The Case Against External Explanations of Tort Law: Can Antecedent Values Divine the Deep Structure of Tort Law?

Avihay Dorfman*

*Tel Aviv University, Faculty of Law, dorfman@post.tau.ac.il

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

http://law.bepress.com/taulwps/art159

Copyright ©2010 by the author.
The Case Against External Explanations of Tort Law: Can Antecedent Values Divine the Deep Structure of Tort Law?

Avihay Dorfman

Abstract

In this paper I discuss the prevailing approach in theoretical reflection about tort law, namely, the tendency to explain its normative structure by reference to values and goals that do not distinctively originate in the engagements that tort law engenders between its constituents. I seek to show that this form of explanation – external explanation – suffers from an important structural deficiency. In particular, I argue that external explanations may lack the normative resources to explain tort law, even on their own respective terms. My analysis reveals that the key to the deep structure of tort law might not be found in abstract economic models or ideals of justice. Rather, it may be found in the freestanding value of the relationship that tort law engenders between care-discharger and cared-for and between defendant-tortfeasor and plaintiff-victim.
The Case Against External Explanations of Tort Law: Can Antecedent Values Divine the Deep Structure of Tort Law?

Avihay Dorfman* 

Abstract

In this paper I discuss the prevailing approach in theoretical reflection about tort law, namely, the tendency to explain its normative structure by reference to values and goals that do not distinctively originate in the engagements that tort law engenders between its constituents. I seek to show that this form of explanation—external explanation—suffers from an important structural deficiency. In particular, I argue that external explanations may lack the normative resources to explain tort law, even on their own respective terms. My analysis reveals that the key to the deep structure of tort law might not be found in abstract economic models or ideals of justice. Rather, it may be found in the freestanding value of the relationship that tort law engenders between care-discharger and cared-for and between defendant-tortfeasor and plaintiff-victim.

Introduction

The practice of torts figures prominently in our ordinary lives. Many of our actions and interactions—in particular, the ways we attend to others—are governed by the law of torts and by the practical principles it embodies. We pay attention to nearby motorists and pedestrian while on our way to work, we take care not to invade the property of our neighbor, we restrain ourselves from knocking down our rivals with a fist (sometimes despite desires to the contrary), and we refuse deliberately to mislead our customers into defective transactions. More generally, we moderate our practical affairs so that they do not impinge on others even when it does not serve our own self-interest. And when we fail to do that, we normally feel obligated to do something about it—to make good the disrespect we displayed toward others. This is how we naturally, not just legally, understand the task of living in a society with others. Norms of respect and recognition are thus crucial to our moral and social experience of one another. It would therefore be natural to expect theoretical reflections about the legal practice of torts to elaborate on this lived experience, to settle a reflective equilibrium, as it were, between our moral intuitions and the theory of tort law.1

* Tel Aviv University Faculty of Law. J.S.D., LL.M., Yale Law School; LL.B., B.A., Haifa University. I am grateful to Hanoch Dagan, Tony Kornman, Daniel Markovits, Ariel Porat, and Robert Post for helpful comments and discussions on earlier drafts.
1 See Rawls, John, A Theory of Justice (Cambridge, Mass.: Harvard University Press, 1971), p. 20 (introducing the idea of reflective equilibrium between theory and intuition to which we should aspire).
In spite of this, the most familiar accounts of tort law (including, but not limited to, economic analysis of torts and corrective justice) remain flatly agnostic about the possibility that tort law is, first and foremost, a legal expression of our everyday moral and social commitments as members of a society of persons. The economist seeks to explain the extent to which tort law can promote efficient allocation of resources by optimally minimizing the costs of accidents and the costs of their prevention. Corrective justice theories articulate the conditions under which imposing on the injurer a duty to compensate the victim for her loss meets the demands of justice. Another member of the family of corrective justice, an ideal Rawlsian theory, explains tort law by reference to the service it renders individuals by allowing their respective freedoms to flourish, separately, against the backdrop of a distributive just constitutional framework. These views of tort law, despite their obvious rivalry, hold in common the commitment to explaining tort law by reference to external normative materials—the principles of efficiency, corrective justice, and equal freedom, respectively. Indeed, the importance of our everyday, caring-related actions and interactions take a back seat, leaving the center stage to concerns about the normative or economic service that these actions and interactions provide for the relevant participants, taken separately. The values upon which tort law is grounded, on these accounts, are extrinsic in the sense that they lie outside the normative relations that tort interactions establish, and they come to bear on tort theory and practice only through their application to the concrete institution of torts. And insofar as its value (be it efficiency, corrective justice, or otherwise) keeps a critical distance from the tort relations themselves, it seems only natural to suspect that extrinsic accounts of tort law may not capture its true normative core.

The ambition behind these observations is straightforward: setting out to build a novel tort theory of a profoundly different kind and to show that this theory does a better job than its competitors in explaining tort law. But this project must await the establishment of the more preliminary stage of the argument. In the following pages, I shall insist that external accounts of tort law (cast in terms of either justice or efficiency)
fail to provide successful accounts of tort law precisely because they proceed under the supposition that the source of the value underlying tort law is extrinsic to the normative relation among the care-discharger and the cared-for, rather than intrinsic to it. This point is rarely noticed but, as I shall seek to show, it accounts for a structural deficiency, not merely explanatory gaps, plaguing contemporary discourse about tort law. Thus, I shall argue that the widespread debate between friends of efficiency, on the one hand, and advocates of justice, on the other, as to what makes up the moral center of tort law is wrongheaded since both, due to their commitment to externalist explanation of the grounds of tort law, lack the normative resources necessary to capture such a center.

To be sure, I shall not attempt to offer a sustained critique of any specific theory that approaches tort law through the lens of efficiency, corrective justice, or Rawlsian theory. No one paper could seriously pursue this task. Instead, I shall focus attention on the normative frameworks characteristic of many accounts of torts falling under these approaches. This method inevitably requires some measure of abstraction in my treatment of the different theories of each approach to tort law. This hardly does justice to the sophistication and rigor of such theories but, nonetheless, it is appropriate insofar as I seek to render more transparent the general insensitivity of the prevailing approaches to the ordinary moral and social underpinnings of tort law.

In Part I, I shall set the stage for the main argument of this paper by elaborating on the normative structure of tort law and on the practical questions to which it gives rise. Parts II, III, and IV will consider the respective responses of the economic, corrective justice, and Rawlsian approaches to these questions. In my concluding remarks I shall describe more generally the deficiency all (otherwise competing) three approaches have in common—the deficiency of casting the values of tort law duties in extrinsic terms—and offer, in a rather speculative fashion, a possible way out.

The Normative Structure of Tort Law

An examination of a legal dispute that reaches court and is appropriately classified (by the litigants and judges) as governed by the law of torts reveals the existence of two distinct duties. The first is the primary duty or—in the case of the most important tort nowadays, negligence—the duty of due care. Ordinarily, most persons in most instances comply with this duty when they discharge due care toward other persons with respect to their activities. However, in other cases they may fail to meet the standard of care specified by the duty, which is the standard of reasonable care in the case of the tort of negligence. In such circumstances, and when this failure results in certain adverse consequences to others (such as injury), the law of torts recognizes a second-order duty, a duty imposed on the failing care-discharger, and on her only, to rectify the consequences of breaching the primary duty. I shall call it the remedial duty. As the names ‘primary’ and ‘remedial’ duties imply, the former is prior to the latter logically (because a remedial duty presupposes a prior duty, the breaching of which calls for

---

remedy) if not also normatively (in the sense that a primary duty conveys freestanding reasons for action that may, in turn, underwrite the remedial duty).

This is not the only familiar characterization of the normative structure of tort law. Notably, Benjamin Zipursky has criticized this characterization, arguing for the prominence of the rights of action vested in victims of wrongs at the expense of the remedial duty.5 Criticizing the corrective justice account, Zipursky shows that a core conceptual element of tort law is the private rights of action conferred by the law upon those whose primary rights have been violated.6 The duty to compensate the loss occasioned by these violations is therefore merely the upshot of victims successfully exercising their rights of action against their tortfeasors. That said, I prefer the former characterization of tort law’s structure—consisting of primary and remedial duties only—because it seems that the insistence on the category of rights of action does not illuminate tort law. This category of rights meant to enlist the court in the service of vindicating primary rights against their violators is not distinctive of tort law, as Zipursky himself has acknowledged.7 It is a general characteristic of private law: contract, property, and unjust enrichment law feature private rights of action just as well.8 Moreover, it is an open question whether courts—and the rights of action associated with their role in adjudicating private law disputes—are essential to the normative structure of tort law: in principle, the primary and remedial duties can be fulfilled without any (direct or indirect) involvement on the part of the court as when the injurer and victim come to agree on the facts of the matter and the former also realizes that, in these circumstances, it is her legal duty to render the latter whole.

The structure of tort law that I shall investigate, by contrast, pays particular attention to tort law’s distinctive properties—its commitment to a particular form of respecting the plans and activities of others and to the special remedial duty of making the victim whole. Moreover, the way I shall characterize tort law’s special remedial duty—as owed to and owned by the victim of a duty of care violation—inherits Zipursky’s important insight concerning the unique normative power (or right of action as he prefers to call it) on the part of the victim of a tort to claim reparation from the tortfeasor.

Tort law, to return to my initial characterization of its normative structure, gives rise to three fundamental questions: what reasons ground acting on a primary duty; what reasons, if any, ground acting on a remedial duty; and, lastly, what is it in the normative relationship between the two sets of reason that mandates their entwinement within the legal practice of tort law? The first two questions figure prominently in persons’ moral experience of one another and in the legal practice of torts; the third question seeks to

---

7 Zipursky, Benjamin C., Philosophy of Private Law, in Jules Coleman and Scott Shapiro (eds.), The Oxford Handbook of Jurisprudence and Philosophy of Law (Oxford; New York: Oxford University Press, 2002), 623-655, pp. 632-36, esp. 635 (“The notion that a plaintiff is entitled to a right of action is … centrally important to the idea of private law.”).
8 It may also be said to capture the law in liberal states, more generally. For example, constitutional rights—the equivalent of primary rights in tort law—are supplemented with rights of action conferred upon the rights-holders against state actors.
explain what reasons exist for supporting the special structure of tort law, a structure consisting exclusively in the union of primary and remedial duties, and so without any recourse to alternative arrangements such as administrative regulations, comprehensive insurance schemes, and penal control (to mention but a few). Stephen Perry has shown that there is no relationship of entailment between the primary and the remedial duty. An answer to the third question, therefore, must draw on the normative resources developed to answer the former two questions in order to reveal the intimate connection, normative if not conceptual, between the two duties.

Arguably, an account of tort law that does not attempt to answer all three questions, but rather only one of the first two, may still provide an adequate explanation of tort law. After all, it is not necessarily true about tort law (and law, more generally) that all its salient features must hang together in a uniquely coherent fashion, although it can plausibly be the case. However, I shall insist that a successful account of tort law must in fact answer all three questions with one answer, and that this answer must turn on the intrinsic value of the relations among the persons involved in discharging and receiving the duties of care and repair. To render this suggestion plausible, I shall argue that the economic, corrective justice, and Rawlsian approaches to tort law cannot even successfully deal with the one question (or two in the Rawlsian case) with which each begins and ends its respective explanation of the normative structure of tort law. Thus, the economic approach, marshalling a forward-looking analysis, purports to answer the first question (concerning the grounds for discharging care) but not the second nor, by implications, the third. As I shall show, its neglect of the other two questions dramatically constrains its plausible ambitions even with respect to the first question. Corrective justice offers a backward-looking analysis, emphasizing the second question (concerning the grounds of the remedial duty), and may run afoul of answering adequately even its own preferred question. The Rawlsian theory of tort law may fall short in its attempt to answer the first two questions because it does not possess the normative resources to answer the third question. These failures, as I have asserted at the outset, point to a deeper trouble in theoretical reflections about tort law than the opening of an explanatory gap; it also undercuts the aspects of tort law’s normative structure that do appear to be accounted for. I shall take each approach in turn. But before embarking upon this investigation, I shall say a few words with respect to the existence and content of the three questions posed above which, as I have characterized it, animate the normative structure of tort law.

---

9 Perry, Stephen R., The Moral Foundations of Tort Law, Iowa L. Rev. 77 (1992): 449-514, pp. 478-88 (criticizing Ernest Weinrib for posing a necessary unity between wrongful conduct and the duty of repair in tort law); Perry, The Distributive Turn: Mischief, Misfortune and Tort Law, in Brian Bix (ed.), Analyzing Law (Oxford: Oxford University Press, 1998), 141-162, p. 151 (observing that “a fault standard” guides us as to “how we should behave towards one another,” but it “tells us nothing about when, or even whether, misfortune should be shifted from one person to another.”).

10 Indeed, contemporary tort law is an institution made by humans, not by any transcendent forces. The case for a pluralistic account of tort law is made, e.g., in Englard, Izhak, The Idea of Complementarity as a Philosophical Basis for Pluralism in Tort Law, in David Owen (ed.), Philosophical Foundations of Tort Law (Oxford: Clarendon Press, 1995), 183-200.
Certainly, any attempt to divine the normative structure of tort law (or, for that matter, any other body of law) would prove controversial. The three basic questions that I prefer are no exception. Indeed, it would be possible to emphasize other questions (such as the standard of care, scope of liability, causation), although many leading tort scholars have worked out their accounts of tort law against the backdrop of a similar normative structure. My approach, which gives particular emphasis to the duties imposed by tort law and to their possible connection, grows out of the Hartian insight that the law, tort law included, purports to make a practical difference by presenting people with reasons for action. Duties are, in this sense, a special form of reasons, namely, mandatory ones. Thus, to promote whatever goals it seeks to promote (correcting injustices, maximizing welfare, etc.), tort law gives its constituents reasons, in the form of duties, to discharge care and (when necessary) to make the victims whole. In this way, the duties prescribed by tort law (and law, more generally) aspire to figure (in the right way) in persons’ deliberations toward action, and thus to affect them through engaging their capacities of practical reason. All other features beside the duties of care and repair that might figure prominently in the everyday practice of torts are either derivable from or secondary to these duties. Finally, it is important to note that my emphasis on the three basic questions posed above is no mere analytic or stylistic predilection. Rather, insofar as tort law is a coercive state institution, it must garner its political legitimacy. This requirement is most pressing when it imposes duties on persons with the expectation of compliance on their parts and with the further expectation that non-compliance could trigger tort action and, ultimately, liability for the victim’s loss.

The Normative Structure of Tort Law: The Economic View

The economic approach to torts begins with the ideal world, as suggested by Ronald Coase, in which there arises no need for a law of torts. Under certain, ideal conditions (consisting of virtually trivial transaction costs), each potential pair of injurer and victim could negotiate an agreed upon resolution of their conflicting interests in the form of determining the extent to which the former may be entitled to pursue his activity...
at the expense of the latter. For example, the activities of neighboring rancher and farmer exert pressure which may lead to conflict. The activity of the former may inflict loss on the latter as a consequence of her trespassing cattle; the activity of the latter may increase the costs of business to the former insofar as eliminating the threat of trespassing cattle is extremely expensive.\textsuperscript{16} The adverse consequences of the conflict—to the farmer as well as the rancher—can be accounted for in a variety of ways. The Coase Theorem, however, holds that it would be economically optimal to let the rancher and farmer to sort out their conflicting land-use claims through negotiation—that is, agreeing on how many cows, if any, will be allowed to trample the farmer’s corn and at what price. This sort of resolution obviates the tort impulse in favor of regulating interactions by imposing involuntary obligations, which is to say duties of care and repair \textit{imposed by the operation of law}. The task of realizing the goal of efficiency—viz., rendering optimal the social allocation of resources—is therefore vested in the economic rationality of the individual whose claim (to engage in his desired activity) competes against that of another.

This ideal-world theory entails, or at the very least implies, that in the real world the entitlements to engage in activities and the corresponding duties to forbear from interfering with these activities are immensely important. As, given the transaction costs, it is implausible to expect that persons will actually negotiate the efficient resolution of their competing acts, the law must provide for a proxy to the negotiation among the competing persons. An appropriate proxy should see to it that each individual employs economic rationality to fix, in the absence of ideal-world negotiation, the scope of her entitlements in any given situation. Tort law furnishes one such proxy. This is the duty of due care understood along the familiar lines of the economic interpretation of the Learned Hand Formula: an obligation on the part of the risk-creator to take precautions insofar as their costs do not exceed the expected costs of injury to the potential risk-bearer.\textsuperscript{17} In short, the economic interpretation of the duty suggests that persons should not engage in acts whose costs surpass their benefits. Thus, the involuntary duty of care (i.e., a duty imposed by law) \textit{stands in} for the voluntary transaction among participants of the Coasean parable.\textsuperscript{18} Rather than trading benefits and costs with others on an actively mutual basis the duty of due care induces each individual person to fix this trade-off on her own through incorporating cost-justified precautions into her preferred course of action. This way of cashing out the implications of the Coase Theorem, as William

\textsuperscript{16} Here I follow Coase’s assumption according to which “[i]t is inevitable that some cattle will stray.” Coase (1960, p. 2).
\textsuperscript{17} The Learned Hand Formula reads:

\begin{quote}
“if the probability be called P; the injury, L; and the burden [of taking adequate precautions], B; liability depends upon whether B is less than L multiplied by P:
i.e., whether B less than PL.”
\end{quote}


\textsuperscript{18} Of course, the duty of due care is only a second-best but, nonetheless, it may well be the best second-best solution.
Landes and Richard Posner have noted, casts tort law as a superior alternative to the Pigouvian state tax on negative externalities.\textsuperscript{19}

Thus, the economic approach to tort law begins with the grounds of discharging due care. It insists that compliance with the duty of care is necessary to promote economic efficiency through minimizing, to an optimal extent, the costs of accidents and of avoiding them. And it therefore recommends legal measures to sustain the effectiveness of the duty’s deterrence aspirations. According to the economic analysis of tort law, persons should be compelled to make good the losses (or parts thereof) befalling others as a result of their breach of the duty of due care in at least some cases.\textsuperscript{20} Indeed, making violators of the duty to take cost-justified precautions pay for the consequences of their shortcomings is warranted insofar as it offers incentives for discharging the primary duty and, more broadly, promoting an optimal allocation of resources.

Nevertheless, the economic reasons for a remedial duty cannot underwrite an independent obligation (on the part of the injurer) to make the victim whole. On the economic view, these reasons have, at best, an incidental draw on the normative structure of tort law. The reasons put forward by the economic analysis of the remedial duty reduce the duty into merely a piece of legal technology whose service is narrowly restricted to economic efficiency, necessarily at the expense of the independent values (plausibly) underwriting the remedial duty. To unpack this claim, I shall investigate two important surface manifestations of the reasons’ contingency. As I shall seek to show, the contingent character of these grounds explains away, rather than explain, the remedial duty which figures so prominently in our tort law.

First, as already noted by tort scholars, these are not reasons to compensate a victim for a wrong done through a breach of a primary duty.\textsuperscript{21} In place of a concern for the victim and for her normative relation with the injurer, the economic approach casts the remedial duty in terms of creating incentives on the part of potential tortfeasors to take (in future cases) cost-justified precautions. Richard Posner has put this point succinctly: “that damages are paid to the plaintiff is, from the economic standpoint, a detail.”\textsuperscript{22} It turns out therefore that the economic picture of the remedial duty resembles the actual remedial duty in tort law only superficially; that is, in the economic effects of imposing a duty of repair (and, as I shall show in a moment, even this resemblance is highly fungible). But this external similarity amounts to nothing more than viewing the remedial duty as a mere transfer of funds from injurers to others (victims or otherwise), but is in no way an expression of a freestanding commitment of the wrongdoer to right the wrong done to the victim. Indeed, the victim being the recipient of these funds represents no fundamental connection between her and the injurer. The only fundamental

connection underlying this transfer is, on the economic view, the relationship between the injurer and the general good (of maximal social wealth). The victim, however, has no special standing to vindicate the general good. Others (such as the state itself and private organizations specializing in bringing suits against people who have acted in an inefficient and, therefore, careless manner) can be vested with the standing needed to exact compliance with the remedial duty and, thus, create efficient incentives for discharging (efficient) care. The victim, according to this logic, has the exclusive legal power to bring a tort suit just because it is assumed by economists that he is the cheapest enforcer of efficient behavior on the part of risk-creators. This empirical assumption may be true in some cases (perhaps even in most cases), to be sure, but it does not reflect any universal or, indeed, conceptual truth about the practical world we occupy. It is, in principle, always an open question (and one that particularly plagues the economic explanation in relation to the remedial duty) whether victims are in the best position to bear the responsibility of enforcing optimal caring behavior of injurers.

A normative system (such as tort law) that seeks to promote efficiency may ignore this possibility (as tort law actually does) only on pain of straightforward inconsistency. For it cannot display fidelity to economic efficiency while at the same time refusing to admit cheaper enforcement agents than the victims, and thus to allow for the responsibility for ensuring compliance with the duty of (efficient) care to be allocated on grounds other than that of being a victim of a tort.

---

23 The latter example—of private organizations—is somewhat imaginary. However, it is not that fictitious. To begin with, insurance companies can be viewed in this way insofar as they subrogate the right of their customers holding first-party insurance. More importantly, as I say in the main text, the victim-plaintiff is understood by the economic approach to tort law precisely as an officer of society, enforcing a norm of efficiency (the duty of care) for the sake of deterring potential tortfeasors (including her tortfeasor) from acting inefficiently. The move from this special officer to private organizations does not seem to raise principled difficulties. As I argue in the main text, according to the economic explanation of the remedial duty, there is nothing in the status of a tort victim that disallows the transition from this means of sustaining compliance with the duty of (efficient) care to the creation of a competitive market for tort plaintiffs.

24 The responsibility on the part of the victim is ethical or moral, but not legal. Tort law does not require victims to make any legal allegations against her wrongdoer. The discretion to bring suit against alleged tortfeasors exacerbates, rather than improves, matters for the economic approach. If the ‘true’ purpose of the remedial duty, as legal economists insist, is to create incentives toward safety, it is not clear why we do not require victims to initiate tort proceedings in furtherance of this purpose. And even if pure requirement—a duty—may be pragmatically counterproductive, there is no reason not to create second-order incentives to induce victims’ recourse to courts. Tort law deploys neither of these means. To overcome this difficulty, Steven Shavell has suggested the possibility of increasing liability beyond actual loss to compensate for the cases that never reach courts for the reason that victims do not file suits against their injurers. Shavell, Steven, Economic Analysis of Accident Law (Cambridge, Mass.: Harvard University Press, 1987), p. 148. This suggestion, needless to say, opens a yet greater gulf between the actual remedial duty and the economic account of this duty.

25 It may seem plausible, in response to this critique, to shift focus from act-efficiency to rule-efficiency (which parallels the distinction between act- and rule-utilitarianism). Rule-efficiency, the idea of assessing the efficiency of acts by reference to their compliance to the relevant rules, cannot, I believe, explain the insistence of tort law on vesting the victim with the exclusive standing to exact the remedy from her injurer. Indeed, it requires, on pain of obvious inefficiency, that victims initiate the tort suit even when it has been clearly demonstrated that others are better situated, economically speaking, to bring the claim (including, for example, when the victim decide not to bring an otherwise successful suit against her wrongdoer).
A second, related surface manifestation of the contingency of the remedial duty’s grounds is the very loose commitment on the part of the economic account to the notion of making the victim whole. Normally, this commitment expresses tort law’s fundamental concern for the victim and for the reestablishment of a relation of respectful recognition between the injurer and his victim. \textsuperscript{26} According to the economic view, however, the victim figures nowhere in imposing tort liability on injurers. As explained a moment ago, her being the recipient of the reparation made by the injurer has nothing to do with being a victim, that is, suffering a genuinely wrongful loss. Indeed, the economic analysis of torts, because it entertains no independent grounds to right a wrong, renders the idea of a remedial duty extremely fungible. Thus, a leading exponent of the economic view observes that tort law may not exert economic pressure toward compensating the victim in every case featuring a loss resulting from a breach of the primary duty. \textsuperscript{27} This is true whenever imposing a remedial duty would have little, if any, effect on the injurers’ incentives to take cost-justified precautions (such as when the injurer is, as Holmes illustrates, “hasty and awkward” \textsuperscript{28} and thus may not respond properly to incentives to take precautions at all). \textsuperscript{29}

Moreover, even when it is desirable, economically speaking, to bring suit against a given tortfeasor, there are good economic reasons to depart substantially from redressing the victim’s actual loss. On the one hand, hyper-compensatory measure is \textit{required} (beyond the familiar doctrines of exemplary or punitive damages) to accommodate systematic failures in the service supplied by the remedial duty of enforcing future compliance with the primary duty (of care). \textsuperscript{30} For example, some injurers might escape liability simply by virtue of not being sued at all (e.g., because victims, for what ever personal reason, decide not to bring suit). \textsuperscript{31} To compensate for this lost opportunity to deter future careless conduct, liability in cases that do reach legal

\textsuperscript{26} Elsewhere, I set out to articulate a theory of the remedial process in tort law as a form of reestablishing respectful recognition. Dorfman, What is the Point of the Tort Remedy? (Sept., 2009) (unpublished manuscript, on file with author).
\textsuperscript{27} See Shavell (1987, p. 298) ("victims may quite rationally decide to bring suits even where the resulting change in injurers’ incentives to reduce risk is small."). (parenthesis omitted)
\textsuperscript{28} Holmes, Oliver Wendell, Jr., The Common Law (Boston: Little, Brown, 1881), p. 108.
\textsuperscript{29} In response, the economist may argue that tort law can still provide effective incentives to those supervising the hasty and awkward person (assuming that the former will be affected by the imposition of tort liability on the latter). This is no doubt true, but it leaves out individuals who experience no such supervision.
\textsuperscript{30} Steven Shavell and Mitchell Polinsky have articulated an economic theory of punitive damages that explains the need for hyper-compensatory damages. According to this thesis, risk-takers could exploit the chance of escaping liability for wrongful losses they cause others (including persons other than the plaintiff currently seeking damages). The authors indicate two relevant aspects of under-detection and one of under-enforcement: uncertainty on the part of the victim as to whether the harm is the result of nature or human causality; uncertainty as to the identity of the tortfeasor; and even when all the facts are available, victims may decide not to file a suit against the tortfeasor (e.g., because of the time and effort he would need to invest to win the suit). See Polinsky, A. Mitchell and Shavell, Steven, Punitive Damages: An Economic Analysis, Harvard Law Review 111 (1998): 869-962, p. 888.
\textsuperscript{31} For other examples see Shavell (1987, pp. 146-51).
proceedings must be higher, to an appropriate extent, than the actual loss to the sued victims.\textsuperscript{32}

On the other hand, an under-compensatory measure of liability (including the limiting case of zero compensation) is warranted insofar as liability for the entire loss is not required for the purpose of creating optimal incentives toward discharging the duty of (efficient) care. A case in point is the eggshell skull rule. According to this rule, the scope of the remedial duty incurred by tortfeasors extends fully to cover harm even when its magnitude and precise type are not reasonably foreseeable as they reflect an idiosyncratic condition—the eggshell skull—on the part of the victim.\textsuperscript{33} Tort law, in other words, is strongly committed to the principle that the tortfeasor takes her victim as she finds him. This commitment is consistently followed across the board.\textsuperscript{34} Moreover, taking the victim as one finds him, including his preexisting condition, just is an expression, perhaps in its purest form, of the remedial duty’s insistence that the injurer must make her victim whole.

Among the different explanations offered for this rule, the law and economics approach has sought to ground the rule in favor of compensating the eggshell skull plaintiff in facts about the world not related to him or to his injurer—that is, the natural allocation of idiosyncratic properties across the entire class of victim. This strategy is necessary because extending tort liability to capture the magnitude of the loss suffered by the eggshell skull victim is inconsistent with the fact that this victim is in the best position, economically speaking, to reduce the otherwise unforeseeable susceptibility of harm resulting from his peculiar constitution.\textsuperscript{35} All else being equal, aiming for the cheapest cost avoider warrants leaving the portion of the loss attributed to the idiosyncrasy of the eggshell skull person where it falls (which is another way to ascribe contributory or comparative negligence to the victim).

But all else, the argument goes, may not always be equal since it could be the case that, on average, the eggshell skull victim and the rock skull person (whose fortitude keeps her from harm’s way) will cancel each other out. Accordingly, a failure to take cost-justified precautions warrants the imposition of liability in the eggshell skull case if, and only if, the total amount of compensation awarded in excess to eggshell skull victims

\textsuperscript{32} The precise level of liability in excess of actual loss is determined by reference to the inverse of the probability of a tort suit and the level of actual losses. For an elaborated account see Shavell (1987, p. 148).

\textsuperscript{33} See, e.g., Vosburg v. Putney, 50 N.W. 403, 404 (Wis. 1891) (noting that “the wrong-doer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him”). To be sure, the metaphor eggshell skull need not confine the rule to physical injuries. It applies, in addition, to mental harm as well as to proprietary torts. See, e.g., Ragsdale v. Jones, 117 S.E.2d 114 (Va. 1960) (applying the eggshell skull rule to harm resulting from a fragile emotional state); Restatement (Second) of Torts § 461 cmt. b (1965) (the eggshell skull rule applies “where an injury to another’s pecuniary interests is increased by the unexpected and unknown or unknowable value of the article damaged”).

\textsuperscript{34} According to the third draft of the Third Restatement, “[e]very United States jurisdiction adheres to the thin-skull rule; more precisely, extensive research has failed to identify a single United States case disavowing the rule.” Restatement (Third) of Torts: Preexisting Conditions and Unforeseeable Harm § 31 cmt. b (Tentative Draft No. 3, 2003).

\textsuperscript{35} This characterization is typical but not universal since it applies to interactions among strangers. In a contractual setting, by contrast, the information costs pertaining to the actual fortitude of the potential victim (say, the promisee) are far less significant.
matches the total amount of compensation saved by virtue of potential victims possessing rock skulls.  

Certainly, the idea that, on average, for every tortious incident involving an eggshell skull victim there exists a substantially similar incident involving a rock skull victim is sheer speculation. Whether or not it actually holds, the economic explanation of the eggshell skull doctrine must therefore be understood to provide a cautious defense of it, nothing by way of celebrating the basic principle that the tortfeasor takes his victim as she finds him. On this more precise interpretation of the economic stance toward the remedial duty, there is no economic reason to insist, as the law actually does, on making the victim whole—that is, to redress his actual wrongful loss. A remedial duty providing for an under-compensatory measure of damages can be legitimately sufficient at least in cases featuring eggshell skull victims. Against this backdrop, the law and economic explanation of tort law’s resistance to follow the economic logic (of restricting the scope of liability in cases of eggshell skull victims) draws on the hypothesis concerning the neat correlation between two classes of tort victim—the unusually sensitive and insensitive victims, respectively. This hypothesis, whether or not empirically true, does not purport to explain why tort law should extend the remedial duty to certain highly sensitive victims. Instead, it explains why, even when it is not economically required to compensate them, tort law should, nonetheless, redress the actual loss of the eggshell skull victims. And the reason, once again, is the economic preference, founded on a speculative claim, for cancelling out the denial of compensation (for non-existing injuries) from persons with rock skulls.

Lawyer economists have further elaborated the economic grounds under which under-compensatory remedy would be apt. For example, Ariel Porat has advocated, “in sharp departure from prevailing tort law,” a diluted measure of damages to capture more accurately the net risk of harm generated by the injurer over and above the risk involved in her alternative course of action.  Elsewhere, Porat has shown that, depending on the interests at stake, under-compensation (including absence of liability) might be tort law’s best response to the problem of balancing between the different interests (of the victim, injurer, and society) put at risk by the acts of the potential injurer. In both of these cases, and in certain others, under-compensatory liability represents a coherent effort to take the economic commitment to the optimal allocation of resources through the imposition of a duty of repair to its logical conclusion.

The unabashed inclination toward both over- and under-compensation, however economically warranted, suggests that the remedial duty—a duty to rectify the loss resulting from a breach of the primary duty—has no independent force in the economic

36 Posner (2007, p. 188) (“A reason for nevertheless imposing liability in [cases involving harm to victims with eggshell skulls] is that, in order for the total amount of tort damages that are awarded to equal tort victims’ total harm, there must be liability in the eggshell skull case to balance nonliability in the “rock skull” case”).


depiction of tort law’s normative structure. An efficient system of torts, that is, abandons the contemporary law’s focus on the victim of a wrong as the object of the remedial duty. Accordingly, and in response to the second question posed at the outset, this system offers no grounds for the remedial duty, but rather articulates the grounds of a qualitatively different duty. The legal consequences of a so-called remedial duty grounded in economic principles may, of course, overlap in some measure with those flowing from the remedial duty. But this overlap is only coincidental and superficial; it certainly cannot dissolve the conceptual inconsistency at the respective cores of these diverging duties.

The point of the discussion so far has been to show that the law and economics of torts, firstly, do not insist on the independent force of the remedial duty and, secondly, offer grounds that are inconsistent with the current law’s commitment to compensating victims for having suffered wrongs. But this concern about the economic theory of torts only sets the stage for a far more fundamental, and rarely noticed, concern. As I have asserted above, a partial explanation of the normative structure of tort law (in the present case, an explanation of the primary duty only) might not adequately account even for the explanation’s own aspiration. Thus, an account of the primary duty, absent an equivalent account of the remedial duty, may not meet its own objective (i.e., explaining the primary duty) because of its parochial attention only to one half, as it were, of tort law’s normative structure.

Indeed, because (as demonstrated above) the economic grounds of the remedial duty do not recognize the independent value of compensating the victim of a wrong, it is far from being clear why tort law must insist (as it actually does) on discharging due care toward this victim to begin with. That is, if the good of maximal social wealth, rather than the good of rectifying a wrong done to this person, informs the imposition of the secondary duty, why exercise care in the specific way that tort law requires in the first place? Or, in other words, why should we be taking seriously the demands of others that we moderate our activities while in their vicinity? After all, it is not a conceptual truth about economic efficiency that it can be promoted in the torts context exclusively by way of moderating one’s acts in the face of others, which is the only form of exercising care acknowledged by tort law. Instead, it may be vindicated in any number of ways (and I shall discuss one of them in a moment). Only a true commitment to treating others, in the course of making reparation in tort law, as free and equal individuals whose respective claims (for repair) are irreducible to the overall considerations of collective wealth can explain why tort law imposes only one form of a duty to take precautions. This is because a primary duty must be of the sort that renders the commitment expressed by the remedial duty appropriate.40 A remedial duty grounded in the independent force of compensating the wrong done to the victim by the injurer can plausibly operate on breaches of primary duties only insofar as these duties do not offend the absolute worth of persons as free and equal agents. And for whatever other good reasons, once the economic approach abandons this commitment (to treating persons as free and equal

---

40 For a related (and very helpful) analysis as applied to the remedial duty grounded in the principle of corrective justice, see Coleman, Jules, The Practice of Principle (Oxford; New York: Oxford University Press, 2001), pp. 32-34.
agents) at the level of the remedial duty, it can no longer insist on the current law’s specific articulation of the primary duty (of care); accordingly, it falls short of explaining the special tort duty to discharge due care which forms the first question posed at the outset. Thus, the contingent force ascribed to the remedial duty by the economic approach assimilates back into the arena of the primary duty, rendering the special duty to exercise due care (rather than any other primary duty to promote economic efficiency) purely contingent, too.

One familiar alternative to the duty of due care is to purchase a third-party insurance policy. As law and economic scholars concede, in a competitive market for third-party insurance, the premium (along with other terms of the insurance policy) reflects expected liability and thus creates incentives on the part of the insured person to take optimal precautions (for otherwise the premium will rise to capture more accurately the expected costs of careless behavior). Thus discharging an equivalent duty of care forgoes the respectful recognition that risk-creators are required as a matter of duty (i.e., the current law’s primary duty) to display toward others by way of modifying their plans to account for the safety of others—more precisely, displaying respect by way of letting the latter class figure, to an appropriate extent, as ongoing constraints on the practical affairs of the former. To pursue the economic view to its logical conclusion, injurers holding valid insurance policies should be eligible to claim before a court of law that disregarding the claims of others, say by driving carelessly, does not violate the primary duty (of efficient care); for they have already and successfully discharged the duty through buying insurance. The lack of respect to our fellow creatures as expressed in so driving may be a proper subject for moral criticism, to be sure, but it need not amount to a legal wrong in the sense referred to by the economic explanation of the primary duty.

This conclusion is not surprising because, for better or for worse, the goal of maximal wealth, as is well known, sets aside the freestanding worth of any individual in particular. And insofar as the normative structure of tort law is organized around relations among persons, as opposed to the relation between an individual and the general good of maximal wealth, a successful account of tort law must insist on the independent force of both obligations to care for other persons and to make good the losses befalling these persons when failing to so care.

Because, as I have sought to show, the neglect of the second question (concerning the grounds of the special remedial duty) unsettles the answer to the first question (concerning the grounds of the special primary duty of due care), the economic approach to the morality of tort law cannot articulate an answer to the third question (concerning the grounds of the special normative structure of tort law). The structure of tort, therefore, becomes mysterious. In some cases, of course, it may not be inconsistent with the strictures of economic efficiency. Nevertheless, its strict adherence to the special duties of due care and repair (to the exclusion of other, more efficient means of sustaining

---

optimal allocation of resources) is at odds with promoting the general good in the precise way required by the economic theory. Whereas there may be economic reasons to defend some (and, in principle, even all) doctrines and other substantive features of the tort practice, there is none when it comes to its normative structure.

This conclusion, however compelling, might strike one as odd. Economic analysis, after all, provides a functional explanation and, as such, displays no allegiance to the normative structure of tort law, nor to legal doctrine. My account, therefore, looks for an explanation (of tort law’s structure) in the wrong place. This accusation may perhaps be true for some lawyer economists, but it illegitimately discredits the most powerful advantage of the economic analysis over its greatest competitor, corrective justice: namely, the ability to deploy economic insights in the service of unearthing, with Landes and Posner, the economic structure implicit in tort law, and thus accurately to predict outcomes of cases. Against this backdrop, the functional aspirations of the law and economics approach do not render the preceding argument redundant. Thus, the explanatory deficit in the economic explanation inspected above remains intact.

**The Normative Structure of Tort Law: The Corrective Justice View**

Another prominent approach to the morality of tort law takes justice, rather than efficiency, to be the organizing principle of this law. This approach emphasizes the injustice involved in leaving setbacks to the interests or rights of others to lie where they fall. An account of the morality of tort law cast in terms of corrective justice specifies the grounds on which these setbacks must be reversed and, thus, borne by the injurer. Tort law, then, vindicates the demands of justice by setting right the wrong done by the injurer to the victim.

The (primary) duties against committing these wrongs, however, are not normally regarded as instances of corrective justice. These violations of the primary duty require, in justice, that their adverse consequences be undone or corrected. But the very duty to discharge due care (or, for that matter, not to trespass onto the property of another) is not a duty of corrective justice. Nor, moreover, do its breach and resulting harm represent instances of corrective injustice. Rather, they may ground the claim that, unless the ideal of corrective justice is to be undermined, a remedial duty must be discharged so as to correct the injustice of leaving the victim of the wrong to suffer its

---


44 There may be exceptions to this rule. The tort of conversion may be said to consist of a violation of corrective justice once the tortfeasor has taken the goods of another even before the question of the remedial duty kicks in. That is, the very commission of this tort constitutes corrective injustice.

45 For this reason, Jody Kraus, himself a philosopher rather than an economist, seeks to incorporate the economic explanation of the primary duty into the normative structure of tort law traditionally understood to express a commitment to a remedial duty grounded in corrective justice. See Kraus, Jody S., Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis, Virginia Law Review 93 (2007): 287-360.

46 For very helpful discussions of this point, see Gardner, John, The Purity and Priority of Private Law, University of Toronto Law Journal 46 (1996): 459-493, pp. 469-70; Cane, Peter, Responsibility in Law and Morality (Oxford and Portland, Or.: Hart Publishing, 2003), p. 187 (“corrective justice tells us that wrongful harms should be corrected, but it does not tell us what harms are wrongful”).
consequences. Accordingly, the principle of corrective justice enters the tort picture when a tortious conduct turns a person into a victim, and then purports to determine what tort law does (or should do) next—whether or not to order the reversal of the harm to the victim. In short, corrective justice sanctions a principle of repair (or correction) that operates on the breach of antecedent, primary duties.\textsuperscript{47}

Thus understood, the normative framework of corrective justice purports to capture, first and foremost, the remedial duty owed by the injurer to the victim of a tort. This is evident in the writings of the two most influential philosophers of torts whose respective theories are cast in terms of corrective justice, Ernest Weinrib and Jules Coleman. The former announces in his magisterial book \textit{The Idea of Private Law}\textsuperscript{48} that his “concern here is with liability as the locus of a special morality that has its own structure and its own repertoire of arguments.”\textsuperscript{49} And, indeed, throughout the book Weinrib analyzes the normative relationships between the persons connected, normatively speaking, through the duties of care and repair in terms of their relationships \textit{qua} plaintiffs and defendants: “In corrective justice … the unity of the plaintiff-defendant relationship lies in the very correlativeity of doing and suffering harm.”\textsuperscript{50} Weinrib justifies this vantage point by observing that tort law “looks neither to the litigants individually nor to the interests of the community as a whole, but to a bipolar relationship of liability.”\textsuperscript{51} That said, the primary duty insofar as it exerts freestanding normative force, cannot be reduced to its breach (the ‘doing’), the consequences that follow this breach (the ‘suffering’), and the task of the judge (“justice ensouled”\textsuperscript{52}) of imposing liability for the harm resulting from the breach.\textsuperscript{53} According to Coleman, who is more

\textsuperscript{47} At this stage of my argument I use \textit{antecedent duties} to express the logical priority of the primary duty over the remedial one (i.e., the latter operates on the former). At a later stage of the argument I shall explain, and this is a major aspect of my overall argument against corrective justice, that the primary duty is also normatively prior to the remedial one.


\textsuperscript{50} Weinrib (1995, p. 73). A possible interpretation of the theory offered by Ernst Weinrib may suggest that reasons for corrective justice govern the primary duty as well. This interpretation can be extracted from his insistence on coherence (so that the entire structure of tort law must consist in the same principle, corrective justice) and from his unqualified discussion of corrective justice as the principle that unifies the private law. But this view is implausible. For it implies that reasons for conducting oneself in conformity with the standards established by the primary duty are reasons for correcting injustice, whereas only their violations can be viewed as instances of injustice calling for redress. Dennis Klimchuk has shown that Weinrib’s account of corrective justice cannot do this work, focusing on Weinrib’s analysis of the law of unjust enrichment in terms of corrective justice. See Klimchuk, Dennis, Unjust Enrichment and Corrective Justice, in Jason W. Neyers et al. (eds.), Understanding Unjust Enrichment (Oxford and Portland, Or.: Hart, 2004) 111-137, p. 121, 131-32.

\textsuperscript{51} Weinrib (1995, p. 2). The italics are mine.

\textsuperscript{52} Weinrib (1995, p. 65). Internal citation (to Aristotle’s \textit{Nicomachean Ethics}) omitted. See also id., pp. 9-10 (noting litigation and adjudication among the essential institutional characteristics of tort law).

\textsuperscript{53} I do not deny that breach, liability, and tort adjudication are not core features of the contemporary practice of torts. My point, however, is that if discharging care is in itself a value, an appropriate understanding of the primary duty (of care)—of what it does and what values it expresses—cannot make sense of its significance by analyzing the normative consequences of violating this duty, which is the sort of analysis that goes under the name of corrective justice.
committed than Weinrib to the lived experience of corrective justice, practices of corrective justice present “a system of practical inferences that purports to determine when the imposition of a liability is justified.”54 This means, as he observes, that “corrective justice is an account of the second-order duty of repair.”55

Focusing its normative attention on the remedial duty does not mean that corrective justice rejects the independent force of the primary duty. In fact, Weinrib draws on the Kantian principle of right to explain the primary duty. According to Kant, each person possesses an “innate freedom”56 simply by virtue of being a person, a natural right to “independence from being constrained by another’s choice.”57 The principle of right sees to it that exercising one’s freedom while in proximity to others leaves equal space, as it were, for these others to be able to regulate their own affairs as free, purposive agents. Weinrib claims, against this backdrop, that “freedom itself implies juridical obligation.”58 This obligation is then divided into two: “a duty to abstain from coercing or doing violence to another”59; and a duty to refrain from interference with owners’ use of their property.60 These duties, however, are not duties to correct injustice, but rather prohibitions against acting wrongfully61; at best they might trigger (remedial) duties of the latter sort in order to eliminate the unjustness of leaving the victim to suffer the consequences of their breach. More importantly, they are not distinctive of any particular tort theory, Kantian or otherwise, for everyone would agree on their existence. The controversy might—indeed, will likely—arise in connection with their content (what counts as wrongful action) and the form they take (criminal or civil law duties, public or private wrongs). Corrective justice, once again, cannot fill out the missing details, but rather presents a plausible, though not necessary, legal response to undoing the consequences of primary duty violations.

Moreover, the focus on the remedial, rather than primary, duty does not imply that the remedial duty, understood to derive from corrective justice, does not exert some normative pressure on the primary duty. Indeed, not every primary duty is consistent with the imposition of a remedial duty (grounded in corrective justice) for its breach. In other words, the derivation of the remedial duty from the principle of corrective justice constrains the kind of primary duty that could figure in a single, tort institution.62

That said, to repeat, the normative framework of corrective justice does not provide an answer to the first question posed at the outset—what grounds exist for the special duty of due care in tort law—but rather operates on whatever set of primary duties pronounced by the appropriate state official (such as a judge). And this explanatory gap

54 Coleman (2001, p. 54).
61 A similar observation has been made in Gardner (1996, pp. 469-72); Perry (1992, p. 480).
62 Weinrib (1995, pp. 148-49) (assessing the standard fixed by the duty of reasonable care in the light of the commitment to transactional equality embodied in the principle of corrective Justice); Coleman (2001, p. 32) (“corrective justice is not compatible with just any set of first-order duties”).
may be innocent insofar as it does not threaten to undermine what corrective justice theorists view as the moral center of torts, a duty to rectify a wrong done. However, I shall now seek to show that it does and that the appropriate explanation of the special remedial duty in tort law must look to the intrinsic value of the relations between persons formed at the level of the primary duty, not just of the remedial one. It is important to note, because this point is easily missed, that I do not argue against the conclusion arrived at by the corrective justice approach—namely, that there exist freestanding grounds on the basis of which we could impose a special remedial duty particularly on the injurer to make the victim whole. My argument, instead, is that the concept of corrective justice does not entitle one to this (correct) conclusion. The reason is the mirror image of the argument pursued above against the economic view. Due to the fact that a tort theory founded on corrective justice pertains to the grounds of the remedial duty only, to the neglect of the grounds for the primary duty, it may fail to make good on its own object of explaining this (remedial) duty appropriately.

Begin with the conception of corrective justice that figures in Weinrib’s monumental theory of tort law. Weinrib famously asserts that “private law is just like love” and that the purpose of private law is to be private law. As I shall argue, however, tort law may well be analogous (in some respects) to love, but his corrective justice account fails to show just how it is. The basic intuition behind my claim is that corrective justice, by virtue of being a form of justice, is not inherently a property of the interaction between private parties to tort litigation. Justice is, and must be, a categorical concern for all of us, and thus the question of why the remedial duty, nonetheless, takes a bilateral, plaintiff-defendant form cannot be derived from the nature of justice alone, corrective or otherwise. Or so I shall argue.

Following Aristotle, the Weinribian corrective justice is a form of justice pertaining to transactions, both voluntary and involuntary, between individuals. It purports to vindicate justice by way of establishing a base-line of equality against which injustice in holdings might be measured. Thus, an unjust state of affairs represents a departure from the equality of the actor and her victim in their entitlements ante this act. It is best depicted, metaphorically speaking, by the idea of a disturbance to the ex-ante equilibrium between the parties to the transaction as equals, not necessarily in the economic value of their respective initial holdings but rather either in the distributive justness of their respective initial holdings or, as Weinrib prefers, in the moral equality of persons qua free and purposive agents. Aristotle observes, in connection with this equilibrium, that “when what was suffered has been measured, one part is called the

---

63 Weinrib (1995, p. 6).
64 Weinrib (1995, p. 61) (“A transaction is an interaction regulated in conformity to corrective justice.”).
66 The equality appropriate to the demands of distributive justice is rejected by Weinrib who, following Immanuel Kant, adopts a conception of equality among persons quota purposive and self-determining agents. Weinrib (1995, p. 81) (“The solution, then, to the problem posed by Aristotle’s reference to equality lies in [the Kantian] account that integrates that equality with corrective justice’s abstraction from particularity and with the correlativity of doing and suffering.”). My argument, as it will become clear below, does not turn on the substantive question of equality.
[victim’s] loss, and the other the [offender’s] profit.”67 And so the duty to restore both the offender and sufferer to their initial equilibrium arises.68

Weinrib then moves on to the next stage of the argument. It appears, at first glance, to be a natural move. But, in fact, it is anything but natural. This stage commences with the assertion that corrective justice “captures the basic feature of private law: a particular plaintiff sues a particular defendant.”69 And, Weinrib goes on, “because the plaintiff has lost what the defendant has gained, a single liability links the particular person who gained to the particular person who lost.”70 However, the fact that contemporary private law (or Aristotle’s picture of private law) provides for the restoration of the equilibrium by means exclusively of a remedial duty owed to and owned by the victim is what one must explain, rather than assume.71 There exists a critical gulf between the exposition of corrective justice and the conclusion that corrective justice requires a remedial duty in the precise form on which tort law insists.

To begin with, Aristotle describes the formal operation of corrective justice—the restoration of the status quo ante—from the standpoint of the judge, saying that “the judge tries to restore the [profit and] loss to a position of equality, by subtraction from [the offender’s] profit.”72 Must this act of restoration involve the engagement of any of the relevant parties? Certainly, correcting the injustice involves the transfer of the profit from the offender to the victim. It does not follow, however, that the victim is the only one who could see to it that the transfer takes place, and that the injurer must take the intentions of the former, and the former only, as authoritative over what she is required to do with respect to the disturbed equilibrium established between these two persons. In our modern age, we can think of the state or other public or private organizations that may serve corrective justice. Alternatively, one commentator has sought to utilize, on behalf of the “corrective justice goal,”73 the supercompensatory measure of punitive damages to repair harms done by the defendant to victims even when they are not parties to the tort proceedings on the basis of which punitive damages are awarded.74 At other times leaders and other influential characters of the tribe could do that as well, perhaps even exclusively so. Whatever past, present, and future alternatives to the current law’s

68 Weinrib, moreover, insists that the appropriate equilibrium is normative, rather than material. Thus, the gains (on the part of the injurer) and losses (on the part of the victim) that unsettle the status quo ante signify violations of the relevant norms of interaction that may also be accompanied by material gains and losses. See Weinrib (1995, pp. 115-20).
71 Other corrective justice theorists have followed Weinrib in asserting the bilateral nature of corrective justice. See, e.g., Beever, Allan, Corrective Justice and Personal Responsibility in Tort Law, Oxford Journal of Legal Studies 28 (2008): 475-500, p. 477 (maintaining that “it is central to corrective justice theory that … wrongdoing be defined in a bipolar fashion.”).
72 Aristotle (1999, p. 1132a10). (The bracketed additions are the translator’s.)
74 According to Sharkey, the plaintiff-victim will exact supercompensatory damages from the defendant-wrongdoer and disburse, in one way or another, the award across the victims that have suffered at the hands of the defendant. See Sharkey (2003).
special remedial duty are, the important point is that, in principle, anyone can see to it that the injustice is corrected and the ex-ante equilibrium is restored.75

Bluntly put, there is nothing in the normative grounds laid down by the Aristotelian principle of corrective justice that requires, conceptually speaking, the remedial duty which happens to figure in our tort law. This is precisely because injurers are, in essence, liable not to their victims, but rather to the ideal of (corrective) justice. The victims are the material beneficiaries of this liability, to be sure, and a practice of corrective justice (such as contemporary tort law) may also employ for obvious pragmatic reasons their service to exact, on behalf of justice, whatever payments are needed to restore justice. However, it is justice to whom injurers must answer in the first place. And justice is necessarily external to the relationships between injurers and victims in the sense that it forms an antecedent, general moral principle with which to assess these relationships; they may or may not live up to it, but they do not generate it through their engagements with one another ante and post the wrongful departure from initial equilibrium. Instead, their interactions are merely instances to which (corrective) justice applies. For this reason it is natural to think that justice comes first, the relationship between the injurer and victim second. Whereas it is possible to make the enforcement of corrective justice the exclusive business of the parties to the relevant transaction, the principle of corrective justice (to repeat) does not require doing so as a means to reestablishing just equilibrium.

Before taking up the corrective justice account developed by Coleman, it will prove helpful to conclude the analysis of Weinrib’s account by returning to the question of external explanations of tort law. I have noted earlier in these pages that corrective justice belongs to the family of external explanations of tort law because it features the application of an antecedent value, justice, to the special practice of torts.76 This claim can be rendered vivid at this point in the argument by observing two ways in which corrective justice remains external to torts: First, the primary duty and its grounds (whatever they are) do not refer in any direct way to corrective justice; and second, even within the arena of the remedial duty, corrective justice is a value to which rectification of certain losses must conform, though the bilateral mode of rectification put forward by tort law is, in principle, but one possible mode.

75 It seems that Aristotle is well aware of this conceptual possibility. At one point he explicitly refers to the “parties to the dispute” who come before the judge to solve their case. Aristotle (1999, p. 1132a20). At another, Aristotle urges, after discussing arithmetical failures in restoring properly the ex-ante equilibrium, that

“[w]e must subtract from the one who has more and add to the one who has less; for to the one who has less we must add the amount by which the intermediate [viz., the amount of subtraction required to correct the injustice] exceeds what he has less, and from the greatest amount we must subtract the amount by which it exceeds the intermediate.”

Aristotle (1999, p. 1132b3). (The italics are mine.)

Thus, Aristotle’s talk of ‘we’, rather than just he or she (the victim), in connection with the vindication of corrective justice reinforces the notion that the nature of this form of justice is logically open-minded to the particular ways by which society can affect the restoration of the disturbed status quo. 76 See the discussion in infra note 2.
A similar argument can be developed, *mutatis mutandis*, with respect to the conception of corrective justice underlying the theory of the other most influential tort philosopher, Jules Coleman. Unlike the abstract starting point of Weinrib, his theory begins with informal, social practices featuring persons responding to losses which have befallen them as a result of the causal agency of others. Coleman observes that these responses are particularly focused on identifying, normatively and not just epistemically, whose loss it is and, moreover, demanding the identified person assume responsibility for the loss insofar as this loss is considered a wrongful one. Against this backdrop, Coleman infers that the conception of corrective justice that these practices exemplify ascribes agent-relative reasons to certain injurers (whose conduct resulted in wrongful losses to others) for making their respective victims whole. These reasons are grounded in the notion that the losses for which rectification is required are theirs to own as a matter of fairness. Accordingly, these injurers incur a remedial duty owed to and owned exclusively by their victims. They are not accountable, at least by the norms of these practices, to other persons beside the victims, no matter how committed these other people are to correcting injustices.

Unlike Weinrib, however, Coleman does not claim that the special remedial duty among participants of the informal, social practices is essential to the concept of corrective justice. Nor does he claim that it is essential to the legal practice of torts or the legal order, more generally. Rather, his claim is that on his preferred conception of the concept of corrective justice, the loss of the victim, because it is a wrongful loss for which the injurer is outcome-responsible, underwrites agent-relative reasons on the part of the injurer to render the former whole. This conception of corrective justice, Coleman maintains, is particularly important because, in addition to our everyday moral practices, contemporary tort law expresses, at its core, this very conception.

As in the case of Weinrib’s conception of corrective justice, it is not clear on what grounds Coleman’s conception can be said to explain, rather than just take notice of, the exclusion of all possible ways of correcting injustice other than the special remedial duty from the law of torts. Being a concern of justice, after all, implies that wrongful losses need not, or perhaps must not, be characterized as the private matter of the injurer and the

---

78 Coleman (1992, pp. 401-04, 432-33, 478-79 n.1).
79 See, e.g., Coleman (1992, p. 366) (“Doing corrective justice means imposing the victim’s loss on the person who is responsible for it.”).
80 Of course, injurers may be accountable in a variety of different ways (e.g., by the norms of criminal law). They may also be the proper subject of attitudes such as indignation, perhaps even resentment, on the part of people other than the victim. However, their obligation to render their victims whole is owed to and owned by victims only.
81 See, e.g., Coleman (1992, p. 434 (Noting that the practice of correcting injustice governed by his developed conception of corrective justice “is not a necessary social practice, even among moral people”).
82 See, e.g., Coleman, Jules L., *Second Thoughts and Other First Impressions*, in Bix (1998, p. 297 n.56); Coleman (1992, p. 367) (acknowledging that “the state need not implement corrective justice.”).
83 See, e.g., Coleman (1992, p. 366) (noting that “imposing the victim’s loss on anyone other than the responsible party cannot count as implementing corrective justice”).
84 See Coleman (1992, p. 367) (“My view is that at its core, tort law is a matter of corrective justice”).
victim, standing apart from the moral community. It is one thing to say that corrective justice operates on two particular persons; quite another to hold that it is their private matter. Indeed, justice, corrective justice included, provides us all with reasons for action, and in the specific case of corrective justice, for contributing to the effort of setting right departures from fair terms of interaction. To establish that the victim has an additional, unique claim against the injurer, and that the injurer has a unique reason to take this claim as freestanding constraint on his conduct, the conception of corrective justice must explain the distinctive significance of connecting the two for the purpose of correcting injustice. However, the normative building blocks with which it works—equality, fairness, well being, and responsibility for outcomes—are not intrinsic to the relationship between the parties of the tort interaction. It is therefore perfectly plausible to sustain them (and so to promote the flourishing of the parties, taken severally) without insisting on the special remedial duty of tort law.

As I noted above, it seems plausible that both Weinrib and Coleman are right to emphasize the important connection between the victim and the injurer at the level of the remedial interaction. The importance of this connection, moreover, may reflect the intuition that the connection is of a freestanding value; that is, quite apart from the goals of correcting injustice or promoting efficiency toward which tort law may possibly aspire. However, as I have just argued, the normative materials of corrective justice fall short of showing why it is so; still less do they explain why must it be the case that the remedial duty is uniquely owed to and owned by the victim. The needed materials are to be found, if at all, in the answer to the first question posed at the outset concerning the grounds of the primary duty. If there is an important normative relation between the victim and injurer that requires the special remedial duty, then the connection between them may be in itself a value and, thus, sufficiently potent to exclude at once all other alternatives to this duty of vindicating (corrective) justice. It is impossible to tell, in the absence of an explanation of the special connection that the primary duty in tort law establishes between the relevant parties, whether or not this is so. And this shortcoming on the part of the corrective justice approach does not only open a critical gulf in our understanding of the normative structure of tort law. It also renders its own aspiration to explain the special remedial duty in terms of corrective justice deficient.

Since, as I have sought to show, the neglect of the first question (concerning the grounds of the primary duty of care) unsettles the answer to the second question (concerning the grounds of the special remedial duty), the corrective justice approach to the morality of tort law cannot articulate an answer to the third question (concerning the

---

85 Take responsibility for outcome, for instance. Stephen Perry, a leading expositor of the notion of outcome responsibility in tort law, observes that “finding the defendant outcome-responsible for a given harm is only the first step in a two-step process that must be followed before a moral obligation to compensate can be established.” Perry, Stephen R., Responsibility for Outcomes, Risk, and the Law of Torts, in Postema (2001, p. 115).

86 I do not develop this possibility in Dorfman (2008).

87 I do not deny the possibility of supplementing the corrective justice theory with an argument, to the effect that it is instrumentally better to implement corrective justice through the special remedial duty than to allow for other alternatives. But this gambit does not explain why, in the first place, a remedial duty is required. Rather, it provides a second-order explanation (grounded in policy considerations, not in corrective justice) as to why it is desirable to constrain the otherwise-warranted operation of the principle of corrective justice.
grounds of the special normative structure of tort law). The peculiar structure of tort, therefore, still remains a mystery.

**The Normative Structure of Tort Law: The Ideal Rawlsian Approach**

That a successful account of tort law must not neglect the grounds of the two duties at the core of the normative structure of torts may well be necessary according to the argument I have pursued so far. However, I shall now seek to show that it is not sufficient. As compelling as it may otherwise be, it cannot make good on the ambition to explain the peculiar normative structure of tort law without supplying, in addition, an answer to the third question (concerning the grounds of bringing the primary and remedial duties together within a single institution).

In *Equality, Responsibility, and the Law*, Arthur Ripstein characterizes the defining question of tort law as being one of fair allocation of misfortunes befalling morally innocent victims. This is a corrective justice approach to tort law, focusing on the conditions under which injurers have reasons to assume responsibility for the losses they cause others. This account of tort law is no exception to the preceding argument, which showed that certain prominent versions of corrective justice might fail to capture the normative structure of tort law. There is, however, a better interpretation of Ripstein’s project, especially in the light of his more recent writings, that defies this predicament.

According to this interpretation, Ripstein develops a theory of tort law as part of a more general theory of law and of political institutions in a liberal society, more broadly. The theory draws on an interpretation of John Rawls’s concern with a division of labor between the responsibilities assumed by society and by each individual person, which (Ripstein maintains) is also reflected in the division between public and private legal orderings and in the political-moral division between distributive and corrective justice. On the society side of the division, Rawls has offered a theory of public responsibility for sustaining the justice of the basic structure of society by providing members of society

---


with an appropriate measure of social primary goods—that is, a fair distribution of a set of entitlements and opportunities with which free and equal persons could pursue their respective conceptions of the good.\textsuperscript{92} On the individual side of the division, one is responsible both to form and pursue a conception of the good and to reconcile one’s freedom with the freedom of others in pursuit of their distinct conceptions.\textsuperscript{93} Thus, equal freedom is secured when each person can safely and equally use her own means (or primary social goods) to achieve her ends.\textsuperscript{94}

Tort law plays two important roles in giving effect to the Rawlsian demand of individual responsibility, which can be summarized as providing preconditions of equal freedom. First, it specifies norms of appropriate conduct in the context of involuntary transactions in order to insure against the possibility that each person will not moderate her pursuit of the good, necessarily at the expense of others’. Thus, equal freedom is preserved when each person can safely use her own means (or primary goods) to achieve her ends. The primary duty (of care), then, purports to sustain the liberty of the individual to self-direct her life based on her means (or primary goods) on a socially reciprocal basis. The underlying idea of the duty becomes, on this view, the security it affords the equal freedom of the individual, taken separately, to form and pursue her conception of the good.\textsuperscript{95} The duty is grounded, therefore, in its ability to vindicate the normative separateness of persons by protecting them (equally) from one another.\textsuperscript{96}

Of course, not just any primary duty can fit this justificatory backdrop. Above all, the content of the duty must conform to the ideal of equality from which the entire Rawlsian theory commences. Arguably, the duty to discharge reasonable care, because it sets an objective standard of conduct, satisfies this condition because neither the potential injurer nor the potential victim can fix, from his or her point of view, the terms of their interaction.\textsuperscript{97}

\textsuperscript{92} For Rawls, the two principles of justice purport to sustain this public dimension of responsibility. See, e.g., Rawls (1971, p. 60) (introducing the two principles of justice and noting, at p. 61, that “these principles primarily apply … to the basic structure of society.”).

\textsuperscript{93} See Ripstein (2006, pp. 1398-99).

\textsuperscript{94} See Ripstein, Arthur, As If It Had Never Happened, William and Mary Law Review 48 (2007): 1957-1998, p. 1969 (“Protecting each in his or her person and property creates a regime of equal private freedom, in which each person’s capacity to set his or her own purposes is secure against the equally protected freedom of others to pursue their own affairs”).

\textsuperscript{95} Ripstein (2004a, p. 1836) (“the division of responsibility mandates that we treat each person as free to do as he or she sees fit with the means at his or her disposal, that is, to use both bodily powers and income and wealth in pursuit of his or her own conception of the good, in a way consistent with others having the same freedom to pursue their conception of the good.”).

\textsuperscript{96} See, e.g., Arthur Ripstein, Authority and Coercion, Philosophy and Public Affairs 32 (2004b): 2-35, p. 14 (noting that “rights to person and property protect persons from others with whom they interact independently”); Ripstein (2004a, p. 1831) (“As I engage in any activity, and you engage in yours, if each of us has a special responsibility for what comes of our respective pursuits, the separateness of those pursuits must reconciled in a way that preserves their independence”). Ripstein also observes, in connection with the conduct required by the duty of care, that “the standard of care is supposed to protect people equally from each other.” Ripstein (1999, p. 71).

\textsuperscript{97} See Coleman, Jules and Ripstein, Arthur, Mischief and Misfortune, McGill Law Review 41 (1995): 91-130, p. 112 (observing that “because fault is supposed to measure the costs of activities fairly and across individuals, it cannot be understood subjectively in terms of good faith efforts at care.”).
The second role of tort law in the grand picture portrayed by Rawls, according to Ripstein, is that of articulating norms of responsibility imposition in response to losses occasioned by violations of the primary duty. And thus the same explanation provided for the primary duty serves to ground the remedial one, namely, reinforcing the right of the plaintiff to act freely on her initial allocation of means or primary goods without the illegitimate interference of others. In short, the remedial duty is just another way of guaranteeing the normative separateness of persons with the only important difference being the timing of the law’s intervention in the interaction between injurers and victims. Whereas the primary duty operates so as to avoid wrongful interference with the freedom of another, the remedial duty is born whenever a wrongful interference has occurred. This difference in timing explains why the tort law remedial duty is focused on rendering the victim whole, since doing so places the victim back in the position of normative separateness she was in prior to the breach of the primary duty. As this form of restoration (or, for that matter, any other form) cannot resurrect the past, the remedial duty provides for compensatory damages instead.

As the preceding discussion reveals, the account under consideration enlists the Rawlsian political vision of the liberal society in the service of explaining both duties of care and repair. Thus it answers the first two questions posed at the outset. Now I shall seek to show that the third question (concerning the grounds for implementing the special normative structure of the tort practice in the law) does not find an equally satisfying answer and, therefore, represents an explanatory gap with respect to the structure of tort law. More importantly, I shall argue that this gap is particularly troubling because it may undermine the force of the Rawlsian-inspired arguments made in favor of explaining, separately, the primary and remedial duties of tort law. Whereas previous stages in my argument attributed structural deficiencies to the neglect on the parts of the economic and corrective justice theories of one of the first two questions (concerning the grounds of the remedial and primary duties, respectively), the present analysis purports to make a similar showing with respect to the current account’s neglect of the third question.

Begin with the sort of answer offered by this theory to the third question. Recall that tort law (among other legal practices such as contract) serves to implement the individual side of the division of responsibility, sustaining the freedom of private persons to utilize, on equal terms, their fair shares in the primary goods. The primary duty operates to prevent, in some measure, wrongful departures from this ideal, whereas the remedial duty purports to restore the victim to her freedom prior to the departure. Thus, tort law is cast in terms of the effects of the relationships between persons, first, at the ex-ante stage of the primary duty and, second, at the ex-post stage of the remedial duty on the more fundamental relationship between one’s freedom and one’s fair share in the primary goods. The norms of interaction delineated by tort law, rather than expressing the intrinsic worth of the interactions themselves, are to be assessed by reference to their

---

98 Ripstein (2004a, p. 1839) (“when private citizens have their rightful shares of primary goods, anyone who violates their private rights wrongfully interferes with their freedom, and so the aggrieved party has an enforceable entitlement to be put back into the situation he or she was in”).
99 Ripstein (2004a, pp. 1840–41). See also Ripstein (2007, p. 1958) (noting that “a sum of money, even a huge sum of money, does not really make it as though someone has not suffered terrible bodily injury, or lost a loved family member.”).
ability to secure the normative separateness of persons and, consequently, the ideal of equal freedom of individuals, viewed separately.

As a matter of logic, the normative landscape which current tort law can be mapped onto can entertain, in addition to tort law, at least three alternative kinds of legal ordering (not including a fourth alternative pertaining to the elimination of this landscape all together). Each of these aims at sustaining individual responsibility and its underlying value of equal freedom. A possible alternative may feature the primary duty without the remedial duty (but with another normative mechanism such as public insurance scheme). Turning this alternative on its head, another system could introduce the remedial tort duty without the primary duty (but with a criminal law duty or an obligation to purchase third-party insurance, for instance). And yet another, third possibility would utilize neither the primary nor the remedial duty, but instead set out a public law, a bureaucratic ordering such as, but not limited to, public insurance.

The crucial question for the Rawlsian account of tort law is normative, however, not logical. This account must, on pain of inconsistency, be morally indifferent to any one of the alternatives described above, provided that, like tort law, they promote a similar measure of individual responsibility and, thus, equal freedom. In other words, the Rawlsian view of tort law ought to be naturally open to any deviation from torts’ contemporary structure provided that the results of thus deviating bring society closer to equal freedom than before. In some familiar cases (such as hit-and-run accidents) there may even be no other reasonable option but repudiating the tort structure for the purpose of better meeting the demands of equal freedom.

Empirical studies of at least one alternative—the public insurance scheme of New Zealand—seems to suggest that tort law may not be the only suitable system to induce responsibility and cautious conduct. Sir Geoffrey, a leading tort scholar and former prime minister of New Zealand, has observed that "for twenty years [since the inception of the comprehensive scheme in 1974] there is no evidence that the absence of market-driven safety incentives has caused anything to happen to the incidence of accidents. Neither does the existence of the scheme appear to have caused significant problems of moral hazard to develop." Palmer, Geoffrey, New Zealand's Accident Compensation Scheme: Twenty Years On, University of Toronto Law Journal 44 (1994): 223-273, p. 254.

Empirical research, comparing eight to ten years of automobile accidents before and after the transition from traditional tort law to the comprehensive insurance scheme, has come to the conclusion that "the removal of tort liability for personal injury in New Zealand has apparently had no adverse effect on driving habits. In fact, statistics show a decline in accident and fatality rates." Brown, Craig, Deterrence in Tort and in No-Fault: The New Zealand Experience, California Law Review 73 (1985): 976-1002, p. 1002. The author, moreover, emphasizes that "the removal of tort rights for personal injury cases did not produce the increase in accident-producing behavior predicted by the traditional theory of tort deterrence." Id.

Another piece of research has sought to determine, among other things, the effects of the New Zealand's comprehensive insurance scheme on injuries resulting from medical misadventure in the hospital environment. Here, again, the findings suggest that the lack of tort law governing the civil liability of hospital personnel (and the hospital's own liability) does not lead to increasing levels of claims for compensation for medical mishap. See Davis, Peter et al., Compensation for Medical Injury in New Zealand: Does "No-Fault" Increase the Level of Claim Making and Reduce Social and Clinical Selectivity?, Journal of Health, Politics and Law 27 (2002): 833-854.

Consider the hit-and-run case. The victim cannot identify her injurer and thus cannot seek reparation for the wrongful affront to her (equal) freedom. The misfortune which has befallen this victim—a harmful breach of the primary duty—exerts the exact same normative pressure towards making her whole as when she can identify the injurer. We would expect a Rawlsian tort law to be morally indifferent between these two cases, seeing that the former victim could be made whole even when (and, indeed, because) the special

http://law.bepress.com/taulwps/art159
of tort law lies in the effects of the interactions among (potential) injurers and (potential) victims, i.e., equal freedom, then it is always worth asking whether tort law (with its special normative structure) is the best institution to accomplish the desired effects. The contemporary tort law insists, nonetheless, on a peculiar structure, to the exclusion of the alternatives. And so the (normative) question is why.

Note that the difficulty with a Rawlsian justification of tort law grounded in its effects on the interactions between persons is not a feature of available alternatives, present and future. Instead, the difficulty is that, on the Rawlsian view, the special normative structure of tort law (consisting in the primary and remedial duties) has no normative force of its own; this structure might surely have great value when implemented by the law (say, in sustaining individual responsibility and, more generally, equal freedom) but it is a contingent one only. There is no reason internal to the account offered by Ripstein to reject categorically an alternative structure to the one presently animating current tort law. Indeed, unlike the actual law of torts, there is nothing in the Rawlsian theory of the morality of this law to require the normative union of the primary and remedial duties, in particular.102

Furthermore, leaving unaddressed the answer to the third question weakens not only the entire normative structure of tort law, but also each of the two components of this structure, taken individually. Indeed, because the answer to the third question explains away, rather than explains, the connection between the primary and remedial duties, it is hard to see why either one of these duties has independent force in the sense that it must necessarily govern the interactions among individuals. Bluntly put, why is either of the two tort duties necessary if bringing them together is certainly not?

Indeed, that the contingent connection between the two duties renders the value of employing any one of them by tort law dependent on conditions external to the relationships they (arguably) engender is evident in the self-imposed limitation on the application of the Rawlsian tort law. According to Ripstein, a pragmatic limitation on the account under consideration arises in connection with the familiar problem of theory implementation—specifically, the costs involved in the operation of the remedial duty.103 The legal procedure of determining responsibility for wrongs often imposes substantial costs (such as the costs of proving the prima-facie case) on victims, injurers, and courts that are not required, strictly speaking, by the ideal of equal freedom. Moreover, and more importantly, these costs may distort tort law’s rational pursuit of equal freedom insofar as they reinforce morally arbitrary distinctions between otherwise similarly-situated victims. For instance, the costly effort of making the case for a remedial duty deters victims (especially the less wealthy ones) from vindicating their freedom before a remedial duty is unhelpful. Tort law, of course, displays anything but indifference to these seemingly morally arbitrary situations.

102 As I shall discuss in more detail below, Ripstein is well aware of this shortcoming as he allows for alternative normative systems (such as public insurance schemes) to take the place of tort law whenever a given alternative would best serve the demands of individual responsibility and equal freedom. See Ripstein (1999, pp. 19-20, 83-84).

103 Ripstein (1999, pp. 19-20) (observing that “procedure is very expensive” and describing the “problems of implementation” that follow therefrom).
court of law; in other cases, suing tortfeasors for small amounts of damages becomes irrational given the high costs of litigation.\footnote{Furthermore, as Ripstein (1999, pp. 19-20) notes, “small-claims judgments are never collected.”}

Against this backdrop, Ripstein acknowledges that there could be other alternatives to the special remedial duty that are, nonetheless, compatible with the demands imposed on our legal institutions by the Rawlsian account.\footnote{Ripstein (1999, p. 20 n.24). See also id. pp. 83-84 (speculating that “[o]ver the longer term, risk-pooling schemes may even approximate the results corrective justice would have reached.”).} It seems that, according to Ripstein, the primary duty forms no part of this concession; the worry about the costs of procedure applies to that which \emph{operates on} this duty, which is the remedial duty. This hybrid institution is perhaps not surprising. The inability of the Rawlsian account to explain the distinctive structure of tort law gives rise to a fungible remedial duty, easily segregated from the tort system, and in particular from the primary duty, whenever it cannot provide the service it is designed to do in concert with the primary duty. And this observation prompts us to consider the second question (concerning the grounds of the remedial duty) again. Since the remedial duty is, in the end, fungible, the appropriate question is not why (on what grounds) would we need to consider its replacement by another legal mechanism. The question, rather, is why we should impose this duty, of all other alternatives, to begin with. In other words, because for the Rawlsian there is nothing special in the union of primary and remedial duties, the required explanation must concern itself with the traditional preference of tort law for the remedial duty, regardless of the pragmatic limitations it may face along the way. After all, it could turn out that the primary duty is most effective, generally speaking, when the legal response to instances of carelessness features certain mechanisms other than the remedial duty (such as administrative or criminal fines coupled with public insurance).

Moving on to the primary duty, recall that the pragmatic limitation on the legal enforcement of the remedial duty need not have bearing on the primary duty. Indeed, for the latter duty to transcend contingency and, instead, to express independent normative potency it must resist being repudiated simply because the former duty has been so repudiated. There seems to be nothing interesting, let alone important, in a primary duty if it cannot stand out to claim its normative significance quite apart from the remedial duty. Yet, I shall now seek to show that the neglect of the third question posed at the outset exposes the primary duty to just that kind of trouble.

To repeat, there might be different alternatives to the remedial duty purporting to restore the victim to her \emph{ex-ante} condition of (equal) freedom. These various possibilities are of a piece, however, insofar as they \emph{reject} the special connection between the victim and her injurer at the foundation of the remedial duty of tort law. Indeed, they count as \emph{alternatives} (to the remedial duty) precisely because they feature forms of vindicating equal freedom independent of the interpersonal, victim-injurer form of redress characteristic of the remedial duty. For expository purposes, I shall focus on a representative form of a widely acknowledged alternative to the remedial duty: a public insurance scheme. Subsidized by the tax coffers, this scheme could restore those whose freedom (to exploit their respective fair shares in the primary goods) has been diminished by the careless conduct on the part of others. Note that the normative relationship formed here brings together the victim and the state, rather than the victim and her injurer. The
injurer is causally related to the victim-state relationship, to be sure. But the rights and duties that govern the transfer of funds from the state to the victim do not apply to the injurer.

What role is played, if at all, by the primary duty in the proposed alternative to traditional tort law? On the one hand, the primary duty can serve to trigger insurance coverage for the victim of its harmful breach. In other words, such a duty is compatible with a scheme of public insurance. On the other hand, once the normative relationship between the victim and injurer is replaced by the public insurance scheme, it is not clear why, and on what normative grounds, the primary duty—whose defining feature is the establishment of a normative connection between potential injurer and victim—would fit, let alone be required by, the proposed alternative. Indeed, the victim-injurer nexus is only incidental to a compensatory system consisting of public insurance. Whatever the reason for supplementing a scheme of public insurance with the primary duty may be, it is not predicated upon the significance of the interpersonal relationship engendered by this duty. Rather, it is external to the relationship (and can therefore be assessed substantively by comparison to any other tort-alternative that shares similar, extrinsic underpinnings). For, unlike the special remedial duty, a scheme of public insurance does not aim to redress a violation of the primary duty and, especially, the normative relation it establishes between persons; it merely makes good the economic consequences of this violation or of any other state of affairs representing a departure (including an illegitimate departure) from equal freedom. Accordingly, the repudiation of the remedial duty by the scheme of public insurance dilutes the significance of the primary duty as it promotes the role of the state, and at the same time demotes that of the injurer, in shaping the normative landscape of those vulnerable to the risky conduct of others. Due to this shift to public law, the special interpersonal character of the duty does not figure as a particularly strong argument against the duty’s elimination, and in this way the Rawlsian tort theory allows for the alternative tort system entirely to break with the normative structure of tort law (the remedial and primary duty included).

To conclude the preceding observations, the Rawlsian account of tort law commences with the first two questions concerning the grounds of the primary and  

---

106 Jules Coleman once defended the annulment thesis, and thus maintained that adherence to the demands of corrective justice does not render the tort institution necessary. According to the annulment thesis, corrective justice requires that wrongful gains and losses should be eliminated. The reasons for action that this thesis underwrites—reasons to annul these gains and losses—are not addressed to any individual in particular, nor do they specify a mode of annulment. Public insurance can, therefore, represent one such mode. See Coleman, Jules, *Corrective Justice and Wrongful Gain*, Journal of Legal Studies 11 (1982): 421-440, reprinted in Coleman, Jules L., Markets, Morals, and the Law (Cambridge, UK and New York: Cambridge University Press, 1988), p. 200 (“in the absence of wrongful gain the tort system will not be required by corrective justice.”).

107 Recall that there may not be a primary duty at all. This could be the result of a radical reform by the legislature, abolishing tort law. Or, this could be a doctrinal limitation within traditional tort law on the scope of the duty’s application as in the famous case of Palsgraf v. Long Island R. Co., 162 N.E. 99 (NY 1928) (articulating a relational conception of the duty of due care, and thus rejecting the notion of a universal duty owed, without any qualifications, to the world at large).

108 As Ripstein himself concedes, “[r]egulatory regimes [such as a public insurance scheme] may do more [than tort law] to make sure that people internalized the costs of their choices.” Ripstein (1999, p. 21 n.24). He also maintains that “[i]t may be that a widespread social insurance scheme would actually approximate corrective justice better at a micro level than does the current tort system.” Id.
remedial duties but does not proceed from there to answer the third question concerning the grounds for bringing the two duties together under a single tort system. The answer to this last question certainly cannot be derived from the idea of sustaining equal freedom. Moreover, lacking the materials necessary to explain the normative structure of tort law distances the Rawlsian theory from its original aspiration; namely, to make good on the special force of the primary and remedial duties. As with the economic and corrective justice accounts of tort law, the neglect of one of the three fundamental questions of tort law by the Rawlsian account opens not only an explanatory gap but also unsettles the answers it does offer to the other questions. As a consequence, the core features of our system of torts—the interpersonal practices of care and repair—lose their special morality in the sea of alternative solutions to the problem of sustaining equal freedom.

**Conclusion**

The law of torts gives rise to three fundamental questions. These concern the grounds for discharging due care toward certain others, rectifying harmful failures to discharge the care, and putting together these two requirements, and these only, in a single institution. Moreover, tort law insists on limiting the range of persons to whom these reasons are addressed: The primary duty directs the potential injurer to be vigilant of a specific class of person, not just of the world at large\(^{109}\); the remedial duty is owed to and owned by the victim\(^{110}\); and, by implication, the practice of torts is organized around the normative relationships formed between the people to whom the grounds of the primary and remedial duties specifically apply.

In these pages I considered the answers to the three questions put forward by three leading accounts of tort law. Although they are often viewed as competitors, my argument reveals a striking similarity in their respective approaches to the morality of tort law; namely, the tendency to neglect some of the core aspects of this law. The economic analysis of tort law, a characteristically forward-looking theory, focuses on the primary duty but neglects the other two questions. Corrective justice is a backward-looking theory of the grounds of the remedial duty. As such, it does not explain the primary duty, only the response dictated by justice to harmful breaches of this duty. Nor can it, absent an account of the primary duty, answer the third question. The Rawlsian theory of tort law combines both forward- and a backward-looking approaches to explain both primary and remedial duties, but it remains silent with regard to the third question concerning the special connection between these duties. In all of these cases, I have shown that there is an intimate connection between the three questions. More specifically, leaving unaddressed any one of these questions undermines the possibility of answering the other two. Accordingly, articulating partial accounts of the normative structure of tort law

---

\(^{109}\) The leading case (in negligence law) is Palsgraf (1928). For a classical statement of the relational character of the primary duty across the different torts (including negligence), see Zipursky (1998, pp. 7-37).

\(^{110}\) See the analysis accompanying supra notes 4-8.
weakens the economic, corrective justice, and Rawlsian theories in precisely those aspects they do aspire to cover, and indeed master.

No doubt, my sketchy discussion of these three approaches to the morality of tort law cannot do justice to the depth and excellence they all achieve in their own distinct ways. Rather than offering a sustained critique of these theories, my ambition has been to provide a taste of the challenge that any theory of tort law must face—that of explaining tort law in the way that makes most sense to those who engage in this practice, including, most importantly, an explanation of the three sets of grounds: grounds for discharging care, for remedying, and for interweaving the duties arising out of these two grounds in the special institution called tort law.

As I noted earlier, neglecting certain aspects of the normative structure of tort law is not in itself implausible. However, the neglect is a surface symptom of a more troubling feature shared by the three stylized accounts briefly discussed in these pages. It is only natural to suspect that the partial attention to torts’ normative structure stems from the fact that each of these accounts imposes an external and antecedent practical theory (of efficiency, corrective justice, or ideal Rawlsian order) on the actual practice of torts. That is, the source of the value(s) upon which tort law is grounded lies outside, and originates in conceptual and normative detachments from the relations that each of the two sequential interactions of care and repair create, and it makes its way to tort theory and practice as a matter of theory application. But why should external theories take seriously the special, perhaps even peculiar, normative makeup of the torts practice? This difficulty is evident, most strikingly, in the partial explanations the three theories of tort law offer to the normative structure of tort law. Indeed, evaluating the normative relationships tort law establishes in terms of their success in promoting or expressing ideas such as efficiency and justice injects contingency into the morality of tort law. This is because measuring the good of engaging in tort interactions by reference to their abilities to bring about efficiency or justice is necessarily susceptible to the question of whether tort law is the best means with which to implement the good in question.

The argument advanced in these pages sets the stage for a better approach to the morality of tort law. This approach will consider whether the normative relationships engendered by the primary and remedial duties are themselves a source of the value

---

111 The point I attempt to make in the main text may not do justice to the methodological commitment of Jules Coleman. Coleman (recall) begins his analysis of corrective justice in the informal, social practices, rather than in abstract principles of justice. See, in particular, Coleman (1992, pp. 478-79 n.1) (“I look first at our informal moral practices” for the purpose of “developing a conception of corrective justice”). Still, I believe, this commitment may not enable Coleman’s account to explain the normative structure of tort law in ways that satisfy the three basic questions I posed at the outset. To begin with, Coleman seeks to reconstruct the informal practice of rectifying wrongful losses, leaving unaccounted the practice of discharging care. See Coleman (1992, p. 479) (discussing the “practice of identifying ‘messes’” [viz., wrongful or non-wrongful losses]). As I have shown above, the remedial duty may not be explained adequately without first explaining the primary duty and, in particular, the features (of this last duty) that require the precise form of rectification that the remedial duty actually takes. Moreover, and more importantly, the methodological commitment of Coleman is, to an important extent, externalist as it employs an antecedent principle (corrective justice) to the explanation of the good of the normative relationships between participants in the practice. Indeed, corrective justice does not ask whether these relationships are in themselves good, but rather whether they conform to certain standards set by corrective justice.
underlying the normative structure of the torts practice. The lived experience of this practice may give ample support for this intuition, as my observations at the very beginning suggest. The pro-social attitudes we acquire, or can on reflection acquire, while exercising due care in the face of others and, when necessary, repairing the harms we carelessly inflict upon them may suggest that thus attending to the demands of others (to engage in activity safely) can in itself be morally significant. That is, the norms of conduct articulated by the primary and remedial duties underwrite a universally respectful form of coexisting with others—in short, a liberal form of social solidarity.\textsuperscript{112}

In this way, rather than shaping the morality of tort law by reference to the requirements laid down by general theories of values (of well-being or justice) from which the leading accounts of tort law begin, a better approach will emphasize the values (arguably) immanent in the special form of living while in the proximity of others which we know as tort law.

\textsuperscript{112} The ideal of liberal solidarity is elaborated in Dorfman (2008, ch. 1).