times uncritical adoption of corrective justice as a framework for unjust enrichment can further be attributed to the comparative difficulties legal theorists have encountered when attempting to apply this framework to the law of torts, in general, and negligence torts in particular. The most challenging obstacle for viewing certain torts as an instance of corrective justice is, as noted above, the apparent lack of equivalence between the plaintiff's loss and the defendant's gain. In the typical negligence-governed tort action, while the defendant's breach of his duty of care *vis-à-vis* the plaintiff results in (material) loss to the plaintiff, the defendant will rarely reap any consequent (material) gain from his injurious behavior. By contrast, in unjust enrichment, the loss of the plaintiff is *identical* with the defendant's gain. It is precisely what the plaintiff has lost by virtue of the mistransfer that the defendant has gained: line segment DC is identical to AE; it *is* line AE. As alluded to above in footnote 13, with respect to negligence's lack of equivalence between the plaintiff's loss and the defendant's gain, Weinrib posits the following solution: The relevant gains and losses should be thought of as normative, not material. The normative loss is the infringement of the plaintiff's right and the normative gain is the defendant's over-stepping his sphere of rightful action. The material losses and gains are, for Weinrib, only manifestations of the infringement of right and their function is to serve as a means to quantify damages. Weinrib, *The Idea of Private Law*, *supra* note 1 at 115-20. For a trenchant criticism of Weinrib's argument, however, see Stephen Perry, "The Moral Foundations of Tort Law" (1991-1992) 77 Iowa L Rev 449 at 478-88.

Notably, this adoption of the Aristotelian language of corrective justice is not limited to legal theorists. Judges also explicitly invoke it: *Regional Municipality of Peel v Canada* [1992] 3 SCR 762 at 804, where McLachlin J [as she then was], speaking for the Supreme Court of Canada, states, "[t]he concept of 'injustice' in the context of the law of restitution harkens back to the Aristotelian notion of correcting a balance or equilibrium that had been disrupted."

For doubts, see Zoë Sinel, "Through Thick and Thin: The Place of Corrective Justice in Unjust Enrichment" (2011) 31: 3 Oxford J Legal Stud 551 [Sinel, "Thick & Thin"].

15. I am leery of saying "with defective consent" as it is an oversimplification. For example, it leaves unexplained unjust enrichment cases where the unjust factor—i.e., what triggers restitution—is a failure of consideration as a result of a subsequent judicial finding that the contract once duly entered into is now void. In these cases, there is obviously good consent since there had to be to ground the contract in the first place. See *Kleinwort Benson Ltd v Lincoln City Council* (1998) [1999] 2 AC 349 HL (Eng). Furthermore, consent is generally considered legally effective in unjust enrichment in the sense that it is sufficient to pass title from the plaintiff to the defendant.

16. It is a matter of debate what "unjust" means in the context of unjust enrichment. Proponents of the (English) "unjust factors" approach construe "unjust" to entail the presence of one or more of the recognized common law unjust factors (*viz*., mistake, duress, failure of consideration, and undue influence). What is unjust about the transfer is that the plaintiff's consent was vitiated or impaired as result of the presence of one or more unjust factor or factors. Ignorance has controversially been proposed as an additional unjust factor since, *a fortiori*, it entails the utter *absence*, not just mere impairment, of consent. By contrast, proponents of the absence of basis approach locate the "unjustness" in the lack of legal justification for the defendant's retention of the benefit—that is, the transfer cannot be explained by contract, gift, or some other legally recognized ground.

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enrichment cause of action would look something like this: the plaintiff's holdings are exemplified by line AA', the subtraction from the plaintiff's wealth is line AE, the addition to the defendant's holdings is line DC, and the operation of the restitutionary duty is the transfer back of DC from line DCC' to EA'. Thus, the parties CC' and AA' are restored to the position they occupied before the unjust subtraction; they are restored to the baseline of BB'.

Far from unequivocal, the principle of corrective justice admits several interpretations. Here, I limit the analysis to two: one thick and one thin.[17] Conveniently, the thick and thin conceptions of corrective justice line up with two formulations of the intrinsic account, Ernest Weinrib's *unity* account and John Gardner's *continuity* account, about which I will have more to say in section 4. The *thick* conception views corrective justice as constitutive of the plaintiff and defendant's relationship from the outset of their interaction. When combined with its corresponding private law theory, the unity approach, the result is corrective justice's redundancy. The *thin* conception limits corrective justice's role to the remedial stage. Combining this version of corrective justice with its private law theoretical correlative, the continuity approach, appears to render corrective justice as precisely the sort of independent principle that is anathema to intrinsic accounts. Again, if it is necessary to invoke the principle of corrective justice to ground the defendant's remedial obligation, it seems we are looking to a feature outside the normative relationship of plaintiff-defendant.

As a reminder, despite its critical tenor, this paper is reluctant to conclude that corrective justice has *no* role to play in private law remedial relations. The similarity in form between the defendant's obligation of repair and Aristotle's conception of corrective justice forcefully suggests the contrary. My aim is rather to challenge certain preconceptions about how obvious this role actually is. By way of conclusion, I advance an alternative understanding of the role corrective justice might play, one that avoids its characterization as a redundant or extrinsic feature.

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17. Robert Stevens has recently introduced a similar, but threefold, taxonomy of corrective justice accounts (Robert Stevens, "Rights and Other Things" in Donal Nolan & Andrew Robertson, eds, *Rights and Private Law* (Oxford: Hart, 2012) at 115. The first is a formal account of corrective justice. Here, corrective justice itself does not do the justificatory work, but rather itself requires justification (*ibid* at 144). Stevens associates such an account with John Gardner. I would agree with this attribution. According to a formal account, corrective justice simply describes a *pattern* of allocation, an allocation back, or a correction. One could imagine, thus, several unappealing possible patterns of corrective justice, for example, "all gifts must be returned." The formal patterned approach to corrective justice, notably, can be seen in all three of Stevens' categories. The second Stevens labels as a "weak" or "trite" formulation of corrective justice. This he associates with Jules Coleman. The essence of this position is that once the primary rights are violated, we should do the next best thing to the wrong never having occurred. Stevens thinks this is an obvious, but uninteresting claim (*ibid* at 145). I would associate this type of corrective justice with Gregory Keating and to a lesser extent John Gardner. The third approach to corrective justice Stevens attributes to Ernest Weinrib, calling it the "broader conception" or the "fat version" of corrective justice (*ibid* at 145-46). This is what I call the "thick" account. According to it, not only our secondary (remedial) rights, but also our primary rights (our rights to property and bodily security) can be justified by reference to corrective justice: "It can justify the right to the toy aeroplane, and not just the obligation to pay for negligently smashing it" (*ibid*).

https://doi.org/10.1017/S0841820900005981 Published online by Cambridge University Press

Two conceptions of corrective justice and two intrinsic approaches to remedies

The acceptance of corrective justice as a, if not the, animating principle of private law is all too often sweeping and uncritical. Few of those who call on it devote much energy to exploring its interpretive nuances. This is unfortunate as there is in fact little consensus on how corrective justice should be understood and what, therefore, its role in private law can be. In what follows, I analyze two possible interpretations alongside the private law theories in which each finds its respective place.

Thick corrective justice and the unity approach

On a thick interpretation, corrective justice permeates the total plaintiff-defendant interaction from the original right and duty through to the remedial right and duty. This thick version is at home in what I call the unity approach to private law's remedies, a leading proponent of which is Ernest Weinrib. Weinrib recognizes the formal limits of Aristotle's account of corrective justice, that the type of equality—how the parties are equal—is empty. According to Weinrib, Immanuel Kant and GWF Hegel, two millennia later, supply the arguments to fill this gap.[18] The Kantian conception of right and the Hegelian conception of abstract right provide the content for the structure of corrective justice. Kant and Hegel also furnish the framework for the unity approach to private law's remedies. I suggest that the combination of a thick corrective justice theory with a unified understanding of rights and remedies has the unfortunate consequence of rendering corrective justice unnecessary for the rational explanation of remedial actions.

Kant's idea of right forms the foundation for the unity approach to private law's remedies. According to Kant, what it means for me to have a right is that, within the scope of the right, I am free from the choice and actions of another. I am a self-determining agent with the capacity to set and to try to realize objectives external to me. Thus, equally essential to my being the type of being that I am is that I am *not* other-determined. Others do not have the freedom (the right) to decide for me or to act upon me without my say-so. This is, in fact, just what it means to be free: that others don't decide for me. I am free *because* I am not other-determined. Further, in order that my claim to freedom (to right) is not a contradiction, I must recognize that others have normatively identical freedoms (rights) with respect to my body and my actions.[19]

The consequence of this recognition is that each human agent possesses a sphere of equal freedom relative to that of every other human agent. Violations or intrusions into such spheres are acts against right, and therefore they are wrongs. Wrongs do not expunge rights. It cannot be the case that by virtue of my wrongdoing I deprive you of your right. Because your right is an embodiment of your freedom, actions opposed to your freedom cannot annul it. If they did,

18. In what follows, I focus (as for the most part does Weinrib) on the ideas of Kant.
19. This is the universal aspect of Kant's Universal Principle of Right.

https://doi.org/10.1017/S0841820900005981 Published online by Cambridge University Press

your "right" would not be a right properly so-called. This is because a right *just is* freedom from the choices and actions of others. When I wrong you, rather than destroying your right, what I do is harm or set back certain means you have to its full actualization. When the law orders me to restore those means to you either *in specie* or in its equivalent value through a calculation of monetary damages, all it does is order me to give you back these means. These are the means that you have to actualize the right—the right that you have had all along.[20] This is the unity thesis with respect to private law's remedies. The obligation the defendant has to repair is the same obligation that he initially had not to interfere with the plaintiff's right. It is the same because the two obligations are *normatively identical*: they are different manifestations (in time and in content) of the same respect for another's freedom (right).

How does the Kantian notion of freedom (right) works itself out *vis-à-vis* Aristotle's formal corrective justice? Weinrib argues that Kantian right supplies the correlative content necessary for the correlative form. I suggest, however, that the two conceptions—Aristotle's corrective justice and Kant's right or Hegel's abstract right—are two ways of describing the same thing. If this is so, then there is no need to invoke "corrective justice" in addition to Kantian right. Weinrib, in fact, seems to support this interpretation:

> *Aristotle's corrective justice, Kant's concept of right, and Hegel's abstract right all refer—though in different terms—to the same bipolar structure of a correlative doing and suffering.* Aristotle expresses this correlativity as a gain realized by the doer at the expense of the sufferer. Kant and Hegel, on the other hand, relate the immediate interaction of doer and sufferer to the juridical structure of right and correlative duty. In natural right theory, the embodiment of the abstract will in one's body and property creates rights that other agents are under a duty to respect. The duty is owed specifically to the holder of the right, and the violation of that duty entitles the holder of the right to a legal remedy.
>
> *The differences between the Kantian-Hegelian and the Aristotelian accounts of private law are expository, not substantive.*[21]

When Weinrib later states that "Aristotle's account of corrective justice is inchoately Kantian,"[22] we may take this to mean that the Kantian account represents an evolution of an idea, one that was originally Aristotle's, but which in essence remains the *same idea*. Aside from pedagogical utility (helping us perhaps to distinguish distributive from corrective justice), it isn't clear what work corrective justice does that it is not already done in a more evolved form by Kantian right.

When we ask why is it that the defendant must pay compensation to the plaintiff upon his wrongful destruction of the object of her choice (i.e., property), the answer simply is that she has a right to the control over her means that said property represents (i.e., is the physical manifestation of). The answer, in other words, lies wholly within Kantian right. There is no need to invoke anything

20. For a clear and persuasive picture of this, see Arthur Ripstein, "As If It Had Never Happened" (2007) 8 Wm & Mary L Rev 1957.
21. Ernest Weinrib, "Corrective Justice" [1992] 77 Iowa L Rev 403 at 424 [emphasis added].
22. *Ibid*.

https://doi.org/10.1017/S0841820900005981 Published online by Cambridge University Press

further. More specifically, we do not need to say that it is a matter of corrective justice that her means be restored. Corrective justice might accurately describe the end result of the transfer back—the situations of the plaintiff and defendant now may be described as correctively just—but it does nothing with respect to grounding it. The justification is completely taken care of by the structure of Kantian right.

Thus, under a thick account of corrective justice, corrective justice is subsumed by the more robust notion of Kantian right, leaving corrective justice with no substantive role to play. For Kantian legal theorists, however, everything really just is one thing. For example, the right and the remedy are one as are the defendant's respective duties at both the initial and remedial stage. As such, proponents of the unity thesis might take what has just been said as an argument in their favor. Nonetheless, it is difficult not to see corrective justice on this approach as redundant given that it makes no practical difference. Corrective justice as justice, that is, as a virtue, has no specific role other than reiterating the noted correlativity of the plaintiff-defendant relationships of which private law consists. Let's now look to see whether a thin conception of corrective justice, one that does not embed the idea of corrective justice within the broader notion of correlativity, fares better.

Thin corrective justice and the continuity approach

What precisely it is that corrective justice is seen to respond to distinguishes thick from thin. For the thick account, it is a corrective injustice. The two parties interact as persons—that is, equal bearers of Kantian right. If the interaction constitutes an interference with either one's personhood, then this is a disruption of the abstract equality of persons established by a system of Kantian right: "the injustice that corrective justice corrects is essentially bipolar."[23] This inequality is a corrective injustice: "The idea that correlativity informs the injustice, as well as its rectification, is a central insight of the corrective justice approach to the theory of liability."[24] Commenting on Weinrib's claim that "the injustice that corrective justice corrects is essentially bipolar," Gardner notes,

> Reading this quickly, one reads it as a reiteration of the illuminating observation that corrective justice is itself essentially bipolar. But it is in fact a much stronger claim. It is the claim that not only corrective justice, but also *the injustice which it corrects*, is essentially bipolar. And from this Weinrib means us to proceed to the conclusion that the injustice which corrective justice corrects, being bipolar, *is itself corrective injustice*. … But this position is obviously untenable: it generates an infinite regress. … reasons of corrective justice are reasons to restore the parties to the relative positions they were in before, or would have been in apart from, some transaction between them. Corrective injustice consists in action against such reasons. But if the transaction which gives rise to reasons of corrective justice must also itself count as a corrective injustice, then it too must have involved action against reasons to restore the parties to the relative positions they were in before,

23. Weinrib, *The Idea of Private* Law, *supra* note 1 at 64.
24. Ernest Weinrib, "Corrective Justice in a Nutshell" (2002) 52 UTLJ 349 at 350.

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> or would have been in apart from some further transaction. And so on ad infinitum. The mistake which leads to this regress obviously lies in the idea that corrective justice only corrects corrective injustices. What we correct in corrective justice is, basically, some wrong we did. That wrong may sometimes be a failure to correct some earlier wrong we (or somebody else) did; it may be some further corrective injustice. But it need not be. It may equally be a distributive injustice. Or it may not be an injustice at all, but an act of (say) sheer dishonesty or pure inconsiderateness, and wrongful for that reason alone.[25]

Gardner's criticism of Weinrib is a criticism of any thick version of corrective justice. If corrective justice consists simply of reasons to allocate back, then it just doesn't make sense to say that corrective justice illuminates the original relationship between the plaintiff and defendant. This original relationship (unless it is one of conversion or perhaps even of unjust enrichment) often has nothing to do with any question of allocation. When I negligently run over your foot, I do not act against reasons that might exist for returning to you the value of your bodily integrity and a life without pain and suffering. If a third party interferes wrongfully with my subsequent action of compensating you for your crushed foot, then this is a corrective injustice—an action against reasons of corrective justice—but this is not the only type of wrongdoing nor is it close to the core type of wrongdoing that private law is concerned with. Corrective justice, for Gardner, is thus limited to the remedial stage, hence my characterizing it by reference to its thinness.[26] Gardner states that

> [t]he question of corrective justice is … the question of whether and to what extent and in what form and on what ground it [the something that has shifted between the two parties] should now be allocated *back* from one party to the other, reversing a transaction that took place between them. A norm of corrective justice is a norm that regulates (by giving a ground for) the reversal of at least some transactions.[27]

It is the justice of adding and subtracting, of allocating back. The wrong it responds to can be a corrective injustice, another injustice, or anything wrongful on its own without necessarily being an injustice (understood in the thin sense as a wrongful allocation).[28]

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25. John Gardner, "The Purity and Priority of Private Law" (1996) 46 UTLJ 459 at 469-70 [emphasis in the original].

26. Sinel, "Thick & Thin," *supra* note 14.

27. John Gardner, "What is Tort Law For? Part 1. The Place of Corrective Justice" (2011) 30 Law & Phil 1 at 9-10 [Gardner, "Part 1"] [emphasis in the original].

28. While Gardner criticizes the logic of the thick version of corrective justice, others take issue with its interpretative accuracy. According to Gregory Keating, for instance, it is misleading to give the concepts of wrong and its reciprocal right "an essentially remedial interpretation," and by this he means interpreting the wrong and right as illustrations of corrective justice. (Gregory C Keating, "Is Tort Law a Remedial Institution?" Center in Law, Economics and Organization: Research Paper Series and Legal Studies Research Paper Series, USC Center in Law, Economics and Organization Research Paper No. C10-11, USC Legal Studies Research Paper No. 10-10, 3). This is because the two exhibit fundamentally different structures: primary obligations are omnilateral, i.e., owed by everyone to everyone else, while secondary (remedial) obligations are bilateral (*ibid* at 4 & 6). Only these secondary obligations are obligations of corrective justice properly so called. Keating elaborates:

> [c]orrective justice gets its peculiarly personal conception of tortious wrongs from its preoccupation with the remedial dimension of tort. Tort law's remedial responsibilities

https://doi.org/10.1017/S0841820900005981 Published online by Cambridge University Press

Gardner's criticism of Weinrib is, in a sense, not quite fair. This is because it confuses a definitional disagreement with a substantive one. What Gardner means by corrective justice is very different from Weinrib's intended usage. As such, it isn't actually a criticism to say, as Gardner does, that given his (Gardner's) definition of corrective justice, Weinrib's understanding is vulnerable to the *reductio ad absurdum* he presents. In other words, Gardner defines corrective justice as simply reasons to *allocate back*. Granted, if this were true, then it *would* be absurd to say that all the injustices corrective justice corrects are corrective injustices, but, notably, this is *not* how Weinrib defines corrective justice. For him, "corrective justice is the idea that liability rectifies the injustice inflicted by one person on another."[29] It is the idea of correlativity. Accordingly, all it asserts is that if the remedy is a response to the injustice and the remedy is correlatively structured, then the injustice to which corrective justice responds must also be correlatively structured: "corrective justice draws out … correlativity's normative implications. For corrective justice, the point of liability is to correct an injustice between the parties. This correction can occur only if the structure of the injustice matches the correlative structure of liability."[30] This reflects the idea that a relational wrong requires a relational remedy. My mother paying me the money that you owe me in no way discharges your prior debt to me. That *you* must repay to *me* the debt that *you* owe to *me* is just the idea of corrective justice that Weinrib presents. As such, it is clearly not the same as Gardner's idea that corrective justice is only about allocations back and so is not vulnerable to Gardner's *reductio* as he presents it.

In sum, on a thin account, corrective justice is essentially remedial, regulating transfers back and the grounds of said transfers. Just as the thick description of corrective justice found itself at home within a specific theoretical perspective on private law's remedies (the unity approach), so too does the thin conception have its theoretical home: the continuity approach. Unlike the unity approach, the continuity approach conceives of the primary and secondary obligations (the

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are correlative to *in personam* rights. Duties of reparation in tort are owed to named plaintiffs and owed by named defendants. Remedial rights are held by and against particular persons; particular plaintiffs are bound to particular defendants through defendants' tortious injury of plaintiffs. Corrective justice theory is quite right about all of this, quite right to insist on the bilaterality of remedial rights and duties and on the "unity of doing and suffering". Primary rights and obligations, however, are not personal in this way. Primary rights and obligations are omnilateral, not bilateral (*ibid* at 31).

It is, however difficult to get a firm hold on Keating's underlying theoretical allegiance as he appears to vacillate between endorsements of the continuity and unity accounts. Here, he sounds wedded to a Gardnerian account with its focus on second-best and the language of primary and secondary obligations:

> Remedial responsibilities in tort are subordinate, not fundamental. They are conditioned on and arise out of failures to discharge antecedent primary obligations. Those primary obligations are the ground of tortfeasors' secondary responsibilities to repair the harms wrought by their torts. Repairing harm wrongly done is a next- or second-best way of discharging an obligation not to do the harm wrongly in the first place (*ibid* at 2).

29. Ernest Weinrib, "The Rights of Corrective Justice" (Paper delivered at The Sixth Biennial Conference on the Law of Obligations at Western University, Challenging Orthodoxy, London, Ontario, 19 July 2012) [unpublished] at 3.

30. Ernest Weinrib, "The Structure of Unjustness" (2012) 92 BUL Rev 1062 at 1068.

https://doi.org/10.1017/S0841820900005981 Published online by Cambridge University Press

original and remedial obligations) as distinct obligations.[31] In order to remain within the intrinsic genus, however, it must still be the case that under the continuity approach there remains a deep and essential connection between the two obligations. The obligatory stages are distinct, but nonetheless intimately and rationally connected.

The puzzle is why does it make sense to perform a remedial obligation at all? In claiming that by failing to perform the initial obligation that obligation ceases to exist—"[following its breach] [m]y original obligation is, we should now be able to agree, discharged (put to an end) by its breach"[32]—Gardner sets himself the task of explaining why it is that performing the remedial obligation does seem somehow rationally related to the initial obligation.[33] Gardner's answer is that the apparent imperfect conformity with the original obligation that remedial actions seem to entail is actually perfect conformity with a *new* obligation, an obligation that is grounded in and called for by (some of) the same reasons that grounded the first obligation and which failed to be satisfied, but, because of the nature of reasons, did not as a result disappear. This rational connection between the primary and secondary obligations is explained through what Gardner calls the "continuity thesis:" "the thesis that the secondary obligation is the rational echo of the primary obligation, for it exists to serve, so far as may still be done, the reasons for the primary obligation that was not performed when its performance was due."[34]

The gist of Gardner's theory is as follows: (1) The defendant has an obligation to φ at t_1. (2) His obligation to φ at t_1 is supported by various reasons, at least one of which is the operative reason, while others are auxiliary.[35] (3) He fails to φ at t_1. (4) He can no longer, because of (3), conform to all of the reasons he had to φ at t_1. (5) He can, however, still conform to some of them. (6) He now has a new obligation, an obligation to θ at t_2. (7) The content of θ is to be drawn from the rationale he had at t_1 to φ. (8) In θ-ing he comes as close as possible to conforming to the reasons he had to φ. Therefore, like the Kantians' unity thesis, Gardner, through his continuity thesis, appears to avoid calling upon an external principle of compensation to ground the secondary duty. Unlike the Kantians, however, he considers the duty to be a new obligation.

The apparent problem with the continuity approach is that corrective justice is no longer rationally connected to the original injustice or wrong. This is because, for Gardner, corrective justice is simply an operation: it is an allocation back, along with the grounds for the allocation. It is not necessarily part of the original

31. Gardner, "Part 1," *supra* note 27 at 32.
32. *Ibid*.
33. *Ibid* at 30.
34. *Ibid* at 33.
35. An operative reason is a reason for which belief in it entails the attitude that I ought to do as the reason recommends. For example: I promise you that I will call on your mother on her birthday; today is her birthday. The operative reason leading to the conclusion that I ought to call on your mother today is the fact of my promise to you. Auxiliary reasons are different. They serve to identify the act that the operative reason provides reason to perform and, in situations of conflict, help determine the weight of conflicting reasons. In the example above, the auxiliary reason is the fact that today is your mother's birthday. This tells me how to execute my operative reason: go *today* to visit your mother. See Joseph Raz, *Practical Reason and Norms*, 2d ed (Oxford: Oxford University Press, 1990) at 33-35.

https://doi.org/10.1017/S0841820900005981 Published online by Cambridge University Press

obligatory relationship. If it is no longer connected, then how do we justify or explain its existence? Where does it come from and why? We might be tempted to think that it becomes an independent principle of repair.[36] In other words, at the remedial stage we are asking a different question from that with which we were preoccupied at the initial stage. This is just a consequence of understanding the two obligations as distinct. At the remedial stage the goal seems to be satisfying some externally given principle of corrective justice, a principle that notably did not necessarily exist at the original stage and so now enters at the secondary stage as something outside the original relationship. When we ask, therefore, why the defendant must pay the plaintiff compensation, our answer is no longer the straightforward "because the defendant wronged her," but the strained "because it is the correctively just action to take." Clearly something has gone awry if this is how we must explain remedial obligations.

Notably, the thick version found within the unity approach does not face this problem. This is because, recall, under that account, corrective justice permeates the entire relationship between the plaintiff and defendant from the outset. What corrective justice corrects is necessarily a corrective injustice. As such, we can see the reasons of corrective justice at the initial stages and so find them easily continuing through to the remedial stage. The continuity thesis, despite its name, struggles to establish this continuous connection. Thus, while the problem faced by the thick account is the lack of substantive role left for corrective justice, the problem for the thin account is the converse. Corrective justice here appears to come in independently (and inexplicably from the point of view of the original obligation) as an extrinsic and stand-alone justification for private law's remedies. In this regard we might think that it challenges its proponents' coherent advocacy of corrective justice within an intrinsic approach.

This criticism, however, does not stick to Gardner as it relies on what is not a completely fair description of his idea of corrective justice. For Gardner, corrective justice is not a normative principle in the robust sense that it grounds transfers back. In a real sense, on Gardner's approach, corrective justice *does* come from nowhere, so it is no surprise that it seems unconnected to the original obligation. His account is so thin that it does not present corrective justice as a justification at all, but merely as a description of the reparative allocative actions that make up private law's remedies. As I will examine in section 5, this thinness pushes back the problem of what it is that justifies private law's remedies. In fact, Gardner's account of allocation back presupposes, in certain private law remedial situations, a certain robust understanding of private law and its remedies.

Potential solutions

In this final substantive section, I explore two possible ways we might preserve a role for corrective justice within an intrinsic account of private law's remedies.

36. If we take a Keating-inspired gloss on the problem, it seems that we have certain kinds of omnilateral wrongs causing loss, we need an external principle of corrective justice to govern allocations *back.*

https://doi.org/10.1017/S0841820900005981 Published online by Cambridge University Press

The first ultimately fails, but the failure is illuminating, revealing several important features of corrective justice. The second attempts to reconcile the thin and thick accounts. Far from incompatible, I suggest that the former presupposes certain properties of the latter. If we understand the two as interacting in this way, we might better delineate the remedies of private law that involve corrective justice, more narrowly so-called, from those which do not.

Reasons of corrective justice as reasons for judges

The first possibility to explore is whether when we look at private law's obligations as reasons, we introduce helpful subtlety into corrective justice's role. Specifically, we might be tempted to look at the difference between the reasons that apply to judges in comparison to those that apply to defendants. While the defendant, we could say, is not motivated by reasons of corrective justice, the court may apply these from its removed perspective.[37] In other words, the defendant does not pay compensation to the plaintiff because of reasons of corrective justice, but because of his initial wrongdoing—that is, his original actions against reasons he had (and continues to have) not to act against certain protected interests of the plaintiff. Under this understanding, the principle of corrective justice specifically applies to those individuals tasked with answering questions of justice, understood narrowly as a question of how and upon what ground he should allocate something to another. The reason that the defendant must perform a remedial action *vis-à-vis* the plaintiff, in other words, is not necessarily a reason of corrective justice, although it might be if he sets himself up as a judge of his own actions. This is because the defendant is not being asked a question of justice. It is only when a matter comes before a third party, a party tasked with answering such questions do reasons of (corrective) justice become particularly relevant.

In this way, the role corrective justice plays in private law is similar to that played by the principle of rationality in practical reasoning. When an agent acts rationally, he does not do so for or because of reasons or principles of rationality. As Scanlon has aptly summarized:

> The behavior of a rational agent will (at least to a significant degree) exhibit the regularities described by requirements of rationality. But this is not because the agent sees this way of behaving as required by principles that she must be guided by. A rational agent who believes that p does not accept arguments relying on p as a premise *because* she sees this as required by some principle of rationality to which she must conform. Nor does she generally do it "in order not to be irrational." Rather, she will be willing to rely on p as a premise simply because she believes that p. Similarly, a person who believes that doing A would advance some end of hers will not see this as counting in favor of A because some principle requires her to so count it, or because she must do this in order to avoid irrationality. Rather, insofar as she is rational she will see the fact that A would advance this end as a reason for doing A simply because she has the end in question. Ideas of rationality and irrationality

37. The judicial perspective is removed because, not being a direct party to the action, he or she is disinterested.

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> belong to a higher-order form of reflective thought that we need not engage in when, for example, we see that we have reason to take means to our ends.[38]

Similarly, we don't act out of or because of a principle of corrective justice when we act in correctively just ways. If I owe you $10, I don't pay you the $10 because corrective justice requires it—that is, for reasons of corrective justice. I pay you the money because I *owe it to you*. My reason for repayment of my debt (from my point of view) has nothing to do with refraining from acting in a correctively unjust way, but simply to do with paying my debt.

Just because the agent him or herself does not act out of or from a principle of corrective justice, however, does not mean the principle has no role to play in evaluating whether an action is correctively just. It is open for others to invoke the principle to criticize or praise me for failing to or for succeeding in fulfilling it. Most notably, it is open to judges to do so. The same idea is at work with respect to the principle of rationality, as Scanlon notes: "Nonetheless, a person who violates these requirements [of rationality] can be described correctly by others as irrational, and she can so describe herself. Moreover, irrationality of this sort is a defect, a failure to meet standards that apply to us."[39] For example, if I believe p but refuse to rely on it as a premise in my future reasoning, others witnessing this can appropriately and correctly criticize me for reasoning irrationally. Likewise, if I fail to pay my debt to you, others can criticize me for failing to conform to corrective justice, and, in so doing, they invoke the principle of corrective justice. Judges can go so far as to order my conformity with the principle. They can act, in other words, on the basis of reasons of corrective justice.

This is not to say that it would be impossible for an agent to pay his debt, for example, because it was the correctively just thing to do, but that this is the exception rather than the rule. Judges, by contrast, can be seen as more commonly invoking something like the principle of corrective justice in their reasoning. Judges can do this because they are essentially evaluating conduct, not acting on first-personal or even second-personal reasons, but rather on third-personal reasons. More significantly, the questions judges are asked are necessarily allocative: who wins, the plaintiff or the defendant? Thus reasons of justice appear to be uniquely reasons for judges *qua* judges.

The above attempt at solving corrective justice's dilemma of redundancy and externality contains two serious difficulties. First, it places too much emphasis on the respective motivations of the parties. Corrective justice has nothing to do with motivation. When the defendant discharges a debt, this is the correctively just thing to do regardless of why he does it. Likewise, a court might simply be enforcing the law and have no reasons of corrective justice as part of its relevant motivation set. The second difficulty with our first proposed solution to the

38. TM Scanlon, "Structural Irrationality" (2011) to appear in a volume of essays in honor of Philip Pettit, tentatively titled *Common Minds*, edited by Geoffrey Brennan, Robert Goodin, & Michael Smith at 3-4.

39. *Ibid* at 4.

https://doi.org/10.1017/S0841820900005981 Published online by Cambridge University Press

dilemma of corrective justice is that it doesn't make sense for a judge to criticize a defendant for failing to act for reasons of corrective justice if the defendant did not already have reasons of corrective justice potentially applying to him. In this way the principle of corrective justice is like the principle of rationality in that it is a higher order principle that applies to all of us. There has to be something in the interaction between the plaintiff and the defendant at the initial stage that contains reasons of corrective justice. This is the position embraced by the Kantians. To take this perspective, however, is to reduce all questions of corrective justice into questions of Kantian right. In doing so, corrective justice loses its distinctiveness. In the alternative, and this is the significant upshot of our first attempt at a solution and its failure, there has to be something in the nature of the misallocation itself that generates reasons of corrective justice for both the defendant and the judge subsequently to act upon. It is this latter possibility that must be accepted by advocates of a conception of corrective justice who wish to keep corrective justice distinct from other questions of how to behave.

A combination of thick and thin

Is the difference between the thick and thin accounts as unbridgeable as their respective proponents, Weinrib and Gardner, would have us believe? My answer to this is both yes and no. Because the two theorists mean quite different things by the term "corrective justice," in a sense there is no real difference. Weinrib's corrective justice is the normatively robust concept of correlativity, specifically, the correlativity manifested in Kantian right. By contrast, Gardner's corrective justice more thinly identifies situations where there is an allocation back from one party to another. I suggest that Gardner's definition is preferable in that it picks out what corrective justice is and does apart from other notions of justice or right. There is something that corrective justice is uniquely crafted to do: to govern allocations back. Yet, Gardner's approach disappoints as it fails to explain the normative reason *why* these allocations back are justified at all.[40] I would like to suggest that while Gardner's thin approach allows us to explain certain types of private law remedies it is, firstly, limited only to those that involve allocations back, and, secondly, appears to presuppose a more robust understanding of correlativity such as that found in Weinrib's intrinsic theory. Nonetheless, this understanding of corrective justice renders it sensible within the intrinsic approach—that is, neither redundant nor external—although, as we will see, its role is potentially quite circumscribed.

Recall that the problem of redundancy is not considered a problem by the Kantian account that views such redundancy as simply further evidence of an

40. In fact, Gardner embraces this feature. Norms of justice, for him, to be valid, do not necessarily need to be good norms of justice. For example, a potential norm of corrective justice could be: 'give all gifts back.' This is clearly an allocation back, so it fits within the form of corrective justice, but we wouldn't say it is a very good (as in morally laudable) norm of justice, or as he puts it "sound" norm of justice. Gardner, "Part 1," *supra* note 27 at 17: "norms of justice are not analytically sound. 'Sound norm of justice' is no tautology; 'unsound norm of justice' is no oxymoron."

https://doi.org/10.1017/S0841820900005981 Published online by Cambridge University Press

ultimate unity. As such, the criticism I levy against the thick version of corrective justice, while for those like myself who want to isolate a particular role for corrective justice to play will have bite, would not cause the Kantians much discomfort. Gardner's approach appears different in that it allows us to see corrective justice as an essentially remedial operation. The worry with his version, recall, was that it disconnected corrective justice sufficiently from the original obligation so as to risk making it into an extrinsic principle. Given my moderate endorsement of his definition of corrective justice, let us now inquire more rigorously into whether this alleged problem cannot be solved using the tools that Gardner's continuity approach itself provides. My suggestion is that within the continuity approach, we can see corrective justice as sometimes, but not always, just the way to do the next-best thing. Private law interactions that involve allocations back entail reasons of corrective justice for both the defendant and the judge, but those without allocations back do not. In other words, sometimes the only way to do the next-best thing is by conforming to reasons of corrective justice. If doing the next-best thing is within the original reason, which is just a truism about reasons, then corrective justice does not come from without and therefore is wholly compatible within an intrinsic account.

Let's explore further the idea that by following reasons of corrective justice this is just the next-best way to satisfy one's original obligatory reasons. The most clear-cut case is that of unjust enrichment. Here there has been a failed allocation, a misallocation. To refuse to allocate the mistransferred value back would be to act against reasons of corrective justice. Another example is rescission in contract. Here, the parties transfer back the benefits received under the contract and do so in accordance with reasons of corrective justice. In my mind, these, the tort of conversion, as well as situations where there has been a misallocation of profits are the types of private law remedies that can be neatly explained as instances of Gardnerian corrective justice. Without something more, not all remedies, in other words, are entitlements to corrective justice, understood as an *allocation back*. Corrective justice is not always the next-best way to achieve conformity with the original reason. However, when it is, as these cases demonstrate, it comes in as a private law phenomenon that is wholly explicable within an intrinsic account. It is not extrinsic as it just is the next-best way to satisfy the original reason—reasons of corrective justice guide one to do the next-best thing in these circumstances.

If Gardner wants to include more into his corrective justice account—and here I am thinking primarily of expectation damages for breach of contract, but also of most of tort law's compensatory remedies—then, I suggest, he must presuppose something like Weinrib's account of corrective justice and Kantian right. Let me explain. For Gardner to say that the payment of expectation damages is an operation of corrective justice, then he must understand such a payment as an allocation back. This means that he must be committed to something like the Kantian picture of contract law wherein the plaintiff is understood as having, at the time of contract formation, a right to the defendant's performance. The defendant, we can say, must transfer back to the plaintiff the right she had all along: the right to his

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future performance. Failure to do so would thus amount to acting against reasons of corrective justice. We can see that a similar story would need to be told in tort law. It is hard, some might say, to see monetary damages for tortiously-inflicted injury as reasons of corrective justice. The defendant received nothing from the plaintiff that he now must allocate back to her. Again, the Kantians have a neat answer to this: the defendant has deprived the plaintiff of the means to actualize her freedom and in so doing has taken (normatively-speaking) these means for himself; he has more freedom than he is entitled to. It is these means or their equivalent that he must transfer back. It is a transfer back, rather than a transfer full stop, because the defendant has in fact received a normative gain by acting outside of his legitimate realm of freedom.[41] Thus, Gardner's thin account of corrective justice, taken as he presents it—as an allocative operation—presupposes, in certain private law remedial situations, a more robust, and possibly Kantian, picture of the original rights and obligations of private law.

Conclusion

To review: Under intrinsic approaches to private law—approaches that look inside for the justificatory apparatus of private law's remedies—corrective justice's pivotal role is not as clear-cut as its proponents would have one believe. More specifically, the two leading intrinsic theses with respect to private law's remedies—the unity and continuity theses, respectively—face the following difficulties. Under the unity thesis, corrective justice is thick and encompasses the entire relationship between the plaintiff and defendant. As such, corrective justice finds itself subsumed under the more robust, more evolved concept of Kantian right. Kantian right (or its equivalents) is sufficient to explain the defendant's remedial obligations in private law. Under the continuity thesis, corrective justice is thin, for the most part limited to the remedial relationship. Corrective justice's independence from the original relationship seems to render it alien to the subsequent remedial relationship, thus turning it into an external principle of compensation and anathema to a pure intrinsic approach. However, closer examination reveals that, on one interpretation of Gardner's account, reasons of corrective justice just are the next-best way to satisfy the original obligation and, as such, are contained within the very idea of what it means to conform to the obligation in the first place.

This article leaves its reader with a choice. Our first option is to adopt the robust understanding of corrective justice wherein it and its reasons are

41. Notably, we do not have to adopt the Kantian picture to see how monetary damages help make up for the original wrong. Simply, we don't have to see them as instantiations of corrective justice. Instead, we can understand them as actions mandated by the obligatory nature of the original operative reason not to harm someone through one's tortious behavior. Obviously, the first-order operative reason—not to cause harm—can no longer be satisfied, but this doesn't mean that the tortfeasor can pretend that, and act as if, nothing happened. The second-order aspect of the obligation—that which gives it its mandatory nature—tells him to do something. The court steps in and crystallizes just what this something is. This idea is developed more fully and argued for in Sinel, *Understanding*, *supra* note 7.

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indistinguishable from Kantian right. The benefit of this option is that we can talk about all of private law's remedies as instantiations of corrective justice. The drawback is that corrective justice no longer plays a distinct role. Our second option is to preserve the thinness of corrective justice and avoid its characterization as external by understanding it as the way to sometimes do the next-best thing. If we take corrective justice as a purely formal operation, this could result in limiting corrective justice only to situations where there has been a clear misallocation, such as in the case of unjust enrichment, and we're now asking for an allocation back. To apply this thin, distinctive conception of corrective justice to other private law remedies, such as expectation damages for breach of contract or compensatory damages for tortious wrongdoing, requires a normatively more robust understanding of the nature of the underlying (original) rights and obligations of the parties.

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