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Corrective Justice and Corporate Tort Liability

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CORRECTIVE JUSTICE AND CORPORATE TORT LIABILITY

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I. INTRODUCTION

Many late nineteenth-century law teachers thought of the common law as a logical system based upon legal premises that yielded determinate—and correct—legal outcomes. Late twentieth century teachers tend to give a somewhat different account. They see common law decisionmaking as the application of a relatively compelling set of social policies to the resolution of individual cases. Thus, in teaching torts, many of us tell a deceptively simple story. There are three basic goals of tort law, we suggest: First, there is deterrence which requires that we formulate tort law in such a way that the fear of legal liability deters unsafe conduct; second, there is corrective justice which requires that we make a fair adjustment between the parties; and third, there is the goal of redistribution which requires that we find a deep pocket defendant who can either pay for the accident without hardship or can spread the costs among large numbers of people. Under this analysis, controversy in the tort law centers around the general question of whether some or all of these policies are appropriate goals for tort law and around the narrower question of whether some particular outcome accomplishes a particular goal.

In the context of this account, it is obvious that questions of deterrence can be quite complex. At first blush, it may seem that a higher standard of due care is good because it will result in greater precautions. On the other hand, further reflection reveals that high standards may increase precautions beyond efficient levels. Indeed, the issue becomes even more confounded when we consider a host of secondary effects that tort rules have on the activities of others. Beyond these complications, it is obvious—although rarely discussed—

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that deterrence analysis must take into account the corporate form of most defendants. Corporate actors are imperfect agents¹ and liability rules do not necessarily have their desired effects upon real world corporate decisionmaking. To predict real world corporate behavior, it is necessary to determine who the corporate decisionmaker is and what the particular incentives are that govern his or her decisionmaking. If liability judgments are years down the road and the decisionmaker is rewarded for present cost savings, then the general incentives of the tort law may well give way to the more particular motivations of this particular agent. In short, liability rules that promote greater care in the case of individual defendants may or may not have the same effect on corporate defendants. Thus, corporate tort liability poses special problems for deterrence analysis.

My particular job for this symposium is to think about the analogous problem with respect to a corrective justice analysis. I will therefore be concerned with cases where the tort defendant is a corporation and I will consider whether the corporate form of these defendants makes any difference to our judgments about fairness and justice. This is a question that will take us not into the realm of economics, but into the murkier depths of political and moral philosophy.

II. CORRECTIVE JUSTICE

Corrective justice questions can be obscured by the fact that the term "corrective justice" is used in a variety of different ways. In the tort literature the term is often used to refer to the fault theory of tort liability. Under this conception, corrective justice requires the cancellation of wrongful gains and losses.² This may seem to be a plausible formulation, but the criterion of wrongfulness is difficult to apply in concrete cases: What are *wrongful* gains and losses? What particular kinds of wrongfulness are adequate to justify a tort recovery? Further, at this level of generality, the concept of corrective justice may even be tautologous—when we ask whether particular gains and losses violate the norms of corrective justice, what we are often really asking is whether they would constitute an appropriate basis for tort liability.

1. Alison Grey Anderson, *Conflicts of Interest: Efficiency, Fairness and Corporate Structure*, 25 UCLA L. REV. 738, 774-77 (1978).

2. Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits: Part II*, 2 L. & PHIL. 5, 6 (1983).

The term "corrective justice" may also be used in a more substantive way. For example, two of the great Western philosophers—Aristotle and Kant—have used the term to denote a central requirement of moral and political theory. In this context, corrective justice, together with its counterpart distributive justice, represent the goal of a good society. Thus, the term "corrective justice" may be used as a distinctly philosophical term whose substantive normative content must be determined in the context of a particular philosophical theory.

In this article, I will use the term "corrective justice" in its substantive philosophical sense. It is therefore important for me to say a few words about the underlying philosophical frameworks that will supply the context for this discussion. In what follows, I will focus on two particular conceptions of corrective justice. The first is the Kantian account given by Weinrib in *The Idea of Private Law*.³ The second is my own pragmatic account developed in "Tort Law as Corrective Justice."⁴ These two accounts analyze the question of corporate liability somewhat differently and utilizing them both will provide not only a fuller understanding of the problems of corporate liability, but also an instructive contrast between the two ways of thinking about corrective justice.

Perhaps the simplest way to describe the difference between Weinrib's account and my own is to think of it in terms of the difference between a top-down theory and the bottom-up variety.⁵ With a top-down approach, one begins with a systematic normative theory and applies it to the particular problem at hand. Thus, Weinrib's account utilizes Kantian moral theory and its corresponding notion of corrective justice to analyze the various problems of tort liability. By contrast, a bottom-up approach looks at societal practices of corrective justice decisionmaking and tries to articulate their relationship to the concept of corrective justice as it is embodied in the particular culture. The point of the analysis is not so much to provide "answers" to corrective justice "questions" but rather to provide an evaluation of

3. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 84-113 (1995).

4. Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348 (1990).

5. This is not quite the same distinction as the one drawn by Cass R. Sunstein in *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1748 (1995).

the underlying practices together with possible prescriptions for reform.⁶

These two approaches to the problems of corrective justice are elsewhere developed at considerable length,⁷ and I will not attempt to duplicate those discussions here. Nor will I be able, within the confines of this short paper, to develop a rigorous theory of corrective justice and corporate liability. Rather, the point of this Article is to identify fruitful directions along which such a theory could proceed and to identify some of the issues that it will confront. In what follows, I will begin by emphasizing three important points that the two accounts—the Kantian account and the pragmatic account—have in common. I will then proceed to show how each account approaches the problem of corporate liability. Obviously, within the confines of this short paper, I will not be able to deal extensively with many of the questions that are posed by the attempt to see corporate liability in corrective justice terms. Rather, the point of this Article is simply to identify fruitful directions for such an inquiry and to outline some of the issues that such an inquiry will confront.

First, in both accounts, corrective justice is distinctly about justice. This may seem obvious, but some people speak as though it is *apparent justice* rather than *justice itself* that is at the center of corrective justice concerns. Corrective justice is not about satisfying the parties or appeasing the masses. It presupposes the notion that justice and virtue are part of the good life, that they are desirable in themselves, and that they are important aspirations for our political lives. In short, corrective justice presupposes that a good legal system will include provisions for enforcing the demands of justice among those it governs. Thus, just as economic analysis assumes the salience of efficiency, corrective justice accounts are based upon a presumed relationship between the rules of tort liability and our aspirations for a just society.

The second point is obvious, but it is also something that is frequently overlooked. The concept of “wrongful gains and losses” is plainly relative to a theory of right and wrong. Thus, theories of corrective justice are inevitably parasitic upon more general normative theories. Weinrib clearly recognizes this when he provides a Kantian

6. I have developed this point at greater length in my previous article. Wells, *supra* note 4, at 2361-63.

7. *Id.* at 2373-93.

backdrop for his discussion of corrective justice.⁸ Similarly, in other writings, I have talked about corrective justice within the context of pragmatic normative theory.⁹

The final point is that corrective justice deals with local rather than global problems. Corrective justice focuses on an occurrence or transaction that involves specific parties. The dominant consideration in a corrective justice case is the equities that exist *between these parties*; the welfare or status of third parties is not a relevant consideration. This approach, of course, contrasts the economic approach which focuses on maximizing resources not just for the parties, but for society as a whole. Corrective justice inquiries are also local in the sense that they require us to confine ourselves to certain types of considerations. What is relevant in a corrective justice case is not the overall merit of the parties, but rather the moral status of a particular transaction or occurrence.¹⁰

III. THE KANTIAN APPROACH

One of the most detailed and interesting accounts of tort law as corrective justice is that given by Ernest Weinrib. He explicitly recognizes that corrective justice questions must be addressed within the context of a larger normative theory¹¹ and proposes that the proper context is the moral and political theories of Immanuel Kant. In this conception, corrective justice "must refer to some notion of equal membership in the kingdom of ends and the consequent impermissibility of arbitrary self-preference. It must also eschew reference to the aggregation of individual utilities which is the hallmark of utilitarian justification."¹² This means that a gain or loss is wrongful if it results from an act taken without due regard for the autonomy of others. From this, Weinrib argues, a number of consequences follow. First, negligent acts are wrong because the actor has failed to give due regard to the interests and preoccupations of another.¹³ Second, there is no corrective justice basis for imposing strict liability—if due regard is given, then the act is not wrongful even though it may have harmed

8. WEINRIB, *supra* note 3, at 84-113.

9. Wells, *supra* note 4, at 2361-63.

10. WEINRIB, *supra* note 3, at 56-61.

11. Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37, 40 (1983).

12. *Id.* at 40.

13. *Id.* at 52-53.

another.¹⁴ Third, tort law should not utilize subjective standards¹⁵ because such standards arbitrarily invoke one person's viewpoint at the expense of others.¹⁶

Note how a corrective justice theory works for Weinrib. The concept of corrective justice provides a structure for certain types of legal inquiries. Specifically, it requires that we test the justice of an individual tort claim using criteria determined by the wrongfulness of the gains and losses under the auspices of a free standing ethical system. Thus, relative to Weinrib's choice of a Kantian moral theory, any act which proceeds from privileging one's own interest or viewpoint over that of others is wrongful, and corrective justice requires the reversal of any gains and losses that are caused by such an act. It is within this context that Weinrib considers the problem of corporate liability.

The issue of corporate liability is closely related to the doctrine of *respondeat superior*. The doctrine of *respondeat superior* permits a recovery against an employer for the negligent acts of the employee. Thus, the recovery is based upon fault (the negligence) of the employee, but it is directed towards the employer who may or may not have been personally negligent in the selection or supervision of the employee. The resulting recoveries have always been problematic. Weinrib asks the question:

This doctrine, which makes defendants pay for wrongs they have not committed, has been the subject of much speculation for more than a century. So far as the employer is concerned, the liability can be regarded as strict, because the exercise of reasonable care by the employer to prevent the accident is no defense. Is such liability, which has proven itself to be difficult for any theory, consistent with corrective justice?¹⁷

To which he replies:

Since corrective justice is the normative relationship of sufferer and doer, *respondeat superior* fits into corrective justice only if the employer can, in some sense, be regarded as a doer of the harm. Corrective justice requires us to think that the employee at fault is so closely associated with the employer that responsibility for the former's acts can be imputed to the latter.¹⁸

14. *Id.* at 57-60.

15. The reasonable person test is an objective and not a subjective standard. This means that defendants are held to the standard of care exercised by a reasonable person and not the best judgment of the individual defendant. *Vaughan v. Menlove*, 132 Eng. Rep. 490 (C.P. 1837).

16. Weinrib, *supra* note 11, at 50-52.

17. WEINRIB, *supra* note 3, at 185.

18. *Id.* at 186.

From this, Weinrib concludes that the doctrine of *respondeat superior* is not at odds with the requirements of corrective justice. His answer to the dilemma is that the doctrine sets out two specific circumstances that are jointly sufficient to attribute the wrongful acts of the employee to the employer: (1) the employee must be a "servant" and not an "independent contractor,"¹⁹ and (2) the acts must be committed within the scope of employment. Thus, he states: "Where the faulty actor is sufficiently integrated into the enterprise and where the faulty act is sufficiently close to the assigned task, the law constructs a more inclusive legal persona, the employer-acting-through-the-employee, to whom responsibility can be ascribed."²⁰

Weinrib's analysis of *respondeat superior* gets us half way to the question of corporate liability. If Weinrib is right, then there is no corrective justice problem with vicarious liability for corporate employers. But this conclusion does not speak specifically to the liability of corporate defendants.

The troublesome nature of corporate liability does not merely stem from the fact that the corporation itself is not the actual tortfeasor. For an act to be wrongful, it must be done by a moral agent. Thus, for example, if a stone falls on someone's head, the stone is neither legally nor morally responsible for the resulting injury. Are corporations morally neutral like a stone or do they resemble natural persons by being the sort of thing to which moral and legal responsibility can be ascribed?

It is important to note that this question of moral agency poses a serious problem for a Kantian theory like Weinrib's. In Kantian theory, no act can be condemned as immoral without reference to the reason and autonomy of the actor. Thus, the notion of moral agency is central and it cannot be ascribed in the absence of human reason and autonomy. In short, it follows from Kantian morality that gains are wrongful only when they result from human acts and this in turn requires that corporate liability be based upon a reductionist theory of human personality. It is not simply a question of whether the employer and the employee are closely enough associated that the act of the one can be attributed to the other. It is also a question of whether the moral status of the human agent can be attributed to the corporate

19. I put these terms in scare quotes because they are terms of art under tort law. See W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 501 and § 71, at 509 (5th ed. 1984).

20. WEINRIB, *supra* note 3, at 187.

principal. In Kantian terms, a corporate act may only be seen as wrongful if we attribute to the corporation the autonomy and the capability for reason that belong to its human owners and employees.

The problem that corporate liability poses for Weinrib is as follows: On the one hand, the fact that corporations are a dominant feature of modern economic life means that there are a whole host of policy reasons for making them liable for harms that are caused by their agents or from which the corporations may have profited. The law recognizes these policy reasons by creating the fiction that corporations are legal persons and by allowing them to be sued and held liable in the same way that natural persons are sued and held liable. On the other hand, if we systematically reduce questions of legal liability to questions of moral accountability then this "host of policy reasons" ceases to be salient. What matters with respect to a systematic moral system such as Kant's is not informal considerations of convenience and fairness, but rather the more formal requirements of moral judgment. A Kantian analysis requires us to tackle the difficult problem of corporate moral agency yet this does not seem to be the true location of the problem. Even if it were clear that corporations were not true moral agents, I doubt that we would abolish the notion of corporate liability. Ultimately, the problem with a formal account of corrective justice is that it does not conform to the practical realities of legal arrangements. The law must be reflexive and responsible to the needs of human life, and thus its substance cannot be reduced to the inflexible requirements of an a priori moral system.

Note that the above difficulty is not the inevitable result of introducing moral considerations into the tort law. There is nothing in this argument that prevents us from employing moral norms and judgments in applying tort liability. The difficulty only arises when we attempt to specify the legal content of corrective justice by applying a rigid moral system in a top-down fashion. Such an application inevitably yields a rigid—and therefore unrealistic—approach to the problem of corrective justice.

IV. THE PRAGMATIC APPROACH

In contrast to the top-down method of the Kantian approach, a pragmatic analysis flows from a bottom-up application of pragmatic normative theory to the problem of corrective justice. A pragmatic normative theory does not begin with abstract principles. Instead, it begins with a painstaking examination of real world practices. Thus,

with respect to corrective justice, the analysis starts with a description of the practices which are used to adjudicate corrective justice claims. It then proceeds to consider these practices in a critical light. Critical evaluation does not move in a straight line from the articulation of general normative principles to the assessment of a given case. Rather it loops through several rounds of inquiry: How can these practices be best described? What forms of argument might justify them? What consequences do these forms of justification have for the reform of the underlying practices? What effect will they have on our manner of justification?

The general features of tort adjudication are well known. When not settled, cases are generally tried in courts of law by advocates that represent each of the parties. Unless waived, each party has a right to submit their claims to a jury, and generally this means the jury decides all factual disputes and assesses the defendant's conduct in accordance with relatively vague standards of liability. I have argued elsewhere that these adjudicatory practices may be justified by their deeply embedded status in American political life, by their use of community standards for the basis for decision, and by their use of consensus decisionmaking as a way of ensuring that cases are understood in the context of several different perspectives and viewpoints.²¹ My purpose here, however, is not to reexamine these justificatory considerations. Rather, it is to see what the substance of contemporary jury decision-making tells us about the corrective justice aspects of corporate liability.

When we approach the issue in this fashion, it is obvious that we must begin with empirical observations. What are the trends with respect to corporate liability? From casual inspection of the pages of *The Wall Street Journal*, one might conclude that the following three trends obtain: (1) that courts freely assess damages against corporations on the basis of vicarious liability, (2) that juries award more generous verdicts against corporations than they do against individual litigants, and (3) that there are frequent and large impositions of punitive damages against corporate defendants.²² As a matter of substantive law and actual practice, it is pretty clear that the first of these

21. Wells, *supra* note 4, at 2393-2410.

22. See, e.g., Alex Kozinski, *The Case of Punitive Damages v. Democracy*, WALL ST. J., Jan. 19, 1995, at A18; Amy Dockser Marcus, *Juries Rule Against "Tort Reform" With Huge Awards*, WALL ST. J., Feb. 9, 1990, at B1; Kevin Pritchett, *Car-Rental Firms Decry Vicarious Blame*, WALL ST. J., Jan. 14, 1992, at B1; Jeffery A. Tannenbaum, *Franchisers Find Chain's Errors Are Costly*, WALL ST. J., Feb. 3, 1994, at B2.

statements is true. The other two are less certain—it would be helpful to have some hard information.²³ Nevertheless, for the sake of demonstration, I shall take these statements as true and consider whether the trend they purport to describe is actually a positive development. Are these “community standards” expressive of our best aspirations for corrective justice?”

One way to think about this question is to consider it in the context of contemporary understandings about the role and responsibility of business corporations. Indeed, there is some considerable ambivalence in public discussions about this topic. On the one hand, corporate responsibility is seen as a good thing. Corporations often describe themselves as good neighbors and responsible members of the community. They have budgets for charitable contributions and, in pursuing good will, will sometimes do more than the law requires by way of protecting their customers and employees. On the other hand, corporations and their advocates are quick to point out that corporations are really only responsible to their shareholders. Accordingly, profit maximization should be the sole concern of corporate managers. During the past twenty years, the latter version—the profit maximization model—has gained momentum and it seems to me that its ascendancy is relevant to the question of why we do—or should—hold corporations to increasingly tough standards of tort liability. Tort law has always sought to walk a fine line between making people pay for the harms they cause and not, at the same time, placing an undue burden on their pursuit of human purposes. Corporations are not human agents. Monetary gain for them is not a means to an end but an ultimate end for all their activity; their risks are motivated—and possibly should be motivated—by a rational calculation of the bottom line. Thus, it makes sense to accord their need for unburdened activity less deference than we extend to human agents whose activities are more often motivated by needs for achievement, productivity, fellowship and family life. These non-monetary goals are not readily translated into economic terms and, for that reason, the tort system might well be justified in taxing them less severely with the cost of accidents.

A second thing to consider is the effect of large corporate damage awards on the economic life of the community. In the last paragraph, I assumed that corporations could be treated as isolated actors who

23. This is especially true because some empirical studies have found that complaints about the “generosity” of the tort system are somewhat overstated.

are motivated only by the accumulation of wealth. If they retained all the wealth they accumulated—serving only as creators of investment capital—then the argument above suggests that tort liability rules could take this into account in imposing greater liability on corporate defendants. But it also makes sense to think of corporations as conduits rather than actors. As conduits, they seek to maximize wealth not merely for accumulation, but also for the benefit of human actors and their human purposes. Thus, it is relevant to ask who or what is ultimately taxed by tort recoveries—corporate accumulations, customers, employees, creditors or stockholders? A realistic answer to this question would certainly further debate on whether it is desirable from a corrective justice point of view to impose high standards of corporate accountability.

A final thing to consider is the desirability of punitive damage awards. From one point of view, punitive damage awards may seem to be a last ditch effort to bring corporate risk-taking under control. The deterrence analysis suggests that an entity whose sole responsibility is to maximize profits may have little incentive to maintain reasonable levels of safety if damage awards are uncertain and far enough in the future to be significantly discounted. Thus, the point of these damages is to serve as an incentive for private plaintiffs to try to force internalization of the costs of accidents onto the corporate actors who cause them.²⁴ There is, however, a lottery aspect to punitive damages that is troubling in the context of corrective justice. How is corrective justice served if some victims are excessively compensated while others are left to bear their losses alone?

This pragmatic analysis of corporate liability looks very different from the traditional economic or moral analyses of tort law. Certainly, the foregoing analysis is not sustained enough to give any decisive answers in this area. Nevertheless, it is suggestive of the kind of normative inquiry that might be effective. The inquiry would proceed something like this: First, we would study actual jury decisionmaking to see if we could discern certain patterns and trends with respect to corporate defendants; second, we would try to understand the reasons for these trends (we might ask, for example, why it is that juries are making larger awards against corporate defendants); third, we would consider what arguments might be offered to justify these trends—judging them “good” or “bad” or “good in some circumstances and bad in others.” Thus, unlike the top-down formal approach with its

24. See Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 46-52 (1972).

rigid application of an a priori moral theory, a pragmatic approach entails an ongoing dialectic between real world practical considerations of moral theory.

V. CONCLUSION

This Article has focused upon a set of questions that are not normally posed in contemporary tort theory. I have proceeded on the assumption that the artificial nature of the corporate persona is something to be taken seriously within the context of corrective justice concerns. I believe that this is true whether we approach these concerns from the top-down and look at them from the standpoint of moral agency, or whether we approach them from the bottom-up and consider them in terms of their practical effects on contemporary life. In closing, I would like to say a little about why I think this is an important move for corrective justice analysis to make.

The economic analysis of tort law has gained considerable momentum in the last twenty-five years. Indeed, it is a very powerful form of analysis so long as we are comfortable with its underlying assumptions. If all human wants, needs and aspirations are commodifiable in monetary terms then an economic approach will yield a powerful descriptive framework within which normative questions can be settled. To the extent that we entertain doubts about this assumption,²⁵ the analysis becomes interesting and provocative, but not necessarily decisive. Similarly, with the fiction that corporations can be treated as legal persons, so long as the fiction is taken as truth, the problem of corporate liability can be easily handled. It reduces itself, as Weinrib has shown, to the abstract problem of attributing an agent's conduct to its principal. But if the fiction is discounted, a whole new set of questions becomes salient: What are the practical consequences of corporate liability? What reasons are there for treating corporate defendants differently from natural persons? What reasons of fairness and convenience justify the choice to hold corporate defendants to higher standards? Thus it would seem that, whatever one might think of the more philosophical debate between pragmatism and Kantian theory, the pragmatic approach has the advantage of locating the controversy over corporate liability in a non-fictional world and addressing it in terms that are both practical and real.

25. See generally Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (arguing that inalienable rights should be evaluated based on "our best current understanding of the concept of flourishing," rather than an economic analysis).