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Legal Theory / Volume 18 / Special Issue 03 / September 2012, pp 293 - 337
DOI: 10.1017/S1352325212000031, Published online:

Link to this article: http://journals.cambridge.org/abstract_S1352325212000031

How to cite this article:
Gregory C. Keating (2012). THE PRIORITY OF RESPECT OVER REPAIR. Legal Theory,18, pp 293-337 doi:10.1017/S1352325212000031

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Legal Theory, **18** (2012), 293–337.
© Cambridge University Press 2012 0361-6843/12 $15.00 + 00
doi:10.1017/S1352325212000031

THE PRIORITY OF RESPECT OVER REPAIR

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Contemporary tort theory is dominated by a debate between legal economists and corrective-justice theorists. Legal economists suppose that tortfeasors and tortious wrongs are false targets for cheapest cost-avoiders and avoidable future losses. Corrective-justice theorists argue powerfully that the economic account of tort as search for cheapest cost-avoiders with respect to future accidents does not capture the most fundamental fact about tort adjudication, namely, that the reason we hold defendants liable in tort is that they have wronged their victims and should therefore repair the harm they have done. Deterring cheapest cost-avoiders from committing future harms no more justifies imposing liability in tort than deterring future crime justifies hanging the innocent. This is a powerful critique of the economic theory of tort, but it overshoots the mark. As an account of tort law, corrective justice puts the cart before the horse Tort is a law of wrongs, not just a law of redress for wrongs. Repairing harm wrongly done is the next best way of complying with an obligation not to do harm wrongly in the first place. Rights and remedies form a unity in which rights have priority. Corrective justice is thus an essential but subordinate aspect of tort. This paper develops this line of criticism of corrective-justice theory and offers an alternative account of tort that places primary norms of harm avoidance and respect for rights at its center. On this conception, tort is—as the corrective-justice theorists rightly insist—a law of wrongs, but its distinctiveness lies in the content and character of the wrongs with which it is concerned. At its core, tort is concerned with protecting essential conditions of individual agency.

*I am grateful to Bob Rasmussen, for urging me to write this article. Earlier versions of this paper were presented to the University of Southern California (USC) Faculty Workshop, the University of California–Los Angeles (UCLA) Legal Theory Workshop, and the New York City Torts Group. I have benefited greatly from these presentations. I am especially grateful to Gary Watson and Seana Shiffrin, who commented on earlier drafts at the USC and UCLA workshops respectively, and to Ben Zipursky for organizing the New York presentation. I have also learned much from the comments of the participants in those workshops and others, including Scott Altman, Kim Buchanan, Eric Claeys, Jules Coleman, Stephen Gardbaum, John Gardner, Mark Geistfeld, John Goldberg, Mark Greenberg, Barbara Herman, Ehud Kamar, Dan Klerman, Jennifer Mnookin, Jeffrey Pojanowski, Bob Rabin, Arthur Ripstein, Jason Solomon, Tony Sebok, Cathy Sharkey, Ken Simons, Martin Stone, Gideon Yaffe, and Ben Zipursky. I am indebted to Aness Webster, Nataline Viray-Fung and Nicole Creamer for invaluable research assistance, including sound editorial advice.

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In America, tort has been the most dynamic of common-law subjects and the preeminent site of private-law transformation.[1] In the past hundred years, the legal landscape of civil obligation—especially its division among the domains of contract, property, tort, and no obligation at all—has been the scene of tectonic shifts. Tort displaced contract as the body of law governing the risks of physical harm created by the sale, use, and consumption of products and mostly pushed property aside as the body of law governing the obligations of owners and occupiers to entrants onto their land. In the early years of the twentieth century, new causes of action for invasion of privacy and infliction of emotional distress were recognized. Those causes of action blossomed as the century marched on, forming part of a larger pattern of expanding liability for pure economic loss and pure emotional injury. For most of the century, tort law grew increasingly strict and increasingly expansive.[2] And then it reversed. For the past twenty-five years, tort law has been the scene of backlash and backtracking. Strict liability has retreated, and negligence has resurged. Tort has stalled, and contract has revived, at least a little.[3]

This turbulent history has been preeminently a history of shifts in what we owe in the way of respect for each other's persons, property, and projects. When product accidents were taken away from contract and taken over by tort, for example, sellers of products became subject to nondisclaimable—and sometimes strict—obligations running to persons with whom they do not have contractual relations. Prior to that shift, product sellers owed obligations only to those with whom they had contractual relations. They were free to disregard entirely the risk of physical harm their products posed to anyone and everyone who was not a customer, no matter how greatly and how foreseeably their products endangered those others. Similarly, when the obligations owed to entrants onto land were severed from property law's status categories (invitee, licensee, and trespasser) and reconstructed around the tort idea of reasonable care, landowners found themselves subject to more extensive and less readily altered responsibilities to protect entrants onto their land from physical harm. Under the traditional property regime of status categories, landowners owed obligations of reasonable care only to those whom they invited onto their property in pursuit of economic gain. Under modern tort law's single standard, landowners usually owe an obligation of reasonable care to everyone except for felony trespassers.

Shifting a domain of civil obligation from contract or property to tort alters the authority and character of the relevant obligation as well as its

1. For an overview of these developments, *see* G. EDWARD WHITE, TORT LAW IN AMERICA (expanded ed. 2003), esp. chs. 3–6 and 8. For a particularly eloquent indictment of tort as the scene of revolutionary developments, *see* George L. Priest, *The Invention of Enterprise Liability*, 14 J. LEGAL STUD. 461 (1985).

2. *See* Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285 (2001); and Priest, *supra* note 1.

3. *See* White, *supra* note 1, chs. 8, 9.

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content. Obligations rooted in tort attach simply on the basis of personhood and are fixed by the law itself. Obligations based in contract arise through mutual agreement and are generally subject to specification by the contracting parties. Obligations rooted in property, for their part, arise from and are mediated by the ownership and use of external objects. The twentieth-century migration of many civil obligations out of contract and property and into tort thus grounded more of civil obligation in equal personhood and less of it in mutual agreement and differential wealth. Concomitantly, that shift rooted more of civil obligation in the law itself and less of it in the wills of the parties.

While the law of torts was the scene of transformations affecting primarily what people owed to one another in the way of obligations to avoid harm, academic theorizing about tort was also dominated by debate. Lately, however, that debate has marginalized questions concerning the character and content of our primary obligations. Academic tort theory has been preoccupied with an argument between legal economists and corrective-justice theorists. Legal economists argue that tort is a regulatory mechanism designed to minimize the combined costs of accidents and their prevention; corrective-justice theorists reply that tort is a law of redress for harm wrongly done. On the economic view, there are no obligations. There are only incentives intended to affect future behavior. Liability rules are prices and their role is to steer resources to their highest uses. On the corrective-justice view, secondary responsibilities of repair dominate primary responsibilities of respect. Although corrective-justice theory assumes primary obligations, it says relatively little about them.

On the economic view, past wrongdoers and the sunk costs for which they are responsible are false targets for cheapest cost-avoiders and preventable future losses. Rational actors recognize that the past is beyond their control. They ignore sunk costs and focus on minimizing future costs—expected costs—because these might still be reduced.[4] The only reason to hold people responsible for past harm is to induce people to avoid future harm, insofar as it is worth preventing. Therefore, the right people to hold responsible are not those who have done past harm wrongly but those who are in the best position to avoid future harm efficiently. Properly understood, then, tort is not about responsibility for past harm. Tort is about providing the proper incentives to minimize the combined costs of paying for and preventing *future* accidents.[5]

4. "[C]ost to an economist is a forward-looking concept. 'Sunk' (incurred) costs do not affect a rational actor's decisions. . . . Rational people base their decisions on expectations of the future rather than on regrets about the past. They treat bygones as bygones." RICHARD POSNER, THE ECONOMIC ANALYSIS OF LAW (7th ed. 2007), at 7.

5. "I take it as axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents." GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970), at 26. *See also* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS (5th ed. 2007), at 359 (refining the criterion to include administrative costs).

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In the same vein, the only reason to recognize plaintiffs' claims to redress for past harm wrongly inflicted is to enlist plaintiffs' participation in minimizing the combined costs of harm and its avoidance going forward. Tort plaintiffs should prevail not when they show that defendants are responsible for wrongly harming them but when plaintiffs show that honoring their claims will promote the social interest in minimizing the combined costs of accidents and their prevention going forward. Plaintiffs are thus private attorneys general deputized to promote the efficient minimization of accident costs. They sue to vindicate the general good, not their own rights.

Philosophers of tort are right to criticize this account of tort adjudication as strained and unconvincing. They are far less persuasive, however, in insisting that the *rectification* of wrongs is the essence of tort. This thesis, too, leaves us with an understanding of tort law that goes awry in a fundamental way: it makes redress and loss—not wrongs and rights—the core of tort. That preoccupation with redress leaves tort theory with little to say about the questions that lie at the heart of tort law, because those questions have to do with the nature and scope of our responsibilities not to wrong one another in the first instance.

On the prevailing philosophical view, "tort law is best explained by corrective justice" because "at its core tort law seeks to repair wrongful losses."[6] Other moral theorists, marching under the banner of "civil recourse, not corrective justice," argue 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 people from enforcing their own claims and it is thus obligated to provide a civil mode of redress against wrongdoers.[7] Both of these conceptions are now

6. JULES COLEMAN, THE PRACTICE OF PRINCIPLE (2001), at 9, 36. The first passage continues: "The central concepts of tort law—harm, cause, repair, fault, and the like—hang together in a set of inferential relations that reflect a principle of corrective justice." 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." *Id.* at 15. Ernest Weinrib advances a similarly influential though not identical thesis that also places corrective justice at the center of tort scholarship. *See* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995).

7. *See* John Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005), at 601–605; and Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO L.J. 695 (2003), at 754. One virtue of the civil-recourse view is that it is more sensitive to the diversity of remedies available in tort than corrective-justice theory is. *See* Zipursky, *supra*, at 710–714. A second virtue is that civil-recourse theory places much more weight on tort law's primary conduct norms. Nonetheless, the view chooses to emphasize "civil recourse" as the master feature of tort law and pitches its critique of corrective-justice theory on the claim that corrective-justice theory misconceives tort law's remedial structure. If the argument of this paper—that substantive obligations to avoid inflicting harm have priority over remedial responsibilities to set matters right—is correct, civil-recourse theory itself suffers from a mistake of emphasis. While civil-recourse theory is correct to say that breaches of primary tort obligations empower plaintiffs to seek redress from those who have wronged them, this power is parasitic on the failure to comply with the primary obligation of harm avoidance in the same way that the duty of repair is. In my view, both of these remedial aspects of tort are among the "successive waves of duty" generated

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being enriched by emerging accounts of tort adjudication as an intrinsically valuable way of articulating our mutual answerability to each other.[8]

These remedial accounts of tort law put the cart before the horse. To be sure, reparation does indeed loom large in tort. Rights require remedies, and reparation for harm wrongly done is the most common tort remedy. Moreover, 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 that 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 it links victims and injurers through the requirement that the tortfeasor repair the injury he has inflicted on 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 an institution whose raison d'être is repair. Yet in tort law itself, remedial responsibilities arise out of failures to discharge antecedent responsibilities not to inflict injury in the first instance. Tort is a law of wrongs, not just a law of redress for wrongs. In the first instance, it enjoins respect for people's rights. Remedial responsibilities in tort are subordinate, not fundamental.

My argument proceeds as follows. Section I explicates "corrective justice" theory in some detail and isolates for consideration a powerful and influential conception of corrective justice that insists that the obligation to repair wrongful loss is the paramount principle of tort. This conception mounts a persuasive critique of the economic theory of tort, and its own alternative theory is the target of this paper. Section II begins by developing the distinction between substantive or primary rights and responsibilities in tort and remedial or secondary ones and explains why rights govern remedies. It then shows that torts that involve harms give rise to duties to repair wrongful losses, whereas torts that can be committed without inflicting such loss give rise to other remedies.

Section III develops the arguments that repairing harm wrongly done is a second-best way of discharging antecedent responsibilities not to do harm and elaborates on the claim that tort's remedial responsibilities are governed by its primary ones. Section III also argues that the corrective-justice principle that wrongful losses should be repaired by those responsible for their infliction is both overinclusive and underinclusive as far as the law of torts is concerned. It is overinclusive because not all wrongful losses are

by the right to the physical integrity of one's person. That right underlies and justifies tort's primary obligations. Breach of those primary obligations brings those remedial aspects of tort into play. *See infra* note 52 and accompanying text.

8. Scott Hershovitz, for example, stresses the remedial role of tort as an institution and as a *process* through which we hold others to account and express our mutual answerability to one another; Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67 (2010), at 95–96 (arguing that corrective justice often requires explanation and apology as well as the repair of wrongful losses). Jason Solomon develops similar ideas; Jason M. Solomon, *Equal Accountability through Tort Law*, 103 NW. U. L. REV. 1765 (2009).

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caused by torts, and underinclusive because not all torts result in wrongful losses. Last, Section III argues that the structure and content of tort law do not conform to the corrective-justice account because primary tort duties are omnilateral not bilateral, and important strict liabilities in tort are not conduct-based wrongs. Section IV argues that we ought to build on corrective-justice theory's powerful insight that tort is a law of wrongs and rights but reorient our thinking to assign pride of place to tort law's primary rights and responsibilities. Section V summarizes.

I. TORT LAW AS CORRECTIVE JUSTICE

Corrective justice is an ancient concept that has spawned a family of distinct modern conceptions. At its most general, corrective justice is defined in contrast to distributive justice. Distributive justice 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."[9] To be sure, this particular characterization of corrective justice reflects Weinrib's distinctive emphasis on the "unity of doing and suffering"—with the "doing" being the infliction of the suffering by violating the "abstract equality of free purposive beings under the Kantian conception of right."[10] Other theorists advance different conceptions.[11]

9. WEINRIB, *supra* note 6, at 56, 71, 77, 142. *See also id.* at 213 ("Corrective justice represents the integrated unity of doer and sufferer.").

10. *Id.* at 58.

11. *See, e.g.*, Richard Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973) (applying the concept to an essentially causal form of liability). Fault is indispensable in Weinrib's account and is dispensed with by Epstein's. George Fletcher, for his part, applies the label "corrective justice" to a theory of liability for nonreciprocal risk imposition; George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). Catherine Wells takes the term to be concerned essentially with the process through which we should and in fact do determine

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These diverse conceptions of corrective justice differ in a number of 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 who take corrective justice to be a subordinate principle or aspect of tort law and those who take it to be tort's paramount or sovereign principle. 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 an aspect of tort law.[12] Accounts that treat corrective justice as the sovereign principle of tort—a principle that 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.

A. Corrective Justice as an Instrument of Efficiency

Theorists such as Jules Coleman and Weinrib take corrective justice to be the sovereign principle of tort law. For Coleman, corrective justice is the fundamental principle on which tort law rests, and it asserts that justice requires repairing wrongful losses. Tort liability, therefore, must attach to losses generated by wrongful conduct. The precept that wrongful losses should be repaired by those responsible for them is an independent principle of political morality, and it governs and justifies the law of torts. This corrective-justice principle is important as well as independent 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

claims of right between persons in civil society; Catherine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348 (1990). Jules Coleman takes corrective justice to require " individuals who are responsible for the wrongful losses of others . . . to repair th[os]e losses"; COLEMAN, *supra* note 6, at 15. *See also* Stephen R. Perry, *The Moral Foundations of Tort Law,* 77 IOWA L. REV. 449 (1992), at 506–507 (taking the task of corrective-justice theory to specify when the law may legitimately shift losses from one citizen to another); ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW (1999) (taking the principle of corrective justice to specify when the state may justifiably force the transfer of one person's loss to another by means of compensatory payment); Richard W. Wright, *Actual Causation v. Probabilistic Linkage: The Bane of Economic Analysis,* 14 J. LEGAL STUD. 435 (1985), at 435 (corrective-justice theories "hold that, as a matter of individual justice between the plaintiff and the defendant, the defendant who has caused an injury to the plaintiff in violation of his rights in his person and property must compensate him for such injury, whether or not imposition of liability will further some collective social goal"); Christopher Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439 (1990), at 449–450 (identifying corrective-justice theory with three requirements: "action-based responsibility," "just compensation," and "internal financing of compensation"); and Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515 (1992).

12. *See* the text accompanying notes 14 to 16 *infra* for an argument of this kind.

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must consist of *conduct-based wrongs* whose commission results in the infliction of loss. Wrongful losses are losses that issue from wrongful conduct.

For the claim that corrective justice is the sovereign principle of tort to be significant, "wrongful losses" must be a concept that does some work and constrains tort's content to some significant extent. It must identify a class of phenomena to which a duty of repair properly attaches. For Coleman, the class consists of wrongful losses, harms, or rights violations, all of which result from wrongful conduct.[13] Wrongful 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 because it is disruptive of a preexisting pattern of entitlement. Innocent disruptions—disruptions that are not wrongful—do not give rise to claims of corrective justice. Corrective justice is thus distinguished 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 wrongful establishes the independence of corrective justice from distributive justice but it does not establish the importance of corrective justice nor show that it explains the law of torts. Corrective justice might just be a *description* of what tort adjudication does. If so, it is not an explanation of tort law but a pithy encapsulation of just what it is about tort law that needs to be explained. Richard Posner drives this home in an important paper in which he distinguishes between what I call subordinate and sovereign conceptions of corrective justice in tort. Posner argues that "[o]nce the concept of corrective justice is given its correct Aristotelian meaning, it becomes possible to show that it is not only compatible with, but required by, the economic theory of law."[14] Starting from the premise that corrective justice, in its robust sense, requires wrongful conduct, Posner argues both that economics can supply the requisite standard of conduct and that an economic conception of tort *requires* corrective justice:

> [For an economic theory,] law is a means of bringing about an efficient (in the sense of wealth-maximizing) allocation of resources by correcting externalities and other distortions in the market's allocation of resources. The idea of rectification in the Aristotelian sense is implicit in this theory. If A fails to take precautions that would cost less than their expected benefits in accident avoidance, thus causing an accident in which B is injured, and nothing is done to rectify this wrong, the concept of efficiency as justice will be violated. . . . Since A does not bear the cost (or the full cost) of his careless behavior, he will

13. *See* Jules Coleman, *The Practice of Corrective Justice, in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 53 (David G. Owen ed., 1995), at 56–57. Wrongdoing understood as wrongful conduct is also essential to Weinrib's theory of corrective justice in tort. *See* WEINRIB, *supra* note 6, at 140–142, 197–198.

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

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> have no incentive to take precautions in the future, and there will be more accidents than is optimal. Since B receives no compensation for his injury, he may be induced to adopt in the future precautions which by hypothesis . . . are more costly than the precautions that A failed to take.[15]

There are two points here. The first is that the identification of tort with wrongful conduct is incomplete. Without a criterion of wrongful conduct, the principle of corrective justice is formal and empty. The concept of efficient precaution provides the necessary content. The second point is that unless correct justice is done, tort law will not provide the incentives necessary to induce appropriate precaution.

These points mount a powerful challenge to Coleman's claim that corrective justice is the sovereign principle of tort. When corrective justice is conceived of as compatible with economics in this way, it is neither sovereign nor justificatory. Corrective justice is a feature of tort law—a constitutive element of the legal subject. As such, it is not a justification but an aspect of the institution requiring justification. For Posner, economics supplies the justification. When tort law is a society's principal mechanism for addressing accidents—and is otherwise efficient[16]—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 justification for corrective justice is simply the justification for tort in general, and for Posner, the justification for tort in general is efficiency. Tort law exists to induce rational actors to reduce a particular class of negative externalities by taking cost-justified precautions against those externalities, 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 proper incentives to minimize the combined costs of accidents and their prevention. Posner's theory pours the substance of efficiency into the form of corrective justice.

B. The Failure of Instrumentalism

Clearly something has gone wrong. Corrective justice and the economic theory of tort are rival conceptions. Either the corrective-justice theorists or Posner must be mistaken. The leading proponents of corrective-justice theory in our time—Coleman and Weinrib—reject Posner's conclusion that

15. *Id.*

16. Without the assumption that tort law is otherwise efficient, this argument does not go through. *See* John Gardiner, *Backwards and Forwards with Tort Law*, *in* LAW AND SOCIAL JUSTICE 255 (Joseph Keim Campbell ed., 2005), at 269–270.

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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."[17] The principle that wrongful losses should be repaired is a *morally* authoritative norm in its own right—it is sovereign, not subordinate. Tort, in a word, is a body of law grounded on the principle that wrongful losses should be repaired by those responsible for their infliction.

For Coleman and Weinrib to be right about this, however, Posner must be wrong. The nerve of their counterargument is that the economic theory of tort offers an inadequate account of tort adjudication.[18] The economic theory of tort is instrumental, and instrumentalism does and must look forward. Tort adjudication, however, is principled, and it does and must look backward. As a result, instrumentalism cannot adequately explain and justify the law of torts. Abstractly, this counterclaim asserts that 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. The flip side of this coin is that corrective justice *cannot* 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.

On Coleman's account, because corrective justice rests on the genuine moral principle that wrongful losses should be repaired, corrective justice is not the goal of tort law.[19] It is instead a justification for holding someone accountable for harm wrongly done. The *reason* we hold defendants liable in tort is that people who have inflicted wrongful losses on others should make

17. Coleman, *Practice of Corrective Justice*, *supra* note 13, at 62.

18. These arguments differ in important ways. Chief among these differences is Weinrib's insistence on the autonomy of tort. Tort adjudication appears to be an entirely autonomous institution whose principles are given by the *form* of tort law, especially the form of tort adjudication; they neither need nor have any further justification. This is epitomized by Weinrib's oft-cited remark that "private law is just like love." Weinrib writes "Explaining love in terms of extrinsic ends is necessarily a mistake, because love does not shine in our lives with the borrowed light of an external end. Love is its own end. My contention is that, in this respect, private law is just like love." *Cf.* WEINRIB, *supra* note 6, at 6. *Compare with id.* at 22–24, and *id.* at 206–208 (discussing formalism, immanence, and the autonomy of private law).

19. Coleman's and Weinrib's views diverge in certain respects, especially over the autonomy of tort law. To get a well-defined conception on the table, I therefore take Coleman's writings as my principal example of a theory of tort that holds that corrective justice is the sovereign principle of the practice. This choice means that not everything I say applies to Weinrib's view nor to other remedial theories of tort. On the one hand, Weinrib's conception of tort as being about "wrongs," not "wrongful losses," places his view closer to the view of this paper. On the other hand, his development of that idea mistakenly (in my view) tries to reverse engineer the wrongs out of the remedies. *See infra* note 70. John Goldberg's and Ben Zipursky's "civil recourse" view also emphasizes the remedial aspect of tort, stressing that the state is obligated to provide a mode of "civil recourse." I cannot examine their view here, except to say that its thesis about the obligations of the state appears less a rival and more a complement to the corrective justice, which emphasizes the responsibilities of the parties. *See* Hershovitz, *supra* note 8, at 102, n.105.

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good the losses they have inflicted. The reason is *not* that holding people who have wronged others liable to those others for the wrongfully inflicted losses will induce cheapest cost-avoiders to minimize future wrongful losses. You are no more justified in recovering from someone in a tort lawsuit by showing only that they are the cheapest cost-avoider with respect to a class of *future* losses than you are justified in convicting someone of a crime by showing only that their conviction and punishment will deter future crime. Putative tortfeasors are liable when and because they commit tortious wrongs just as putative criminals are punishable when and because they commit crimes. Imposing liability in tort merely to deter cheapest cost-avoiders from committing future harms is no more imposing justified liability in tort than hanging the innocent to deter future crimes is imposing justified criminal punishment.

Instrumentalism, Coleman believes, cannot avoid the false-target view of tort defendants—the view, that is, that we hold those who commit tortious wrongs liable because they are false targets (or surrogates) for those who are in the best position to prevent future losses of a similar kind from happening. Further, the false-target view cannot do justice to the fact that the *reason* we hold a defendant liable to a plaintiff in tort is that the defendant has wronged the plaintiff and must therefore repair the harm she has wrongly done. Corrective justice is thus *not* an instrument for the realization of a valuable social objective but the instantiation of a morally authoritative principle of responsibility. It is *fair* to hold people responsible for repairing the wrongful losses they inflict on others. On the one hand, the practice of holding people responsible for the wrongful losses that they have inflicted on others through their tortious conduct is not an oddly indirect way of inducing other people to behave appropriately in the future. On the other hand, the practice is not simply the fetishistic following of ancient rules. Instead, the principle that people should repair the wrongful losses that they have inflicted on others justifies the practice of tort law, and the practice fleshes out the principle.

1. The Principle of Corrective Justice and the Practice of Tort Law

Wrongful human agency, *correlativity*, and *repair* lie at the core of both tort law and corrective justice. That tort law is about *agency* is evident enough to the pretheoretic eye but is 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.[20] In this respect, the law of tort taps into deep

20. "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

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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.[21]

That the pertinent agency must be and is *wrongful* is a proposition that looks to be at once self-evident and overdetermined. 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 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. The wrinkle here, if there is one, is that wrongfulness plus agency is taken to require wrongful conduct. Wrongful conduct, for its part, is wrongful failure to conform one's behavior to a norm of justified behavior.

Correlativity is central to tort, Coleman says, because:

> The 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.[22]

Correlativity thus refers to the bilateral (or bipolar) structure of tort adjudication, which itself mirrors the underlying interaction of a tortious wrong. 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."[23] "[T]he direct connection between the particular plaintiff and the particular defendant" is "the master feature characterizing private law."[24] Coleman concurs, calling the bilateral relationship of plaintiff and defendant, injurer and victim, "the most basic

distinction among kinds of misfortune." COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 6, at 44 (footnote omitted).

21. Isaiah Berlin quotes Jean-Jacques Rousseau's famous remark, "The nature of things does not madden us, only ill-will does"; I. BERLIN, TWO CONCEPTS OF LIBERTY (1958), at 2. This appears to be Berlin's own translation of a passage in Rousseau's EMILE. *See* J. ROUSSEAU, *Emile*, *in* 4 OEUVRES COMPLETE, 320 (B. Gagnebin & M. Raymond eds., 1959). Rawls follows Rousseau's lead here in explicating what he calls "the sense of justice." *See* J. RAWLS, COLLECTED PAPERS (S. Freeman ed., 1999), at 96–116. *See also* P.F. STRAWSON, *Freedom and Resentment*, *in* STUDIES IN THE PHILOSOPHY OF THOUGHT AND ACTION 71 (1968) (showing that "reactive attitudes" such as resentment are fundamental to our sensibilities and cannot be accounted for by instrumentalism).

22. COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 6, at 66–67.

23. *See* WEINRIB, *supra* note 9.

24. *Id.* at 10.

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relationship in torts."[25] "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."[26]

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.[27] 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 economics takes it to be a forward-looking regulatory mechanism designed to minimize the combined costs of accidents and their prevention. Generally speaking, this requires pinning accident costs on the "cheapest cost avoider"—on the party in the best position to minimize the combined costs of accidents and their prevention going forward.

Because it is only contingently the case that the particular injurers responsible for particular injuries are the cheapest cost-avoiders with respect to the general classes into which those injuries fall, economic theory is hard-pressed to explain why plaintiffs always have rights only against those who have wronged them.[28] To induce efficient precaution going forward, we ought to pin liability on cheapest cost-avoiders going forward. The economic theory of tort can explain tort law's backward-looking focus on past wrongdoers only by saying that we have good reason to think that past wrongdoers are probably the cheapest cost-avoiders going forward. This argument fits tort practice poorly and justifies it only very weakly. Tort law's penchant for holding wrongdoers responsible for the wrongs that they commit is deep-seated. You might reasonably regard this feature as one of tort law's constitutive characteristics. The logic of the economic theory of tort, however, holds that wrongdoers are merely false targets for cheapest cost-avoiders. The theory's logic requires pinning liability on cheapest cost-avoiders—and not wrongdoers—whenever the two diverge and whenever we can find the cheapest cost-avoiders. Tort law shows no such tendency.

25. Jules Coleman, *Theories of Tort Law*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2003) ("From the normative point of view, the most basic relationship in torts is that between the injurer and the victim whom he has wronged.").

26. COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 6, at 16. *Cf.* Coleman, *Theories*, *supra* note 25, sec. 3 (giving "[t]he bilateral structure of a tort suit—the fact that victims sue those they identify as their injurers and do not instead seek repair from a common pool of resources [as is the case in New Zealand]" as an example of a structural feature of tort law.).

27. For Weinrib, this relationship expresses the "unity of doing and suffering," the intrinsic moral salience of the doer of harm as someone specially responsible for the harm that she has wrongly done. 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.

28. 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* COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 6, at 18–20.

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The justificatory force of the economic theory is weak because it makes tort's practice of holding wrongdoers accountable a mere rule of thumb whose rationale is epistemic. It does not capture the *normative* force of tort practice. Tort practice looks backward to breach of preexisting obligations and asks tortfeasors to make right the harms they have wrongly done by breaching those obligations. The proposition that society would be better off in the future if some party were held accountable for the costs of accidents they are in the best position to minimize going forward may be a reason for holding that party liable for harm done in the past, but it does not capture the obligatory character of defendants' duties of repair.[29]

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."[30] The failure is a failure to do justice to the way 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 backward to the past interactions of the parties in order to determine whether the defendant should be held responsible for the plaintiff's injury. In this way the basic concepts of negligence law provide the grounds for liability in negligence.

For the economic analysis of negligence, however, breach of duty is not a premise but a conclusion. Coleman explains that:

> Standard 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 case.[31]

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

29. *Id.* at 14–21, especially at 21. 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*, 23 VAL. U. L. REV. 485 (1989); WEINRIB, *supra* note 6, at 37–38, 142, 212–213.

30. Weinrib, *supra* note 6, at 9–10. *See also* Jules Coleman, *The Economic Structure of Tort Law*, 97 YALE L.J. 1233 (1988). In conjunction with the basic structural features of tort adjudication, these concepts form what Coleman calls the pretheoretic core of tort law; COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 6, at 15 n.2.

31. COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 6.

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them and assign liability to whoever is in the best position to prevent *future* accidents at the lowest cost.

For orthodox economic analysis, liability does not follow from breach of duty when and because 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.[32] Judges say that they are imposing liability in negligence because duty, breach, actual and proximate cause, and harm 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 harm are not *reasons for* the imposition of liability. They are merely evidentiary markers that do a respectable job of identifying cheapest cost-avoiders going forward.

The separate weaknesses of the economic theory of tort compound into a larger whole because the structural and substantive elements of tort law themselves 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."[33] 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 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 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 instituted the principle "that individuals who are responsible for the *wrongful* losses of others have a duty to repair them."[34] Causation connects the wrongdoer to the loss wrongfully suffered by the victim and so plays an essential role in establishing the special responsibility of the wrongdoer for that loss. Corrective justice thus gives each of the elements of a typical tort suit a natural, unforced justification. The institutional practice of tort law puts flesh on the bones of the abstract moral principle of corrective justice.

32. *Id.* at 34–36.
33. I*d.* at 23.
34. *See, e.g.*, *id.* at 15, 36 (emphasis added).

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II. SUBSTANTIVE AND REMEDIAL RESPONSIBILITIES

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 fail unreasonably to repair harm reasonably inflicted.[35] Secondary, remedial responsibilities are responsibilities of repair—responsibilities triggered by the breach of various primary obligations. When the distinction between these two kinds of 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. Remedial responsibilities, by contrast, are bilateral and conditional. If I defame or defraud you, you may require me to repair the harm 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.

Importantly, omnilateral obligations are not the same as indefinitely extensible bilateral ones.[36] When obligations are omnilateral, our obligation to one person may be affected by our obligations to other people. California tort law's incorporation of the traffic code rule "speed limit 25 [in the vicinity of primary and secondary schools] when children are present" is a

35. The second clause of this sentence refers to circumstances where tort law protects autonomy rights. Some batteries, trespasses, and conversions are cases in point. The last clause of the sentence describes the general character of strict liability in tort. For the sake of convenience, I 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. The distinction between primary or substantive legal norms and remedial ones bears on tort in a particular form, but it is a general distinction. *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994), at 122 (emphases in original) explaining the general distinction in the following way:

> Every general directive arrangement contemplates something which it expects or hopes to happen when the arrangement works successfully. This is the primary purpose of the arrangement, and the provisions which describe what this purpose is are the *primary provisions*.
>
> Every arrangement, however, must contemplate also the possibility that on occasion its directions will not be complied with. . . . The provisions of an arrangement which tell what happens in the event of noncompliance or other deviation may be called the *remedial provisions*.

The distinction appears to be especially prominent in tort theory, in part because corrective-justice conceptions invite the objection I am developing here. *See, e.g.*, Hanoch Sheinman, *Tort Law and Corrective Justice*, 22 LAW & PHIL. 21 (2003), at 32–34. Its importance is also due to the fact that tort has had to shake off the worry that it is not a freestanding body of law but a remedial appendage to other bodies of law. *See* Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225 (2001), at 1242–1244.

36. This possibility was suggested to me by both Martin Stone and Arthur Ripstein.

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case in point.[37] That norm makes the care owed any one child depend in part on whether that child is in the company of other children. Remedial responsibilities, by contrast, *are* bilateral. They are owed to named plaintiffs by named defendants on the basis of a wrong done the former by the latter.

Tort rights and obligations attach to persons simply as persons residing within some jurisdiction and run from every person in the jurisdiction to every other person, and these facts about tort rights and obligations need to be front and center in our thinking about the character and content of primary obligations. These facts are fundamental to the structure of tort as a body of law and they play an important role in determining the content of its primary obligations.[38] Lucchese v. San Francisco–Sacramento Railroad, Co.[39] nicely illustrates the omnilateral impact of form on the substance of primary responsibility. *Lucchese* involved a train that had two types of brakes. Using one set of brakes was safer for the train's passengers but increased the risk of injury to motorists at crossings. The other set of brakes provided better protection for motorists but increased the risk of harm to passengers. Reasonable care required reconciling these conflicting interests. The care that the railroad owed passengers was thus shaped by its obligations to motorists, and vice versa. Importing the bilateral logic of remedial rights into our understanding of primary rights fosters the misconception that the defendant's obligations to the plaintiff are determined solely by considering the relation of the defendant and the plaintiff.[40]

The priority of primary responsibilities is in part a logical one. Remedial responsibilities arise out of the breach of antecedent primary duties. But the priority of primary responsibilities is also normative.[41] Remedial responsibilities 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. Breach of a primary obligation in tort neither discharges that obligation nor relieves the breaching party of her responsibility to comply with that obligation. Breach of a

37. *See* California Vehicle Code § 22352(a)(2). Not all tort duties are sensitive to the numbers. While greater precautions may be necessary to make a skyscraper safe, the fact that skyscrapers house more people than single-family homes is not a reason to make the homes less safe.

38. *See* Robert Stevens, Torts and Rights (2007), at 328.

39. Lucchese v. San Francisco–Sacramento Railroad, Co., 289 P. 188 (Cal. 1930).

40. Less obviously, omnilaterality affects remedial responsibility. Scott Hershovitz perceptively observes that tort is an institution of mutual answerability. Within broad limits of good faith, anyone can call anyone else to account for tortiously wronging them. *See* Hershovitz, *supra* note 8, at 101–102. This democratic form of mutual answerability depends in important part on the omnilaterality of tort obligations.

41. For observations along these lines, *see* Neil MacCormick, *The Obligation of Reparation*, *in* Legal Right and Social Democracy 212 (1981); and Joseph Raz, *Personal Practical Conflicts*, in Practical Conflicts: New Philosophical Essays 182 (Peter Baumann & Monica Betzler eds., 2004). This line of argument is developed powerfully by John Gardner and dubbed "the continuity thesis"; John Gardner, *What Is Tort Law For? Part I: The Place of Corrective Justice*, University of Oxford Legal Research Paper Series, January 2010.

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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 the wrongdoer can now do to honor her obligation. Breach of a primary obligation thus provides the circumstance that calls corrective justice into play, and the existence of an undischarged primary obligation provides the *reason* an injury wrongly inflicted must be repaired. In this way, right and reparation form a unity.[42]

Within that unity, rights have priority over reparation. 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 that effects perfect compliance with its obligations of repair and one that effects 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.[43]

The general point here is that in tort law, as elsewhere, remedies exist to enforce and to restore rights.[44] Because remedies exist to enforce as well as to restore rights, the relation between right and remedy is more varied and complex than the corrective-justice literature suggests. The wrongs with which the law of torts is concerned do not uniquely give rise to claims that wrongful losses be repaired. Tort actions, for instance, often enforce property rights (as trespass, conversion, and nuisance do), yet those rights are also enforced by property doctrines (e.g., actions to quiet title and to evict) and by public-law doctrines (e.g., the takings clause). Tort's own history includes actions with mixed public and private remedies. The action for "amercement" under medieval trespass included penalties payable to the state among its remedies. Even today, restitution is often matched with criminal punishment, and in our not very distant past, there was a burgeoning debate over whether and when tort actions should be implied from regulatory statutes.[45] Tort law's place in this complex fabric shifts over time, and

42. 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's 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. His duty of repair falls out of his failure to discharge his duty not to harm Jules wrongly in the first place.

43. The position in the text exaggerates in one important respect: if there were no tortious wrongs, the common law of torts could not develop, because it develops through adjudication. This collateral benefit of tortious wrongs is not, however, a reason that justifies their commission. It is merely a loss caused by their (hypothetical) disappearance.

44. *See, e.g.*, Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 348, 356 (2001); HART & SACKS, *supra* note 35.

45. *See, e.g.*, Cass Sunstein & Richard Stewart, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982). On amercement, *see* Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1251–52 (1987); Browning-Ferris

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tort's domain is neither coextensive with the scope of the duty to repair a wrongful loss nor differentiated from other bodies of law by that principle.

The general principle here is that right governs remedies. 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 thus serves to restore the right. To be sure, rights and remedies are reciprocal: we look to a right to determine what a remedy should be and we look to a remedy to determine what a right is. Even so—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 harm in general and physical harm in particular. Harms—broken arms or legs, for example—leave their victims in conditions requiring repair. However, when the underlying right is, say, to exclusive control or dominion over real property, and the violation of that right does not leave the right-holder in a condition requiring repair, the appropriate remedy is different. For all practical purposes, injunctive relief is available as a matter of right in cases of recurring or ongoing trespass, because injunctive relief normally restores the right to control who or what enters one's real property.[46] Remedying harmless trespasses by requiring merely that the wrongdoer repair the harm that he has done would not vindicate the right. It would, indeed, enable those whose trespasses inflict no injury to do so as long as they were prepared to pay nominal damages.[47] In both the trespass case and the wrongful physical injury case, the remedy is governed by the right.

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. 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

Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 286–92 (1989) (O'Connor, J., dissenting). For a brief but acute explanation of the relation of all of this to the emergence of tort, *see* Tom Grey, Holmes on Tort (n.d.), at 18–22 (unpublished manuscript) (on file with author).

46. "Generally an injunction will lie to restrain repeated trespasses." Planned Parenthood of Mid-Iowa v. Maki, 478 N.W.2d 637, 639 (Iowa 1991). *See generally* DAN DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION (1993), ch. 5 (noting, inter alia, that a plaintiff may be entitled to an injunction prohibiting a recurring trespass).

47. The award of punitive damages in Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997), enforces the right to exclusive control by stripping the one-shot, harmless trespass in that case of the economic advantage that made its commission by the defendant rational. Defendant had dragged a trailer home across plaintiff's snow-covered property without plaintiff's permission. Because its trespass did no harm, defendant was otherwise liable only for nominal damages.

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violation.[48] If Arthur punches Jules in the nose, he violates Jules's 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's claim for redress is naturally directed against Arthur. After all, Arthur is the person who has violated Jules's right and has thus opened himself up to the responsibility of restoring Jules's 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 to 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, it 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. We then fail 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 to named victims by named tortfeasors, we must regard workers' compensation and similar administrative schemes as entirely discontinuous from 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 wrong to assert that the two legal regimes have nothing

48. Marbury v. Madison famously holds that "the very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives an injury"; Marbury v. Madison, 5 U.S. 137, 163 (1803). That holding invoked Blackstone's claim that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law wherever that right is invaded." "Every right, when withheld, must have a remedy, and every injury its proper redress"; *id.* (quoting BLACKSTONE, COMMENTARIES). Blackstone himself was following Coke. *See, e.g.,* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *56; 2 EDWARD COKE, INSTITUTES OF THE LAWES OF ENGLAND *55–56; chs. 39–40 of the Magna Carta. The remedies clauses found in many American state constitutions are a direct expression of the maxim that "for every right there must be a remedy." *See generally Smothers*, *supra* note 44.

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in common.[49] Workers' compensation and the common law of torts have something fundamental in common: they are both legal regimes that aim to institute the right to the physical integrity of one's person.[50] They are also competing legal regimes because they are alternative legal mechanisms for instituting the same right with respect to one important site of accidental injury. They battle for dominion over that and related legal domains. Workers' compensation schemes displace the common law of negligence from the domain of workplace injuries. Kindred administrative schemes for nuclear accidents, vaccine-related harms, and health injuries incident to mining coal, among others, displace tort from other domains.

The proposition 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 is evident if—but only if—we recognize that in the law of torts itself, remedial rights and responsibilities are derivative of substantive ones. Only then can we recognize that tort and its administrative alternatives are both competitive and continuous, and only then do we have a first principle by reference to which we can choose between them. Without a conception of primary right in hand, the question "which legal regime gives better institutional expression to the right to physical safety?" gets swept out of sight. By identifying tort with its remedial aspect, corrective-justice theory asserts that tort is radically discontinuous with its administrative alternatives. The shared conception of the subject in both the case law and the academy, however, regards tort and its administrative alternatives as members of the same family of institutions—as alternative ways of instituting the same right.

This view of the matter should not be surprising. To see why, bear in mind, first, that it is a feature of rights that they justify "successive waves of duty."[51] The right to reasonable care for protection against physical harm is backed by ancillary procedural and remedial rights. The right to the physical security of one's person justifies imposing the primary duty of reasonable care to avoid causing foreseeable physical harm to others. That right also justifies the duty to repair harm negligently inflicted. For that remedial

49. *See* Jeremiah Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235 (1914), at 344 (arguing that the workmen's compensation acts were organized on the principle of strict liability, which could not be reconciled with the fault liability of the common law, and prophesying that the common law of torts would be reconstructed to be more compatible with the normative logic of workers' compensation). For further discussion, *see* Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285 (2001)

50. Historically, 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. *See* G. EDWARD WHITE, TORT LAW IN AMERICA (1985), at 102–106, 173–176 (discussing the expansion of liability for invasion of privacy and infliction of emotional distress). Thus the right that the text is referring to has transformed from a right to physical integrity toward a right to physical and some psychological integrity. For simplicity, I generally speak of this right as the right to physical or bodily integrity or security.

51. J. WALDRON, *Rights in Conflict*, *in* LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991 (1993), at 203, 212 (explaining why "rights . . . should be thought of, not as correlative to single duties, but as generating a multiplicity of duties.").

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right to be effective, moreover, the state must be under a duty to provide some avenue of "civil recourse" through which rights of repair can be enforced.[52]

Next, observe that the right to the physical and psychological security of one's person not only generates waves of duty, it also generates diverse primary duties. Within the law of tort itself, for example, that right justifies duties of reasonable care in negligence law, duties not to assault or batter other people, and duties to conduct abnormally dangerous activities only on the condition that one repair the unavoidable harm that one does. The extension of the point that the right to the security of one's person—an abstract and protean right if ever there was one—justifies diverse primary obligations within tort is that this right may also justify displacing tort and adopting an administrative scheme on the straightforward supposition that the administrative scheme does a better job of securing the 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. Worker's compensation and tort, for instance, are understood and assessed as alternative ways of instituting the same right to the safety of one's person.

This approach to the choice between tort and its administrative alternatives asks the right question. Taking our cue from the remark in the *Second Restatement of Torts* 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,"[53] we might frame the choice between tort and various administrative alternatives as a matter of determining which institutional arrangement gives more satisfactory expression to the right that they share in common. The private law of tort *is the natural default* legal institution for the enforcement of the right to the physical integrity of one's person, because when one person violates another person's right to the physical integrity of his or her person, responsibility to repair the harm wrongly done naturally falls on the wrongdoer. But it is *only* the natural default. The private law of tort can be displaced by administrative alternatives as long as those alternatives are defensible ways of instituting the underlying right to the security of one's person.

52. This last point is emphasized by the "civil-recourse theory" of John Goldberg and Ben Zipursky. *See* Goldberg, *supra* note 7; and Zipursky, *supra* note 7. On the view of "civil recourse" presented in the text, it is essentially complementary to—not competitive with—corrective justice. Both involve secondary responsibilities necessary to institute effectively the primary duties of tort law.

53. RESTATEMENT (SECOND) OF TORTS, § 1 cmt. d (1965). The right to bodily security thus grounds diverse tort obligations. I am grateful to Mark Geistfeld for calling my attention to this comment.

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III. THE STRUCTURE AND CONTENT OF PRIMARY NORMS

Corrective-justice theory is right to place wrongs at the center of tort but wrong to call the repair of wrongful losses the "overarching ambition or purpose" of tort law.[54] Torts are indeed wrongs—violations of rights important enough to be made coercively enforceable by law—but it is better for wrongs not to be done in the first place than it is to attempt to erase their untoward effects once they have been committed. The corrective-justice principle that wrongful losses should be repaired is indeed prominent in the law of torts, but it is not prominent because it is the fundamental principle on which the law of torts is built; rather, it is prominent because most tortious wrongs involve harms and therefore leave their victims in conditions requiring repair. Or so I am arguing.[55]

A. Why Primary Norms Explain the Prominence of Corrective Justice in Tort

The argument that the prominent place of corrective justice in tort is accounted for by the character of tortious wrongs warrants further discussion. Most torts protect against harm in one of its manifestations. An important minority of intentional torts, however, guard aspects of our "sovereignty." Sovereignty-based torts proscribe various interferences with zones of control or powers of discretion—control, for example, over one's physical person or one's real property.[56] These torts protect important boundaries against unauthorized crossings. Sovereignty-based torts can be committed without doing harm and, indeed, while benefiting 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. Nonetheless, I have

54. Jules Coleman, Risks and Wrongs 395 (2002). The general idea of torts as wrongs is Blackstonian. Blackstone described acts that deprived people of rights as "wrongs." 3 Blackstone, Commentaries, *116, and explained that the remedial part of the law provides for the redress of wrongs. 1 Blackstone, Commentaries, *54. Whenever the common law recognized a right or prohibited an injury it also gave a remedy, initiated by filing the appropriate writ. 3 Blackstone, Commentaries, *123.

55. This statement may need to be qualified in the case of strict liability. In important cases of strict liability, justifiable harm is done, and the basic reason for imposing liability is to prevent the defendant from loading the cost of its justified conduct off on the plaintiff who does not benefit proportionately from that conduct. This raises the question of whether damages serve a corrective or a commutative role. They serve a corrective role if they rectify a wrong; a commutative one if they align burden and benefit. See the discussion in the text at notes 83–84, *infra*.

56. I borrow the term "sovereignty-based" from Arthur Ripstein, *Beyond the Harm Principle*, 34 Phil. & Pub. Aff. 216 (2006). He is not responsible for my usage. The shorthand distinction between "harm-based" and "sovereignty-based" torts 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. To put it in a more cumbersome way, we might call these torts "autonomy-rights-based torts" and distinguish them from "harm-rights-based torts."

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violated your rights and committed the tort of battery because I have operated on you without your consent.[57] In the same vein, I may not enter your real property without your permission, even if I thereby improve that property.[58]

For our purposes, the first 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 this 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.[59] The repair of wrongful losses—corrective justice as Coleman conceives it—is appropriate only when reparation 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 consequence of the fact that most torts involve harms.

B. The Principle of Corrective Justice Is Formal and Not Confined to Tort

To see the dependence of tort's distinctive remedial norms on the characteristic content of its primary norms, consider the natural extension of the principle that wrongful losses ought to be repaired by those responsible for their infliction. That principle is *formal*: it does not contain within itself any criterion of wrongfulness. It latches onto many torts because we have independent reasons for thinking of torts as wrongs, and many tortious wrongs cause losses. We supply the content that the principle requires without remarking to ourselves that the principle is otherwise empty. This is perfectly natural. We already know that tort is the canonical law of wrongs. Without that subconscious sleight of hand, however, the principle of corrective justice would wander the law looking for wrongful losses to repair.

The wrongs that we find, moreover, depend on the content that we supply. The domain of corrective justice is heavily shaped by how broadly or narrowly we state the principle of corrective justice. When we interpret corrective justice as having to do with the repair of wrongful *loss*, restitution does not effect corrective justice because it undoes wrongful *gain*. On a broader interpretation of corrective justice, the undoing of wrongful gain might be as much a matter of corrective justice as the repair of wrongful

57. *See* Mohr v. Williams, 104 N.W. 12 (Minn. 1905); Kennedy v. Parrott, 90 S.E.2d 754 (N.C. 1956). This prohibition against unconsented invasive medical procedures is a different aspect of the tort of battery.

58. *See, e.g.*, Longenecker v. Zimmerman, 267 P.2d 543, 545 (Kan. 1954).

59. *See supra* note 46, and accompanying text.

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loss.[60] Furthermore, if we adopt a conception that does not insist on bilateraility, we are likely to find some wrongful losses in various pockets of public law.[61]

Similar issues arise with respect to contract law. If contract is really about reliance—as Lon Fuller thought—then breach of contract results in wrongful loss and contract damages do corrective justice on a narrow interpretation of the principle. If, however, contract is about expectation damages, then contract damages are about being put in the position that one would have occupied had the contract been performed.[62] That would count as corrective justice only if corrective justice is broadly construed as righting wrongs, not repairing wrongful losses. When corrective justice is construed that broadly, however, it can no longer be presented as the paramount principle of liability in tort. It is now at least a principle of private law in general, and it may well be a general principle of law, period.

Just how broadly to state the principle of corrective justice is not, however, our present concern. For our purposes, the point is that the corrective-justice thesis that tort law is about repairing wrongful losses is both under- and overinclusive. It is underinclusive because some torts do not result in wrongful losses. It is overinclusive because some wrongful losses do not result from torts. To be sure, it is common for tort law to do corrective justice, but only because most torts involve harms and therefore result in wrongful losses. For example, unlike the tort of battery, the general duty of due care never protects a boundary against an unauthorized crossing. The duty of due care guards the right to "bodily security"[63] by requiring everyone to take appropriate precautions to avoid physically harming others.[64] Breaches of the duty of due care that violate a correlative right to "bodily security" leave their victims in conditions where repair is required. Because most torts are "harm-based" not "sovereignty-based," they bring to bear the corrective-justice principle that wrongful losses should be repaired. They do so, however, not because corrective justice is the paramount principle of tort but because reparation is perceived to restore the primary right.

60. Ernest Weinrib takes this broader view of the matter because he thinks of correlativity of right and duty as the essence of corrective justice. *See* WEINRIB, *supra* note 6, at 122–126. Restitution does corrective justice even though it involves wrongful gain, not wrongful loss, because it involves breach of duty correlative to plaintiff's right. *Id.* at 140–141, 197–198. Weinrib's broad conception of corrective justice also encompasses contract damages. *Id.* at 136–140.

61. *See generally* L. Smith, Corrective Justice and Public Law (paper presented at the Obligations V Conference: Rights and Private Law, University of Oxford, July 14–16, 2010).

62. *See* Lon L. Fuller & William R. Perdue Jr., *The Reliance Interest in Contract Damages I*, 46 YALE L.J. 52 (1936); and *cf.* Daniel Friedmann, *The Performance Interest in Contract Damages*, 111 LAW Q. REV. 628 (1995); Sheinman, *supra* note 35, at 61–62.

63. RESTATEMENT (SECOND) OF TORTS § 1 cmts. b and d (1965), cited *supra* note 53.

64. "Sovereignty-based" torts protect the exercise of powers, whereas "harm-based" torts ground duties whose protections are enjoyed. This distinction is drawn nicely in Leif Weinar, *The Nature of Rights*, 33 PHIL. & PUB. AFF. 223 (2005), at 233.

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C. Justice and Rights in Tort

The corrective-justice theory of tort goes wrong in the way that retributivism goes wrong as a theory of criminal law. Just as we do not have the criminal law in order to punish the wicked, so, too, we do not have the law of torts in order to repair wrongful losses.[65] The "overarching aim or purpose" of the law of torts is not to repair harm wrongly done but to articulate certain obligations to others—obligations that are grounded in the fundamental interests of persons and which are therefore urgent enough to count as rights. The wrongs that tort law recognizes spell out an important part of what we owe to each other in the way of coercively enforceable responsibilities by virtue of our essential interests as persons.[66] The rights those responsibilities respect have to do, for the most part, with liberty and security, broadly construed. Primary obligations in tort are obligations not to harm other people in various ways and to respect powers of theirs that confer on them authority over their persons and possessions. To be sure, tort guards these rights with remedial responsibilities of repair, but repair is a second-best form of protection. Tort obligations are discharged most fully when harm is not done and rights are respected in the first instance, not when harm wrongly done is repaired after the fact.

Because tort law is fundamentally concerned with the question of what we may reasonably demand from each other as a matter of right with respect to 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 that "corrective 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."[67]

Corrective justice does not come into play until an antecedent wrong exists. With the possible exception of strict liability wrongs—where the primary wrong consists in harming without repairing[68]—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.

65. Coleman anticipates this criticism and argues that retributivism is a defensible explanatory and justificatory theory of punishment. COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 6, at 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 6, 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. *Cf.* Sheinman, *supra* note 35, at 46–47.

66. The exact content of what we owe to each other in the way of tort obligations depends on the jurisdiction in which we find ourselves, but the basis of our varying obligations is the same, namely, our equal personhood.

67. COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 6, at 32.

68. *See infra* note 82, and accompanying text.

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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.[69] More generally, torts—fraud, battery, intentional infliction of emotional distress, negligent infliction of physical injury, and the like—are wrongs that presuppose rights, not antecedent corrective injustices.[70] People have rights, for 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 thus 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. If anything, the question of what rights people have is a question of distributive justice.[71] Taxonomy aside, the substantive point is this: tort law is not fundamentally about corrective justice—it is fundamentally about wrongs, and wrongs are grounded in rights. Corrective justice, broadly construed, is *an* essential aspect of tort because rights require remedies, and remedies require making right

69. "The primary objects of the law are the establishment of rights, and the prohibition of wrongs," the former being "necessarily prior" to the latter. 3 WILLIAM BLACKSTONE, COMMENTARIES *1–*2 (1766). *See also* RESTATEMENT (SECOND) OF TORTS, *supra* note 53.

70. 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 thus appears to be about the righting of corrective injustices (actions that, say, disturb "the equality between the parties"). WEINRIB, *supra* note 6, at 76. This is, as John Gardner says, a "nonstarter"; Gardner, *supra* note 41, at 28. *See also* Sheinman, *supra* note 35, at 34–36. With the possible exception of strict liability wrongs, where the wrong consists in harming without repairing, torts are wrongs—not corrective injustices.

71. Theorists are split on this point. Stephen Perry, for one, thinks that rights to the liberty and integrity of our person precede questions of distributive justice: "At least within nonconsequentialist moral theory, it makes sense to think of this [security] interest as morally fundamental, and hence as falling outside the purview of distributive justice; our physical persons belong to us from the outset, and are accordingly not subject to a social distribution of any kind." Stephen Perry, *On the Relationship between Corrective Justice and Distributive Justice*, *in* OXFORD ESSAYS IN JURISPRUDENCE 237 (Jeremy Horder ed., 4th ser., 2000), at 239. 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. References to rights as concerned with the distribution of freedom in H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175 (1955), at 178, fit this description, as does John Rawls's usage. *See* JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999) (1971), at 54 ("the basic structure of society distributes certain primary goods. . . . the chief primary goods *at the disposition of society* are rights, liberties, and opportunities, and income and wealth.") (emphasis added). For an example of distributive justice being used in this broader sense in connection with private law, *see* Peter Cane, *Corrective Justice and Correlativity in Private Law*, 16 OXFORD J. LEGAL STUD. 471 (1996), at 481.

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one's wrongs.[72] Because remedies are the handmaidens of rights, however, corrective justice is not the sovereign principle of tort.

The nature and philosophical significance of remedies in tort is a topic in its own right. Several points, however, warrant brief mention. The first is that reparation for wrongful loss—corrective justice in tort as corrective-justice scholars conceive it—*is* the default tort remedy. "The basic rule of tort compensation is that the plaintiff should be put in the position that he would have been in absent the defendant's negligence."[73] The second is that when a "tort causes bodily harm or emotional distress, the law cannot restore the injured person to his previous position."[74] Paradoxically, the kind of serious impairments of agency that count as harms in the law of torts are all but constituted by a shared property of not being fully repairable. Damages in tort therefore have expressive and performative aspects.[75] Their task, as Honoré says[76], is to put matters right, and this often requires something other than the impossible task of restoring the plaintiff to the position that she would otherwise have occupied. For purposes of this paper, however, the essential point is that tort remedies are governed by tort rights. Remedying a wrong is a second-best way of respecting a right in the first instance.

D. 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 backward-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.

72. This broad conception of corrective justice is similar to the view taken in TONY HONORÉ, *The Morality of Tort Law—Questions and Answers*, *in* RESPONSIBILITY AND FAULT 67 (1999), at 73 ("On a wide view, [corrective justice] requires those who have without justification harmed others by their conduct to put the matter right."). There are thus connections between the view of tort that I am developing here and the broad view of tort's remedial operation taken in Hershovitz, *supra* note 8.

73. Keel v. Banach, 624 So.2d 1022, 1029 (Ala. 1993).

74. RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1979).

75. Peggy Radin emphasizes the expressive dimension of damages in tort. *See* Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993). Scott Hershovitz emphasizes the performative view of tort's remedial operation; *see* Hershovitz, *supra* note 8. The civil-recourse point that giving the plaintiff "satisfaction" was once taken to be the purpose of tort damages also has affinities with the broad view of corrective justice being taken here. *See* John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435 (2006), at 440–445.

76. Honoré, *supra*, note 72.

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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 bilateral, backward-looking structure that corrective-justice theory emphasizes.

If corrective-justice theory misconceives the content of tort law by insisting that it must involve wrongful loss, it also misconceives the structure of tort law in three distinct ways. First, by emphasizing the bilateral structure of tort lawsuits, corrective-justice theory gets the formal character of primary tort norms wrong and gives them a curiously personal cast. Primary obligations in tort are omnilateral, not bilateral, they are owed by everyone and to everyone else. The wrong at the center of modern tort law—negligence liability for the infliction of accidental physical harm—is an abstract and general wrong, not a personal one. Negligence is the failure to exercise reasonable care in order to protect an indefinite plurality of potential victims whose persons and property one might otherwise unreasonably endanger by one's actions. 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 does not mirror 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 and thus 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. The wrong lies in not repairing harm faultlessly inflicted but rightly attributed to the tortfeasor's agency. Strict liability prevents an injurer who is justified in inflicting harm from loading the costs of that harm off on its victim in circumstances where it would be unjust for the injurer to make the victim bear that cost.

Third and last, even tort's remedial responsibilities have a forward-looking role to play. Remedial responsibilities enforce rights as well as restore 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.

To make good on these assertions, we must elaborate each of them in turn.

1. The Omnilateralty 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 not simply settle

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disputes; it also applies and articulates *law*. A legal decision is a decision made in accordance with preexisting norms. Further, common-law legal decisions do not simply bind retrospectively; they also have precedential force. Rulings in individual cases bind prospectively on all who fall within their scope. Indeed, 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 more narrowly but still broadly. They obligate indefinite classes of potential wrongdoers and protect indefinite classes of potential victims going forward indefinitely.[77]

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 owed both 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. Corrective-justice theory is quite right about all of this and 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. Unlike contractual obligations, tort obligations do not arise between named persons. They are grounded in fundamental interests of persons qua persons and are owed by each of us to everyone else.

Once more, the general law of negligence is 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

77. *Cf.* Sheinman, *supra* note 35, at 50–51 (discussing the doctrine of precedent in tort).

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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 are antecedent to and grounding of 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.

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.[78] 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*, in the natural and primary sense of that term, but on an unreasonable failure to repair harm reasonably inflicted. In Vincent v. Lake Erie Transportation Co.,[79] for instance, it is right and reasonable for the owner of the ship to lash the ship to the dock during the storm even though he does not have permission to do so, but it is unreasonable and wrong for the shipowner to foist the cost of saving his ship off onto the owner of the dock.

When the defendant's lashing of his ship to the dock results in harm, a duty to make reparation arises. That duty is breached when the dock owner does not volunteer, in a timely fashion, to pay for the harm he has inflicted. The lawsuit is brought to repair the wrong of failing to comply with that duty. That wrongful conduct is *secondary*, not *primary*. The primary conduct—lashing the ship to the dock and damaging the dock—is not wrongful. The wrong lies in failing to step forward and repair the damage, even though that damage is justifiably done. Strict liability thus involves a wrong, but that wrong is not conduct-based in Coleman's sense of the term. Liability is not predicated on the assertion that the defendant should have behaved differently and not harmed the plaintiff.[80]

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. Coleman's theory flunks the test for two distinct reasons. First,

78. 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.

79. Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910).

80. The identification of tort with conduct-based wrongs is not particular to Coleman. Weinrib holds the same kind of view, a fact vividly illustrated by his criticisms of strict liability as a norm of conduct that condemns "any penetration of the plaintiff's space"; WEINRIB, *supra* note 6, at 177. For their part, Goldberg and Zipursky write that "[a]lthough by convention, strict liability for abnormally dangerous activities clearly is part of what lawyers define as 'tort law,' strictly speaking it does not belong in this department"; JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS 267 (2010). Any account of tort law that specifies the constitutive features of tortious wrongs in such a way that the account cannot acknowledge—or properly characterize—strict liability in tort is, for that reason alone, seriously defective and in need of revision.

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Coleman conceives of strict liability as lying outside the core of tort that it succeeds in explaining. He notes that that corrective-justice theory "does not explain" various features of tort law, "for example, vicarious liability or perhaps product liability."[81] Coleman also excludes product liability from the core of tort and tentatively suggests that it should be understood not in terms of corrective justice but in terms of rational bargaining.[82] Both the concession and the exclusion are troubling. A theory of tort that can explain its domains of strict liability is interpretively superior to a theory that cannot. Coleman's theory is vulnerable precisely because it cannot. The absorption of product liability into tort, moreover, is the most important development in twentieth-century tort law. An adequate theory of tort ought to be able to account for it.

Second, Coleman's account of strict liability goes wrong 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. 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 to those whose property it takes.

Eminent domain thus embraces 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 must repair any physical harm done by their conduct.[83] Whereas negligence liability is predicated on primary criticism of conduct, strict liability is predicated on a secondary criticism of conduct. In negligence, the infliction of the harm is wrongful; in strict liability, the failure to step forward and repair a harm faultlessly inflicted is wrongful. Strict liability asserts that the costs of necessary or justified harms should be borne by those who benefit from their infliction, not by those whose misfortune it is to find themselves in the path of valuable activity.

81. COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 6, at 36.

82. COLEMAN, RISKS, *supra* note 54, at 417–429.

83. 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 in Grey, *Accidental Torts*, *supra* note 35, at 1275–1281; and at greater length in Grey, Holmes on Torts, *supra* note 45. Two other classic statements are Francis H. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307 (1926); and Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959).

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This form of strict liability is embodied by a diverse set of doctrines: by private necessity cases such as *Vincent*; by liability for abnormally dangerous activities; by some liability for intentional nuisance; by liability for manufacturing defects in product liability law; and by the liability of masters for the torts committed by their servants 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.[84]

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 that 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 a 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 differently, 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 presumptively wronged whenever their boundaries are crossed without permission. Their rights thus give rise to stringent "duties to succeed" on the part of others.[85] In this class of cases, the strictness of liability in tort is the consequence of the character of the right being protected.

The wrong committed in a sovereignty-based tort is conduct-based *in only the most attenuated sense of the term.* In negligence—the canonical example of a conduct-based wrong—liability is predicated on the wrongfulness of the defendant's *conduct*; it is that wrongfulness that does the work and triggers

84. A complication lurks here. Because we believe harm may be done justifiably in cases of strict liability, and because the basic reason for imposing such liability is to prevent the defendant from loading the cost of its justified conduct off on the plaintiff who does not benefit proportionately from that conduct, there is a question of whether damages serve a corrective or a commutative role. They serve a corrective role if they rectify the wrong; a commutative one if they align burden and benefit. We cannot purse this question here.

85. The concept of "duties to succeed" is developed in John Gardner, *Obligations and Outcomes in the Law of Torts*, *in* RELATING TO RESPONSIBILITY: ESSAYS FOR TONY HONORÉ (P. Cane & J. Gardner eds., 2001).

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liability. In "sovereignty torts," it is the violation of the plaintiff's right that does the work and triggers liability. The duty is a duty not to violate the right, and conduct that violates the right is wrongful only because it violates the right. Viewed in isolation from the right, the conduct may be innocent and even justified. The defendant doctor in *Mohr v. Williams*, for example, benefited the plaintiff by curing her disease.[86] Moreover, sovereignty-based torts are clear counterexamples to the thesis that tort is a law of wrongful losses. These may be committed without inflicting wrongful loss, because the rights at issue are powers of control, not protections against harm. The essential distinguishing features of strict liability are thus obscured and distorted by calling strict liability torts "conduct-based wrongs." Strict liability wrongs are based not on wrongful conduct in the normal sense of that term but on violations of autonomy rights or on secondary failings of conduct—on conditional, not primary fault.[87]

Coleman's views on the nature of strict liability have changed over time, but lately he takes 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. . . . 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.
>
> . . . 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.[88]

86. Mohr v. Williams, 104 N.W. 12 (Minn. 1905).

87. This is Robert Keeton's vocabulary. *See* Keeton, *supra* note 83.

88. Jules Coleman, *Facts, Fictions, and the Grounds of Law*, *in* LAW AND SOCIAL JUSTICE 327 (Joseph Keim Campbell et al. eds., 2005), at 329. *See also* COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 6, at 35 n.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.'").

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When strict liability is conceived of as a "duty-not-to-harm," it conforms to the demand that the sovereign conception of corrective justice imposes on tort law, namely, that tort imposes liability on *wrongful conduct*.

This conformance to the demands of corrective-justice theory comes, however, at the cost of offering an inaccurate account of strict liability in tort. *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. In *Vincent*, the doctrine of private necessity with regard to the shipowner's plight justifies his use of the dock and trumps the dock owner's right to exclude. But that trumping extends only as far as its rationale requires. It is neither necessary nor fair to shift the cost of the ship's salvation onto the dock owner's shoulders. The shipowner, therefore, does wrong not in harming the dock but in failing—unreasonably—to make reparation for harm reasonably done.

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.[89] The standing availability of negligence liability and its capacity for calibration to the seriousness of the harm threatened make 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

89. *See, e.g.*, Foster v. City of Keyser, 501 S.E.2d 165, 175 (W. Va. 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." *Id.*

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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, be justifiably wary of discharging our obligations to others if we are not assured that they will discharge their reciprocal responsibilities 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 that tort law places in the hands of injured plaintiffs put teeth in its primary obligations. Damages may do their most important and effective work when their prospect diminishes the number of occasions on which they must be awarded. Insofar as reparation is a second-best or next-best way of honoring primary rights and responsibilities, this forward-looking, rights-enforcing aspect of damages should not be dismissed lightly.[90]

In short, corrective-justice theory claims that tort is bilateral, backward-looking, and composed of conduct-based wrongs. Primary obligations in tort, however, are logically and normatively prior to remedial obligations, and tort law's primary obligations are usually omnilateral and forward-looking. They are owed by everyone to everyone else, and they govern relations among persons prospectively. These primary obligations have a better claim to being the core of tort law than the remedial obligations stressed by corrective-justice theorists do, because tort's remedial obligations are parasitic on its primary ones. Primary obligations in tort, moreover, do not consist entirely of conduct-based wrongs. Strict liabilities in tort are either conduct-based only in the most attenuated sense—as sovereignty-based strict liabilities are—or predicated on secondary, not primary criticism of conduct—as harm-based strict liabilities in tort are. The structure of tort law thus does not bear out the claims of corrective-justice theory.

IV. TAKING PRIMARY RIGHTS SERIOUSLY

Theory of the sort under consideration here is the law in quest for itself, the law's quest for self-understanding. We turn to theory because our understanding of some field of law seems inadequate. What we want from

90. Doctrinally, this concern manifests itself most vividly in damages and proximate cause. Punitive damages are sometimes imposed 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 not priced out by economically rational tortfeasors. *See supra* note 47, and accompanying text. Proximate-cause cases, fixing the outer perimeter of responsibility for harm tortiously done, often take explicit account of whether the scope of liability is sufficient to enforce the rights at stake. This is especially evident in negligence cases involving pure economic loss and pure emotional harm. *See, e.g.*, Barber Lines v. Donau Maru, 764 F.2d 50 (1st Cir. 1985); Thing v. La Chusa, 771 P.2d 814 (Cal. 1989).

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theory is orientation, a clear view of the subject at hand, which can guide our more particular inquiries. In the case of tort theory, reorientation is in order. Remedial theories of tort law have been on the right track in putting wrongs and rights at the center of the institution but they have overshot the mark in asserting that the essence of tort law lies in the rectification of wrongs. Placing primary weight on the reparative aspect of the institution is mistaken in the 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 establish and enforce certain rights that persons have against one another, rights not to be harmed nor have their liberty violated in various ways. We need to reorient tort theory in a way that retains the insights of remedial theories but also gives primary rights and obligations their due.

A. Remedialism Right and Wrong

What corrective-justice theory gets right is that tort is 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,[91] but its overall account of the structure of tort adjudication is strained and implausible, as corrective-justice theory powerfully argues. It is unconvincing to argue that tort is a wholly forward-looking and 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, usually by requiring the defendants who have wronged them to make reparation for the harm 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.[92] 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 with making wrongdoers repair the losses that they have 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 that 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

91. One insight deserves special mention, even though we cannot do it justice here. Accidental harm *is* a social problem, not just a matter of wrongs. Those of us who champion the truth that torts are wrongs need to figure out how to do justice to this insight.

92. For an illuminating account of the way in which criminal law protects our rights in general, *see* RIPSTEIN, EQUALITY, *supra* note 11, ch. 5.

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instituted because they cannot be enforced and restored. Unless they are effectively instituted, they may not even be legal rights at all. Further, tort does involve a particular 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 in adjudication it links those whose rights have been violated with those who have done the violating.

What corrective-justice theory gets wrong is the relative priority of remedial and primary responsibilities. 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. Coleman's sophisticated and powerful version of corrective-justice theory asks the primary rights of tort to answer to the requirements of 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 that leaves those who suffer it in an injured condition. Repair is necessary to restore rights.

Placing proper emphasis on primary rights and responsibilities results in recasting the corrective-justice 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 backward-looking, bipolar structure of tort law and cannot do justice to concepts such as duty and cause. For the view I am sketching, 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 because those rights protect essential interests. The articulation of what those rights require in the way of mutual respect is the principal task of tort law. While tort rights require justification in larger moral and political terms,[93] they are not merely

93. On an "interest 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*

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devices to induce people to behave in a way that minimizes the combined costs of accidents and their prevention.

B. Is Tort a Coherent Institution?

Putting primary rights and responsibilities at the center of tort law has the virtue of putting the horse back in front of the cart, but it is not itself free of difficulties. First and foremost, it must confront the claim that tort law's primary rights and duties are heterogeneous, and irreducibly so.[94] 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 over and use of real and moveable property; in reputation and privacy; in not being deceived as we go about our economic lives and enter into mutual agreements; in the legitimate economic expectancies that our agreements create; in not having legal processes used abusively against us; and so on. Tort may therefore be an irreducibly diverse 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 important than secondary ones. The question of whether tort is a unified subject, and if so, what that unity is has never been entirely settled.[95] Putting a varied collection of primary rights and responsibilities at the center of one's account seems likely to awaken deep-seated doubts about the coherence of the institution. Indeed, the variety of tort's primary obligations seems to be a point in favor of a remedialist account of the subject. We 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, and what most torts have in common is that they give rise to wrongful losses.

It may well be that the 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

Charles R. Beitz, *The Moral Rights of Creators of Artistic and Literary Works*, 13 J. POL. PHIL. 330 (2005), at 335–337 (and sources cited therein).

94. COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 6, at 34–35 ("I reject the suggestion that an adequate account of tort practices requires that there be a general theory of primary duties from which we can derive them all systematically. Indeed, I am dubious about the prospects for such a theory. On my view, much of the content of the primary duties that are protected in tort law is created and formed piecemeal in the course of our manifold social and economic interactions."). Goldberg and Zipursky appear similarly inclined. *See* GOLDBERG & ZIPURSKY, *supra* note 80, at 6, 27–45. *Cf.* Scott Hershovitz, *Two Models of Tort (and Takings)*, 92 VA. L. REV. 1147 (2006).

95. *See* Grey, *Accidental Torts*, *supra* note 35; and Holmes on Torts, *supra* note 45.

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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 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.[96] This alternative conceives of tort as one of the laws of freedom. It asserts that 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 account is whether it can make sense of and justify the basic terrain of tort law.

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.[97] The general law of negligence, for example, stands at the center of modern tort law and 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 that gives rise to liability.[98]

Intentional torts are more diverse. Many of them protect us against harm, but the harms they protect against are various: 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 reputations; tortious interference with prospective economic advantage protects important economic expectancies from invasion by third parties; and so on. Other intentional torts protect domains of choice or powers of control. To those we have already mentioned—battery in some of its incarnations, trespass,

96. Social contract theory traditionally conceived of the subject in this way. *See* 1 BLACKSTONE, COMMENTARIES, *125, *129, *134, *138 (explaining that the common law is founded on "absolute" rights to liberty, security, and property). By "absolute," Blackstone seems to mean what we would call "natural." For an illuminating discussion, *see* Grey, Holmes on Torts, *supra* note 45, at 111–127 (*The Prehistory of Torts*).

97. The view that tort law is about harm is one of Oliver Wendell Holmes's famous theses, and it has been prominent in the legal academy ever since. *See* THE COMMON LAW, (Sheldon Novak ed., 1991 [original edition 1881], at 144 ("the general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbors, not because they are wrong, but because they are harms."). Unfortunately, Holmes distinction between"harms" and "wrongs" sets up a false antithesis between the two. On Holmes and harm, *see* Grey, *Accidental Torts*, *supra* note 35, at 1272–1275; and Grey, Holmes on Torts, *supra* note 45, at 35–38.

98. *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS (5th ed. 1984), at 361. On pure economic loss, *see* Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927); Barber Lines, *supra* note 90.

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and conversion—we should add false imprisonment, which protects our freedom to move about in the world at large.

The first test of the thesis that tort is one of the laws of freedom is whether it can show that both sovereignty-based and harm-based torts protect autonomy. The link between sovereignty-based torts and 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. These powers, moreover, are essential aspects of our personal freedom: they enable us to do as we please with ourselves and our possessions. The link between harm and autonomy, however, is not obvious in this way. In fact, the thought that harm is an assault on autonomy is contrary to the most influential contemporary account of harm.

That account holds that harms are "violations of one of a person's interests, an injury to something in which he has a genuine stake."[99] This "interest account" conceives of harm in counterfactual or historical terms and locates harm's moral significance in its assault on our well-being.[100] Harms are not so very different from costs. They are just more damaging to our well-being than costs, and targeted more precisely. Harms set our *vital* interests back, and seriously. The thesis that tort is a law of freedom depends on showing that another account of harm is superior, at least with respect to the harms that preoccupy tort law. That alternative account conceives of harm as a condition whose badness is not comparative and grounds harm's significance in its assault on our agency.

This conception of harm hearkens back to Mill. In its most robust articulation, it asserts that 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 that thwarts one's control over the content of one's life.[101] Serious physical injury and agonizing pain are harms of this kind, and their relation to autonomy is clear. They impair and at the limit negate their victims' capacities to subject their experiences to their wills, their capacities to effect their intentions and purposes. Harms overwhelm their victims and so rob

99. JOEL FEINBERG, SOCIAL PHILOSOPHY 26 (1973). The interest account of harm is briefly but clearly deployed in Sheinman, *supra* note 35; and in Hershovitz, *Two Models*, *supra* note 94, at 1161–1168.

100. For a survey and summary of this and other accounts of harms, including the autonomy account endorsed in this paper, *see* Matthew Hanser, *The Metaphysics of Harm*, 77 PHIL. & PHENOMENOLOGICAL RES. 421 (2008).

101. *See* Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 LEGAL THEORY 117–148 (1999); Seana Valentine Shiffrin, *Harm and Its Significance*, 18 LEGAL THEORY (2012). Tortious harms, of course, are marked by one more essential property: they are 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.

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them of their agency. Those who are harmed must suffer and endure that which is inflicted upon them.[102]

Insofar as harms are assaults on agency, harm-based and sovereignty-based torts both protect autonomy. Harm-based torts protect faculties and capacities whose exercise is partially constitutive of autonomy, whereas sovereignty-based torts protect powers that are essential to the exercise of our freedom in the world. Both kinds of torts thus protect aspects of human agency. Indeed, the distinction between them can be collapsed by counting the violation of the victim's power of control over a protected domain as harm. On this account, the harm lies in the impairment of agency, even if the agent is not left in an impaired condition.[103]

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 unwitting instruments of other people's wills. Fraud undermines freedom every bit as effectively as force does. The latter overpowers the body; the former disables the mind.

Protection of our sovereignty over our persons and our property as it is found in trespass and battery and protection against harm as it is found in the general law of negligence are canonical cases of tort protection. We must ask, of course, whether all torts fit one of these two templates. Most torts do because most torts are harms. The kind of intense fear that the tort of assault protects us against fits the conception of harm as an assault on our persons so severe as to thwart our mastery over our experience. So, too, 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.[104] Sensibility-based nuisances also fit this account of harm. They are visceral assaults on our senses that prevent us from using and even occupying our property.[105]

Other torts stand at greater distance from the core sovereignty- and harm-based torts. Consider defamation and privacy. To bring defamation within the ambit of an autonomy account of harm, reputation must be an especially

102. JOSEPH RAZ, THE MORALITY OF FREEDOM 412–20 (1986), at 412–420, traces a broader if less intense connection between autonomy and harm: "To harm a person is to diminish his prospects, to affect adversely his possibilities." *Id.* at 414. Raz notes explicitly that he is explicating John Stuart Mill's famous "harm principle." JOHN STUART MILL, ON LIBERTY (1859).

103. It is, I think, best to recognize that we can *both* distinguish the two kinds of torts or conflate them, but that we can do this only if we understand harm as serious impairment of agency. If we take a welfarist conception of harm, we will not be able to collapse the distinction.

104. *See* Gregory C. Keating, *Is Negligent Infliction of Emotional Distress a Freestanding Tort?*, 44 WAKE FOREST L. REV. 1131 (2009).

105. *See, e.g.*, Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972) (flies and odor from cattle feedlot held to be a nuisance); Berg v. Reaction Motors Div., Thiokol Chem. Corp., 181 A.2d 487 (N.J. 1962) (noise, vibration, and air blasts from test-firing a rocket engine constituted a nuisance); O'Cain v. O'Cain, 473 S.E.2d 460 (S.C. 1996) (presence of hogs in front of plaintiff's residence was a nuisance).

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important condition of agency, so that some capacity to ensure that others' perceptions of us are determined by who we are and what we have done is essential to our capacity to work our will upon the world.[106] To count as an autonomy-based harm, the ground of defamation must be that reputational harm seriously impairs the efficacy of our agency by making our reputations subject to the false claims of others instead of answering 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 his or her good name ruined by falsehoods. Fitting privacy into this framework in turn requires showing why the presence of some sphere where one is free of observation is essential either to the formation of an independent sense of self or to the exercise of independent selfhood—or to both.

When we move beyond torts that protect the physical and psychological integrity of the person, the full diversity of the subject becomes apparent. Some torts protect economic interests, others protect property rights, and still others protect rights against harm flowing from the abuse of legal and political processes. The list of tortious mistreatment is long and open-ended. At this point, it may help to distinguish tort into three domains. At the center of the field are the freestanding torts: these torts protect interests in the physical and psychological integrity of the person. These torts spell out what we owe to each other simply by virtue of essential interests that we have as autonomous agents. Tort's freestanding core is flanked on two sides by the protections that it confers on rights originating in other bodies of law, primarily property and contract. In these flanking domains, the role of tort is to help secure the effectiveness of legal rights that are not themselves creatures of the law of torts.

These departments of tort law raise different questions. Tort's freestanding core poses the question whether the interests in bodily security, physical liberty, emotional tranquility, privacy, and reputation that it protects should be understood as a coherent whole embodying a defensible idea of the conditions of autonomous agency. The view that tort is not a heterogeneous collection of wrongs but a unified subject whose central domain is the liberty and security of persons against one another bears the burden of showing that the major torts protect against important impairments of autonomous agency. With respect to the flanking departments of tort, the first question is whether unity exists. For these torts to form a law of freedom, they would have to protect rights to economic expectancies whose frustration is a serious blow to autonomous agency or protect powers of control over

106. Blackstone counted reputation among the fundamental rights comprising the right of personal security, but the tort may have since become less central in most accounts of the fundamental interests of persons. BLACKSTONE, COMMENTARIES, *129 ("The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, health and his reputation.").

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external objects, which are similarly essential to the exercise of individual liberty.

The most obvious way in which these flanking domains might be connected to autonomy is that the recognition of rights by other bodies of law (e.g., contract) confers this status upon them. The formation of a contract, for example, converts a fluid economic interest subject to the vagaries of the market into a protected economic expectancy. The security of this expectancy is, then, essential to autonomy. Contract enables planning, and planning requires secure confidence that one can rely on contractual commitments. Tort law's role here is to play handmaiden to contract by putting third parties under binding legal obligations of noninterference.

Contracting parties, after all, cannot obligate strangers to their transactions to refrain from interfering with their contractual arrangements, and yet such noninterference may be essential for contractual agreements to be secure. Similarly, parties to property agreements must bind the whole world to respect their rights but cannot ground that obligation in their own private agreements. In both cases, tort adds an essential layer of protection by putting third parties under the obligations necessary to secure the effectiveness of rights established by other departments of the law. Derivatively, tort law's role is to promote the autonomy that contractual agreements and property arrangements effect more directly.

Whether this view of tort as a law of freedom can be developed and sustained is a large question. The preceding sketch does no more than explain the basic idea and show (I hope) that it has enough initial plausibility to warrant further inquiry. Unless some such conception can be sustained, however, we have to confront the possibility that tort's standing as a legal subject is still shaky a century and a half after it is thought to have emerged as an autonomous department and pillar of private law.

V. REORIENTING TORT THEORY

Corrective-justice theory in full flower claims that tort is essentially a matter of repairing losses wrongly inflicted. I argue 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; because it is both under- and overinclusive; and because it offers an inadequate account of strict liability in tort. Corrective-justice theory's emphasis on

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tort's remedial responsibilities slights the law's primary responsibilities; its claim that the essence of tort is the repair of wrongful loss excludes some canonical torts and includes some wrongs that are not torts; and its thesis that liability in tort must be a matter of wrongful conduct is belied by strict liability doctrines that impose liability on conduct that is justifiable.

We should follow the lead of corrective-justice theorists in putting wrongs at the center of our understanding of tort law but we should reorient tort theory to place primary responsibilities at the subject's core. On the particular view of those rights and responsibilities that I am suggesting, the law of torts guards essential conditions of autonomous agency against harm. Tort as a whole thus illustrates the Millian proposition that individual liberty ends with the infliction of (unacceptable) harm. In its freestanding core, tort takes the liberty and integrity of the person to be fundamental and guards it against physical and psychological violation. On its flanks, tort guards diverse rights and expectancies. These flanking wrongs are diverse, and the list of such wrongs is in principle an open-ended one. The essential character of these wrongs is nonetheless captured by the torts that protect property and contract. Property and contract are institutions through which we extend and exercise our agency. In protecting property and contract rights against harm, tort is discharging its role of guarding essential conditions of agency.

Modern tort law has been preoccupied with questions of what kinds of harm persons should be protected against and how stringent those protections should be. The emergence of intentional infliction of emotional distress and the privacy torts, for example, implicitly asserts that the psychological integrity of the person is an essential condition of agency and therefore commands respect from other people. The expansion of tort into the domain of product accidents once governed by contract rests on the assumption that our interest in being free from physical harm is implicated in the marketing and sale of products whether or not we have contractual relations with those who sell the products. It also asserts that our interest in being protected from physical harm trumps our competing interest in setting the terms of our own interactions. For its part, the expansion of tort into the domain of landowner liability implies that our common interests as physically vulnerable natural persons trump our differential interests in and statuses with respect to the ownership of land. The waxing and waning of strict liability is, at bottom, about the stringency scope of protection owed.

Questions about whether and when obligations to avoid harm ought to be recognized and how such obligations ought to be implemented deserve attention from tort theorists commensurate with their importance to tort law. Giving these questions their due begins with recognizing that in the law of torts, respect for rights has priority over the repair of wrongs.

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