November, 2020

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The Oxford Handbook of the New Private Law
Edited by Andrew S. Gold, John C. P. Goldberg, Daniel B. Kelly, Emily Sherwin, and Henry E. Smith

Print Publication Date: Nov 2020 Subject: Law, Jurisprudence and Philosophy of Law
Online Publication Date: Nov 2020 DOI: 10.1093/oxfordhb/9780190919665.013.3

Abstract and Keywords

This chapter discusses the concept of corrective justice, which has been at the heart of much recent scholarship on the law of torts in particular and private law more generally. Notwithstanding its familiarity, ancient origin, and apparent universal acceptance, the concept of corrective justice has produced a remarkable number of distinct conceptions and has stirred up major controversies. For at least a generation, corrective justice stood at the center of the argument between contending conceptions of tort. For legal economists, corrective justice was an aspect of the institution of tort law. It was part of the data that needed to be explained and justified in economic terms. Corrective justice was subordinate. It was a feature of—not a justification for—the institution of tort law. For legal philosophers Ernest Weinrib and Jules Coleman—who championed corrective justice as the countertheory to economic analysis—corrective justice was sovereign. It was both instantiated in the institution of tort law and the justification for the institution. It was incipiently normative. And the justification it supplied was formal, not instrumental. The chapter explains and analyzes corrective justice in light of this history, in the hope that this will set the stage for tort theory to move forward.

Keywords: corrective justice, tort law, private law, tort, economic analysis, tort theory, Ernest Weinrib, Jules Coleman

THE concept of corrective justice has been at the heart of much recent scholarship on the law of torts in particular and private law more generally. On the face of it, this is both surprising and unsurprising. Unsurprising, because the term “corrective justice” is at least as old as Aristotle and private law is its natural habitat. Competing conceptions of private law remedies are generally thought to share the premise that the “primary” role of such remedies “is [to] restor[e] the plaintiff to his rightful position.”[1] Surprising, because everyday examples suggest that corrective justice is common sense—not an opaque concept in need of theoretical clarification. Suppose I walk past your stand at a farmers market and see a mouthwatering array of fresh fruit. I pick up a basket of raspberries and consume them on the spot—they’re delicious. Suddenly, you appear and make it clear that you are the owner of the farm stand. You had run off on an errand, and I had mistakenly

thought your berries were just there for the taking—a gift to passersby. You let me know that the berries I've just eaten were only available for purchase. My thinking otherwise was silly and mistaken, but not malicious. I now owe you an obligation of reparation. I've taken and consumed something that belonged to you. I am unable to return the raspberries, and I owe you recompense for the loss that I've inflicted on you, at least if you choose to stand on your rights. That *I* am the person who must make reparation seems as evident as the fact that *reparation* is what I owe to you. This paired obligation and relation is what Aristotle called "corrective justice"[2] and Locke called the obligation of "reparation."[3] It is intuitive that this kind of obligation is fundamental not just to tort but to private law in general. And so it is.

Notwithstanding its familiarity, ancient origin, and apparent universal acceptance, the concept of corrective justice has spawned a remarkable number of distinct (p. 38) conceptions and has stirred up major controversies. For at least a generation, corrective justice stood at the center of the argument between contending conceptions of tort. For legal economists, corrective justice was an aspect of the institution of tort law. It was part of the data that needed to be explained and justified in economic terms. Corrective justice was *subordinate*. It was a feature of—not a justification for—the institution of tort law. For legal philosophers Ernest Weinrib and Jules Coleman—who championed corrective justice as the countertheory to economic analysis—corrective justice was *sovereign*. It was both instantiated in the institution of tort law and the justification for the institution. It was incipiently normative. And the justification it supplied was formal, not instrumental. The aim of this chapter is to explain and analyze corrective justice in light of this history, in the hope that this will set the stage for tort theory to move forward. What this history teaches, I think, is that tort law's remedial norms are parasitic on its primary ones. Tort theory should therefore attend more to tort law's primary norms.

I. Theorizing Corrective Justice

For the tort theorists who have marched beneath the banner of corrective justice in the past few decades, corrective justice is defined in contradistinction to distributive justice and in terms of a relationship between the parties. Distributive justice has to do with the justice of holdings, with the distribution of wealth, income, rights, and property. Persons who participate in the same institutions of distributive justice have their claims against one another mediated by those institutions. Claims in distributive justice are not direct claims on other persons. We may have a claim in distributive justice to some particular share of wealth and income, but we do not have a claim in distributive justice against another private person for that share. Corrective justice, by contrast, involves the relationship between the parties to a claim. It requires a "wrong" or a "rights-violation." That wrong must relate the parties directly to one another, so that it gives rise to an obligation of reparation owed by the wrongdoer to the victim. "Corrective justice," Ernest Weinrib tells us, "treats the wrong, and transfer of resources that undoes it, as a single nexus of activity and passivity where actor and victim are defined in relation to each other." "Cor-

rective justice joins the parties directly, through the harm that one of them inflicts on the other." It involves "the correlativity of doing and suffering harm."[4]

Weinrib's emphasis on the "unity of doing and suffering"—with the "doing" being the infliction of the suffering by violating the "abstract equality of free purposive beings (p. 39) under the Kantian conception of right"[5]—articulates a particular conception of corrective justice. The general concept is broader. Richard Epstein's theory of tort also marches under the banner of corrective justice, but it articulates a form of liability where cause is central and "wrong" is attenuated.[6] George Fletcher, for his part, applies the term to a theory of liability for nonreciprocal risk imposition.[7] Catherine Wells argues that it involves providing an appropriate process for determining whether the defendant is responsible for the plaintiff's loss.[8] Jules Coleman asserts that the principle of corrective justice "states that individuals who are responsible for the wrongful losses of others have a duty to repair [those] losses."[9] Arthur Ripstein identifies corrective justice with "the unity of right and remedy" and with the fact that both must be understood relationally.[10] Scott Hershovitz explains the gist of corrective justice theory by remarking that "according to corrective justice theorists, tort law enforces duties of repair that arise in response to wrongdoing."[11]

These conceptions differ in diverse ways. Jules Coleman, for example, identifies corrective justice with wrongful losses. Others identify corrective justice with "wrongs" instead of "wrongful losses" or with "allocation back."[12] These distinctions make a difference. For example, theories which identify corrective justice with "wrongs" instead of with "wrongful losses" have an easier time encompassing violations of rights that do not involve losses (e.g., some trespasses and batteries). Identifying corrective justice with "allocation back" includes "gains-based" measures of recovery (e.g., for unjust enrichment) within corrective justice. Of course, broadening the scope of corrective justice may also diminish its explanatory power by casting the concept as more formal and less substantive. For our purposes, these differences and the issues they raise can be put to one side. The important division is the division between theories that take corrective justice to be a subordinate aspect of tort law and those that take it to be the paramount principle of the legal field. This distinction captures the central issue contested (p. 40) by economic theories of tort and their philosophical challengers over the course of the past several decades.

On a subordinate account, corrective justice is an aspect of tort—perhaps even a necessary and defining feature of the institution—but it does not play a fundamental role in explaining or justifying tort law. Instead, the justifications for tort law—say, minimizing the combined costs of preventing and paying for accidents—call for corrective justice as a feature of the institution. Accounts which treat corrective justice as the sovereign principle of tort work the other way around. Rather than being required by other, more basic, justifications for tort, corrective justice justifies tort law as an institution and shapes its design. If corrective justice is the fundamental principle on which tort law rests and if, as Jules Coleman argues, corrective justice requires repairing wrongful losses, then tort liability must attach to losses generated by *wrongful conduct*.[13] Justice governs claims that persons have against one another, and one person has a claim in corrective justice

against another when the wrongful conduct of the latter has inflicted a loss on the former. The wrongfulness of the conduct makes the loss it inflicts a wrongful one. On this account, then, corrective justice is an independent principle to which the law of torts answers, and it imposes significant constraints on tort law's primary norms. Because corrective justice requires that those responsible for wrongful losses repair them, if tort law does corrective justice, its primary norms must proscribe conduct which begets such losses.

A. Corrective Justice as Subordinate

An oversimplified version of a libertarian theory of tort is useful for understanding how corrective justice might be a subordinate principle of justice in tort. Suppose that everyone has a natural right to liberty and that, therefore, "[a] line (hyper-plane) circumscribes an area in moral space around an individual."[14] Accidental harms constitute impermissible crossings of this line and thus violate the victim's natural right to the liberty and integrity of her person, unless consent to the risk imposition that resulted in the crossing has been given in advance. "Voluntary consent opens the border for crossings."[15] Absent such consent, the infliction of accidental injury constitutes a wrong. When a wrong has been done, the person whose rights were violated acquires a derivative right to redress against the person who violated her rights. These rights to redress are claims of corrective justice. When we honor them by requiring the wrongdoer to (p. 41) rectify the harm done by her violation of the victim's right, we do justice in the specific form of corrective justice. The work of determining when a boundary has been wrongly crossed and when, therefore, a rights-violation must be repaired, is done by principles of distributive justice. Libertarian principles of *distributive* justice specify initial entitlements and a procedure for altering them. Initially, each person has a natural right to liberty encompassing the physical integrity of her person. The boundaries that define and protect that right may only be altered by consensual agreement. When consent has not been given, boundary crossings are not permissible and harm that results from them is wrongly inflicted. Corrective justice comes into play because *principles of distributive justice* identify some boundary-crossings as unjust. Libertarian principles of distributive justice and permissible transfer do the real work. They determine what people are and are not entitled to. Corrective justice is the handmaiden of distributive justice; it undoes illegitimate alterations of entitlements.

Many different accounts of tort liability may incorporate corrective justice as a subordinate principle of tort justice. Richard Epstein's theory of tort liability, for example, incorporates corrective justice in this subordinate sense, but rests (in its original formulation) on a natural right to liberty.[16] That right is violated when harms are caused in various paradigmatic ways. Wrongful conduct—fault—is not necessary. George Fletcher's influential fairness conception of tort law also incorporates corrective justice in a subordinate way. Fletcher's conception takes a Rawlsian view of tort as a realm of equal freedom and so founds tort on a conception of distributively just risk imposition.[17] Reciprocity of risk identifies a fair distribution of risks of accidental harm and guides the substantive criteria of tort liability—determining the choice between negligence and strict liability, for in-

stance. Within Fletcher's theory, corrective justice operates in the same subordinate way that it does in our stylized libertarian theory. It restores a distributively just state of affairs by requiring reparation for harm done when tortious harms issue from distributively unfair risk impositions.

B. Corrective Justice as Sovereign

For theorists like Coleman and Weinrib, corrective justice is the *sovereign* principle of tort law. Coleman claims that "tort law is best explained by corrective justice" because "at its core tort law seeks to repair wrongful losses."[18] For this claim to be significant, "wrongful losses" must be a concept which does some work and which has some constraining content. It must identify a class of losses to which a duty of repair properly attaches. Coleman thus argues that corrective justice is concerned with responsibility for wrongful losses, harms, or rights-violations. Losses are wrongful when they are (p. 42) attributable to wrongful conduct.[19] Such conduct gives rise to liability in corrective *justice* because it is *wrongful*, not because it disrupts a preexisting pattern of just holdings. Disruptions that are not wrongful do not give rise to claims of corrective justice. Corrective justice is thus separated from distributive justice, and the criteria of wrongfulness that corrective justice places at the center of tort law do the work of determining when liability in tort is justified.

The proposition that corrective justice involves both the infliction of harm or the violation of a right *and conduct that is in some way wrong* establishes the *independence* of corrective justice from distributive justice, but it does not establish the *importance* of corrective justice, or show that it explains the law of torts. Richard Posner drove these points home in an important paper. Posner argued that "[o]nce the concept of corrective justice is given its correct Aristotelian meaning, it becomes possible to show that it is not only compatible with, but required by, the economic theory of law."[20] Starting from the premise that corrective justice in its robust sense requires wrongful conduct, Posner argued first that economics could supply the requisite standard of conduct, and second, that an economic conception of tort *required* corrective justice:

> [For an economic theory,] law is a means of bringing about an efficient (in the sense of wealth-maximizing) allocation of resources by correcting externalities and other distortions in the market's allocation of resources. The idea of rectification in the Aristotelian sense is implicit in this theory. If A fails to take precautions that would cost less than their expected benefits in accident avoidance, thus causing an accident in which B is injured, and nothing is done to rectify this wrong, the concept of justice as efficiency will be violated. … Since A does not bear the cost (or the full cost) of his careless behavior, he will have no incentive to take precautions in the future, and there will be more accidents than is optimal. Since B receives no compensation for his injury, he may be induced to adopt in the future precautions which by hypothesis … are more costly than the precautions that A failed to take.[21]

Corrective justice can, in short, take a standard of efficient precaution as the criterion of wrongful conduct that it requires. For its part, economics requires that corrective justice be done if tort is to induce efficient precautions.

When corrective justice is conceived of as compatible with economics in this way, however, it is neither sovereign nor justificatory. Corrective justice is a feature of tort law: it helps to constitute the institution that we have and it therefore requires economic explanation and justification. It is not a justification but an aspect of tort law that needs to be justified. For Posner, the principle of wealth maximization supplies the necessary (p. 43) justification. When tort law is a society's principal mechanism for addressing accidents—and is otherwise efficient—corrective justice is necessary to ensure that the law of torts as a whole induces efficient precautions. By accepting the proposition that corrective justice involves not just the restoration of a prior, distributively just regime—but liability for wrongful conduct—Posner's account both incorporates a robust idea of corrective justice and makes corrective justice a subordinate principle of tort liability. The reasons that we have for corrective justice reduce to the reasons that we have for deploying tort law in the first place and, for Posner, those are reasons of efficiency. Wrongful losses—meaning losses inflicted by inefficient conduct—must be shifted back onto the parties responsible for them, or else neither injurers nor victims will have the right incentives. Posner's theory pours the substance of efficiency into the form of corrective justice.

This union is surprising. Corrective justice and the economic theory of tort appear to be rival conceptions. The economic conception of tort law is forward-looking, and it takes as its touchstone the attainment of a state of the world where wealth is maximized.[22] The rights and duties of plaintiffs and defendants with respect to one another matter only insofar as they may be deployed as instruments to the realization of this end. Corrective justice theory, by contrast, is backward-looking. It aims to repair past wrongs. It places the rights and wrongs of plaintiffs and defendants at the very center of its account and focuses on who has done what to whom. Tort is about the obligations of wrongdoers to repair the wrongful losses that they have inflicted on their victims. The total amount of value in various states of the world is immaterial.[23]

C. Corrective Justice as a Practice of Principle

Tort theorists who march under the banner of corrective justice reject the conclusion that it is merely a feature of tort law to be explained and justified, claiming that corrective justice is the principle that does the explaining and justifying. "Corrective justice," Coleman asserts, "expresses the principle that holds together and makes sense of tort law."[24] The principle that wrongful losses should be repaired is a *morally* authoritative norm in its own right. Within the domain of tort law that principle is sovereign, not subordinate. The economic theory of tort is both the target of, and the foil for, the claim that corrective justice is the master principle of tort law. The nerve of the argument is that the economic theory of tort is instrumental, and instrumentalism does and must look forward. Correc-

tive justice, however, does and must look backward. Consequently, it cannot be adequately explained by instrumentalism.

(p. 44) For Coleman and Weinrib, the relation between tort and corrective justice is one of instantiation. For Weinrib, tort adjudication appears to be an entirely autonomous institution. Its principles are given by the form of tort law—as embodied in the traditional, bipolar (P v. D) tort lawsuit—and they neither need nor have any further justification.[25] For Coleman, the principle of corrective justice and the practice it sustains can be explained and justified by reference to more abstract and fundamental principles, such as the principle that the costs of life's misfortune should be allocated fairly.[26] Tort adjudication cannot, however, be conceived of as a means to an independently valuable end. Instead, it must be understood to enforce claims that persons have the standing to assert against one another in their own names. On Coleman's account, because corrective justice rests on the sound moral *principle* that wrongfully inflicted losses should be repaired, it is not an instrument for the realization of an end but the specification of a morally authoritative principle of responsibility. It is *fair* to hold people responsible for repairing the wrongful losses that they inflict on others. This gives corrective justice a dual relation to tort practice. On the one hand, the principle of corrective justice grounds the practice. On the other hand, the practice puts flesh on the bare bones of the principle.[27]

Wrongful exercises of human agency, correlativity, and repair lie at the core of both tort law and corrective justice.[28] That tort law is about agency is evident enough to the pretheoretic eye, but obscured by the theoretical apparatus of economics, with its emphasis on achieving states of the world where value is maximized. The thesis that losses are more easily borne when they are widely dispersed, for example, gives us reason to be as concerned with concentrated losses caused by natural disasters as with concentrated losses caused by human malfeasance. Yet tort law denies this equivalence: it is about malfeasance, not misfortune.[29] In this respect, the law of tort taps into deep moral sentiments, constitutive of the sense of justice itself. We have reason to resent mistreatment by others, but it is anthropomorphic nonsense to complain of mistreatment by (p. 45) Mother Nature.[30] Wrongfulness explains why the distinction between malfeasance and misfortune is intuitively basic. The wrongfulness of someone's action is a reason to hold that person responsible for a loss that conduct inflicts on someone else. Last, wrongful conduct figures very prominently in the law of torts itself. Both intentional and negligent torts involve wrongful conduct.

Correlativity is central to tort because "[t]he claims of corrective justice are limited … to parties who bear some normatively important relationship to one another. A person does not … have a claim in corrective justice to repair in the air, against no one in particular. It is a claim against someone in particular."[31] The bilateral (or bipolar) structure of tort adjudication, which itself mirrors the underlying interaction of a tortious wrong, is the institutional incarnation of correlativity. For Coleman (and also for Weinrib), the bilateral relationship of plaintiff and defendant is "the most basic relationship in our actual institution of tort law."[32] Tort law's core is represented by case-by-case adjudication in which particular victims seek redress for certain losses from those whom they claim are

responsible.[33] Having a wronged plaintiff seek reparation from the wrongdoer who has injured him is the most natural way to give institutional expression to the principle that persons who are responsible for wrongly injuring others ought to repair the harm they have done.[34]

Here the payoff from taking the formal structure of tort law seriously becomes visible. Coleman and Weinrib offer a convincing explanation for the form of a tort lawsuit, whereas economic analysis offers an implausible one. Tort adjudication presents itself as a backward-looking practice concerned with repairing harm wrongly done. Economists take it to be a forward-looking regulatory mechanism concerned with minimizing the combined costs of accidents and their prevention going forward. Tort adjudication's true target is not wrongdoers but "cheapest cost avoiders"—parties best positioned to minimize *future* accident costs. Because it is only contingently the case that the particular defendants responsible for the injuries before the court are the cheapest cost-avoiders with respect to the general classes into which those injuries fall, the orthodox economic (p. 46) analysis of tort has to work hard to explain why plaintiffs always have rights against and only against those who have wronged them. Economic analysis explains this by asserting that the law of tort enlists plaintiffs as private attorney generals and holds wrongdoers liable in order to induce efficient accident prevention going forward. Coleman and Weinrib rightly find this hypothesis strained and unconvincing. Coleman writes:

> In the absence of any explanatory theory, our intuition is that a victim is entitled to sue *because* he makes a cognizable claim that the injurer has wrongfully harmed him; that the victim must present arguments in support of that claim *because* the harm and the wrong are recognized by the law as pertinent to the outcome of the lawsuit; and that if the victim's claims are vindicated, he recovers against his injurer because the law recognizes wrongful harm as grounds for such recovery. The economic theory tells us, however, that each of these intuitions is wrong; that the apparently transparent purpose of the law of tort in each case is not the real purpose; and that the real purpose, efficiency, has nothing at all to do with the fact that the injurer may have wrongfully harmed the victim. If the fact of the harm has any significance at all, it is epistemic. … [T]he economic analysis asserts that in the absence of search, administrative, and other transaction costs, these structural features of tort law would be incomprehensible.[35]

The implausibility of the economic account of tort adjudication is compounded by the weakness of its explanation of the central substantive concepts of tort law—duty, "harm, cause, repair, fault and the like."[36] These concepts hang together to articulate a relationship of right and responsibility between victim and injurer.[37] Orthodox economic analysis, however, dismisses these concepts as a kind of false consciousness. It denies that they operate as *reasons* for the imposition of liability in tort. For the law of negligence, breach of duty is a *reason* for the imposition of liability. Duty specifies an obligatory standard of conduct. In conjunction with the other elements of a negligence claim, failure to conform to that standard of conduct is a reason to hold a defendant responsible for harm done to a victim by that failure. Tort law looks backward toward the past interactions of the parties

in order to determine if the defendant should be held responsible for the plaintiff's injury. The basic concepts of negligence law are the ground of liability for negligence. Defendants are liable to plaintiffs not only *when* they breach duties owed to them but *because* they breach those duties. A secondary obligation to repair a tortiously inflicted injury arises from and *because of* a failure to comply with a primary obligation of harm avoidance.

For orthodox economic analysis, liability is not imposed because the defendant breached a duty of care and was the actual and proximate cause of harm done. Liability is imposed when and because we rightly conclude that the imposition of liability for past (p. 47) harm will induce optimal prevention of accidental harm going forward. For economics, the concepts of duty, breach, actual and proximate cause, and harm are not the real grounds of liability.[38] Judges say that they are imposing liability in negligence because duty, breach, actual and proximate cause, and injury are present, but standard economic analysis takes them to be justified in what they are doing only if they are engaged in a transaction cost-minimizing search for cheapest cost-avoiders. Duty, breach, actual and proximate cause, and injury are not reasons for the imposition of liability. They are evidentiary markers that do a respectable job of identifying cheapest cost-avoiders going forward.

Sovereign corrective justice theory thus argues persuasively that the basic structural features and main concepts of tort adjudication instantiate the principle of corrective justice. The bilateral form of the lawsuit tracks the substantive responsibility of a wrongdoer for the wrongful losses that she has inflicted. The retrospective character of tort adjudication reflects the fact that the wrongful infliction of harm is the reason why tortfeasors must repair the losses that they have inflicted. Duty and breach articulate criteria of wrongfulness. If tort regularly enjoined repair of losses attributable to innocent conduct, it could not be said that the law of tort institutes the principle "that individuals who are responsible for the wrongful losses of others have a duty to repair them."[39] Causation connects the wrongdoer to the loss wrongfully suffered by the victim and so plays an essential role in establishing the special responsibility of the wrongdoer for that loss. Corrective justice thus gives each of the elements of a typical tort suit a natural, unforced justification. The institutional practice of tort law fleshes out the abstract moral principle of corrective justice.[40]

II. Turning Tort Law Upside Down

It is commonplace to distinguish between primary (or substantive) responsibilities and secondary (or remedial) ones.[41] In tort, primary responsibilities are grounded in the rights of those they protect and the responsibilities that they articulate are diverse: to avoid harming others in various ways, to avoid violating certain of their rights even when no harm is thereby done, and in certain circumstances, to repair harm reasonably inflicted.[42] Remedial responsibilities are responsibilities of repair, triggered by the (p. 48) breach of various primary obligations. When the distinction between these two kinds or responsibilities is marked, it is natural to think that primary responsibilities are, well, pri-

mary—that is, antecedent to and more important than secondary ones. In part, the priority is logical. Remedial responsibilities arise out of breach of antecedent primary duties.[43] But the priority of primary responsibilities is also normative.[44] Remedial responsibilities are second-best ways of complying with obligations that are best honored by discharging primary responsibilities.

Secondary, remedial responsibilities express the persisting normative pull of undischarged primary obligations. Remedies are, as Arthur Ripstein says, "the continuation of the right that was violated."[45] Breach of a primary obligation does not relieve the breaching party of her responsibility to comply with that obligation; it simply makes it impossible for the breaching party to comply fully with that obligation. That conjunction of continuing obligation and factual impossibility requires doing the next-best thing: repair the harm wrongly done. Breach of a primary obligation is the circumstance that calls corrective justice into play, and the undischarged primary obligation is the reason why corrective justice must be done. Right and reparation form a unity within which right has priority. The first-best way of complying with tort law's obligations is not to harm anyone or violate their rights in ways that tort law proscribes. Repairing harm done by failing to fulfill that responsibility is the next-best way of respecting that right. Corrective justice has an important place in the law of torts, but that place is subordinate.

In tort law, as elsewhere, remedies exist to enforce and to restore rights.[46] The prospect of a remedy helps to assure a right holder that she can enforce her right if necessary and by so doing gives others reason to respect her right. The enforcement of a remedy when a right has been violated serves to restore the right. Even though rights and (p. 49) remedies are reciprocal—and even though remedies are partially constitutive of rights—remedies are the servants of rights, not their masters. Thinking about the content and the contours of a remedy ought to begin by attempting to determine what the enforcement or the restoration of the right requires. In tort, the remedy fixed upon by corrective justice theorists—the duty to repair a loss—is preeminent because tort is preoccupied with physical harm.[47] Physical harms leave their victims with injuries to be repaired, if their right to the physical integrity of their persons is to be restored.

When the right violated is not one whose violation leaves the victim in an impaired condition the presumptively appropriate remedy is different. For example, when the underlying right is exclusive control or dominion over real property, and the violation is the denial of that control, injunctive relief is presumptively appropriate. Injunctive relief is routinely available in cases of recurring or ongoing trespass because injunctive relief vindicates the right of control.[48] Remedying harmless trespasses by requiring merely that the wrongdoer repair the harm that he has done would not vindicate the right. It would, indeed, enable those whose trespasses inflict no injury to do so as long as they were prepared to pay nominal damages.[49] In both trespass cases and wrongful physical injury cases, the remedy is governed by the right. The lesson of these examples is that remedies are prominent in tort, but they are prominent because rights are fundamental to tort and there is a unity of right and remedy. Remedies enforce rights and repair their violation.

Overemphasizing corrective justice distorts our understanding of torts in a second, subtler way. By mistakenly identifying tort and tort alone with responsibilities of repair, sovereign corrective justice theories misconceive tort law's relation to the rest of private law.[50] Rightly, remedial theories recognize that tort law enforces and restores rights in a particular way. It does so by enabling the victims of tortious wrongdoing to obtain redress for the wrongs done them from those who have done them wrong. This, however, is a distinctive feature of *private law in general*, not a distinctive feature of the law of torts in particular. Contract, property, and restitution also enforce rights by empowering those whose rights have been violated to seek redress from those who have done the violating. If a duty of *repair* is more characteristic of tort than it is of contract or restitution, that is because primary tort rights differ from primary contract, or restitutionary (p. 50) rights, and those differences are reflected in the corresponding remedies. We lose sight of the fact that private law *in general* has a distinctive relation to rights when we identify responsibilities of repair, broadly conceived, with tort and tort alone. And we fail entirely to see that tort is distinguished from other private law subjects by the character of the primary rights and obligations it enforces.

Step back and consider the natural extension of the principle that wrongful losses ought to be repaired by those responsible for their infliction. That principle is *formal*: it does not contain within itself any criterion of wrongfulness. It latches onto many torts because we have independent reasons for thinking of torts as wrongs, and many tortious wrongs cause losses. We supply the content that the principle requires. Without that provision of content, the principle of corrective justice would wander the law looking for wrongful losses to repair. Furthermore, when we supply content we are likely to find wrongs requiring correction both within and beyond the private law of torts. Much depends on how broadly or narrowly the principle is stated. For example, when we interpret corrective justice as having to do with the repair of wrongful *loss*, restitution is not corrective justice because it undoes wrongful *gain*. On a broader interpretation of corrective justice the undoing of wrongful gain might be as much a matter of corrective justice as the repair of wrongful loss.[51]

Similar issues arise with respect to contract law. If contract is really about reliance—as Lon Fuller thought—then breach of contract results in wrongful loss and contract damages do corrective justice on a narrow interpretation of the principle. If, however, contract is about expectation damages then contract damages are about being put in the position that one would have occupied had the contract been performed.[52] That counts as corrective justice only if corrective justice is construed more broadly. When corrective justice is construed that broadly, however, it can no longer be presented as the paramount principle of liability in tort. It is now at least a principle of private law in general, and it may well be a general principle of law, full stop.

Just how broadly to state the principle of corrective justice is, fortunately, a problem we can leave to others. For our purposes, the point is that wrongful loss is not unique to tort

and corrective justice is therefore not distinctive of tort. Wrongful loss crops up across the legal landscape.

Calling the repair of wrongful losses the "overarching ambition or purpose" of tort law[53] is a mistake. This theory of tort goes wrong in the way that retributivism goes wrong as a theory of criminal law. Just as we do not have the criminal law in order to (p. 51) punish the wicked, so too we do not have the law of torts in order to repair wrongful losses. Corrective justice is a secondary part of tort, not the heart of the subject. The wrongs that tort law recognizes and specifies are the heart of the subject. Tort obligations are discharged most fully when wrongs are not committed and harm is not done—when persons' sovereignty over their physical selves and their property is respected in the first instance, not when harm wrongly done is repaired after the fact. Given the choice between a law of torts which effects perfect compliance with its obligations of repair and one which effects perfect compliance with its primary responsibilities, there is no choice to be made. When the primary norms of the law of torts are perfectly complied with, there is no work left for its remedial norms to do.

The role of tort law's primary norms is to articulate certain obligations to others, obligations grounded in interests of persons urgent enough to count as rights and imposed irrespective of voluntary agreement or ownership of external objects. The wrongs that tort law recognizes spell out an important part of what we owe to each other in the way of coercively enforceable responsibilities. Those rights and responsibilities of respect have to do, for the most part, with liberty and security, broadly construed. Because tort law is fundamentally concerned with the question of what we may reasonably demand from each other as a matter of right with respect to our liberty and the security of our persons and property, tort is basically concerned with *justice*, but the justice that lies at the base of tort law is *not corrective*. Committing battery is wrong not because it fails to correct a prior wrongful interaction but because it violates a primary obligation of harm avoidance. That primary obligation is, in turn, grounded in the victim's right to the physical integrity of his or her person. Torts—fraud, battery, intentional infliction of emotional distress, negligent infliction of physical injury, and the like—are wrongs which presuppose rights. It is wrong to batter someone because it violates their right to physical integrity. It is wrong to defraud someone because it makes their mind the unwitting instrument of wrongdoer's will, undermining their right to be the master of their own life. It is wrong to imprison someone falsely because it violates their right to liberty. It is wrong to injure someone negligently because it violates their right to reasonable security. And so on.

The question of what rights people have is not a question of corrective justice. If anything, the question of what rights people have is a question of distributive justice.[54] Taxonomy aside, the substantive point is this: tort law is fundamentally about wrongs and wrongs are grounded in rights. Corrective justice broadly construed is *an essential aspect of tort* because legal rights generally require remedies and private law remedies (p. 52) requiring making right one's wrong.[55] But the core of tort consists of the primary rights and responsibilities that its remedial norms enforce.

Sovereign conceptions of corrective justice are thus fundamentally correct to emphasize what is now called the "continuity thesis."[56] Practical reason exhibits a fundamental unity. Duties of repair have their roots in the same normative material that primary rights and responsibilities do. The rights or duties or reasons that figure centrally in the justification and explanation of primary rights and responsibilities also figure centrally in the justification and explanation of remedial rights and responsibilities. Rights, as Jeremy Waldron has argued, "generate[] waves of duties."[57] The right to the physical integrity of one's person generates primary duties of harm avoidance, secondary duties of repair, powers of civil recourse, and duties on the part of all of us to support the institutions which enable these rights to be enforced and realized. Where sovereign corrective justice theory goes wrong is not in emphasizing the continuity of obligations of repair with primary wrongs but in putting the cart before the horse. The law of torts does require repair, but it enjoins repair of wrongs. Remedial responsibilities are parasitic on primary ones. Philosophically inclined theorists of tort need to turn their attention toward the field's primary norms, and the reasons and values that either succeed or fail in justifying them.

For their part, economic analysts of tort have been right to argue that obligations of repair are subordinate to the justification of the institution as a whole, but the relentlessly forward-looking theory they have offered can account for the backward-looking obligations of repair that tort law enforces only by claiming that tort is not at all what it seems to be. For economics, the way forward may be to follow in the footsteps of economic analyses of property, which now give the concept of property itself its due and deploy the concept of efficiency indirectly to justify the institution as whole.[58]

Acknowledgments

I am grateful to participants in the conference for helpful comments and suggestions and to Joseph Harper and Taiyee Chien for excellent editorial and research assistance.

Notes:

([1]) Samuel L. Bray, Chapter 34 of this volume.

([2]) Aristotle, *Nicomachean Ethics* 85–86 (Roger Crisp ed. & trans., 2000).

([3]) John Locke, *Second Treatise on Government* 11 (C.B. Macpherson ed., 1980) (1690).

([4]) Ernest J. Weinrib, *The Idea of Private Law* 56, 71, 77, 142 (1995); see also *id.* at 213 ("Corrective justice represents the integrated unity of doer and sufferer."). The idea originates with Aristotle: "For it makes no difference whether it is a good person who has defrauded a bad or a bad person a good. … The law looks only to the difference made by the injury, and treats the parties as equals, if one is committing injustice, and the other suffering it—that is, if one has harmed, and the other has been harmed." Aristotle, *supra* note 2, at 87.

([5]) Weinrib, *supra* note 4, at 58.

([6]) See Richard A. Epstein, *A Theory of Strict Liability: Toward a Reformulation of Tort Law* (1980). Compare Robert Nozick, *Anarchy, State and Utopia* 54–87 (1974).

([7]) George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

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

([9]) Jules Coleman, *The Practice of Principle* 15, 36 (2001).

([10]) Arthur Ripstein, *Private Wrongs* 7 (2016).

([11]) Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U. L. REV. 107, 108 (2011). Other conceptions can also be found in the literature. See, e.g., Christopher Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 449–450 (1990) (identifying corrective justice theory with three requirements: "action-based responsibility," "just compensation," and "internal financing of compensation").

([12]) Ripstein, *supra* note 10, and Weinrib, *supra* note 4, identify corrective justice with rights and wrongs. John Gardner, *What Is Tort Law For? Part 1: The Place of Corrective Justice*, 30 LAW & PHIL. 1 (2011), identifies corrective justice with "allocating back." Tony Honoré remarks that "[o]n a wide view [corrective justice] requires those who have without justification harmed others by their conduct to put the matter right." Tony Honoré, *Responsibility and Fault* 73 (1999). Note that harming "without justification" is not necessarily the same as "wronging" or "harming wrongfully."

([13]) Coleman, *supra* note 9, at 32–34 (suggesting "assault and battery" as a paradigm case of the kind of wrong that gives rise to a duty of repair). Coleman's emphasis on "wrongful conduct," like his emphasis on "wrongful losses," stakes out a contested position in a debate. To flesh out the difference between sovereign and subordinate conceptions of corrective justice, we need an account of sovereign corrective justice that takes a position on these issues and so puts flesh on the bones of the concept. More than anyone else, perhaps, Coleman championed the view that corrective justice was the conceptual key which unlocked the law of torts.

([14]) Nozick, *supra* note 6, at 57.

([15]) *Id*. at 58.

([16]) See Epstein, *supra* note 6.

([17]) Fletcher, *supra* note 7 (invoking Rawls's first principle of justice as the parent of his principle of reciprocal risk imposition).

([18]) Coleman, *supra* note 9, at 36.

([19]) See Jules Coleman, *The Practice of Corrective Justice, in Philosophical Foundations of Tort Law* 53, 56–57 (David G. Owen ed., 1995) (explaining that corrective justice imposes a duty on an injurer to repair a victim's loss when the injurer is responsible for having brought the loss about by virtue of the injurer's wrongful conduct).

([20]) Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 201 (1981).

([21]) *Id.*

([22]) The standard criterion is the one usually attributed to Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* 26 (1970) ("I take it as axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents.").

([23]) The economic theory of tort is an "end-state" theory whereas corrective justice is an "historical" theory of tort justice. See Nozick, *supra* note 6, at 153–160.

([24]) Coleman, *supra* note 9, at 62.

([25]) Weinrib famously analogizes private law to love. "Explaining love in terms of extrinsic ends is necessarily a mistake, because love does not shine in our lives with the borrowed light of an external end. Love is its own end. My contention is that, in this respect, private law is just like love." Weinrib, *supra* note 4, at 6.

([26]) Coleman, *supra* note 9, at xiii, 4, 5, 8, 9–10, 43, 55, 58. At page 28, Coleman writes: "Anglo-American tort law *expresses, embodies, or articulates* corrective justice. Tort law is an institutional realization of principle, not an instrument in the pursuit of an external and hidden goal."

([27]) *Id.* at 62.

([28]) *Id.* at 58 ("[C]orrective justice requires that the costs of misfortune owing to human agency be imposed on the person (if any) whose wrongful conduct is responsible for those costs. The losses are made his by imposing on him an enforceable duty of repair.").

([29]) "There is a basic pre-theoretic distinction between misfortunes owing to human agency and those that are attributable to no one's agency. The traditional philosophical distinction between corrective and distributive justice reflects, among other things, this pre-theoretical distinction among kinds of misfortune." *Id.* at 44 (footnote omitted).

([30]) "The nature of things does not madden us, only ill-will does." Jean Jacques Rousseau, *Émile* 320 (Bernard Gagnebin trans., 1969). P.F. Strawson, "Freedom and Resentment," in *Studies in the Philosophy of Thought and Action* 71 (1968) (showing that "reactive attitudes" such as resentment are fundamental to our sensibilities and cannot be accounted for by instrumentalism).

([31]) Coleman, *supra* note 19, at 66–67.

([32]) Jules Coleman, Scott Hershovitz, & Gabriel Mendlow, *Theories of the Common Law of Torts*, STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta ed., 2015), https://plato.stanford.edu/archives/win2015/entries/tort-theories/; Weinrib, *supra* note 4, at 10.

([33]) Coleman, *supra* note 9, at 16. Cf. Coleman et al., *supra* note 32 (giving "[t]he bilateral structure of a tort suit—the fact that victims sue those they identify as their injurers and do not instead seek repair from a common pool of resources [as is the case in New Zealand]" as an example of a structural feature of tort law).

([34]) For Weinrib, this relationship expresses the "unity of doing and suffering," the intrinsic moral salience of the doer of harm as presumptively responsible for the harm that she has wrongly done. Weinrib, *supra* note 4, at 142.

([35]) Coleman, *supra* note 9, at 21 (footnote omitted). Compare Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989); Weinrib, *supra* note 4, at 37–38, 142, 212–213.

([36]) Coleman, *supra* note 9, at 9–10; see also Jules Coleman, *The Economic Structure of Tort Law*, 97 YALE L.J. 1233 (1988).

([37]) Coleman, *supra* note 9, at 23.

([38]) *Id*. at 34–36.

([39]) See, e.g., *id*. at 15, 36.

([40]) *Id*. at 62. Compare Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 L. THEORY 457 (2000) (offering a similar account of this debate).

([41]) See Henry M. Hart & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 122–124 (William Eskridge Jr. & Philip Frickey eds., 1994). Perhaps because tort has had to fend off the charge that it is not a freestanding body of law but a remedial appendage to other bodies of law, the distinction has loomed especially large in tort theory. See, e.g., Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1242–1244 (2001).

([42]) See Gregory C. Keating, *The Priority of Respect Over Repair*, 18 LEGAL. THEORY 293, 308 (2012).

([43]) See Coleman, *supra* note 9, at 32 ("Someone does not incur a second order duty of repair unless he has failed to discharge some first-order duty.").

([44]) See Neil MacCormick, *The Obligation of Reparation, in Legal Right and Social Democracy* 212 (1981); Joseph Raz, *Personal Practical Conflicts, in Practical Conflicts: New Philosophical Essays* 182 (Peter Baumann & Monica Betzler eds., 2004).

([45]) Arthur Ripstein, Chapter 5 of this volume.

([46]) See, e.g., Smothers v. Gresham Transfer, Inc., 23 P.2d 333, 348, 356 (Or. 1999); Hart & Sacks, *supra* note 41. Because remedies exist to enforce as well as to restore rights, the relation between right and remedy is more varied and complex than the corrective justice literature suggests. For example, tort actions often enforce property rights (as trespass, conversion, and nuisance do), yet those rights are also enforced by property doctrines (e.g., actions to quiet title and to evict) and by public law doctrines (e.g., applications of constitutional Takings clauses). Tort's own history includes actions which mixed public and private remedies. The action for "amercement" under medieval trespass included penalties payable to the state among its remedies. Even today, restitution is often matched with criminal punishment and, in our not very distant past, there was a burgeoning debate over whether and when tort actions should be preempted by or implied from regulatory statutes. See, e.g., Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982). On amercement, see Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 VAND. L. REV. 1233, 1251–1252 (1987). For a brief but acute explanation of the relation of all of this to the emergence of tort, see Grey, *supra* note 41, at 1230–1239.

([47]) *Restatement (Second) of Torts* § 1 cmts. *b* and *d* (1965) describe the law of torts as treating the interest in "bodily security" as a "right" and protecting it in diverse ways: "the interest in bodily security is protected against not only intentional invasion but against negligent invasion or invasion by the mischances inseparable from an abnormally dangerous activity."

([48]) "Generally an injunction will lie to restrain repeated trespasses. …" Planned Parenthood of Mid-Iowa v. Maki, 478 N.W.2d 637, 639 (Iowa 1991). See generally Dan B. Dobbs, *Law of Remedies* ch. 5 (2d ed. 1993) (noting, inter alia, that a plaintiff may be entitled to an injunction prohibiting a recurring trespass).

([49]) The award of punitive damages in Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (1997), enforces the right to exclusive control by stripping the one-shot, harmless trespass in that case of the economic advantage that rendered its commission by the defendant instrumentally rational.

([50]) This criticism does not apply to Ernest Weinrib's view, which identifies private law in general with corrective justice.

([51]) Weinrib takes this broader view of the matter, because he thinks of correlativity of right and duty as the essence of corrective justice. See Weinrib, *supra* note 4, at 122–126. Restitution and contract damages both do corrective justice because they involve breaches of duty correlative to rights. *Id*. at 136–140, 140–141, 197–198. Similarly, on Gardner's or Honoré's views, restitution is an instance of corrective justice. See *supra* note 12.

([52]) See Lon L. Fuller & William R. Perdue Jr., *The Reliance Interest in Contract Damages (pt. 1)*, 46 YALE L.J. 52 (1936); cf. Daniel Friedmann, *The Performance Interest in Contract Damages*, 111 L.Q. REV. 628 (1995).

([53]) Jules Coleman, *Risks and Wrongs* 395 (2002).

([54]) Theorists are split on this point, but prominent usages of the term "distributive justice" include within its domain the question of what rights people have on the ground that this is one kind of question about the distribution of entitlements. See John Rawls, *A Theory of Justice* 54 (rev. ed. 1999) ("[T]he basic structure of society distributes certain primary goods … the chief primary goods *at the disposition of society* are rights, liberties, and opportunities, and income and wealth.") (emphasis added). For an example of distributive justice being used in this broader sense in connection with private law, see Peter Cane, *Corrective Justice and Correlativity in Private Law*, 16 OXFORD J. LEGAL STUD. 471, 481 (1996).

([55]) As Tony Honoré says, *supra* note 12.

([56]) For recent, illuminating discussion, see Sandy Steel, *Compensation and Continuity*, Oxford Legal Stud. Res. Paper (July 18, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3422418.

([57]) Jeremy Waldron, *Rights in Conflict*, 99 ETHICS 503, 510 (1989).

([58]) See, e.g., Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001).

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