Is Tort a Remedial Institution?

Gregory C. Keating*

*University of Southern California, gkeating@law.usc.edu
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Abstract

In the past 30 years, philosophers of tort have performed invaluable work in restoring the concept of a “wrong” to prominence in tort scholarship, and in building a persuasive case that no adequate account of tort can replace the idea of a “wrong” with the idea of a “cost”. The structure of tort adjudication, which pits an injured victim against the party allegedly responsible for injuring her, is powerfully explained and justified by the thesis that the plaintiff has a claim for redress against the defendant when and because the defendant has wronged the plaintiff. The competing claim that tort adjudication is a forward looking instrument for minimizing the combined costs of paying for and preventing accidental harms is much more forced and difficult to sustain.

Less persuasively, however, modern philosophers of tort have spelled out the general claim that tort is a law of wrongs—and their reciprocal, rights—in the more particular thesis that tort is about the rectification of wrongs. Influential legal philosophers have argued, for example, that “tort law is best explained by corrective justice” because “at its core tort law seeks to repair wrongful losses”. Other theorists, marching under the banner of “civil recourse” have argued that the normative essence of tort law lies in the plaintiff’s right to demand redress from the defendant. The claim that remedial responsibilities are the core of tort law ought to give us pause. Calling responsibilities of redress the heart of tort law makes tort a remedial institution, an institution whose raison d’etre is repair. Yet in tort law itself remedial responsibilities to repair wrongful losses arise out of failures to discharge antecedent responsibilities not to inflict wrongful injury in the first instance.

This paper argues that remedialist accounts of tort are right to place the concept of a wrong—and its reciprocal, a right—at the heart of tort law, but wrong to give those concepts an essentially remedial interpretation. Remedial responsibilities
in tort are subordinate, not fundamental. They are logically subordinate because they are conditioned on and arise out of antecedent wrongs. These wrongs are not themselves corrective injustices, but failures to respect rights. Remedial responsibilities are normatively subordinate because the reason why tortfeasors are obligated to undo the harms wrought by their torts is that they have failed to discharge their primary responsibilities to avoid committing those torts in the first place. Breaching those responsibilities leaves them undischarged, and precludes full compliance with those responsibilities. Repairing harm wrongly done is a second-best way of discharging an obligation not to do harm wrongly in the first place.

Remedialist theories thus put the cart before the horse. Rights and remedies form a unity but it is a unity in which rights govern remedies: the role of remedies is to enforce and restore rights. We need to reorient tort theory in a way which does justice to remedialist insights about the centrality of rights and wrongs to tort law, but which places primary rights and responsibilities at the center of the subject.
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In the past 30 years, philosophers of tort law have performed invaluable work in restoring the concept of a “wrong” to prominence in tort scholarship, and in building a persuasive case that no adequate account of tort can replace the idea of a “wrong” with the idea of a “cost”. The structure of tort adjudication, which pits an injured victim against the party allegedly responsible for injuring her, is powerfully explained and justified by the thesis that the plaintiff has a claim for redress against the defendant when and because the defendant has wronged the plaintiff. The competing claim that tort adjudication is a forward looking instrument for minimizing the combined costs of paying for and preventing accidental harms is much more forced and difficult to sustain. On that account, the plaintiff is a private attorney general serving the common good by seeking to pin the costs of her injury on the party in the best position to minimize — going forward — the costs of accidents such as the one that befell her. The plaintiff does not sue because she has been wronged, or to vindicate her own right, but to promote the social interest in efficient accident avoidance.

Less persuasively, however, modern philosophers of tort have spelled out the general claim that tort is a law of wrongs — and their reciprocal, rights — in the more particular thesis that tort is about the rectification of wrongs. Influential legal philosophers have argued, for example, that “tort law is best explained by corrective justice” because “at its core tort law seeks to repair wrongful losses.” Other theorists, 

1William T. Dalessi Professor of Law and Philosophy, University of Southern California Gould School of Law. I am grateful to Bob Rasmussen, for urging me to write this article. Earlier versions of this paper were presented to the USC Faculty Workshop, the UCLA Legal Theory Workshop and the New York City Torts Group. I am especially grateful to Gary Watson and Seana Shiffrin, who commented on these drafts at the USC and UCLA workshops respectively, and to Ben Zipursky for organizing the New York presentation. I have also benefitted greatly from the comments of the participants in those workshops and others, including Scott Altman, Kim Buchanan, Eric Claeys, Stephen Gardbaum, Mark Geistfeld, Mark Greenberg, Barbara Herman, Ehud Kamar, Dan Klerman, Jennifer Mnookin, Bob Rabin, Anthony Sebok, Cathy Sharkey, Ken Kamar, Dan Klerman, Jennifer Mnookin, Bob Rabin, Anthony Sebok, Cathy Sharkey, Ken Kamar, Dan Klerman, Jennifer Mnookin, Bob Rabin, Anthony Sebok, Cathy Sharkey, Ken Kamar, Dan Klerman, Jennifer Mnookin, Bob Rabin. I am indebted to both Aness Webster and Nataline Viray-Fung for invaluable research assistance, including sound editorial advice.

marching under the banner of “civil recourse” not “corrective justice”, have argued that the normative essence of tort law lies not in the defendant’s duty to repair the plaintiff’s loss but in the plaintiff’s right to demand redress from the defendant. The state prohibits private violence and it is therefore obligated to provide a civil mode of redress against wrongdoers. Both of these conceptions may soon be challenged — or perhaps just enriched — by emerging, equally remedial accounts of tort adjudication as an intrinsically and expressively valuable way of articulating our mutual answerability to each other.

Repair, recourse and redress do indeed loom large in tort. When we stand back and survey the array of institutions that we bring to bear on wrongful injury in general and accidental harm in particular — an array which includes administrative schemes such as workers’ compensation and no-fault automobile insurance, direct regulation of risk, reliance on market mechanisms, and social insurance — tort stands out because of the way that it links victims and injurers through the requirement that the tortfeasor repair the harm done that he or she has done the plaintiff. Nonetheless, the claim that remedial responsibilities are the core of tort law ought to give us pause. Calling corrective justice the heart of tort law makes tort a remedial institution, an institution whose raison d’etre is repair. Yet in tort law itself remedial responsibilities to arise out of failures to discharge antecedent responsibilities not to inflict injury in the first instance.

Tortfeasors are called to account for and because of their failures to discharge primary obligations to avoid inflicting certain harms. Remedial responsibilities in tort are subordinate, not fundamental. They are logically subordinate because they are conditioned on and arise out of failures to discharge antecedent primary obligations.

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4See e.g., Scott Hershovitz, Harry Potter and the Trouble with Tort Theory, 9-10 (unpublished ms. December 2010?) (“tort provides a forum for conversations we might want played out in public. Through tort suits, judges work out what duties we owe one another. . . If there is value in public conversations about what we owe one another, tort suits serve a purpose, even if [we] could implement tort’s rules without them. Likewise, the fact that: ”we could arrive at the right result in individual cases without holding trials does not mean that there is no “point in holding trials. Litigants often have reasons to tell their stories in public. Tort provides an opportunity for doing so. . . “). (Cite to something of Jason Solomon’s?)
And they are normatively subordinate because the reason why tortfeasors are obligated to undo the harms wrought by their torts is that they have failed to discharge their primary responsibilities to avoid committing those torts in the first place. Breaching those responsibilities leaves them undischarged, and prevents discharging them in the best way possible. Repairing harm wrongly done is a next- or second-best way of discharging an obligation not to do harm wrongly in the first place. Rights and remedies form a unity: the role of remedies is to enforce and restore rights. Corrective justice theories reverse this relation by putting remedy before right.

My aim in this paper is to argue that this putting of cart before horse is a mistake and that we therefore need to reorient tort theory. Corrective justice theorists are right to place the concept of a wrong— and its reciprocal, a right— at the heart of tort law, but wrong to give those concepts an essentially remedial interpretation. My argument will proceed as follows. Section I develops the distinction between substantive or primary rights and responsibilities in tort and remedial or secondary ones. It explains why it seems intuitively correct to say that primary rights are more fundamental than remedial ones. Section I also suggests that the prominence of duties of repair in tort is due to the prominence in tort of obligations to avoid inflicting harm. Harms leave their victims in conditions requiring repair. Duties of repair thus figure prominently in tort because tort is preoccupied with harm in general and with physical harm in particular. Last, Section I suggests that putting remedial responsibilities at the center of tort law distorts our understanding of tort law’s relation both to other domains of private law and to various administrative alternatives to tort. Powers of redress vested in those whose rights have been violated are not peculiar to tort in particular, they are characteristic of private law in general. Administrative schemes like workers’ compensation are both linked to and distinguished from the common law of torts because they are alternative ways of instituting the same underlying right to bodily integrity.

Section II begins the task of making good on the paper’s main arguments, by explicating “corrective justice” theory in some detail. A wide variety of contemporary tort theories march under the banner of “corrective justice”. Section II therefore begins by distinguishing between two different kinds of corrective justice theory. One kind takes corrective justice to be a subordinate feature of tort law, a feature which can be explained by tort’s more fundamental principles or policies. Richard Posner’s influential explication of corrective justice, for example, takes it to be an aspect of tort which must be and can be explained by the fact that tort is an institution designed to minimize the combined costs of accidents and their prevention. Other corrective justice theorists in this first camp disagree strongly with Posner about the dominant end or principle of tort liability, but share his conviction that corrective justice is a subordinate aspect of tort.
The second kind of corrective justice theory insists that corrective justice—the obligation to repair wrongful loss—is the paramount or sovereign principle of tort. It is the cornerstone of the institution. In its most powerful and influential form this kind of corrective justice theory advances a compelling critique of the economic theory of tort, especially its implausible account of tort adjudication. And it offers an alternative account of tort law as an institution concerned at bottom with repairing wrongful losses. This paramount conception of corrective justice holds that tort wrongs have to satisfy constraints imposed by the principle of corrective justice. Because tort is an institution for the repair of wrongful losses, tort wrongs must be the kinds of things that issue in wrongful loss. This requires that tort be a realm of conduct-based wrongs. This paramount conception of corrective justice is both a powerful challenge to instrumentalist theories of tort, and the target of this paper. Section II therefore concludes by laying out the details of this conception.

Section III critiques the essentially remedial conception of tort developed in part II, and proposes an alternative to it. Section III begins by arguing that the aims of tort law are most fully realized when primary rights and responsibilities are honored in the first instance, not when the corrective justice of repairing wrongful loss is done. Repairing harm done is a second best way of respecting underlying rights. Section III goes on to elaborate the claim that tort’s remedial responsibilities are governed by its primary rights, and that the prominence of duties of repair in tort flows from the fact that most—but not all—primary tort rights and responsibilities have to do with the avoidance of harm. Harms leave their victims in conditions requiring repair. The principle that wrongful losses should be repaired is only contingently connected to tort. Left to its follow its own logic, that principle ought roam the law perching anywhere that wrongful losses are found.

Next, Section III argues that the structure and content of tort law does not conform to the corrective justice account. First, primary obligations in tort are omnilateral not bilateral: they are owed by everyone and to everyone else. Second, strict liabilities exist in tort and they are not conduct-based wrongs. The wrong in strict liability lies in failing to repair harm done through faultless conduct, through conduct that is not wrongful. Third, even tort’s obligations of reparation have a forward looking role. They exist not just to restore rights that have been violated ex post, but also to assure that rights are honored ex ante.

Section IV argues that we ought to take primary rights in tort seriously. To do this we must honor the essential insight of remedialism that tort is a law of wrongs and rights, but assign pride of place to tort law’s primary rights and responsibilities. This reorientation does justice to the structure and content of the tort law that we have, and enables us to grasp tort’s relation to the administrative schemes that vie with the common law of torts for control of various domains of accidental harm. When we put
primary rights and responsibilities at the core of the field, we see that these schemes are alternative ways of instituting the same right to bodily integrity that the law of torts itself seeks to vindicate. Last, Section IV briefly considers whether tort is a coherent subject. Remedialism in tort has flourished in part because tort’s primary rights and responsibilities appear irreducibly heterogenous. Section IV cautions against leaping to this conclusion. Tort, it suggests, may be a coherent body of law delineating just what it is that we owe to, and can demand from, each other with respect to our liberty and security. Tort, in other words, may be one of the laws of freedom. Section V summarizes, suggesting that tort theory should be reoriented to focus on primary rights and responsibilities.

I. Rights and Responsibilities in Tort

In thinking about the law of torts it is natural to distinguish between primary (or substantive) responsibilities and secondary (or remedial) ones. Primary responsibilities are responsibilities to avoid harming others in various ways, to avoid violating certain of their rights even when no harm is thereby done, or to unreasonably fail to repair harm reasonably inflicted. Remedial responsibilities are responsibilities of repair, responsibilities triggered by the breach of various primary obligations. When the distinction between these two kinds or responsibilities is marked, it is likewise natural to think that primary responsibilities are, well, primary—that is, antecedent to and more important than secondary ones. Primary responsibilities in tort are omnilateral and standing. We are all obligated, for example, not to defame or defraud one another.

5The second clause of this sentence refers to circumstances where tort law protects autonomy rights. Some batteries, trespasses and conversions are cases in point. See infra, the text accompanying note. The last clause of the sentence describes the general character of strict liability in tort. The duty here has the structure of eminent domain doctrine, transposed to the realm of private law. Just as eminent domain makes the payment of just compensation a condition for the legitimate taking of private property for a public purpose, so too strict liability doctrines in tort make reparation for harm done a condition for the legitimate infliction of certain reasonable risks (e.g., the risks of blasting) or harms (e.g., the harm reasonably inflicted on plaintiff’s dock when you lash your ship to the dock in a hurricane to avoid the ship’s destruction). I shall have more to say about strict liability in the text, infra, at –.

The distinction between primary or substantive obligations and remedial ones in tort is a familiar one. See, e.g., Tom Grey, Accidental Torts, 54 VAND. L. REV. 1225, 1242-44 (2001). The distinction is naturally salient when corrective justice conceptions of tort are under consideration. See, e.g., Kenneth W. Simons, Jules Coleman and Corrective Justice in Tort Law: A Critique and Reformulation, 15 HARV. J. L. & PUB. POL’Y 849, 867-68 (1992); Hanoch Sheinman, Tort Law and Corrective Justice, 22 Law and Philosophy 21, 32-34 (2003). For the sake of convenience, I will refer to primary duties as “duties of harm-avoidance”, even though duties of harm-avoidance are only the most common kind of primary duty in tort.
Remedial responsibilities, by contrast, are bilateral and conditional. If I defame or defraud you, you may require me to repair the harm that I have done. That obligation, however, is particular to me, owed to you, and conditioned on my breach of my primary obligation of harm avoidance. Secondary, remedial responsibilities thus come into play only when primary, substantive responsibilities are not discharged.

The priority of primary responsibilities is in part a logical or conceptual one. Remedial responsibilities arise out of breach of antecedent primary duties. But the priority of primary responsibilities is not just conceptual, it is also normative. Remedial responsibilities and are second-best ways of complying with obligations that are best honored by discharging primary responsibilities. Remedial responsibilities draw their obligatory force from the persisting normative pull of the primary obligation that has not been discharged. Suppose, for example, that Arthur punches Jules in the nose without provocation, excuse or justification. Arthur has battered Jules, breaching his obligation not to do so and violating Jules’ right that he not do so. By battering Jules, Arthur has neither discharged his obligation not to batter Jules nor relieved himself of the responsibility to comply with that obligation. Arthur is still bound by the obligation that he has breached, but he has placed himself in a position where he cannot comply fully with its commands. Now, the best that Arthur can do is to repair the harm that he has wrongly done. His duty to repair the harm that he has wrongly done falls out of his failure to discharge his duty not to harm Jules wrongly in the first place.

What this example shows is that primary responsibilities ground remedial responsibilities. 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 the harm you have done by violating someone’s right is the next-best way of respecting that right. It would have been better not to violate their right in the first instance. The flip side of this coin is that primary rights — to reasonable care, not to be battered, and so on — are more important than remedial ones. My right to reasonable care is best respected when others take care not to injure me, not when they repair the harm that they have done by carelessly injuring me. Given the choice between a law of torts which effects perfect compliance with its obligations of repair and one that effects

6See Jules Coleman, The Practice of Principle, 32 (2002) (“Someone does not incur a second order duty of repair unless he has failed to discharge some first-order duty.” [emphasis in original]) (henceforth cited as PP) and Hanoch Sheinman, supra note 6, at 30-31 (explaining the conceptual or functional priority of primary obligations in tort law).

7For observations along these lines, see Neil MacCormick, The Obligation of Reparation in Legal Right and Social Democracy (1981) and Joseph Raz, Personal Practical Conflicts in Peter Baumann & Monica Betzler, eds. Practical Conflicts: New Philosophical Essays, 182 (2004).
perfect compliance with primary responsibilities of harm-avoidance, we should not hesitate a moment before choosing perfect compliance with primary responsibilities of harm-avoidance. When the primary norms of the law of torts are perfectly complied with, there is no work left for its remedial norms.

The general point here is that in tort law, as elsewhere, remedies exist to enforce and to restore rights. 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 remedies are reciprocal — and even though remedies are partially constitutive of rights — remedies are properly the servants of rights. They are governed by and subordinate to rights because the content and the contours of a remedy ought to be fixed by determining 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. 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 this is not the case, when the underlying right is, say, to exclusive control or dominion over real property and the violation of that right does not inflict an injury to be repaired, the appropriate remedy is different. Injunctive relief is available as a matter of right in trespass cases because injunctive relief normally restores the right to control who or what enters one’s real property. Remedy by requiring merely that the wrongdoer repair the wrong that he has done, would not vindicate the right. It would, indeed, enable those whose trespasses inflict not injury to do so as long as they were prepared to pay nominal damages. In both the trespass case and the wrongful physical injury case, the remedy is governed by the right.

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9Cite. Trespass is an instance of an important category of torts which protect “autonomy rights” — powers of control or zones of discretionary choice. Following Arthur Ripstein I call torts of this kind “sovereignty-based” torts. See infra note 63, and accompanying text.

10For a vivid illustration of this see Silver King case. The well-known award of punitive damages in the Jacques case is meant both to punish a deliberate, harmless trespass and to enforce the right to exclusive control by stripping that trespass of the economic advantage that made its commission rational. [cites needed]
The lesson of these examples is that remedies are prominent in tort, but their prominence is not the consequence of tort law’s adherence to a freestanding principle of corrective justice, or a freestanding right of recourse. Remedies are prominent in tort because rights are fundamental to tort and there is a unity of right and remedy. You do not have a legal right unless you have some remedy for its violation. When Arthur punches Jules in the nose, he violates Jules’ right to the physical integrity of his person. If Jules has no legal remedy for that violation of his right, his right is legally meaningless. Absent some special institutional arrangement, Jules claim for redress is naturally directed against Arthur. After all, Arthur is the person who has violated Jules right. By so doing he has opened himself up to responsibility for restoring Jules’ right. He stands in a special and unique relation of responsibility to Jules.

Putting remedial responsibility at the center of tort distorts our understanding of the subject in subtler ways as well. By mistakenly identifying tort and tort alone with responsibilities of repair, remedial theories misconceive tort law’s relation to the rest of private law. Rightly, remedial theories recognize that tort law enforces and restores rights in a particular way, namely, 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 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.

Putting responsibilities of repair at the center of tort law also obscures tort law’s relation to administrative alternatives to tort, such as workers’ compensation. When we take the common law of tort to be defined by duties of repair owed named victims by named tortfeasor we must regard workers’ compensation and similar administrative schemes as radically discontinuous with the law of torts. After all, these schemes abolish private law duties of repair and private law mechanisms for the enforcement of rights and replace them with public law systems and mechanisms. While it is surely correct to say that workers’ compensation is “public law” and tort is “private law”, it is misleading to insist that the two legal regimes are radically discontinuous. Workers’ compensation and the common law of torts are both continuous and discontinuous,
connected and competitive. They are continuous and connected because they are both legal regimes which aim to institute the right to the physical integrity of one’s person. They are discontinuous and competitive because they are alternative legal mechanisms for instituting the same right with respect to various kinds of accidental injuries, and they battle for dominion over various legal domains. Workers’ compensation schemes, for example, displace the common law of negligence from the domain of workplace injuries. Administrative schemes for nuclear accidents, or health injuries incident to mining coal displace tort from other domains.

The essential lesson here is that administrative schemes such as workers’ compensation and the common law of torts are alternative ways of instituting the right to the physical integrity of one’s person. To grasp that lesson, however, we must see that within the law of torts itself remedial rights and responsibilities are derivative of substantive ones. Only then can we recognize that these legal regimes are both competitive and continuous. And only then do we have a first principle by reference to which we can choose between them. The fundamental question raised by the competition between workers’ compensation and the common law of torts is “which legal regime gives better institutional expression to the right to physical safety?” Answering that question is, no doubt, difficult and complicated. But we must begin with right questions if we are to reach right answers.

This argument presupposes an account of corrective justice theory that has not yet been offered, and jumps over that theory’s great achievement. Contemporary corrective justice theorists have made a compelling case that we cannot plausibly understand the law of torts — and especially the structure of tort adjudication — without placing the concepts of wrongs and rights at the center of our accounts. They have thus mounted a powerful challenge to the economic analysis of tort law, the most sophisticated instrumentalist account of tort yet offered. To make good on our critique

12Cite to Jeremiah Smith.

13Historically, the law of tort has been preoccupied with physical harm, and thus with the right to physical security. Over time, however, the law of torts has come to grant more protection against psychological harm. Thus the right that the text is referring to has transformed from a right to the physical integrity toward a right to physical and psychological integrity. For simplicity, I will generally speak of this right as right to physical or bodily integrity or security.

14Or even all accidental injuries, as with the New Zealand Accident Compensation scheme.

15Cites
of corrective justice, we must first examine the theory and its accomplishments in more detail.

II. Tort Law As Corrective Justice

Corrective justice is an ancient concept and it has spawned a family of distinct modern conceptions. At its most general, corrective justice is defined in contradistinction to distributive justice and in terms of a relationship between the parties. Distributive justice, in the pertinent sense, has to do with the justice of holdings, with the distribution of wealth, income and property for example. 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 a certain share of society’s wealth and income, but we do not have a claim in distributive justice against another 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 or rights-violation must relate the parties directly to one another, and it must give rise to an obligation of reparation on the part of the defendant. Corrective justice has to do with claims that one person has against another, to repair a loss to the former for which the latter is accountable. “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.” “Corrective 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”.16

By the time we reach Weinrib’s emphasis on the “unity of doing and suffering” —

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ERNEST WEINRIB, THE IDEA OF PRIVATE LAW, 56, 71, 77, 142 (1995) [henceforth cited as IPL]. See also id., at 213 (“Corrective justice represents the integrated unity of doer and sufferer.”) Martin Stone places “the unity of doing and suffering” at the heart of Weinrib’s corrective justice theory. Martin Stone, THE UNITY OF DOING AND SUFFERING, IN GERALD J. POSTEMA , ED. PHILOSOPHY AND THE LAW OF TORTS, 131 (2001) (“Modern tort law looks out on a situation which is ubiquitous in human affairs and inherent, as a possibility, in the fact of human action: a situation where the actions of one person are connected to the misfortunes of another.”) See also Martin Stone, ON THE IDEA OF PRIVATE LAW [cite]. The font of this is Aristotle: “Whether a worthy person has taken something from an unworthy person or vice versa, makes no difference . . . the law looks to the difference in harm alone, and it treats them as equals, if the one commits and the other suffers injustice and if the one has inflicted and the other has suffered harm.” ARISTOTLE, THE NICOMACHEAN ETHICS, 1132a2-1132a6.
with the “doing” being the infliction of the suffering by violating the “abstract equality of free purposive beings under the Kantian conception of right”\textsuperscript{17} — we have left the common ground of corrective justice theories. Richard Epstein’s theory of tort flies under the banner of corrective justice, but it applies the concept to an essentially causal form of liability. The concept of a wrong that is so central to Weinrib’s account is attenuated in Epstein’s. George Fletcher, for his part, applies the term to a theory of liability for nonreciprocal risk imposition.\textsuperscript{18} Catherine Wells has argued that it involves providing an appropriate process for determining whether the defendant is responsible for the plaintiff’s loss.\textsuperscript{19} 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 th[os]e losses.”\textsuperscript{20} Other conceptions can also be found in the literature.\textsuperscript{21}

These diverse conceptions vary in a number different ways. Wells, for example, is calling attention to the procedural aspect of remedial institutions. Part of what legal institutions must provide is a process by which rights may be enforced. For our purposes, however, the important division among theories is the division between those that take it to be a subordinate principle or aspect of tort law and those that take it to be the paramount or sovereign principle of tort law. Endorsements of corrective justice as a subordinate principle of tort law are widespread, and it is important to distinguish them from conceptions of corrective justice which conceive of it as the sovereign principle of tort. 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 — inducing optimal accident prevention, say — call for corrective justice as

\textsuperscript{17}IPL, 58.

\textsuperscript{18}Georg Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537 (1972).

\textsuperscript{19}Catherine Pierce Wells, Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication, 88 Mich. L. Rev. 2348 (1990) (arguing that justice requires making some forum for determining claims of right available).

\textsuperscript{20}See supra note ?, and accompanying text.

an aspect of tort law.\textsuperscript{22}

Accounts which treat corrective justice as the sovereign principle of tort— a principle which grounds and explains the law of torts— 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 it asserts that justice requires repairing wrongful losses, then corrective justice requires tort law and tort law must be concerned with the repair of losses that are properly called wrongful. More particularly, corrective justice theorists of the sovereign strip insist, tort liability must attach to losses generated by \textit{wrongful conduct}. On this account corrective justice is an \textit{independent} principle to which the law of torts answers. The principle that wrongful losses should be repaired by those responsible for them is a freestanding principle of political morality and it shapes and justifies the law of torts. Corrective justice is also an \textit{important} principle, because it places a significant constraint on the character of tort’s primary norms. For tort to be an institution of corrective justice, the primary norms of tort law must consist of conduct-based wrongs. Wrongful losses are losses that issue from wrongful conduct.

\textbf{A. Corrective Justice as a Subordinate Principle of Tort Justice}

To understand how corrective justice might be a subordinate principle of justice in tort, consider the following oversimplified version of a libertarian theory of tort.\textsuperscript{23} 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.”\textsuperscript{24} 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.”\textsuperscript{25} 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

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\textsuperscript{22}\textit{See infra} note 31 for an argument of this kind.
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\textsuperscript{23}Richard Epstein and Robert Nozick have advanced robust and well-developed libertarian approaches to tort law. See \textsc{Richard A. Epstein, A Theory of Strict Liability} (1980); \textsc{Robert Nozick, “Prohibition, Compensation and Risk” Anarchy, State and Utopia}, 54-87 (1974).
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\textsuperscript{24}Nozick, \textit{supra} note 22, at 57 (1974).
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\textsuperscript{25}Nozick, \textit{supra} note 14, at 58. The wrong here fits an old fashioned idea of a “trespass to a person”.
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requiring the wrongdoer to rectify the harm done by her violation of the victim’s right we do justice in the specific form of corrective justice.\textsuperscript{26}

In this example, corrective justice operates as a subordinate principle of 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 justified entitlement establish that people have the right to be free of accidentally inflicted harms unless they have consented to the risks from which those harms issue. Absent consent, when risk impositions come to fruition in harms, those harms constitute an impermissible alteration of the victim’s entitlements, a wrongful taking of her physical integrity or property.

Libertarian principles of distributive justice thus specify an initial entitlement and a procedure for altering that entitlement. Initially, each person has a natural right to liberty encompassing the physical integrity of her person and that initial entitlement may only be altered by consensual agreement. Consent makes otherwise impermissible boundary crossings permissible, thereby altering the preexisting distribution of entitlements. When consent has not been given, boundary crossings are not permissible and harm that results from them wrongly inflicted. Corrective justice undoes this wrong; it operates to restore a preexisting, distributively just state of affairs and it comes into play because principles of distributive justice identify the boundary-crossing and the entitlement alteration that it effects as unjust. Corrective justice is the handmaiden of distributive justice. It does not specify or even require an independent criterion of wrongful conduct, conduct whose wrongfulness gives rise to losses that must be repaired. Corrective justice simply undoes illegitimate alterations of entitlement. Libertarian principles of distributive justice and permissible transfer do the real work. They determine what people are and are not entitled to. Corrective justice simply restores a distributively just state of affairs.

Many different accounts of tort liability may incorporate corrective justice as a subordinate principle of tort justice. Richard Epstein’s theory of tort liability incorporates corrective justice in this subordinate sense but rests (in its original

\textsuperscript{26}Even stating these ideas in outline raises difficult questions. It is natural to suppose that rectifying the wrong requires restoring the victim to the position that she would have been in had her right not been violated in the first place, but setting damages at this level may not compensate for the failure to have had one’s consent obtained in the first place. Payments over and above the amount required to restore the plaintiff to the position she would have been in had her rights not been violated may either be required by corrective justice, or may be required but not by corrective justice. We may ignore these difficult questions. For our purposes, it will do to note that the duty to repair is a duty of corrective justice.
See Epstein, supra note –. The claim that Epstein’s view rests on a conception of natural right is contestable, because Epstein spends considerable time developing a causal theory designed to determine when people are responsible for inflicting harms on others. Recasting the theory so that it rests on utilitarian foundations leaves its corrective justice aspect untouched. Corrective justice still rights the same wrongs, and principles of corrective justice do no independent work in determining what count as wrongs warranting correction. George Fletcher’s influential fairness conception of tort law also incorporates corrective justice as a subordinate principle of justice. 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. 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 instance. Corrective justice operates in the same subordinate way that it does in our stylized libertarian theory. It restores a distributively just state of affairs (so far as possible) by requiring reparation for harm done when tortious harms issue from distributively unfair risk impositions. Principles of distributive justice again do the work of determining what counts as a wrong which must be rectified.

B. Corrective Justice as the Sovereign Principle of Tort Justice

Theorists like Coleman and Weinrib do not espouse modest conceptions of corrective justice as the handmaiden of distributive justice. These theorists take corrective justice to be the sovereign principle of tort law. Recall Coleman’s claim: “tort law is best explained by corrective justice” because “at its core tort law seeks to repair wrongful losses.” For this claim to be credible, “wrongful losses” must be a concept which does some work and which has some constraining content. It must identify a

27See Epstein, supra note –. The claim that Epstein’s view rests on a conception of natural right is contestable, because Epstein spends considerable time developing a causal theory designed to determine when people are responsible for inflicting harms on others. A theory of responsibility thus does the work of determining when people are liable. But what they are liable for is violations of other people’s natural liberty. Violating someone’s natural liberty is the event that requires reparation. For contrasting causal and natural rights interpretations of Epstein’s theory compare Stephen Perry, [cite to The Impossibility of General Strict Liability, 1 CANADIAN J.L. & JURISPRUDENCE 147 (1988) with Eric Claeys, Jefferson Meets Coase, forthcoming Notre Dame L. Rev. [19-20 and 29-30 of draft]. Epstein later recast his view as having a utilitarian basis. [cites]

28George Fletcher, supra note 17. Fletcher invokes Rawls’s first principle of justice as the parent of his principle of reciprocal risk imposition. Charles Fried’s very similar view invokes Kant’s principle of equal right. See CHARLES FRIED, AN ANATOMY OF VALUES, (1970).

29See supra note –. WEINRIB, IPL, 133-34 (arguing that corrective justice is “immanent” not just in tort, but in contract and restitution as well). Corrective justice is thus characteristic of private law in general, not of tort law in particular.
class of phenomena to which a duty of repair properly attaches. Coleman’s robust conception of corrective justice thus hold that it involves responsibility for *wrongful losses, harms or rights-violations*, meaning losses that result from *wrongful conduct*. Such conduct disrupts the preexisting distribution of entitlements — it violates rights, inflicts injury, or does harm — but it gives rise to liability in *corrective justice* because it is *wrongful*, not just disruptive of a preexisting pattern of entitlement. Innocent disruptions — dislocations which 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 distinguished between what I have called subordinate and sovereign conceptions of corrective justice in tort, and went on to argue that “[o]nce the concept of corrective justice is given its correct Aristotlean meaning, it becomes possible to show that it is not only compatible with, but required by, the economic theory of law.” 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 Aristotlean 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 efficiency as justice 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

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*Coleman, Encyclopedia entry (emphasis in original?) (Practice of Principle, Practice of CJ, Risks and Wrongs†). Wrongdoing understood as wrongful conduct is also essential to Ernest Weinrib’s theory of corrective justice in tort. For Weinrib, however, liability for restitution is a species of corrective justice but a species of corrective justice which does not require wrongful conduct. See IPL at 140-42 197-98.

*Richard A. Posner, The Concept of Corrective Justice in Recent Theories of Tort Law, 10 J. LEG. STUD. 187, 201 (1981).*
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.\textsuperscript{32}

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 — a constitutive element of the field. As such, it is not a justification but data to be justified. For Posner, economics supplies the justification. When tort law is a society’s principal mechanism for addressing accidents — and is otherwise efficient\textsuperscript{33} — corrective justice is necessary to ensure that the law of torts as a whole induces efficient precaution. Corrective justice, in other words, is an instrument of wealth-maximization.

Posner’s account makes corrective justice a subordinate principle of tort liability even though it incorporates the idea that corrective justice involves liability for wrongful conduct. The reasons that we have to do 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. Tort law exists to induce efficient precaution and corrective justice serves this end. Wrongful losses — meaning losses inflicted by inefficient and therefore wrongful 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 of efficiency and corrective justice 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 value of a certain sort (wealth and, indirectly, welfare) is maximized.\textsuperscript{34} 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. Corrective justice theory focuses on who has done what to whom, and on

\begin{footnotesize}
\textsuperscript{32}Id, at 201.

\textsuperscript{33}Posner’s argument isolates reparation for harm wrongly done and assumes that tort law is otherwise efficient, in order to determine whether reparation for harm wrongly done is efficient. Without the assumption that tort law is otherwise efficient the argument does not go through. See John Gardiner, Backward and Forward with Tort Law, in Joseph Kein Campbell, ed., Law and Social Justice, 255, 269-270 (2005).

\textsuperscript{34}Cites http://law.bepress.com/usclwps-lewps/art117
\end{footnotesize}
the immediate normative implications of that doing and suffering. It places the rights and wrongs of plaintiffs and defendants at the very center of its account. 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 utterly beside the point. 35

C. Corrective Justice as a Practice of Principle

The leading proponents of corrective justice theory in our time—Jules Coleman and Ernest Weinrib—reject Posner’s conclusion that corrective justice is merely a feature of tort law to be explained, or even a subordinate principle of tort law. For Coleman and Weinrib, corrective justice is tort law’s sovereign principle. “Corrective justice”, Coleman writes, “expresses the principle that holds together and makes sense of tort law.” 36 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. Tort is a body of law grounded on the principle that wrongful losses should be repaired.

The corrective justice theories of Coleman and Weinrib are the most important, influential and ambitious views of their kind, and the best examples that we have of remedialism in tort theory. Their view of corrective justice as the sovereign principle of tort is the view that this paper challenges. We must, therefore, get as clear an understanding as we can of their claims and their conception. The first step towards that understanding is to grasp their criticisms of the economic theory of tort. That theory is both their target and their foil. Powerfully and persuasively, Coleman and Weinrib argue that the economic theory of tort offers an inadequate account of tort adjudication. The economic theory of tort is instrumental and instrumentalism does and must look forward. Tort adjudication, however, does and must look backwards. Because this is so, instrumentalism cannot adequately explain and justify the law of torts.

35 To invoke a distinction made famous by Robert Nozick, the economic theory of tort is an “end-state” theory whereas corrective justice is a “historical” theory of tort justice. Cite to ASU.

Coleman appears to have been more sympathetic to the idea that tort law might effect the union of efficiency and corrective justice earlier in his career. Compare Jules Coleman, Mental Abnormality, Personal Responsibility, and Tort Liability, in MENTAL ILLNESS: LAW AND PUBLIC POLICY 107, 123 (B.A. Brophy & H. Tristam Engelhardt, Jr. eds. 1980) (stating that “that a duty of corrective justice is compatible with a substantive concept of unjust conduct based on economics or utilitarianism.”) with Jules Coleman, The Economic Structure of Tort Law 97 Yale L.J. 1233 (1988) (arguing that economics cannot account for the normative structure of tort law).
Coleman and Weinrib’s own theories spring, in turn, from their critiques of economics. Tort adjudication, they argue, must be understood to be the instantiation of a principle of corrective justice. For Weinrib, tort adjudication appears to be an entirely autonomous institution. Its principles are given by the form of tort law, especially the form of tort adjudication, and they neither need nor have any further justification.\(^{37}\) 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.\(^{38}\) 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 not, say, on behalf of the general good.

The divergence between Coleman and Weinrib over the autonomy of tort law signals the fact that their views, though closely related, diverge in certain respects. To get a well-defined conception on the table, I shall therefore take Coleman’s writings as my canonical example of a theory of tort which holds that corrective justice is the sovereign principle of the practice. On Coleman’s account, because corrective justice rests on a genuine moral principle — the principle that wrongful losses should be repaired — corrective justice is not the goal of tort law. It is instead a justification for holding someone accountable for harm wrongly done. As a legal practice, corrective justice is not an instrument for the realization of an end, but the instantiation and further 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.\(^{39}\)

Wrongful human agency, correlativeity, and repair lie at the core of both tort law and corrective justice.\(^{40}\) That tort law is about agency is evident enough to the pre-theoretic

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\(^{37}\)This is epitomized by Weinrib’s oft-cited remark that “law, like love, is its own end.” [cite to the Idea of Private Law]

\(^{38}\)Coleman, PP, xiii, 4, 5, 8, 9-10, 43, 55, 58. At 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.”

\(^{39}\) Cole, OLEMAN, PP, 62

\(^{40}\) Cole, OLEMAN, PP, 58 (“...corrective 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.”). PCJ, 66.
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.\footnote{There is a basic pretheoretic 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 pretheoretical distinction among kinds of misfortune.” Coleman, PP, 44 (fn. omitted).} In this respect, the law of tort taps into deep moral sentiments, 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 Mother Nature.\footnote{Rousseau famously remarked that “men regret misfortune but resent injustice”. Emile, –. Rawls follows Rousseau’s lead here in explicating what he calls “the sense of justice”.

That the pertinent agency must be and is wrongful is a proposition that looks to be at once self-evident and over-determined. Wrongfulness explains why the distinction between malfeasance and misfortune is intuitively basic. By themselves, natural events are just facts. Moral appraisal applies only to our response to natural facts. Human agency, by contrast, is immediately and directly subject to moral appraisal, and to negative moral appraisal if it is wrong. Wrongfulness gives us a reason to hold people responsible for the losses that they inflict on others. Last, but surely not least, wrongful conduct figures very prominently in the law of torts itself. Both intentional and negligent torts involve wrongful conduct. Perhaps for these reasons, robust conceptions of corrective justice take wrongfulness to be an indispensable element of tort liability.\footnote{“Wrongful losses are those that result from wrongs or wrongings: breaches of duties to particular persons . . .” Encyclopedia entry at –. Jules L. Coleman, Facts, Fictions, and the Grounds of Law in , 328-29 (arguing that the concept of a “wrong” is central to tort law and that both fault and strict liability “are different ways of articulating the content of one’s duty to others.”). Duties specify norms of conduct: “the duties articulated in the law of torts purport to express genuine reasons for acting, or standards with which one ought to comply.” Coleman, PP., 35, fn. 19. And “economic analysis eliminates the concept of duty in tort law — that is, it eliminates the concept of something that can be defended as a standard of conduct and not merely as a condition of liability.” Id (emphasis mine). Recall, too, that the principle of corrective justice “states that individuals who are responsible for the wrongful losses of others have a duty to repair the losses.” Coleman, PP, 15 (emphasis deleted).}\

\textit{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.” Correlativity thus refers to the bilateral (or bipolar) structure of tort adjudication, which itself mirrors the underlying interaction of a tortious wrong. Ernest Weinrib explains that “[c]orrective 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”. “[T]he direct connection between the particular plaintiff and the particular defendant” is “the master feature characterizing private law.” Coleman concurs, calling the bilateral relationship of plaintiff and defendant, injurer and victim, “the most basic relationship in torts.” “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.”

The structure of tort adjudication coheres smoothly with the basic principle of corrective justice. 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. Economic analysis, moreover, cannot offer an equally elegant and persuasive explanation of tort’s adjudicative structure. On its face, tort law is a backward looking practice concerned with repairing harm wrongly done, but

44 Coleman, PCJ, 66-67.
45 See supra note 15. The quotes from Martin Stone and Aristotle in that footnote are also on point.
46 IPL, 10.
47 Coleman, Encyclopedia Entry.
48 IPL, 142. Weinrib’s view appears more metaphysical than Coleman’s in that it appears to take the structure of tort law to reflect an essential and eternal form of human interaction. Recall Stone, supra note 15: “Modern tort law looks out on a situation which is ubiquitous in human affairs and inherent, as a possibility, in the fat of human action: a situation where the actions of one person are connected to the misfortunes of another.”
Hard pressed, but not without resources. It may be, as Coleman recognizes, that administrative costs (e.g., search costs) make tort litigation as it now exists a far more competitive institutional mechanism for inducing optimal accident precaution than it appears to be at first glance. See -. Weinrib likewise argues that extrinsic goals cannot make sense of the bipolar relationship between plaintiff and defendant, and that the relationship must be understood in terms of an immanent juridical relationship. See Ernest Weinrib, Understanding Tort Law [cite]; IPL, 37-38, 142, 212-13. Weinrib’s argument has a more metaphysical aspect: the bipolar structure of tort adjudication is indispensable to tort law because it corresponds to the underlying structure of the interaction between persons that characterizes all torts. See e.g., IPL, 215 (“The formalisms of corrective justice therefore lies not in its existing somewhere apart from the social world, but in its representing the unifying structure of the doer-sufferer relationship. Because it renders the interaction of doer and sufferer intelligible from within, corrective justice takes the doing and suffering of harm — as well as the conditions under which such interaction occurs — for granted. Accordingly, corrective justice both draws on a social and empirical reality and impresses that reality with the stamp of its regulating form.”). Compare Stone, supra note 9 (describing the unity of doing and suffering as a possibility inherent in human action). Coleman’s position is simply that the practice embodies and is grounded by a principle of corrective justice that cannot be explained instrumentally.
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. . . .

The economic analysis asserts that in the absence of search, administrative, and other transaction costs, these structural features of tort law would be incomprehensible.52

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—concepts such as duty, “harm, cause, repair, fault and the like.”53 Here, the failure is a failure to do justice to the way that these concepts 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 is a reason to hold a defendant responsible for harm done to a victim by the breach of that duty. Tort law looks backwards toward the past interactions of the parties in order to determine if defendant should be held responsible for the plaintiff’s injury. In this way the basic concepts of negligence law are the ground of liability in negligence. Defendants are liable to plaintiffs not only when they breach duties owed to them, but because they breach those duties.

For the economic analysis of negligence, however, breach of duty is not a premise but a conclusion. “[S]tandard economic account[s] . . . do not use efficiency to discover an independent class of duties that are analytically prior to our liability practices. . . . What counts as a ‘duty’ or a ‘wrong’ in a standard economic account depends on an assessment of what the consequences are of imposing liability in a given

52 OLEMAN, PP, 21 fn. omitted.

53 OLEMAN, PP 9-10. See also Jules Coleman, The Economic Structure of Tort Law, 97 Yale L. J. 1233 (1988); RW --. In conjunction with the basic structural features of tort adjudication, these concepts form what Coleman calls the pre-theoretic core of tort law. OLEMAN, PP, 15, n.2. As a pragmatic conceptualist, Coleman believes that tort theory must explain how the central concepts of tort law hang together. Coleman is concerned with whether views can explain the conceptual structure that forms the heart of tort law (OLEMAN, PP). Weinrib similarly believes that economic instrumentalism cannot explain the structure of tort law but, as a committed legal formalist, he believes that private law must be understood on its own terms and that “an immanent moral rationality” is latent in the form of tort law. IPL, 24-25. Legal theory elicits that logic and makes it explicit. For Weinrib, corrective justice is a distinctively juridical concept. IPL, 210-14. Coleman and Weinrib agree that tort law is an institutional expression of corrective justice, but Weinrib thinks that concept arises within tort law itself whereas Coleman does not. Moreover, for Coleman corrective justice is distinctive to tort law whereas Weinrib believes that it is characteristic of private law in general.
Economic analysis looks forward to the reduction of future accident costs. Legal decisions must therefore be justified by good future consequences. They cannot be vindicated (at least not directly) by the correction of past injustices. Past accident costs are sunk; rationality requires that we disregard them and assign liability to the whoever is in the best position to prevent future accidents at the lowest cost.

For orthodox legal reasoning, 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, however, liability does not follow from breach of duty when breach of duty is the actual and proximate cause of harm done. Liability follows from and because of a conclusion that the imposition of liability for past harm will induce optimal prevention of accidental harm going forward. For economics, the central concepts of tort law—duty, breach, actual and proximate cause, and harm—do no real work. 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. For the standard economic analysis, duty, breach, actual and proximate cause and injury are not reasons for the imposition of liability. They are evidentiary markers which do a respectable job of identifying cheapest cost-avoiders going forward. Or so the orthodox economic analysis of tort claims.

Last, but surely not least, these structural and substantive elements form a unified whole. "The relations among the central concepts of tort law—wrong, duty, responsibility, and repair—are best understood as expressing the fundamental normative significance of the victim-injurer relationship as it is expressed in the principle of corrective justice." Because economics analysis fails to explain both the structural and the substantive cores of tort, it cannot do justice to the larger whole that they form.

The success of corrective justice as a theory of tort is the flip side of the failure of economic analysis. The basic structural features and main concepts of tort law embody...
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 tort law is corrective — the fact that its sovereign principle requires wrongdoers to repair the wrongful losses that they have inflicted. Duty and breach articulate criteria of wrongfulness and thereby ensure that the law of tort honors the principle of corrective justice in its robust form. If tort regularly enjoined repair of losses that stemmed from 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.”  

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 an typical tort suit a natural, unforced justification. The institutional practice of tort law instantiates and fleshes out the abstract moral principle of corrective justice.

III. The Priority of Primary Rights and Responsibilities

Calling the repair of wrongful losses the “overarching aim or purpose” of tort law misunderstands the law of torts. Torts are wrongs — violations of rights important enough to be made coercively enforceable by law. It is better for wrongs whose effects need undoing not to be committed in the first place. In a social world where the law of torts was fulfilled as far as reasonably possible, tortious wrongs requiring repair would presumably be rare. Primary duties prohibiting the infliction of wrongful harms would be widely honored and the rights that they protect would be widely respected. From the point of view of corrective justice theory, this withering of the practice of corrective justice would seem unwelcome. The values realized by the practice of corrective justice would be less frequently enforced and thus less fully honored by the law. From the point of view of tort law itself, however, this withering

57See e.g., Coleman, PP, 15, 36 (emphasis mine).

58 “The patterns of inference that give the key concepts of tort law their content are not haphazard, but can be seen to hang together in a coherent and mutually supportive structure. Corrective justice describes that structure; or, to put it differently, it expresses the principle that holds together and makes sense of the central concepts of tort law. At the same time the practices of tort law serve to realize or articulate corrective justice in concrete institutional forms... tort law embodies corrective justice, and corrective justice explains tort law.” Coleman, PP, 62.

59RW, 395 (2002 edition?)
of the practice of corrective justice would be a welcome development. From the point of view of tort law, it is better not to inflict wrongful harms in the first place than it is to erase their untoward effects once they have been inflicted. In tort, as elsewhere, an ounce of prevention is worth a pound of cure. Tort is not a remedial institution.

Obligations of reparation, moreover, are parasitic on primary obligations of harm-avoidance and they draw their obligatory power from the obligatory character of those primary obligations. Breach of a primary obligation in tort does not discharge that primary obligation, much less relieve the breaching party of her responsibility to comply with that obligation. Breach of a primary obligation simply makes it impossible for the breaching party to comply fully with that obligation. Repairing the harm done by breach of obligation is the best that the wrongdoer can now do to honor her obligation. Breach of primary obligation provides the circumstance that calls corrective justice into play, and the existence of an undischarged primary obligation provides the reason why an injury wrongly inflicted must be repaired. Right and reparation form a unity, and within that unity, primary obligations and primary rights have priority over remedial ones. Corrective justice theory has the law of torts backwards.

B. The Content of Primary Rights Accounts for the Prominence of Corrective Justice in Tort

To be sure, the corrective justice principle that wrongful losses should be repaired has a connection with the law of torts, but that connection is due to the character of primary tort rights. Most torts involve harms: most tortious wrongs make their victims worse off and leave them in conditions requiring repair. One way to see that the duty of repair is the offspring of the obligation to avoid inflicting harm is by examining those torts whose commission does not require doing harm. Although most torts are naturally characterized as protecting us against harm in one of its diverse manifestations, an important minority of intentional torts—let us call them “sovereignty-based” torts—are naturally characterized as protecting particular autonomy rights against violation, even beneficial violation. Sovereignty-based torts proscribe various interferences with zones of control or powers of discretion—control

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60 This point appears to have been made first by Neil MacCormick, The Obligation of Reparation, in Legal Right and Social Democracy, 212 (1982). It has since been made by others. [cites to Raz and Gardiner]

61 I borrow the term “sovereignty-based” from Arthur Ripstein, Beyond the Harm Principle, PPA (2006?). He is not responsible for my usage. The shorthand distinction between “harm-based” and “sovereignty-based” is not meant to imply that the former do not involve rights whereas the latter do. The point, rather, is that some tort rights are grounded in harm whereas others are grounded in autonomy.
over one’s physical person or one’s real property, for instance. They guard important boundaries against unauthorized crossings.

Sovereignty-based torts can be committed without doing harm and, indeed, while benefitting their victims. If I operate on your ear without your permission and succeed in curing your earache I have not harmed you. You are better off, not worse off, by virtue of my curing your earache. Nonetheless, I have violated your rights and committed the tort of battery because I have operated on you without your consent.\footnote{See Mohr v. Williams, 95 Minn 261, 104 N.W. 12 (1905); Kennedy v. Parrott, 243 N.C. 62 355, 90 S.E.2d 754 (1956). This prohibition against unconsented to invasive medical procedures is a different aspect of the tort of battery.}

In the same vein, I may not enter your real property without your permission, even if I thereby improve that property.\footnote{See e.g., Longenecker v. Zimmerman, 175 Kan. 719, 267 P.2d 543 (1954). Believing that cedar trees near the boundary of her property were on her side of the line, defendant had them topped, trimmed and cleaned of bagworms. In fact, they were on plaintiff’s property. Defendant had trespassed and was liable for “at least nominal damages, even though he was actually benefitted by the act of the defendant.” [pinpoint cite needed]}

For our purposes, the pertinent lesson taught by these torts is that when primary rights do not protect against harms, the proper remedy for their violation is not repair of wrongful loss. The tort of trespass protects the interest in dominion over real property and the right to exclusive control that interest grounds. Put differently, the tort of trespass protects the exercise of a power, namely, the power to determine who and what will enter your property. When that right is violated and that power is denied the proper remedy is one that restores the power. That restoration is normally accomplished by injunctive relief.\footnote{Restatement cite.} Remedies are the servants of rights. The repair of wrongful losses is only appropriate when that is what is required to restore the relevant right. In tort, it is often but not always the case that restoration of the right requires reparation. The connection of tort to corrective justice is thus a contingent one.

To see this point from a different direction, consider the natural extension of the principle that wrongful losses ought to be repaired by those responsible for their infliction. That principle is both highly general and formal: it does not contain any criterion of wrongfulness. It can, no doubt, attach itself to many torts because many torts result in wrongful losses. But it is hardly confined to the law of torts. By its terms the principle applies to any wrongful loss. Left to follow its own logic, the principle ought to wander the law looking for wrongful losses to repair. Some such losses would be found in the private law of torts but others might be found in other bodies of private law or in various pockets of public law. Contract comes to mind as a private law...
possibility, and eminent domain comes to mind as a public law one. Nothing in the principle itself claims tort law as the unique domain of its application.

Most torts, of course, do involve harms and most tort rights are rights protecting their holders against harms. The general obligation of reasonable care, for example, guards the right to “bodily security.”65 It does so by requiring that people take appropriate precautions to avoid injuring others. The protections of this right are thus enjoyed, not exercised.66 Unlike the tort of battery, the general duty of due care does not protect in any part the exercise of a power to determine who may and may not touch you. It protects only against harm, not against boundary crossings to which consent has not been given. Unlike some unauthorized boundary crossings, harms leave their victims in conditions where repair is required to restore the victim to the position that she occupied prior to being injured.

In short: because most tortious wrongs involve harms most torts give rise to remedial responsibilities of repair. Most torts there implicate the corrective justice principle that wrongful losses should be repaired. Tort is connected to corrective justice, but because of the primary rights it recognizes and protects.

B. Justice and Rights in Tort

As a theory of tort law, remedialism 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 punish the wicked, so too we do not have the law of torts in order to repair wrongful losses.67 The “overarching aim or purpose” of the law of torts is not to repair

65Comments b & d to Section 1 of the Restatement (Second) of Torts describe the law of torts as treating the interest in “bodily security” as a “right” and protecting it 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.” The right to bodily security thus grounds diverse tort obligations. I am grateful to Mark Geistfeld for calling my attention to this comment.

66This distinction is drawn felicitously in Leif Weinar, The Nature of Rights, 33 Phil & Public Affairs, 223 233 (2005).

67Coleman anticipates this criticism and argues that retributivism is a defensible explanatory and justificatory theory of punishment. Coleman, PP, 32-33. He is quite right about this, but the observation is beside the point. Coleman claims not that corrective justice is a defensible theory of tort remedies, but that “tort law is best explained by corrective justice” because “at its core tort law seeks to repair wrongful losses.” See supra note 2, and accompanying text. Just as retributivism is only plausible as a theory of criminal punishment, so too corrective justice is only plausible as a theory of tort remedies. Compare Hanoch Sheinman Tort Law and Corrective Justice supra note 6, at [pinpoint cite needed] and Benjamin Zipursky, Civil Recourse not Corrective Justice, – GEORGETOWN L. REV. - [pinpoint cite needed]
harm wrongly done but to protect certain powers and preconditions of personal agency. Tort protects urgent interests in life, property and personality and thereby constructs important forms of protection and power. Primary rights in tort are rights to liberty and security, broadly construed, and primary obligations are reciprocal responsibilities not to harm other people in certain ways, or disregard rights which confer on them authority over their persons and possessions.

Because tort law is fundamentally concerned with the question of what we may reasonable demand from each other as a matter of right with respect the liberty and 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. Analytically, corrective justice is parasitic on primary obligations and those primary obligations are not obligations of corrective justice. Coleman himself observes:

[C]orrective justice is an account of the second-order duty of repair. Someone does not incur a second-order duty of repair unless he has failed to discharge some first order duty. However the relevant first-order duties are not duties of corrective justice.\(^68\)

Corrective justice does not come into play until an antecedent wrong exists. With the possible exception of strict liability wrongs— where the primary duty is not to harm without repairing and where the wrong thus consists in harming without repairing\(^69\) — tortious wrongs themselves are not corrective injustices. It is wrong to punch someone else in the face absent justification or excuse, but it is not a corrective injustice.

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.\(^70\) More generally, torts— fraud, battery, intentional infliction of emotional distress, negligent infliction of physical injury and the like— are wrongs which presuppose rights, not antecedent corrective injustices.\(^71\) People have rights, for

\(^68\) See infra note -- , and accompanying text.

\(^69\) See infra note -- , and accompanying text.

\(^70\) As the RESTATEMENT (SECOND) OF TORTS recognizes. See supra note - [cross-cite needed].

\(^71\) Weinrib appears to deny this. He writes: “Corrective justice serves a normative function: a transaction is required, on pain of rectification, to conform to its contours.” Corrective justice is thus about the righting of corrective injustices (actions which, say, disturb “the equality between the parties”). IPL, 76. This is, as John Gardner says, a “non-starter”.
example, not to be defrauded. Deception destroys freedom every bit as much as coercion does; it robs people of their autonomous agency and makes them the unwitting instruments of the wills of others. People have compelling reasons to object to such treatment, and even more so when their cooperation is unwittingly enlisted in economic transactions that are injurious to them.

Primary obligations in tort are grounded in people’s rights. It is wrong to batter someone because it violates their right to physical integrity; 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. Either that question escapes the distributive/corrective dichotomy, because that Aristotelean distinction predates the concept of a right, or that question is a question of distributive justice. Whether we classify the question of what rights people have as a question of distributive justice or not, primary obligations in tort are grounded in corresponding rights to various kinds of liberty and security. This kind of justice that involves the articulation of rights is thus more fundamental to tort than corrective justice is.

C. The Structure of Tort Law

Corrective justice theory identifies tort law with its adjudicative incarnation and its remedial phase. The structural features of tort that it counts as core—tort’s bilateral marrying of a single plaintiff to a single defendant, with strictly correlative rights and duties; its backwards looking focus on whether the defendant complied with a binding standard of conduct; its concern with repairing wrongful losses— are all aspects of tort law in its remedial phase. Because the first question of tort law is just what it is that we owe to others in the way of respect for their persons, their property, and a diverse set of their “intangible interests” it is a mistake to identify tort law with tort adjudication. The first task of tort is the articulation of primary obligations. The structure of primary obligations therefore has a better claim to be the core of tort than the structure of remedial responsibilities does. And that structure is quite different from the structure

Gardner, “What is Tort Law For?”, supra note , at 19-20. With the possible exception of strict liability wrongs, where the wrong consists in harming without repairing, torts are wrongs— not corrective injustices.

72 We normally think of distributive justice as concerned with the distribution of goods such as income or wealth, or with the distribution of essential services such as medical care. On this conception, the question of what rights people have is a question of justice but not a question of distributive justice. Other usages of the term distributive justice appear to 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. 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. LEG. STUD. 471, 481 (1996).
emphasized by corrective justice theories.

Corrective justice theory misconceives the structure of tort law in three ways. First, by emphasizing the bilateral structure of tort lawsuits corrective justice theory gets the formal character of primary tort norms wrong, and gives a curiously personal cast to the character of tort wrongs. Primary obligations in tort are omnilateral not bilateral, they are owed by everyone and to everyone else. And characteristically modern tortious wrongs have an abstract and general quality, not a personal one. The negligent infliction of accidental physical harm, for example, is usually an abstract and general wrong: a failure to exercise care in order to protect an indefinite plurality of potential victims whose persons and property we might otherwise unreasonably endanger. Because primary tort norms are articulated through private lawsuits, the structure of the typical tort lawsuit conceals this truth instead of making it manifest. The bilateral and personal form of the lawsuit is out of sync with the omnilateral obligations and general law that tort adjudication generates.

Second, not all primary obligations are properly expressed as standards of conduct and not all tort liability attaches wrongful conduct. If corrective justice requires wrongful losses issuing from wrongful conduct, then significant chunks of tort law are not compatible with corrective justice. Strict liability in tort exists and it attaches to conduct that is justified or innocent, not wrongful. When strict liability is the prevailing liability rule, the primary obligation is to make reparation for harm fairly attributed to one's justified or faultless conduct. Strict liability wrongs are wrongs, but they are not conduct-based wrongs.

Third and last, even tort’s remedial responsibilities have a forward-looking role to play. Remedial responsibilities enforce rights, as well as restoring them. The prospect of remedial responsibility serves to assure compliance with primary responsibilities not to inflict harm requiring repair. Paradoxically, then, remedial responsibilities uphold the rights they guard most fully when they diminish the number of occasions on which remedy is required.

1. The Properties of Primary Obligations

Tort law, to be sure, is not regulation. Tort is a common law legal institution and it develops law through adjudication. But it does apply and articulate law, not just settle disputes. Legal decision is decision in accordance with preexisting norms, and tort rulings do not bind only the parties to the case at hand. Nor do common law legal decisions bind only retrospectively. Common law legal decisions have precedential force. Rulings in individual cases bind prospectively on all who fall within their scope. In their prospective aspect, tort rulings bind very generally. Tort obligations are at root omnilateral— they are owed by everyone and to everyone else. Tort rulings, for their part, bind indefinite classes of potential wrongdoers going forward indefinitely and protect indefinite classes of potential victims going forward indefinitely.
In the general law of negligence, for example, duties are owed by classes of prospective injurers and to classes of potential victims. There are, indeed, few legal duties as general and few legal norms as abstract as the general obligation of reasonable care. That obligation is both owed by everyone and to everyone else and presumptively applies to all actions that create significant risks of physical harm. When corrective justice theories insist that duty and right in tort have a bilateral, one-on-one structure, they simply overlook this basic feature of the structure of rights and duties in tort. The result of this oversight is an oddly and mistakenly personal conception of tortious wrongs. Torts are presented as wrongs done to one named person by another.

Corrective justice gets its peculiarly personal conception of tortious wrongs from its preoccupation with the remedial dimension of tort. Tort law’s remedial responsibilities are correlative to in personam rights. Duties of reparation in tort are owed to named plaintiffs and owed by named defendants. Remedial rights are held by and against particular persons; particular plaintiffs are bound to particular defendants through defendants’ tortious injury of plaintiffs. Corrective justice theory is quite right about all of this, quite right to insist on the bilaterality of remedial rights and duties and on “the unity of doing and suffering”. Primary rights and obligations, however, are not personal in this way. Primary rights and obligations are omnilateral, not bilateral. Unlike contractual obligations, tort obligations do not arise out of voluntary agreements among particular persons. Unlike property obligations, they are not created and mediated by the ownership of external objects. They are grounded in fundamental interests of persons qua persons and are owed by each of us everyone else.

The general law of negligence is again a case in point. The obligation of reasonable care — the standing requirement that one conform one’s conduct to the dictates of whatever it is that due care demands in the circumstances at hand — binds omnilaterally and prospectively, not bilaterally and retrospectively. Indeed, tort law’s omnilateral and prospective primary obligations are the source of and reason for its bilateral remedial responsibilities. Because primary obligations are owed by each of us to all the rest of us, the responsibility to repair tortiously inflicted injury falls, in the first instance, on the person who has inflicted that injury and is owed to the person who has suffered that injury. When my doing is the source of your suffering — and tortiously so — I stand in special relation of responsibility to you. My failure to honor my primary obligation not to tortiously injure you naturally gives rise to a special obligation to erase the effect of my wrong.

Because primary obligations and primary rights ground remedial ones, the structure of primary rights and obligations has a better claim than the structure of remedial rights and obligations does to being an essential structural feature of tort law.

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73 Cite to Arthur’s review of Kaplow and Shavell.
2. Strict Liability Wrongs

Corrective justice theory’s insistence on wrongful conduct as essential to tort law prevents it from giving an adequate account of strict liability in tort. Negligence liability is predicated on wrongful conduct—on conduct that is unreasonable or unjustified. The competing principle of strict liability predicates responsibility not on unreasonable conduct but on an unreasonable failure to repair harm reasonably inflicted. To be sure, strict liability is the exception and negligence the general rule. Strict liability is common enough, however, that we can reasonably insist that an adequate theory of tort be able to explain and justify its existence as an alternative to negligence. Corrective justice theory flunks this test. In Coleman’s case, corrective justice theory flunks the test in part because it conceives of much strict liability as lying outside the core of tort that it succeeds in explaining, and in part because it models strict liability on negligence. Whereas negligence liability imposes a duty to exercise reasonable care to avoid inflicting physical harm on others, strict liability, Coleman claims, imposes a duty not to harm others—period.

This misconceives strict liability. Structurally speaking, strict liability in tort generally resembles the public law of eminent domain, not fault liability in tort. Indeed, strict liability competes with fault liability because it imposes liability on reasonable conduct. Eminent domain law holds that it is permissible for the government to take property for public use only if the government pays just compensation from those whose property it takes. This is a two part criterion. First, the taking must be justified; it must, that is, be for a public use. Second, compensation must be paid for the property taken. In parallel fashion, strict liability in tort holds that it is permissible to undertake certain actions and activities only when two conditions are met. First, the acts and activities must be conducted reasonably. Second, those who undertake those acts and activities

74 This is ironic because strict liability “duties” are the only primary duties that might be plausibly described as corrective; they involve obligations not to harm without repairing.

75 In Coleman, PP, Coleman notes (p. 36) that corrective justice theory “does not explain” various features of tort law, “for example, vicarious liability or perhaps product liability.” In Risks and Wrongs, Coleman excludes product liability from the core of tort and asserts that it cannot be explained by corrective justice principles. [cite] The issues here are too complicated to be discussed adequately in this paper. For now we must settle for noting two points. First, a theory of tort which can explain its domains of strict liability is interpretively superior to a theory which cannot. Second, the emergence of product liability law is the most important development in twentieth century tort law. An adequate theory of tort ought to be able to account for it.
must repair any physical harm done by their conduct. Whereas negligence liability is predicated on criticism of conduct, strict liability is predicated on the failure to make reparation for harm done. Negligence liability is liability for harm done by unreasonable conduct whereas strict liability is liability for harm done by reasonable conduct. Its fundamental justification is that the costs of necessary or justified harms should be borne by those who benefit from their infliction.

This form of strict liability is embodied by a diverse set of doctrines: by private necessity cases such as Vincent v. Lake Erie; by liability for abnormally dangerous activities; by liability for intentional nuisance; by liability for manufacturing defects in product liability law; and by the liability of masters for the torts of their servants committed within the scope of their employment. The obligation imposed by these doctrines is an obligation to undertake an action (e.g., saving your ship from destruction at the hands of a hurricane by bashing the dock to which it is moored) or conduct an activity (e.g., operating a business firm) only on the condition that you will repair any physical harm for which your action or activity is responsible. The reciprocal right is a right to have any physical harm done you undone by the party responsible for its infliction.

There is also a second, less common form of strict liability epitomized in the torts of conversion and trespass and in some batteries. Here the wrong is the violation of a right which assigns a power of control over some physical object or, in the case of battery, control over some subject. The law’s specification of various powers of control over one’s person and physical objects gives rise to a form of strict liability predicted on the voluntary but impermissible crossing of legally specified and enforced boundary. If you enter my land, or appropriate my pen, without my permission you have violated my right of exclusive control over these objects even if your entry is entirely reasonable and justified. The wrong consists in the failure to respect the right. Fault is simply irrelevant. Put otherwise, liability for violation of a right of exclusive control is strict for the simple reason that the right itself would be fatally compromised by tolerating all reasonable (or justified) boundary crossings, without regard to whether consent was given to those crossings. Rights of control are a species of autonomy rights. Those who hold such rights are entitled to forbid even reasonable boundary crossings and they are

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76 This “private eminent domain” conception of strict liability may make its first appearance in American tort theory in the writings (some famous and some obscure) of Oliver Wendell Holmes. These writings are cited and discussed Grey, Accidental Torts, supra at 1275-1281 and at greater length in his unpublished manuscript “Holmes on Torts”. Two other classic statements are Francis Bohlen, Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality, 39 Harv. L. Rev. 307 (1926); Robert E. Keeton, Conditional Fault in the Law of Torts, 72 Harv. L. Rev. 401 (19590. [cite also to Bohlen The Rule in Rylands v. Fletcher, ?]

77 Cites. See supra note 64, and accompanying text [fix cross-cite]
presumptively wronged whenever their boundaries are crossed without permission.

Coleman’s views on the nature of strict liability have changed over time, but he has lately taken the view that strict liability involves a duty not to harm. In contradistinction to what he calls “the standard view”, Coleman’s view models strict liability on negligence liability. On the standard view, negligence liability is— and strict liability is not— based on a failure to conform one’s conduct to a norm of obligatory conduct. On Coleman’s contrary view, both strict liability and negligence are conduct based norms: both involve breaches of duty. The only difference is the content of the duty:

[T]he relevant concept in the law of torts is wrong . . . . A wrong is a breach of a duty. Strict and fault liability are different ways of articulating the content of one’s duty to others. . .

In torts, blasting is governed by strict liability and motoring by fault liability. The way to understand the difference is as follows. In the case of motoring, my duty of care is a duty to exercise reasonable care; it is a duty not to harm you through carelessness, recklessness or intention. The law demands that I take reasonable precautions not to harm you: that I insure that the brakes and lights on my car operate properly, that I observe speed limits and other traffic regulations and so on. In the case of blasting, however, the law imposes on me the duty-not-to-harm-you. The way I am to take your interests into account is to make sure that I don’t harm you by blasting.

The difference between fault and strict liability is a difference in the content of the duty of care I owe to you. . . . If my duty to you is a duty-not-to-harm-you, then the only way that I can discharge that duty is by not harming you.

If my duty to you is a duty-not-to-harm-you-faultily . . ., then I can discharge that duty either by not harming you or by not being at fault—whether or not I harm you.78

When strict liability is conceived of as a “duty-not-to-harm” it conforms to the demands of corrective justice theory. Sovereign conceptions of corrective justice insist that corrective justice is an independent and important principle of justice precisely because

78Jules Coleman, Facts, Fictions, and the Grounds of Law, in Joseph Keim Campbell et al., eds. Law and Social Justice, 327 (2005). See also COLEMAN, PP, 35 fn. 19 (“The concept of a duty in tort law is central both to strict and fault liability. In strict liability, the generic form of the duty is a ‘duty not to harm someone’, while in fault, the generic form of a duty is a ‘duty not to harm someone negligently or carelessly.’”)
corrective justice requires, and tort liability imposes, liability on wrongful conduct.\textsuperscript{79}

This conformance to the demands of corrective justice theory comes, however, at the cost of offering an inaccurate account of strict liability in tort. \textit{Vincent} type cases are clear counterexamples to Coleman’s claim. When your ship is going to be destroyed by a storm if you unmoor it from the dock, lashing the ship to the dock and pounding the dock with your ship is the right — not the wrong — course of conduct. The doctrine concedes this; it does not impose a duty not to harm. Harm to the dock is to be regretted and repaired but — far from imposing an obligation not to do such harm — the law expressly permits, and indeed invites, its infliction. Better to bash the dock and save the ship than to leave the dock undamaged and let the ship be destroyed.

More fully, the doctrine of private necessity overrides the right to exclude and permits an actor whose property is threatened with destruction to save that property by making use of someone else’s property, even if that use involves the infliction of damage. It is reasonable for the ship owner to save his ship by lashing it to the dock and bashing the dock all night long. Conversely, it would unreasonable— as the ruling in \textit{Vincent} asserts — for the owner of the dock to refuse the ship permission to dock. The shipowner’s plight justifies his use of the dock and trumps the dock owner’s right to exclude. Finally, although it is reasonable for the owner of the ship to inflict the harm, it is unreasonable for the ship owner not to repair the harm that it inflicts. The exigencies of the situation justify overriding the dock owner’s right to exclude, but they do not justify shifting the cost of the ship owner’s salvation onto the dock owner. That would both be unfair and disregard the dock owner’s rights unjustifiably. The dock owner’s right to exclude the ship is overridden because lashing the ship to the dock is necessary to save the ship. But it is neither necessary nor fair to shift the cost of the ship’s salvation onto the dock owner’s shoulders.\textsuperscript{80} It is therefore unreasonable for the ship owner to refuse to repair the harm that it does in the course of saving its ship. The ship owner’s wrong consists not in breaching a duty not to harm the dock, but in failing — unreasonably — to make reparation for harm reasonably done.\textsuperscript{81}

\textsuperscript{79}See supra note , and accompanying text.

\textsuperscript{80}“It might be said, and it has been held, when it is a question of paying damages, that a man cannot shift his misfortunes to his neighbor’s shoulders.” O.W. Holmes, The Common Law, 78 (1881). Holmes is speaking here of Gilbert v. Stone; he thought that the principle applied more broadly. See also [cites to Holmes and others, and to Vincent paper].

\textsuperscript{81}Ernest Weinrib treats Vincent as an unjust enrichment case. See Ernest Weinrib, The Idea of Private Law, [pinpoint cites needed] (1995). Because \textit{Vincent} is a clear case of strict liability, moving it out of tort law furthers Weinrib’s identification of tort with fault liability. The argument is unconvincing, however. The liability in \textit{Vincent} is for harm done, and the measure of damages is injury inflicted, not benefit received. The benefit received by the
When we turn to cases where reasonable harm is inflicted accidentally (as it is in the blasting cases to which Coleman alludes) positing a duty not to harm is equally unpersuasive. Negligence duties always backstop strict liabilities in tort. Negligence liability is always available as an alternative to strict liability, and the stringency of negligence obligations of care increase with and are calibrated to the seriousness of the risk at issue. Courts often decline to impose strict liability precisely because they perceive the law’s default norm of negligence liability as an adequate alternative. The standing availability of negligence liability, and its capacity for calibration to the seriousness of the harm threatened, makes an independent strict duty not to harm superfluous. The ground of strict liability is simply different from the ground of fault liability. Strict liability asserts that when harm is done even though all reasonable precautions have been taken it is unfair to leave the cost of that harm on the plaintiff. The injurer ought to take the bitter with the sweet.

3. The Forward Looking Role of Remedial Responsibility

Last, but surely not least, corrective justice theory takes reparation to be tort’s fundamental purpose, but tort puts the prospect of reparation to use to enforce primary rights and responsibilities, not just to restore them. Tort damages perform, in part, a forward looking role. Primary tort duties enjoin respect for the rights of others, thereby constraining our freedom and checking the pursuit of our self-interest. It is natural to chafe at these obligations and tempting to disregard them. We may, moreover, justifiably be wary of discharging our obligations to others if we are not assured that they will discharge their reciprocal obligations to us. The prospect of liability in tort serves as a counterweight to our self-interest, as an incentive to discharge our obligations, and as an assurance that others will comply as well. The remedial powers

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defendant — saving its ship from near certain destruction — vastly exceeds the harm inflicted on the plaintiff’s dock. That’s why it is both rational and reasonable to authorize the trespass and the ensuing damage to the dock, after all. Liability for benefit unjustly received requires a different damage measure and much greater damages. Moreover, because the privilege authorizes the trespass, the saving of the ship is an enrichment but not an unjust one. What would be unjust is for the defendant to shift the cost of its plight onto the shoulders of the plaintiff by failing to make reparation for harm done. In short: Vincent is not an unjust enrichment case, but unjust enrichment ideas play a role in justifying the imposition of strict liability in tort.

82See e.g., Foster v. City of Keyser, 202 W. Va. 1, 501 S.E.2d 165 [pinpoint cites needed] (1997). In Foster, the West Virginia Supreme Court of Appeals reversed the circuit court’s imposition of strict liability on a natural gas company for an explosion caused by the escape of gas from one of its transmission lines because “other principles of law — a high standard of care and res ipsa loquitur — can sufficiently address the concerns that argue for strict liability in gas transmission line leak/explosion cases.”
that tort law places in the hands of injured plaintiffs, and the correlative duties that it imposes on defendants, put teeth in its primary obligations. Damages may do their most important and effective work when they diminish the number of occasions on which they must be awarded. Insofar as reparation is a second- or next-best way of honoring primary rights and responsibilities, this forward looking, rights-enforcing aspect of damages should not be dismissed lightly.\textsuperscript{83}

\textbf{IV. Taking Primary Rights Seriously}

Moral theorists of tort law have been on the right track in putting wrongs and rights at the center of tort law, but they have overshot the mark in asserting that the essence of tort law lies in the fact that it vindicates rights by rectifying wrongs. This kind of emphasis on rectification is mistaken in same way that retributivism in criminal law is mistaken. Just as we do not have the criminal law in order to punish the wicked, so too we do not have the law of torts in order to repair wrongful losses. The primary role of tort law is to articulate and enforce primary duties that we owe to one another, duties not to harm each other, or invade each other’s liberty in various ways. We need to reorient tort theory in a way which acknowledges the insights of remedial theories but which also gives primary rights and obligations their due.

\textit{A. Remedialism Right and Wrong}

What the remedialists get right is that tort is, indeed, a law of wrongs and rights. The economic account of tort as a law concerned with the costs of accidents has generated many powerful insights, but its overall account of the structure of tort adjudication is strained and implausible, as corrective justice theory has powerfully argued. It is unconvincing to argue that tort is an essentially regulatory body of law oriented toward minimizing the combined costs of accidents and their prevention. It is much more plausible and persuasive to maintain that tort suits seek to vindicate the rights of those who bring them, by requiring the defendants who have wronged them to

\textsuperscript{83}Doctrinally, this concern manifests itself most vividly in two areas. One is the imposition of punitive damages in order to deprive certain kinds of tortious acts of their economic advantage, thereby attempting to assure that the relevant rights will be respected and priced out by economically rational tortfeasors. See e.g., Jacques v. Steenberg [cite & parenthetical]. The other is in the adjustment of the scope of liability in certain kinds of proximate cause cases. In fixing the outer perimeter of responsibility for harm tortiously done, courts consider whether the scope of liability is sufficient to enforce the rights at stake. See generally —. This is especially salient in pure economic loss and pure emotional harm cases. See e.g., Dona Maru Cal NIED case. Compare Hanoch Sheinman [cite].
make reparation for the harm that they have done.

Moreover, this emphasis on wrongs and rights also draws an appropriate contrast between tort and criminal law. Criminal law certainly protects our rights, but it is not primarily concerned with the rights of the victims of crimes against the criminals who harm them. Its concern is with protecting us in general against wrongful, harmful forms of conduct that threaten us all, and with punishing those who do wrong— not making them repair the losses that they have wrongly inflicted on their victims. Tort, by contrast, is centrally about the rights that we have against one another.

More subtly, there is something important and right in the emphasis corrective justice and civil recourse theorists have placed on tort law’s remedial and adjudicative aspects. Rights do require remedies. This, indeed, is an axiom of the law. Without remedies legal rights are not effectively instituted, they cannot be enforced and restored. Unless they are effectively instituted, they may not even be legal rights at all. And tort does involve a distinctive approach to rights: it empowers those whose rights have been violated to seek redress from those who have done the violating. This is a distinctive way of enforcing primary rights. It is, however, distinctive of private law in general, not of tort law in particular. Contract, property and restitution share the same structure. Tort’s special character as a field of private law, therefore, is not revealed by the fact that it links those whose rights have been violated with those who have done the violating in adjudication.

Where remedialism goes wrong is in assigning pride of place to tort law’s remedial responsibilities and rights, instead of to its primary ones. Rights require remedies, but rights are anterior to remedies and remedies are governed by rights. Remedies are, or ought to be, constructed by determining what the relevant rights require— what must be done to enforce and restore them. Jules Coleman’s sophisticated and powerful version of corrective justice theory, for example, asks the primary rights of tort to answer to the requirements of the corrective justice. Tort wrongs must be the kind of wrongs that give rise to responsibilities of repair. They must be, Coleman argues, conduct-based wrongs. Requiring rights to answer to the requirements of a remedial principle reverses the relation of right and remedy. Remedies should and generally do answer to rights. Duties of repair loom large in tort because rights not to be harmed loom large in tort, and harm is the kind of thing which leaves those who suffer it in an injured condition. Repair is necessary to restore their rights.

We can elaborate on this by noting how the view that I have sketched in this

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84 For an illuminating account of the way in which it protects our rights in general, see Arthur Ripstein –.

85 Cites
paper contrasts with corrective justice theory in its critique of the economic theory of tort. For corrective justice theory, the failings of the economic theory of tort are essentially conceptual. Economics cannot explain or justify the backwards looking, bipolar structure of tort law and it cannot do justice to concepts such as duty and cause. For the view I have sketched, the failings of the economic theory are as much normative as they are conceptual or interpretive. Economics conceives of tort law as an instrument for minimizing the combined costs of accidents and their prevention so that wealth is maximized. Value resides in an end state of affairs and the claims of persons against one another are merely incidental to the production of that state of affairs.

The view that the essence of tort lies in the primary rights that it recognizes, rights to the liberty and security of our persons and our property requires that we take rights more seriously than economics does. On this view, people have rights against one another with respect to the liberty and security of their persons, because their essential interests are ones that our institutions must honor and protect. While these rights require justification in larger moral and political terms, they are not merely devices to induce people to behave in a way that minimizes the combined costs of accidents and their prevention.

Reorienting tort theory so that primary rights and responsibilities take pride of place frames the relation of tort to its more controversial manifestations (such as products liability) and to its administrative alternatives in a distinctive way. That framing is both different from the framing characteristic of remedial theories, and congruent with the framing characteristic of our legal system. When tort is identified with the characteristic feature of private law in general, namely, that it empowers those whose rights have been violated to enforce their rights against those who have done the violating through private lawsuits, then administrative alternatives to tort must be conceived of as radically discontinuous with the common law of torts. They extinguish the single most important feature of the law of tort, namely, the power of the wronged victim to call his wrongdoer to account in a private lawsuit. In a slightly different vein, when tort is identified with conduct-based wrongs, the harms that arise out of consensual market transactions have an uneasy relation to the core of tort law.

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86 On a “benefit theory” of rights, for example, the task will be to show that the interest of the right-holder is sufficient to justify imposing coercively enforceable duties on others. See Charles R. Beitz, The Moral Rights of Creators of Artistic and Literary Works, 13 JOURNAL OF POLITICAL PHILOSOPHY, 330, 335-37 (2005) (and sources cited therein). Within a contractualist political theory showing that the interest of the right-holder warrants placing others under coercively enforceable obligation protection entails showing that the demand for such protection could not reasonably be rejected.

87 Cites to Coleman & Weinrib.
Our law does not regard tort and its administrative alternatives as radically discontinuous in this way, however. It views them as members of the same family of institutions because it views them as alternative ways of instituting the same right. When a common law remedy is set aside and replaced by an administrative scheme, the question that courts most commonly ask is whether the administrative scheme provides an adequate alternative remedy for the underlying right.\textsuperscript{88} Worker’s compensation and tort are conceived of as alternative ways of instituting the same right to the safety of one’s person. Taking our cue from the Second Restatement’s remark that the interest in bodily security is “protected against not only intentional invasion but [also] against negligent invasion or invasion by the mischances inseparable from an abnormally dangerous activity,”\textsuperscript{89} we might frame the choice between tort and various administrative alternatives as a matter of which institutional arrangement gives more satisfactory expression to the right that they share in common. That, in any case, is how the matter looks from the vantage point of a view which takes primary rights and responsibilities to form the heart of the law of torts.

Second and related, placing primary rights and responsibilities at the center of tort invites us to bring product liability back into the law of torts. Jules Coleman and Ernest Weinrib, both exclude product liability from the core of tort law as they conceive it. This is disappointing. The rise of product liability law is not just the great development in the common law of torts in the twentieth century, it is the great development in the common law in the twentieth century.\textsuperscript{90} Excluding it from the common law of torts is a high price to pay. Fortunately, we do not need to pay that price once we place primary rights and responsibilities at the center of our understanding of tort. We can then see tort law’s central preoccupation—namely, physical harm—grounding the reconstruction of tort. Just as the right to the physical integrity of our person grounds the intentional tort of battery, the general law of negligence, and the law of abnormally dangerous activity, so too it grounds the modern law of product liability.

\textbf{B. Is Tort a Coherent Institution?}

If putting primary rights and responsibilities at the center of tort law has the advantages sketched above, it also has perceived disadvantages. One of these is the

\textsuperscript{88}This is most evident in litigation under state “remedy clauses” but it is also evident in litigation under other legal doctrines over such matters as the adequacy of workers’ compensation schemes or the nuclear power accident scheme. For remedy clause adjudication, see [cites needed]. For other doctrines, see [cites needed].

\textsuperscript{89}Cited supra, note .

\textsuperscript{90}[cites to Priest and me]
sense that tort law’s primary rights and duties are highly heterogenous, and irreducibly so.\textsuperscript{91} We are disposed to believe that tort protects an unruly collection of interests — in physical integrity, in emotional tranquility, in our freedom to move about, in dominion and use of real and moveable property, in reputation and privacy, in not being deceived as we go about our economic lives and enter agreements, in the legitimate economic expectancies that our agreements create, in not having legal processes used abusively against us — against violation. Tort may therefore be an irreducibly heterogeneous collection of wrongs. To be sure, all of the interests that tort protects are important enough to warrant coercive legal enforcement, but that may be all that they have in common.

The heterogeneity of tort law’s substantive obligations is a significant issue for a view that takes primary rights and obligations to be more than secondary ones. The question of whether tort is a unified subject and, if so, what that unity is has never been entirely settled.\textsuperscript{92} Putting a heterogenous collection of primary rights and responsibilities at the center of one’s account seems like to awaken deep-seated doubts about the coherence of the institution. Indeed, the heterogeneity of tort’s primary obligations seems to be a point in favor of a remedialist account of the subject. We do treat tort as a distinct and unified field, yet tort law’s primary obligations are untidy and apparently unified. Tort’s secondary responsibilities, by contrast, appear comparatively neat and unified. For the most part, they enjoin repair. What torts have in common is that they give rise to wrongful losses.

It may well be that best account of tort law shows it to be a miscellaneous collection of rights and causes of action, each of which is best explained in terms of its idiosyncratic history. But we should not jump to that conclusion and, indeed, ought to put the character of tort law on the table as an open question. It is possible that tort law has more unity than we are inclined to suppose. Placing primary rights and responsibilities at the center of our understanding of tort, should bring the issue to the fore. I shall therefore suggest that one traditional alternative — the view of tort as a body of law concerned, in a coherent way, with protecting people’s liberty, property and security — is plausible enough to sustain debate.\textsuperscript{93} This alternative conceives of tort as one of the laws of freedom. Tort establishes an essential piece of the independence and security of persons against one another as members of civil society. The basic test of this view is the extent to which the principal domains of tort law — injuries to persons both physical and intangible, injuries to property, and interferences with certain economic interests — can be understood in terms of essential interests in autonomy and security. A

\textsuperscript{91}Cite to Hershovitz Virginia piece, to Coleman and to John and Ben?

\textsuperscript{92}Cite to both Tom Grey pieces.

\textsuperscript{93}Cites
quick tour of tort’s terrain is therefore in order.

1. Tort’s Terrain

Tort law is a law of wrongs, but most of the wrongs that it is preoccupied with involve harm— to persons, their property, and their intangible interests. The general law of negligence, for example, stands at the center of modern tort law, and it is primarily concerned with guarding the physical integrity of persons and their property. The exceptional pockets of strict liability that attract the most attention are likewise preoccupied with physical harm. In both cases, harm is an essential element of a claim, and neither pure economic loss nor pure emotional injury generally counts as a harm which gives rise to liability.

Intentional torts are more diverse. Many of them protect us against harm but the harms they protect against are heterogeneous: battery protects us against physical harm; assault protects us against the fear of imminent physical harm; intentional infliction of emotional distress protects our emotional tranquility — but only when it is severely upset by outrageous conduct; fraud protects us against deception, but only when we are engaged in commercial transactions; defamation protects our reputation; tortious interference with prospective economic advantage protects important economic expectancies from invasion by third parties; and so on. As we have seen, other intentional torts protect domains of choice or powers of control. To those we have already mentioned — battery, trespass, and conversion — we should add false imprisonment, which protects our freedom to move about in the world-at-large.

The distinction between harm-based torts and sovereignty-based ones is important and illuminating, but it may conceal a deeper commonality. Both kinds of torts may have their roots in autonomy. The link between sovereignty-based torts and

94 The view that tort law is about harm is one of Oliver Wendell Holmes’ famous theses and it has been prominent in the legal academy ever since. The view may, indeed, be the most intuitively appealing of the standard views. Holmes takes this view in The Common Law, supra note --, e.g. at 115 (stating that the purpose of torts is “to secure a man against certain forms of harm.”). Unfortunately, Holmes thought that “harms” had to be distinguished from “wrongs”, thereby setting up a false antithesis between the two. On Holmes and harm, see Grey, Accidental Torts, supra note , at 1272-75 and “Holmes On Torts” [pinpoint cites needed].

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96 See supra note , and accompanying text.

97 Supra note 63, and accompanying text.

98 This is controversial, particularly in the case of harm. The prevailing account of harm holds that harms are violations of one of a person’s interests, an injury to something in which
he has a genuine stake.” Joel Feinberg, Social Philosophy, 26 [date]. The interest account conceives of harm in counterfactual or comparative terms and locates harm’s moral significance in its assault on our well-being. Harms are not so very different from costs. They are just more damaging to our well-being than costs; they set our vital interests back, and seriously. The autonomy account conceives of harm in terms of conditions whose badness is not comparative, and grounds harm’s significance in its assault on our agency. The interest account of harm is briefly but clearly deployed in Sheinman supra note, and in Scott Hershovitz, Torts and Takings, – Va L. Rev. – (200–).

See Seana Valentine Shiffrin, Wrongful Life, Procreative Responsibility and the Significance of Harm, 5 Legal Theory 117 (1999); “Harm and Its Significance” (unpublished ms.). Tortious harms, of course, are marked by one more essential property: they inflicted by some and suffered by others. This is an essential feature of tortious harms because tort is concerned with what we may demand from each other as a matter of right and rights hold only against other agents, not against natural forces. This feature of tortious harm is not our present focus, however.

autonomy is straightforward: sovereignty-based torts protect powers of control over persons and property. Those who hold these powers can use and dispose of the objects the powers govern as they see fit. The link between harm and autonomy is not as obvious. It holds in the strongest way insofar as harm involves being put in a condition where one’s experience is severed from one’s will so that one is alienated from the content of one’s life, and deeply so. To suffer a harm of this sort is to be subjected to an intensely unpleasant experience, or to be placed in a condition which thwarts one’s control over the content of one’s life. Serious physical injury and agonizing pain are harms of this kind and their relation to autonomy is clear. They negate it; they rob their victims of their agency. Harms like this are to be suffered and endured.

Insofar as harms are assaults on agency, harm-based and sovereignty-based torts both protect autonomy. Harm-based torts protect one of the faculties whose expression is constitutive of autonomy whereas sovereignty-based torts protect powers that are essential to the exercise of our freedom in the world. In other cases, the connection between wrong and autonomy is different, but not difficult to draw. The wrong at the heart of fraud, for example, is deception and the link between deception and autonomy is straightforward. Deception undermines autonomy by making people the unwilling instruments of other people’s wills. Fraud undermines freedom every bit as effectively as force does. The latter overwhelms the body, the former undoes the mind.

Protection of our sovereignty over ourselves and our property as it is found in trespass and battery, and protection against physical harm as it is found in the general law of negligence, are canonical cases of tort protection. The law of torts protects a diversity of interests, however, and we must therefore ask just how far this diversity can be mapped onto these canonical examples. Some torts are naturally described as other
instantiations of these two basic categories. The kind of severe fright or emotional distress that the law of torts protects us against fits the conception of harm as an assault on our persons so severe as to thwart our mastery over our experience. Emotional distress of the acute kind that concerns the law of torts in both its negligent and intentional modes constitutes a brutal assault on agency. Sensibility-based nuisances are fit this conception nicely as well—they are visceral assaults on our senses. By contrast, the idea of sovereignty at work in trespass and battery has less generative power. Conversion and false imprisonment may be its only other domains.

Other torts stand at greater distance from the core cases. Consider defamation and privacy. To bring defamation within the ambit of an autonomy account of harm, reputation must be an especially important condition of agency, so that the security of our reputation is essential to our capacity to work our will upon the world. The case would have to be made that defamation undermines our autonomy by making our reputations subject to the false claims of others, instead of answering to our own agency, to what we have done in and with our lives. For defamation to meet this description it would have to have certain features: it could not merely protect the powerful from justified criticism of their conduct or protect the good names of those with high status. It would have to protect everyone from having their good name ruined by falsehoods. Fitting privacy into this framework requires showing why the presence of some sphere where one is free of observation is essential either to the development or the exercise of independence.

The business wrongs of tortious interference with contractual relations and prospective economic advantage challenge the categories of harm-based and sovereignty-based torts, when harm is modeled on serious physical injury and understood in terms of disabling the will. These torts protect the reliability of justified economic expectancies against outside interference. Tortious interference with contractual relations, for example, protects existing contracts against breaches induced by third parties. For the most part, our economic interests are subject to the fluctuations of the marketplace. When those interests have crystallized into contract rights, however, we may reasonably rely on them. Our contract rights against counter-parties would count for relatively little if they did not also entail rights to the non-interference of third parties. Those parties would otherwise be justified in continuing to compete for the advantages we have secured for ourselves. By protecting justified economic expectancies, tort law protects our control over essential instruments of agency in a way which parallels the protections conferred by the property torts of trespass and conversion. One set of torts protects property rights against interference; the other
protects contract rights.

This layering of tort on contract protects against something that it seems natural to characterize as a harm, namely the thwarting of justified and important expectations, expectations to whose satisfaction we have a right. In liberal political theory, the thwarting of justified expectations to which we can lay claim as a matter of right is an important kind of harm. John Stuart Mill, for example, conceived “of security primarily in terms of the reliability of established expectations”. For Mill, “unpredictable encroachments” on justified expectations amounted to “encroachments on the moral right to security.” The reliability of established expectations is, “to everyone’s feelings the most vital of all interests... security no human being can possibly do without; on it we depend for all of our immunity from evil, and for the whole value of all and every good, beyond the passing moment; since nothing but the gratification of the instant could be of any worth to us, if we could be deprived of anything the next instant by whoever was momentarily stronger than ourselves.” To be sure, the security against each other obtained by the business interference torts is far more modest than the security that Mill had in mind. It is nonetheless similar in kind: a protection of expectations which we are justified in counting on satisfying.

Tort’s three domains might then be understood as follows. At the center of the field are the freestanding torts: these torts protect interests in the physical and psychological integrity of the person which do not derive from other fields of law. They spell out what we owe to each other not by virtue of acquiring external objects (property) or entering into voluntary agreements (contract), but by virtue of essential interests that we have as autonomous agents. The question they pose is whether the interests that they protect (in bodily security, physical liberty, rational agency, emotional tranquility, privacy and reputation) are best understood as especially important aspects of persons’ welfare, or as urgent aspects of their autonomous agency. The burden of the view that tort is not a heterogeneous law of wrongs but a subject whose central domain

\[\text{\textsuperscript{102}}\text{JOHN GRAY, MILL ON LIBERTY: A DEFENCE, 54 (1983).}\]

\[\text{\textsuperscript{103}}\text{JOHN STUART MILL, UTILITARIANISM, [pinpoint cite needed] (original and edition publication dates). Security in the sense Mill is using it here extends beyond tort to encompass, at the least, security of property and contractual expectations. Conceiving of tort law as protecting our vital interests against serious injury is quite Millian. For a concise statement of the relevant aspect of Mill’s thought, see JOHN GRAY, MILL ON LIBERTY: A DEFENCE (19–). Gray observes that Mill’s conception of vital interests strongly resembles Rawls’ account of primary goods. The Millian character of the thesis that tort law is about harm (or, more exactly, rights against harm) is even more pronounced when harm itself is conceived as the negation of agency and hence of autonomy. On this view, the gap between a Kantian view of tort as a law of equal freedom and a Millian views of tort as a law of autonomy and security, is small. For a contrasting view see Arthur Ripstein, Beyond the Harm Principle [cite - PPA].}\]
From a different angle, we are once again encountering the point that rights justify a diversity of legal protections. Just as the right to bodily security justifies rights of reasonable care in negligence law, rights against battery and assault in intentional tort law, and rights against abnormally dangerous activities in strict liability, so too property and contract rights justify some tort duties. Rights may generally have this quality of generating “successive waves of duty”. See Jeremy Waldron, *Rights in Conflict*, in [cite needed].

Tort’s freestanding core is flanked on two sides by the protections that it confers on rights originating in other bodies of law, namely property and contract. In these flanking domains, the role of tort is to help secure the effectiveness of rights which are not themselves creatures of the law of torts. Here, the critical question is whether those rights are essential enough to warrant the protections of tort and what tort must do to assure that those rights are efficacious. Tort’s intervention is warranted when those rights ground the kind of expectations whose frustration is a serious harm, or create powers of control which are both important and which can only be effective with tort protection. Miscellaneous torts lying outside these three domains—such as those prohibiting abuse of legal and political processes—might then be understood on the model of the property torts and the business torts. They are justified insofar as they are necessary to guarantee the effectiveness of important rights originating elsewhere.

V. Reorienting Tort Theory

Corrective justice theory in full flower claims that tort is essentially a matter of repairing losses wrongly inflicted. I have argued that this claim is unconvincing, both normatively and interpretively. Normatively, corrective justice theory is unconvincing because it puts the cart before the horse. Duties of repair are parasitic on, and derivative of, primary duties of harm avoidance. Repairing harm done is a next best way of respecting underlying rights to protection against harm and invasions of one’s sovereignty; and duties of repair derive from failures to respect those rights and discharge primary obligations in tort in the first instance. Tort is not a remedial subject.

Interpretively, corrective justice theory fails because its account of tort law matches only tort’s remedial dimension, not its primary obligations— and because it offers an inadequate account of strict liability in tort. Corrective justice theory’s emphasis on tort’s remedial responsibilities slights the law’s primary responsibilities, and its thesis that liability in tort must be a matter of wrongful conduct is belied by strict liability doctrines which impose liability on conduct that is justifiable. We should follow

104 From a different angle, we are once again encountering the point that rights justify a diversity of legal protections. Just as the right to bodily security justifies rights of reasonable care in negligence law, rights against battery and assault in intentional tort law, and rights against abnormally dangerous activities in strict liability, so too property and contract rights justify some tort duties. Rights may generally have this quality of generating “successive waves of duty”. See Jeremy Waldron, *Rights in Conflict*, in [cite needed].
the lead of corrective justice theorists in putting wrongs (and rights) at the center of our understanding of tort law, but we should reorient tort theory to place primary rights and obligations at the subject’s core. The questions at the heart of tort law are questions about what rights and responsibilities persons owe to one another with respect to their liberty and security.