

Purely Formal Wrongs

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I The normative orders of private law

On the face of it, the internal normative structure of private law generally is a matter of rights and obligations and private law remedies are a matter of making up for the wrongs done when obligations are breached and rights violated. As we are often reminded, it is a relational or bilateral affair: The obligations are directed and so correlate with the rights; breach of a private-law obligation violates someone's private-law right. And of course, if you violate a duty directed in my direction, if you violate my right, you wrong me. Private law remedies aim to undo, so far as possible, the wrong done to the right-holder. I agree with Robert Stevens that "[w]here the wrong has been committed, the secondary obligation to pay money imposed upon the wrongdoer can be seen as the law's attempt to reach the 'next best' position to the wrong not having been committed by him in the first place."¹ I also agree with Arthur Ripstein's gloss on this that "[b]y its nature, a substitute is not an equivalent; a substitute is a deficient version of an equivalent. The point of a substitute is to make up for something, even if that something cannot be made up for completely."²

My own field of private law is contracts, and I have always thought about the normative order of contract law in this way. Parties to a bilateral contract have both a legal obligation to perform and a legal right to the other side's performance. There are two pairs of reciprocal

¹ Stevens 2007, 59

² Ripstein 2016, 4

legal obligations and rights. Failure to perform violates the right of the promisee, thus wronging them, and the remedy aims to put the promisee as far as possible in the position they would have been in if the wrong had not occurred. It seems to me that everyone else has always thought about it this way as well. Some have held that the right of the promisee is a right against suffering loss in reasonable reliance on a contractual obligation.³ They therefore support reliance damages rather than enforcement of the contract. They don't disagree that contracts is about obligations (not to cause reasonable reliance losses by failing to perform) and rights (not to be stuck with reliance losses reasonably induced by another's unperformed promise) and that the remedy aims to make up for the wrong done when the rights are violated. The reciprocal structure of obligation and right, the idea of a wrong, and the thought that the remedy undoes the wrong so far as possible—it's all there for the reliance theorist, just with different substantive content for the obligation-right pair. Fuller and Perdue found it hard to see how expectation damages could be seen as compensatory, but that, as Weinrib rightly notes, is just because they did not see (or, one might say, agree) that the plaintiff's right was to performance of the contract rather than to not being left stuck with reliance losses reasonably induced by another's promise.⁴

Even those who follow Holmes's idea that the obligation of the promisor is to perform or pay the money value of performance agree. The obligation is perform or pay; the right is to performance or its money equivalent; a wrong is done when the promisee gets neither of those. Ripstein points out that this position had better not be arrived at by inferring from p,

³ Atiyah 1981; Fuller and Perdue 1936

⁴ Weinrib 2003, 68

“you must do A and if you don’t do A, then you must do B” to q, “you must do A or B.” If that were a valid inference there would be no stopping it. If the obligation is to perform or pay, p is “you must perform or pay, and if you don’t perform or pay you will be told to perform or pay again on pain of a contempt sanction”; we are not tempted to infer q, that the promisor’s obligation properly spelled out is to perform or pay or face a contempt sanction.⁵ Some have made a different kind of argument for Holmes’s disjunctive obligation view. Daniel Markovits and Alan Schwartz argue as a matter of interpretation that contract parties who say “I promise to perform” actually mean “I promise to perform or pay damages.”⁶ This is a particular interpretation of the content of the agreement that is entirely compatible with the idea of a secondary remedial obligation. If the promisee is wronged by the promisor failing to perform or pay, the remedy of an order to pay damages in principle undoes the wrong entirely.

But surely economic analysts of law don’t think that contract law is a matter of obligations, rights, wrongs, and the undoing of wrongs? They don’t think about the internal structure of legal normative orders much, but if they did, I see no reason why they should resist the idea. Who can deny that contract remedies aim to put promisees in the position (near as we can) that they would have been in had the contract been performed? Many economic analysts would deny that the promisor has a legal duty to perform and the promisee a right to performance, violation of which wrongs them. But that’s because they accept the disjunctive account of the promisor’s obligation. That account, as we have just seen, is fully compatible with understanding contract law in terms of obligations, rights, and wrongs.

⁵ Ripstein 2016, 234-41

⁶ Markovits and Schwartz 2011. For effective criticism of the interpretive claim, see Shiffrin 2012.

What about Holmes himself? To many he is the original sinner here. But Holmes never denied that the normative structure of law is one of rights and duties. His concern was with the “fallacy” of taking “these words in their moral sense.”⁷

So it comes as something of a surprise to a contracts scholar to discover that within tort theory there has been great controversy about these things. Stevens, John Goldberg and Benjamin Zipursky, Ripstein, Weinrib, and others offer lively defenses of the idea that tort law is a matter of obligations, rights, and wrongs and the mood of their arguments is one of fighting back against a new orthodoxy that denies these simple and long understood truths. (Goldberg and Zipursky disagree that the remedy aims to undo the wrong, holding instead that the remedy offers civil recourse, an alternative to revenge.⁸ I find Ripstein’s reply to this line of thought effective.⁹)

But is all this fuss really necessary? In “Torts as Wrongs,” Goldberg and Zipursky consider four possible objections to the idea that torts are wrongs.¹⁰ One of these, what they call the hodgepodge problem—if torts are wrongs then there are a hodgepodge of wrongs that are torts—doesn’t seem to me to be much of an objection. Another is a somewhat baffling argument made by one branch of corrective-justice tort theory that compensation for losses can’t be the undoing of a wrong; I don’t think this line of thought became orthodoxy.¹¹ The third objection is what they call the realization problem, which arises for negligence only. If the duty is to drive nonnegligently, isn’t negligent driving that causes no harm just as wrongful as

⁷ Holmes 1897, 460

⁸ See, e.g., Goldberg and Zipursky 2006, 1580-1.

⁹ Ripstein 2016, 263-75

¹⁰ Goldberg and Zipursky 2010

¹¹ See the discussion of the views of Jules Coleman and Stephen Perry in Goldberg and Zipursky 2010, 932-4, 945-7.

similar driving that does not? Goldberg and Zipursky plausibly reply that the wrong is to injure nonnegligently, the obligation is not to do that. The realization of harm is not something added to the wrongful conduct, it is part of the content of the obligation/right pair. They also spend some time defending the appeal of this obligation/right pair.¹² But if we are trying to understand the structure of the normative order that is tort law, that doesn't seem necessary. As John Gardner puts it rather breezily in a discussion of Goldberg and Zipursky's views, "I could not agree more. Torts are legal wrongs, i.e. breaches of legal duty or obligation, and they are legal wrongs, against particular people, i.e. they violate particular people's legal rights."¹³ The breezy tone suggests that so much is barely worth discussing.

We get to the heart of the matter with the fourth objection Goldberg and Zipursky discuss. It is this: "[O]ne cannot characterize torts as moral wrongs without losing the ability to account for large swaths of doctrine, yet one cannot characterize torts as legal wrongs without rendering the concept of "wrong" vacuous (a legal wrong being anything the law defines as a legal wrong)."¹⁴ Similarly Stevens: "Possibly the most important objection to the rights-based conception of the law of torts is that it is essentially empty. However descriptively accurate the account so far given may be, the sceptic will still need to know why we have the primary rights we do (and do not) have."¹⁵ I have been saying that everyone agrees that private law is a normative order that trucks in obligations, rights, and wrongs. But what we all, including Holmes, agree about is that they are *legal* obligations, rights, and wrongs. Whether these legal

¹² Goldberg and Zipursky 2010, 941-5

¹³ Gardner 2011, 46

¹⁴ Goldberg and Zipursky 2010, 947-8

¹⁵ Stevens 2007, 329

rights are anything other than purely nominal, mere features of the structure of a conventional social practice, is a quite different question. Whether or not “fallacy” is the right word, Holmes is obviously right that we cannot simply *assume* that legal obligations, rights, and wrongs, are moral obligations, rights, and wrongs. Not even Stevens does that, though he does devote only eight pages of a 340-page book to defending his startling claim that all judge-made private-law rights are natural moral rights.¹⁶ Nor even Weinrib, who usually supplements his supposedly formal (in the sense of taking the internal normative structure of private law at face value) accounts of an area of private law with impeccable Kantian or Aristotelean argument.¹⁷

To make a moral argument that private law wrongs are moral wrongs is, of course, to go beyond description of the internal structure of private-law normative orders. Such an argument has its place in quite different enquiries: we may want to make best sense of the overall point of having these normative orders, or, alternatively, how best to justify or critique them, as appropriate, from a moral point of view. The first of these we can call interpretive legal theory,¹⁸ the second normative legal theory.

What the authors I have been mentioning are campaigning against is the view that the legal obligations, rights, and wrongs of private law are not real obligations, rights, and wrongs; that they are merely internal features of the legal normative orders, reflecting nothing. The interpretation that makes best sense of the legal orders and/or justifies them will make no reference whatsoever to real relational obligations, rights, and wrongs; it will refer instead to the good these normative orders do for society in general. The enemy, then, is instrumentalist

¹⁶ Stevens 2007, 329-37

¹⁷ See e.g. the prominent place of Kant in Weinrib 2003

¹⁸ See Smith 2004

interpretation and justification of private law. Here Holmes can of course plead guilty, but he is certainly not the original sinner—instrumentalism about private law goes back to Bentham's assault on the Blackstonian orthodoxy of his day and, more importantly, to the profound philosophical insight of Hume.

The most familiar contemporary instrumental account is the economic analysis of private law. But that is just one possibility, and an implausibly impoverished one at that. There are many social goods other than economic efficiency, including social justice, the promotion of autonomy for its own sake, and so on, that the legal practices of contract, property, and tort may serve. John Rawls was no utilitarian; much less did he believe that the basic structure of society, which includes private law, was to be evaluated by the standard of economic efficiency. But his view of private law is thoroughly instrumental nonetheless—private law is part of the totality of social and legal institutions whose first virtue is justice.

If instrumentalism about private law became an orthodoxy—as I agree it did, due to the influence of Holmes and later the economic analysis of law, and also the very different position of Rawls—was there anything wrong with that?

II Does the internal structure of private-law normative orders constrain interpretation?

We agree that private-law normative orders comprise obligations, rights, and wrongs. That need not constrain our normative legal theorizing, since there is no requirement that a normative legal theory fit the actual legal doctrine of any place or tradition. Existing doctrine is

a good source of ideas, and you'd be rash to assume that everyone has been getting it all wrong all these centuries, but it does not constrain normative theory in any way.¹⁹

But our rights-and-wrongs crusaders are engaged in interpretive legal theory, and here fit is obviously a central criterion, along with justification—together these criteria guide our attempt to present an understanding of an area of law that makes sense of it while showing it, if possible, in a morally attractive light. These criteria of fit and justification are familiar from Dworkin's nonpositivist theory of legal interpretation.²⁰ Dworkin's theory applies at the retail level, to answer questions about what the content of the law is. That the legal materials are to be interpreted in their morally best light is what makes it a nonpositivist theory. By contrast, interpretive theory of a particular area of law, as I understand it, is not aiming to answer particular questions of legal content, but rather to understand why the law we have might be a good thing to have (if we think it is). This enterprise entails no nonpositivist commitment when it comes to the grounds of law.

Now just how to understand the criterion of fit is a crucial question for interpretive theory. All agree that the account must attempt to justify the main features of the actual legal doctrine of a particular place or tradition. But it is sometimes added that this account must in some sense match the reasoning of participants in the relevant practice. Thus Stephen Smith requires a moderate level of what he calls "transparency."²¹ What exactly this requirement amounts to for Smith is not entirely clear. Sometimes he seems to be concerned that the theory is compatible with believing that the reasons the legal actors, especially judges, give for their

¹⁹ See Murphy 2014

²⁰ See Dworkin 1986

²¹ Smith 2004, 24-32

actions are their real reasons. But that seems hardly difficult to satisfy. Judges characteristically give as their reasons those that are grounded in the normative structure of private law—an order of obligations, rights, and wrongs. An instrumentalist theory of private law by no means implies that those judges must be faking it. Nor that they must believe that the legal order of obligations and rights is a real moral order of obligations and rights. It is the easiest thing in the world to understand that the enforcement of the normative order makes sense for instrumental reasons but that, as one is a judge, one's role is to apply its rules.

Where judges make or develop the law the issue becomes a little more complicated. Should judges always restrict their reasoning to the internal resources of the normative order, or is it appropriate, if an instrumental account of that area of law is correct, for them sometimes to refer directly to the social goals that the normative order is serving?²² And if it is appropriate to refer directly to those goals, must judges say always that that is what they are doing, and never pretend that they are finding the way forward entirely from within the legal order as it is? Whatever the answer to these questions, it hardly seems a plausible criterion for the adequacy of an interpretive theory of some area of law that conscientious judges will never have to dissemble to any degree.

But in the end I think Smith's concern is not with whether judges can report their own real reasons for their decisions. Transparency seems to require that justification for an area of law not employ normative resources foreign to the internal resources of that normative order. For example, "[e]fficiency-based explanations characteristically explain the law using concepts

²² For an argument that judges and other legal actors should never step outside of the normative resources internal to the legal normative order of contract law, which however can only be justified instrumentally, see Jiménez 2018.

that are foreign to legal reasoning. ... The legal explanation focuses on the rights and duties of the litigants, the efficiency explanation focuses on the incentives for future behaviour of contracting parties generally”²³ This is correct. But the upshot, Smith believes, is that economic analysis is not eligible as an interpretative theory. It is quite unclear to me why we should believe this, unless we go into the enterprise already convinced that the legal obligations and rights of private law are real moral obligations and rights. For what is the general methodological objection to be made to the possibility that the right way to understand a body of law will employ normative resources not found in the legal normative order itself? An instrumental account of the point of contract law commends the existence of an artificial normative order, with its own internal structure of rules and principles, tailor-made to advance certain social goals that are not referred to in the content of the rules. This general structure is very familiar in our social life generally. A natural analogy is the rules of a game. The point of the rules might be to make the game challenging and fun, but that doesn’t mean that those goals must be referred to in the rules, or that the rules must be applied with those goals in mind. The same goes for all sorts of normative orders, such as school rules, etiquette, and so on. Of course, a good interpretive theory will want to make sense of and explain the merits of the internal normative resources, otherwise we would not have made sense of the legal normative order we are interpreting.²⁴ But that is a far cry from demanding that a theorist trying to understand the law should be limited to the normative resources employed by the normative order in question.

²³ Smith 2004, 31

²⁴ Jiménez 2018 helpfully distinguishes between a “reflective” and an “explanatory” criterion of transparency; only the latter is plausible.

As I say, this general phenomenon is entirely familiar in our social lives. It is also familiar in consensus understandings of certain areas of private law. Take property. For this private-law normative order, virtually everyone accepts that you can't explain its point without making use of resources entirely external to it. Property law and property-related tort law is all about rights and obligations but no one really believes in natural moral property rights. Even those who call themselves libertarians, with the exception of Nozick, generally argue for a right to (some conventional scheme of) private property, not a natural order of property rights. When we talk about the rights of owners, we are talking about their legal rights; that their having these legal rights is a good idea is then explained instrumentally with reference to social goals such as the promotion of social welfare, individual autonomy, and so on.²⁵ Since we are all comfortable with this for the centrally important case of property, why the resistance in the case of torts and contract?

One probably important reason is the argument, first made by Weinrib but very often repeated, that makes much of the fact that tort and contract law are a matter of bilateral obligations, rights, wrongs, and remedies. It is the wronged person who has the remedy against the obligation-breaker. Instrumental accounts have to treat that fundamental bilateral structure as a mere means to a social end. Correct, but the question is why that is a problem, if

²⁵ See Murphy 2018a. I do not here consider (in part because I fear I do not understand) Ripstein's position in Ripstein 2013 that while property norms are conventional, they are not to be justified instrumentally. In that article, moreover, Ripstein argues from inside the law of property out which, as I have been arguing, is a method in need of defense. It is one of the great virtues of Ripstein 2016 that he does not employ this approach. "I think that Weinrib has the better of his debate with the instrumentalist, and I share his conception of wrongs as violations of rights and remedies as substitutes. But I defend that conclusion by a different route. Rather than working backward from a tort action, my account moves in the opposite direction, starting from the moral idea that no person is in charge of another." Ibid. 6. In that book, however, Ripstein does not defend a noninstrumentalist account of property; in fact, he hints that he may be persuadable to the dark side. Ibid 42. The instrumental account would, he notes, be compatible with his theory of torts, including property torts, as interferences with something "you already have."

our aim is to provide a good interpretation of private law, an account of why it makes sense, if it does, to have that institution. Again, it is one thing to *explain* that bilateral structure, to make good sense of it, it is another to assume that the best way to understand private law is to treat that structure as a matter of intrinsic moral importance, rather than of instrumental importance only. Instrumental accounts have, in Weinrib's words, "the defect of operating outside the law's self-understanding."²⁶ That is a defect for Weinrib, whose project is that of "understanding private law from within." But it is not in itself a defect for any theorist with the different project of making sense of the reasons for having private law in the first place. If it is a defect for this presumably wider group of theorists, that could only be because there are compelling arguments in favor of treating private law's internal realm of obligations, rights, and wrongs as reflecting real obligations, rights, and wrongs. "One way of being apolitical," Weinrib writes, "is by avoiding judgments about the desirability of particular legal arrangements. The formalist insistence on coherence in legal justification is apolitical in precisely this way."²⁷ Interpretive legal theory, as I am understanding it, is political in precisely this way.

III Form and Substance

Argument is needed to justify treating private law's legal wrongs as real wrongs. Ripstein and Goldberg and Zipursky give arguments, of very different kinds, that I will consider in turn. But first I want to point out that the instrumentalist's understanding of private law's legal obligations, rights, and wrongs as not reflecting or expressing real obligations, rights, and

²⁶ Weinrib 1995, 49.

²⁷ Weinrib 1995, 45

wrongs is just a particularly stark example of a kind of interpretation that is utterly familiar in our everyday legal practice. I mean the kind of interpretation that treats a particular legal rule or principle as formal, rather than substantive, in content.²⁸

Atiyah and Summers introduced a number of different senses of the distinction between form and substance in *Form and Substance in Anglo-American Law*.²⁹ The one that most concerns me here is what they call content formality, but it will be helpful also to introduce, by way of contrast, what they call interpretive formality. A legal rule has greater content formality, on their account, to the extent that it is shaped by fiat and/or the extent to which it is under- or over-inclusive with respect to its objectives.³⁰ They note that it is not always easy to tell whether a rule has high content formality, because it is not always easy to see what the purposes of the rule are.³¹ Interpretive formality is a matter of the resources that may legitimately be used in interpreting a rule—there is high interpretive formality if the interpreter is limited to the semantic content of the rule and is not permitted to read it in light of its understood purposes, or in light of other substantive concerns such as background principles of law or morality. Atiyah and Summers rightly note that “[l]egal systems vary greatly in the degree to which they permit interpreters to go behind the verbal expression of the law and thus engage in reasoning that is more substantive than formal in deciding what the law itself *is* in the first place.”³²

²⁸ I develop the argument in this section in greater length in Murphy 2018b.

²⁹ Atiyah and Summers 1987

³⁰ Ibid. 13

³¹ Ibid. 14

³² Ibid. 15.

Content formalism and interpretive formalism interact. Interpreters will feel more comfortable engaging in substantive interpretation the less apparently formal the content of the rules they are interpreting. It is not hard to justify substantive interpretation of section 2-302 of the UCC which provides that a court may limit enforcement of an unconscionable contract, without offering any guidance on what unconscionability is. The substantive surface content of many of the rules of Article 2 makes it easier to comply with the Code's injunction that it be interpreted substantively (§ 1-103).

Nonetheless, substantive interpretation of rules with high apparent content formality is certainly possible. In the case of *Pillans and Rose v. Van Mierop and Hopkins*,³³ Lord Mansfield held that a written gratuitous promise for commercial purposes among merchants was legally enforceable despite the lack of consideration. "I take it," he wrote, "that the ancient notion of consideration was for the sake of evidence only: for when it is reduced into writings, as in covenants, specialties, bonds, etc., there was no objection to the want of consideration." What Mansfield is doing here is interpreting substantively a rule that he takes to have formal content. The rule must have formal content, he reasoned, since no consideration was required for sealed instruments, and seals obviously have no substantive purpose. So the purpose of the consideration requirement can only be evidentiary. In the case of a written commercial promise between merchants, however, there is plenty of other evidence already, and so, interpreting the rule according to its evident purpose, the requirement of consideration could be waived. Good reasoning, but Mansfield was overturned by the House of Lords about ten years later on the simple ground that English law in fact required consideration for all agreements that were

³³ (1765) 3 Burr 1663

not specialties (under seal); it did not distinguish written commercial agreements among merchants from other unsealed agreements.³⁴

What the House of Lords said, in effect, was that English judges were not to interpret the rule of consideration substantively in the way that Lord Mansfield had done. Even if he was right about the best way to understand the rule's content, his job was to interpret it formally, paying no attention to its underlying purpose. Not only do legal systems vary greatly in how far they permit judges to engage in substantive interpretation, there is considerable scholarly controversy about how far they should permit judges to engage in substantive interpretation. But none of that is relevant here, since, as I in effect argued in the previous section, there is no compelling reason to impose interpretive formality on a legal theorist attempting to understand the rationale for private law.

Atiyah and Summers' definition of content formality leaves something to be desired. To enrich it, I want to look at Mansfield's opinion in *Pillans and Rose* again, but treating him now as an interpretive legal theorist. The purpose of the rule requiring something given in exchange for a promise is evidentiary, he concluded. How could there be a substantive reason to care about consideration, if a purely formal device, like a seal, could dispense with the requirement? We could understand Mansfield as saying that though the rule says there must be an exchange, we shouldn't think that that means that exchanges matter in themselves, that there is some intrinsic reason *not* to enforce gratuitous promises. The purpose of the rule is not to be found by taking the requirement at face value. Put otherwise, we could say that Mansfield argued that

³⁴ *Rann v. Hughes* (1778) 4 Bro PC 27, 2 ER 18

the rule of consideration does not state its own rationale. For if it did the point of the rule would be that exchanges are more worthy of legal enforcement than gratuitous promises.

I suggest that we understand substantive legal rules as those that do state their own rationale. Karl Llewellyn wrote that the best rules “carry their reason on their face”³⁵; in saying this, I take him to be stating his preference for substance over form. It is tempting to say that a substantive rule wears its rationale on its face. That has a good ring to it, but it would seem to imply that it was always clear from the face of the rule what its rationale was. As already mentioned, however, it can be hard to determine what the rationale of a rule is, and therefore hard to tell whether the rule is formal or substantive in content.³⁶ So my definition is that a substantive legal rule states its own rationale, with the understanding that it can be hard to tell whether that is in fact the case for any particular rule. Atiyah and Summers’s definition of content formality in terms of arbitrariness and under- and over-inclusiveness doesn’t seem to get to the heart of the matter, even though it may be a generally accurate descriptive statement about formal rules.

When substantive rules require something, that is because what they require matters in itself. With a formal rule, by contrast, the purpose of what the rule requires lies elsewhere. The consideration rule doesn’t say anything about evidence. Mansfield’s argument depended on an interpretive assumption of overall coherence in the law; he would not have been able to reach the conclusion that the point of the rule was evidentiary just by looking at the rule.

³⁵ *The Common Law Tradition*, 335, quoted by Atiyah and Summers 1987, 15n.12.

³⁶ I am grateful here to Fred Wilmot-Smith.

If a rule does not state its own rationale, an obvious question to ask is precisely why it requires something that does not, in itself, matter. Why would a legislator or other law-maker create a rule like that? Lon Fuller's celebrated discussion of the variety of functions of form can help us here.³⁷ One of the functions of form he identified is the evidentiary. But he also introduced two others, the cautionary and the channeling functions. The cautionary function is simple enough. Even the promise to hand over a peppercorn could add a sense of seriousness that may hinder rash promising. By the channeling function Fuller has in mind that formalities can allow us to know with some certainty what the legal effects of our actions are. Here the seal, traditionally dispositive of enforceability, seems to serve the channeling function well, along of course with both the cautionary and evidentiary.

Fuller's discussion allows us to see that Mansfield's argument neglected an important alternative. It is true that a letter may do as good a job on the evidence front. Perhaps too the restriction of his decision to commercial cases involving merchants indicated that he was conscious of the cautionary function, since perhaps promises in such a context are rarely rash. But what of the channeling function? If a form is to have a channeling function, it must be strictly enforced, it won't do to lift the formal veil. This was the position of Holmes who declared that "consideration is a form as much as a seal."³⁸ We have then three options for consideration: a strict form with a channeling function, a nonchanneling form that serves the evidentiary and cautionary functions only, and a substantive rule that expresses the proposition that exchanges are more worthy of legal enforcement than gratuitous promises. This last is

³⁷ Fuller 1941

³⁸ Holmes 1880, 273

evidently the position of the Restatement (Second) of Contracts since it rejects nominal or sham bargains as good consideration (§71).

All this, I take it, is entirely familiar to legal scholars. The idea that the content of a rule may not state the purpose of a rule is entirely familiar. The claim of the instrumentalist, that private law's internal normative order of obligations, rights, and wrongs does not state or express the purpose of that normative order is a claim of exactly the same kind. It is the claim that all those legal obligations and rights and wrongs are formal in content. Making good on this claim requires moral argument, of course.

It also requires generalizing from Fuller's functions of form. All three of his functions are means to ends not stated in the statement of the formal rule. The natural generalization, then, is simply that rules have formal content when what they require has instrumental significance only. This is not a surprising conclusion, since if a rule does not state its purpose, what it states cannot be an end in itself, but rather a means to something else.

The point of this section has just been to emphasize how familiar we are with the kind of claim that the instrumentalist is making, the claim that a legal rule does not express its own rationale. It is inconceivable that it is never appropriate to regard legal rules as formal in content. What is distinctive about the instrumentalist approach is that it regards the fundamental structure of private law as being in this sense formal. Of course, the instrumentalist owes us an explanation of why it might make sense to promote general social goals such as welfare, justice, and autonomy by way of a legal normative order of bilateral obligations and rights. But equally, a non-instrumentalist owes us an explanation of why we should believe that there are real private bilateral obligations and rights that the law reflects.

To do justice to the debate that now needs to be had obviously would require several books. With respect to the possibility that private law obligations, rights, and wrongs are moral obligations, rights, and wrongs, I am, in the next section, going to be limited pretty much to stating my view—in order to indicate just how little of the content of private law seems to me to be substantive. In the following section I will make an argument against the position of Goldberg and Zipursky that private law wrongs, while not moral wrongs, are real wrongs nonetheless.

IV Moral wrongs: manifesto

As I have already indicated, it seems to me uncontroversial that property law does not reflect natural moral rights of ownership but is rather a conventional scheme, a system of legal rights, whose point is to promote social welfare, justice, autonomy, and so on. Much more controversial is the case of contract; here the instrumentalist orthodoxy has been under attack for several decades. The revisionists see contract law as enforcing genuine moral promissory obligations and rights, even if that isn't its sole purpose.³⁹

I take an orthodox Humean position about both property and contract. Just as there are no natural rights of ownership, there are no natural promissory obligations and duties. Promissory morality is an artificial rather than a natural part of morality—in the sense that we cannot make sense of it without reference to valuable conventional practices. There is no promissory obligation without a prior social practice that comprises rules specifying that promises made should be kept. I believe that Hume is right about this primarily for the reason

³⁹ See Fried 1982, Scanlon 2001, Shiffrin 2007.

that none of the available arguments for a natural morality of promise is successful. I can't go into my reasons here.⁴⁰ But it is important to explain here that the instrumentalist view does not introduce genuine moral promissory obligations, rights, and wrongs through the back door. That is, it is not only the case that the practices of property and promise and contract do not reflect practice-independent natural obligations and rights; they do not create moral obligations and rights, either.

We have social practices up and running: conventional moral orders of promise making and keeping and respect for legal property and, supporting that, the legal institutions of contract and property law. We have the social practices and the legal orders because they are socially valuable. They expand people's options by allowing stable possession and thus productive use of the world's resources and by making possible cooperative behavior that would not otherwise occur, with resulting benefits (welfare, justice, autonomy) for all of us.

But the fact that a conventional normative order is socially beneficial does not mean that its rules have genuine deontological force; that they are, in other words, real moral duties. It is, of course, morally important that the conventional morality of promise and property and the institutions of contract and property law are socially valuable. If informal social enforcement and formal legal enforcement of the practices of making and keeping agreements and respect for property is to be justified, it had better (among other requirements) do some good.⁴¹ But justification for enforcing a conventional normative order and the genuine moral force of its rules are two different matters. Similarly, the fact that a practice or institution is

⁴⁰ See Murphy 2018a for my reasons.

⁴¹ Gaus 2011 makes the important point that legitimacy is not just a requirement for enforcement of law by the state, but of informal enforcement of conventional morality by society as well.

socially beneficial has moral implications for individuals. We should be disposed to promote and protect valuable social practices, and not undermine them. But again, that we should support and not undermine the normative orders of promise and contract and property doesn't mean that we have an obligation always to comply with their rules.

Rawls once advanced a different view. In "Two Concepts of Rules" he argued that the morality of promise requires a valuable, just practice.⁴² But once we have such a practice, its rules are fully binding automatically, without any need to think about whether noncompliance would be unfair, or harm the practice. From within the practice we do not think about the instrumental reasons to have the practice, or the reasons for participants to comply; we just know that the rules are binding, and that any breach will wrong promisees. To ask about what good my compliance with the rules would do is to misunderstand what a practice is.⁴³ That may be, but I could still ask why the fact that general compliance with the practice would be good means that I should blindly follow the rules regardless of whether it will do any good. The reply "that's what it is to act within the context of a practice" won't move me, since I can always ask why I should do that, why I should accept this practice and its rules so unconditionally.

In recent non-Humean accounts of promising, by Joseph Raz and several others, the idea of a normative power plays a central role. The thought is that I have the normative power to promise just in case it would be morally valuable if I did.⁴⁴ This strikes me as a close cousin of the "Two Concepts of Rules" view, and subject to the same objection. Suppose it would be better, because the interests of promisors and promisees would de facto be better served, if

⁴² Rawls 1955

⁴³ Ibid. 26

⁴⁴ See Raz 2015; Owens 2012

there were genuine promissory rights and obligations. Does that mean that there are genuine rights and duties? It would be good if it were, so it is, is clearly not generally a good form of argument, and I can't see that it is in this specific context either.⁴⁵ At one point, Raz suggests that if we wonder why we should keep our promises, we have failed to understand what a normative power is.⁴⁶ As with Rawls' point about what a practice is, this may be, but still the question remains why the fact that it would be good if I had a normative power means that I have a normative power, given that this implies real rights and obligations.

So the fact that general compliance with a certain rule-structured social practice produces value does in not in itself establish the deontological force of the rules. The moral significance for individuals of the beneficial practices of promise, contract, and property is that we have a duty to protect and promote these practices. Rawls himself embraces such a view for the background structure of society in *A Theory of Justice* when he introduces the natural duty of justice.⁴⁷

It is true that violations of the rules of the practices of promise and contract and property on occasion cause actual material harm to individuals, thus possibly violating a moral obligation not to harm. But to focus on pure cases of promissory and proprietary noncompliance we should leave such cases aside. For promise, we can think of cases where the person to whom the promise has been made, the promisee, has not relied in any material way on the promise. And for property, we can imagine a case of theft of assets that an owner never

⁴⁵ See Regan 1989

⁴⁶ Raz 2015, 76

⁴⁷ Rawls 1971. Though Rawls does, mysteriously in my view, hold that the natural duty to promote and protect just institutions implies full compliance with legal rules. For discussion, see Murphy 2018c.

knew she owned and never will miss. In such cases, we face clearly the question of what reason we have to follow the rules requiring performance of promise and respect for property.

The answer, on the instrumental view, is again that those rules are merely positive rules of the practice. The moral tie between individuals and the practices is that since these are very valuable social practices, we each are required to protect and promote them. That may mean more than complying with the rules, but it can also mean less. Probably we should all develop a disposition generally to keep promises and agreements and respect legal property rights, unusual circumstances aside. But having that disposition is compatible with noncompliance with the rules, since sometimes breach of promise or theft will not tend to undermine the practices, and in fact will do no harm at all.

So property and contract law do not enforce real moral duties. They enforce beneficial social practices. The point of enforcing the rules of the practices is entirely to make possible the achievement of the social goods that justify them.

Torts is of course more complicated, because of the hodgepodge factor. Ripstein's heroic attempt to ground the law of torts in a fundamental moral duty of noninterference—with our bodies, property, and reputations—seems to me compelling for intentional torts relating to bodies and perhaps reputations, but not property. The idea that I have a moral duty not to interfere with "what is yours," whatever happens to be yours and whatever the community should do about the distribution of property, seems to presuppose a natural notion of ownership that is untenable.⁴⁸ The reason you shouldn't interfere with my body is not because it is mine in any sense that carries over to external goods. My relationship to my body

⁴⁸ Ripstein 2016, chap. 2

is not that of something belonging to me, it is closer to that of identity. The idea of self-ownership, in my view, is one of the worst wrong turns in the history of moral and political thought.⁴⁹ You shouldn't interfere with my body because I have natural rights against you that you not harm me or impede my free movement. So there is, in my view, no single moral idea of noninterference that will capture my person and my property in a single net. If we are not to interfere with people's legal property, that must be explained by appeal to the same goals that explain setting up the artificial normative order that assigns things to people in the first place.

As for negligence, understood in terms of moral obligations and duties, I find Goldberg and Zipursky's realization objective decisive. We don't have to reject the reality of moral luck to reject as morally perverse the massive difference factors outside people's control can make to the extent to which they have, in the eyes of tort law, wronged someone.⁵⁰ So for negligence, I line up with the instrumentalist camp that sees the point of this normative order as attempting to promote the twin goals of compensation and deterrence.

In the end, then, it seems to me that very little of private law can plausibly be seen to reflect genuine moral obligations, rights, and wrongs.⁵¹ What we are left with are natural rights to bodily integrity and free movement. What we might think of as the main business of private law—contract, property, and negligence law—all get an instrumental justification. Now as I have said, any instrumental account requires an explanation of why the best way to achieve the relevant goals is to set up artificial normative orders of relational rights and obligations. This is

⁴⁹ Reading Harris 1996, 184-97 on self-ownership is a lot of fun.

⁵⁰ I largely agree with Waldron 1995; for a thoughtful reply, see Goldberg and Zipursky 2007.

⁵¹ As I am not sure what to say even by way of manifesto about unjust enrichment, or torts relating to reputations, I leave those areas of private law to one side.

not very hard to do for the case of contract and property. The practices of making and keeping agreements and respect for conventionally determined rights of possession and use are precisely, the argument goes, what promote welfare, justice, and autonomy. And the simplest way support those practices is to enforce their rules. Informal reputational sanctions and legal sanctions cannot assess how well a person supports the practices in any other feasible way. Even if, in a particular case, an individual has no reason to follow the rules, it makes sense from the social point of view that the rules are generally enforced.

Negligence law looks entirely different. There is no conventional practice in this story that we think essential to the promotion of certain social goals. Clearly there are other ways in which people can be deterred from unduly risky conduct and accident victims can be compensated. The choice between private rights of action (with insurance in the background) and a public no-fault compensation scheme with deterrence built into the system turns entirely on which scheme does a better job, at a lower cost, promoting the goals of deterrence and compensation.

V Real, but not moral, wrongs?

Goldberg and Zipursky hold that the legal wrongs of tort law are genuine wrongs, and though they would no doubt disagree with much in my manifesto, they would also not be perturbed by it. For they freely admit, as I have already quoted them, that we “cannot characterize torts as moral wrongs without losing the ability to account for large swaths of doctrine.” They give as a clear example of a legal but not moral wrong using the land of another person, while

reasonably believing it to be one's own land.⁵² If that's a real wrong though not a moral wrong, so too could be, for example, negligently injuring someone.

In "Tort Law From the Internal Point of View" Goldberg and Zipursky argue, in the first instance, that the internal structure of tort law is one of obligations, rights, and wrongs. I do not quarrel with that. But I do quarrel with this: "Tort law, if its concepts are taken seriously, is not a social or regulatory program that aims to maximize compensation and/or deterrence."⁵³ As I have been arguing, one can certainly take a legal normative order's concepts seriously while not explaining its purpose in terms of them.

Goldberg and Zipursky are in fact clear that argument is needed to get from a descriptive account of a legal order's normative structure to conclusions about real obligations, rights, and wrongs. But rather than a moral argument, they offer an argument to the effect that legal obligations, rights, and wrongs are real, on a par with moral obligations, rights and wrong. As authority for this idea they appeal to H.L.A. Hart. For Hart, as they rightly note, legal and moral obligations are simply two different species of the same genus, that of social rules.

For Hart: "Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten it is great." We then distinguish between moral and legal obligation by pointing to the involvement of certain distinctive kinds of feelings, the role of coercion, the possibility of deliberate change, and so on.⁵⁴ Goldberg and Zipursky rightly emphasize that Hart stresses the "internal aspect" of social rules, by which he means that generally speaking people

⁵² Goldberg and Zipursky 2010, 930.

⁵³ Goldberg and Zipursky 2006, 1579-80

⁵⁴ Hart 1960, 82-91, 167-80

do not respond to enforced rules as one does to a gunman's (or sovereign's) threat; rather, people "accept" the rules. To accept a rule for Hart is to treat it as giving you a reason for action, though the reason why one does so treat it could be more or less anything, from a belief that the rule is morally binding or serves one's self-interest to a mere desire to conform.⁵⁵

Now in this account of moral obligation Hart is talking about what we would call conventional morality. Legal obligations are just like conventional moral obligations. Both are social rules accompanied by a demand for conformity, and so on. This is not, it is clear, an account of real obligations in the sense of actual reasons for action. It is quite clear that, for both the moral and legal case, he offers merely an account of the conditions under which it is proper to say that a certain special kind of rule exists in a society. He does not have an account of "critical morality" or what those with realist or objectivist commitments would think of as actual obligation. It is true that his emphasis on the internal aspect of rules, the fact of acceptance of the rules, at least by many, provides an element of normativity missing from the command theory of law. But that element remains descriptive: people treat the rules as reason giving. Hart never asserts that therefore they are reason-giving.⁵⁶

So the Hartian authority does not help Goldberg and Zipursky's case. If, to establish that the obligations of tort law are real, it is enough to show that there are social rules coupled with an insistent demand for conformity and considerable social pressure, then rules requiring deference from black people to white people in the antebellum and Jim Crow South imposed obligations as real as any moral obligations one might think we have. That would be fine, if all

⁵⁵ Ibid., 203

⁵⁶ For an account of Hart's meta-ethical views, see Raz 1993.

we mean by real is a really existing social rule coupled with social pressure. But that clearly isn't going to do if our aim is to uncover a morally attractive purpose for an area of law.

Goldberg and Zipursky seem to make a different argument in "Torts as Wrongs."⁵⁷ A person asserting a moral rule of conduct, they write, is asserting that the rule should be complied with "*because it is morally sound.*" "The judge, by contrast, may or may not be referring to the moral soundness of the law's injunctionThe putative authority that lies behind the judge's categorization of certain conduct as tortious is the same authority that accompanies all legally justifiable statements within the legal system."⁵⁸ This seems to be a departure from Hart, for whom asserting a moral rule of conduct is just to assert that there is a certain kind of social rule in place, not that it reflects any kind of truth or soundness. And the reference to the authority of the law seems to suggest moral authority—the idea that there are moral reasons to treat legal obligations as reason-giving. This reading is encouraged when the authors write that to say that a tort is a legal wrong "asserts that the act in question is not to be done, and that it merits some form of accountability when done. . . .the statements and principles categorizing torts as such are provided from within a legal system that has authority apart from whether its edicts all prove to be sound."⁵⁹

I may not be right that by "authority," Goldberg and Zipursky mean that there are moral reasons for treating all legal duties as reason-giving. Some other passages suggest that the authority in question is just that of being able to say what legal duties there are.⁶⁰ If this were

⁵⁷ Goldberg and Zipursky 2010

⁵⁸ Ibid., 949

⁵⁹ Ibid., 950

⁶⁰ See the "says who" discussion, *ibid.*, 949. And, on the same page: "To assert that some act is a legal wrong is to assert that it violates a legal directive."

the right interpretation, however, it wouldn't seem to answer their objection that started this whole enquiry, which, we'll recall, was this: "[O]ne cannot characterize torts as moral wrongs without losing the ability to account for large swaths of doctrine, yet one cannot characterize torts as legal wrongs without rendering the concept of "wrong" vacuous (a legal wrong being anything the law defines as a legal wrong)."⁶¹

So I'm going with the first interpretation: Legal wrongs are real wrongs because of the moral authority of the legal system. Now I do not believe that even ideal legal systems have the kind of authority that converts all their obligations, rights, and wrongs, into moral obligations, rights, and wrongs.⁶² But assume I am wrong about that. If that is how legal wrongs get their moral force, the instrumentalist need not object. Such an account of legal obligations, rights, and wrongs tells us nothing at all about why it would be a good idea to have a legal order with that content. It merely tells that if we do have such a legal order, we are morally required to comply. It is entirely compatible with such a position that the point of most of private law has to be understood in terms of general social goals, and that legal obligations, rights, and wrongs internal private law should be regarded as purely formal.

VI Conclusion

I conclude that it is entirely a matter of substantive moral theory whether the obligations, rights, and wrongs of private law are purely formal or not. It is a matter of interpretation, of trying to figure out why it would make good moral sense to have the area of private law in

⁶¹ Goldberg and Zipursky 2010, 947-8

⁶² See Murphy 2018d.

question. To my mind, private law wrongs are overwhelmingly formal; the exceptions are certain tortious wrongs involving violations of natural rights to bodily integrity and individual liberty. This means that for the main business of private law an instrumental account is required. In this paper I have not done more than state my view about that. What I do hope to have shown is that the fact that the internal normative order of private law is everywhere one of obligations, rights, and wrongs, leaves it entirely open what the best account of the point of private law may be. The only thing for it is to argue about whether there really are natural moral proprietary and promissory rights, rights not to be negligently injured, and so on.

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