Tort Law and the Demands of Corrective Justice†

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In a series of articles I have explored the grounds of our current practice of holding injurers liable in torts.[1] Part of my motivation has been the belief that because political authority is necessarily and inevitably coercive—that is, it constrains the scope of individual liberty—exercising it requires a justification. At the very least, the authority in question must not be arbitrary or random. I have taken this minimal requirement to mean that any body of the law must be coherent and consistent; some set of consistent norms must be capable of making sense of it. But that is not enough for the law itself to be justifiable. In addition, the underlying norms must be worthy of respect and provide justifiable grounds for political action. Thus, the task of the legal philosopher is to determine the extent to which law is coherent and if its coherence is an expression of a defensible conception of justice or some other important aspect of morality.

The problem I have taken on, then, is one of determining whether, and to what extent, our current tort practices can be understood as expressing an ideal of justice. This, in turn, requires identifying the essential elements of tort law and its paradigm cases. Is fault central to tort liability? Is the one-to-one, victim-injurer relationship essential to it? If fault is not essential to tort practice, then the move to strict liability may be welcomed rather then feared. On the other hand, if the paradigm tort case involves the one-to-one, victim-injurer relationship, cases like DES and those involving so-called enterprise liability are at the fringes rather than the frontiers of tort law.

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1. Coleman, *Adding Institutional Insult to Personal Injury*, 8 YALE J. ON REG. 223 (1991); Coleman, *The Structure of Tort Law* (Book Review), 97 YALE L.J. 1223 (1988) (reviewing W. LANDES & R. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987) and S. SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987)); Coleman, *Property, Wrongfulness and the Duty to Compensate*, 63 CHI.[-]KENT L. REV. 451 (1987); Coleman & Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335 (1986); Coleman, *Moral Theories of Torts: Their Scope and Limits* (pts. 1 & 2), 1 LAW & PHIL. 371 (1982), 2 LAW & PHIL. 5 (1983); Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982); Coleman, *On the Moral Argument for the Fault System*, 71 J. PHIL. 473 (1974); Coleman, *Justice and the Argument for No-Fault*, 3 SOC. THEORY & PRAC. 161 (1974).

Richard Epstein has advanced the view that the causal, rather than the fault, requirement is essential to tort liability.[2] Thus, he has defended a version of strict liability. In fact, he has defended several versions of it. We can distinguish among at least three versions of the theory of strict liability. In the first, the fact that *A* causes *B* a *loss* grounds *A*'s prima facie liability for *B*'s losses. In the second version, it is not enough that *B* suffer loss as a result of *A*'s doings. Only losses that result from *harmful* acts are compensable in justice. In the third version, *B* can recover from *A*'s conduct only if it is invasive of a *right* of *B*'s.

In each version of the theory of strict liability, the *injurer's* prima facie liability depends on his volitional conduct causing the victim to suffer a compensable loss. In no case does his liability depend in any way on the injurer's being at fault. The theories are increasingly more restrictive with respect to the *victim's* grounds of recovery, however. Not every loss results from a harm, and conduct can be harmful without violating anyone's rights. The criteria of compensable loss vary, but the causal condition, and not the fault principle, as the essential element of liability and recovery, does not.

Not only can we distinguish among versions of the theory of strict liability, we also can distinguish among principles that purport to render strict liability, conceived in any of these ways, a matter of justice or morality. First, there is a general principle of responsibility which holds that in order to be just liability must depend on the responsibility of the injurer. In this view, responsibility is analyzed in terms of causality or causal powers, not in terms of fault. Because injurers are liable for all and only the causal results of their agency, the principle of responsibility renders liability both strict and just. Then there is the principle of autonomy and negative liberty according to which each individual is free to exercise his autonomy until his doing so invades the moral space of others. At the point of invasion, he may be said either to harm another or to invade another's right and, in doing so, makes himself eligible for liability. Again, since it does not matter whether the invasion is innocent, liability imposed upon moral-space invaders is both strict and just. Finally, we can characterize a principle according to which by harming or invading the rights of another an injurer upsets a pre-existing equilibrium between the parties. Liability is imposed upon the injurer to reestablish that equilibrium and is for that reason required by justice.

The theory of strict liability is a response to both the *failure* of the retributive theory of fault liability[3] and the *success* of the economic analysis

2. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

3. For a fuller discussion, see Coleman, *On the Moral Argument for the Fault System*, *supra* note 1.

of such liability.[4] Strict liability expresses the idea that if our current practices are to be interpreted as articulating a moral ideal that interpretation must downplay or eliminate entirely the role of fault.

The theory of strict liability is correct in that liability and recovery in tort do not always depend on the existence of injurer fault. The theory goes astray as an account of our current practices, however, in its belief that the justice of liability and recovery in torts rarely, if ever, depends on injurer fault. In this essay, I want to present the beginnings of an account of tort law that takes the principle of fault liability seriously. Fault is central both to the institution of tort law and, in my view, to its ultimate moral defensibility. I want to provide here a moral foundation for the fault principle in the principle of corrective, not retributive, justice.

1. Recovery and Liability

The theory developed here relies on several distinctions, and I want to begin presenting it by developing these distinctions. The first is a distinction between the reasons for providing an individual with compensation for her losses and those that support imposing those costs on a particular person. This is the distinction between the grounds for recovery and liability. This distinction is analytically unassailable, but the truth is that our current tort practice does not take advantage of it. In torts, the costs of accidents are allocated between particular victims and the individuals they have made defendants in their suits. Tort litigation is structured such that if a victim has an adequate case for recovery liability is appropriately imposed upon the defendant; that is, an adequate case is presumed to exist for holding his injurer liable to him. If the injurer is deemed not to be a suitable candidate for liability, the victim is viewed as someone whose claims to redress are unworthy in the appropriate sense.

The distinction between liability and recovery itself does no justificatory work. It does not allow us to say, without the benefit of moral or political argument, that institutional forms that separate questions of liability from those of recovery are better than our current practices. It does, however, encourage us to reassess the ability of our current practice to answer both concerns and to recognize that the current practice treats as unified a variety of questions that can be treated as distinct.

2. Grounds and Modes of Recovery

The distinction between the grounds of recovery and those of liability is central both to Fletcher's[5] and my account of tort law. I want now to

4. For economic analyses of fault liability, see S. Shavell, Economic Analysis of Accident Law (1987) and Posner, *A Theory of Negligence,* 1 J. Legal Stud. 29 (1972).

5. Fletcher, *Fairness and Utility in Tort Theory,* 85 Harv. L. Rev. 537 (1972).

introduce a further distinction that is central to my account of tort law and appears to play no role whatsoever in anyone else's account: the distinction between the *grounds* and *modes* of recovery or liability.

The grounds of recovery specify the conditions that must be satisfied if a person's claim to compensation is to be justified. We might hold, for example, that a victim is entitled to recover only if she is injured by another's fault, or we might hold that her claim to recovery depends only on her not being the cause of her own downfall. The grounds of liability can be analogously characterized. They specify the conditions that must be satisfied if imposing liability is to be justified. We might hold, for example, that an injurer should be made to pay damages only if she is at fault in having caused them or only if she has benefitted from having caused them.

Once we determine, by applying the appropriate criteria, that a victim is entitled to repair, we have the further question of how compensation ought to be provided. Should valid claims to repair be made good by the use of a general insurance scheme? Should they instead be covered by the injurer, or should they remain the responsibility of the victim, no matter how legitimate the claim to repair may be? It might well turn out that even victims who have a right to compensation should arrange their own compensation through private insurance. Again, we can make similar remarks about the mode of liability. Once we draw the conclusion that an injurer ought to be held liable for damages, should her liability be to the victim, or should she be made to pay into a general fund, perhaps the same fund from which victims as a class draw compensation? On balance, it might be that the fairest and most efficient compensation and liability scheme is one in which victims draw payment from a fund stocked by liability judgments against injurers who are at fault, though no such injurer is directly liable to his victim and no victim recovers directly from his injurer.

Tort law makes good the legitimate claims of victims by imposing the costs on their respective injurers. Once again, the question we want to answer is whether, and to what extent, this practice can be justified. With all the options available for allocating costs and the risks associated with bearing those costs, why impose them on particular injurers? Why not spread the costs among the class of injurers? Or among those injurers that are at fault? Or among those who are at fault whether or not they are injurers? Or among those best able to reduce the risk of injury at the lowest marginal cost? Or among those who are the best risk spreaders? Why, in other words, allocate liability for loss as the tort system does?

3. Grounds and Extent of Liability/Recovery

I want to introduce now a distinction that I have not much emphasized in my previous work but that is both obvious and important. This is the distinction between the grounds of the right to recover and the scope of

that right, a distinction that applies with equal force to the grounds and scope of liability. Suppose that an injurer should be liable to a victim only if he has caused her harm through his negligence; it is a further question whether the scope of his liability should extend to cover all the damages that result from his negligence or whether it should be limited to those of the victim's damages that were or should have been foreseeable.

These are important and interesting questions about the scope of liability and recovery, but they are not the questions of fundamental interest in this essay. Instead of the relationship between foreseeability and consequential damages, I want to focus on other aspects of the relationship between fault and loss. Suppose that an injurer is at fault in causing another to suffer a loss and that whenever an injurer is at fault in causing harm to another she secures a gain thereby. Because the gain is the result of wrongdoing, it is wrongful. The injurer's wrongful gain can exceed, be equal to, or be less than the loss his conduct imposes upon the victim. Setting aside questions of foreseeability, what is it that justice requires of her liability: the annulment of her wrongful *gain* or the annulment of the wrongful *loss* her conduct occasions?

If the victim's loss equals the injurer's gain, no special problem emerges; annulling the injurer's gain also annuls the victim's loss. The other cases can create problems. If the injurer's wrongful gain is less than the victim's loss, and justice requires only that her wrongful gain be annulled, doing justice may leave the victim without full relief. In the event the victim's loss is less than the injurer's gain, giving the victim full relief is inadequate to rectify the injurer's wrongful gain. But to give the victim more than full compensation as a way of rectifying the injurer's wrongful gain may be to give the victim more than she deserves. It may also impose a cost on the injurer in excess of what is permissible as a matter of justice. We might say then that, because justice permits and requires us to impose costs on the injurer equal to, but no less nor greater than, the wrongful gain she secures, imposing costs in excess of those gains creates an additional wrongful loss, a loss that justice demands be rectified. If justice requires that no more nor less than the injurer's wrongful gain and the victim's wrongful loss be annulled, then tort law, which more often than not imposes costs on injurers in excess of the gain they secure by their mischief, is indefensible as a matter of justice.

Of course, the extent to which these cases present problems depends on the extent to which liability and recovery are merged in a single legal practice. Were we to create separate institutions for rectifying wrongful gains and losses, rather than merging them into a single legal practice, it may be possible to do both in ways that are compatible with the demands of justice so conceived. On the other hand, it may not be the case that justice prohibits us from imposing costs on injurers in excess of the gains they secure from wrongdoing. The *justification* for imposing liability on an

injurer may depend upon her having secured a wrongful gain, but the *scope* of her liability will be determined by other factors. In such a view, it is unjust to impose liability upon someone who has not secured a wrongful gain at another's expense. However, the extent of someone's liability does not depend on the extent of the gain. Perhaps someone who wrongfully secures a gain at another's expense is a candidate for liability because he has shown himself to be someone who uses another as a means to his own ends; he fails, in other words, to conform his conduct to the Kantian requirement to treat others as ends-in-themselves. Once such a person *qualifies* for liability, the scope of his duty to repair depends not on his gain, but on the loss his mischief occasions. Alternatively, it may turn out that justice in liability has nothing to do with the injurer securing a wrongful gain. It may be enough to hold him liable that the victim's loss is both wrongful and his responsibility. If an injurer secures a wrongful advantage, then that gain should be annulled as well; its existence, however, is not a precondition of liability.

A second set of questions regarding the distinction between liability and the scope of liability has to do with the distinction between pecuniary and nonpecuniary losses, those losses a rational individual would insure against and those against which he would not insure.[6] Suppose an injurer has acted in a way that makes her liable to her victim. Should she be liable for losses, such as emotional distress or pain and suffering, that the victim herself would not have insured against? Why would it be rational for the law to impose a duty to insure against a category of losses that rational victims would not insure against? Put slightly differently: liability rules impose insurance burdens. If a victim would not insure against nonpecuniary losses, why would the law impose the duty upon third parties to provide that insurance? If it is irrational to insure against a loss, then it is irrational to insure against it—no matter who is given the burden of providing the insurance. On the other hand, if these losses are occasioned by the fault of the injurer, they are, in a suitable sense, wrongful; should not wrongful losses be annulled? The wrongfulness of a loss is distinct from the issue of whether it is a loss rational individuals would insure against. Which standard, rationality or wrongfulness, should determine liability and recovery in justice and torts?

4. JUSTIFICATION AND COMPENSATION

The theory of tort law that I advance depends not only on these three distinctions, but on a fourth set of related distinctions as well. This is a

6. Of course, it is controversial that individuals will not insure against nonpecuniary losses. However, for the sake of this argument, we can simplify the problem. We can define pecuniary costs, such as lost wages due to accident, as those against which rational agents will insure, and nonpecuniary costs, such as emotional distress or pain and suffering, as those against which rational agents would not insure. Then the important and controversial question is to determine which costs fall into which category.

compound distinction among three ways in which the justifiability of an agent's conduct can relate to his victim's claim to repair.

1. Sometimes a person owes another compensation only if the loss he causes is the result of unjustifiable or unreasonable conduct. In this sense, acting justifiably is a bar both to liability and recovery; fault or unreasonableness on the injurer's part is a necessary condition of the right to compensation.
2. On other occasions, an individual can suffer loss owing to the justifiable conduct of another, but the justifiability of the conduct precludes neither liability nor recovery.
3. On yet other occasions, an injurer's conduct is justifiable only if the injurer pays compensation for whatever losses his conduct occasions. In such cases, the rendering of compensation is a necessary condition of the justifiability or reasonableness of what the agent does. In that sense, compensation helps to right what in its absence would be a wrong.

We might summarize these distinctions in the following way: justification and no compensation, justification and rightful compensation, and justification only if compensation is paid, respectively.

Examples of each category may help to elucidate the distinctions I have in mind. If I drive reasonably, as would a reasonable person of ordinary prudence, I am justified in imposing the risks I do. If you are injured as a result of my doing so, ordinarily you would have no claim to compensation against me. This example falls into the first category, in which the justifiability of what I do defeats any claim to compensation for loss that you might hope to press. On the other hand, if Hal justifiably takes a portion of Carla's insulin in order to keep from lapsing into a coma, the justifiability of his conduct may not preclude the legitimacy of Carla's claim to repair, nor need it preclude the possibility of Hal being obligated to provide it. This example falls into the second category, in which the justifiability of what the injurer does is adequate to free him from *fault* but is inadequate to defeat the victim's claim to *repair* for the taking.

Often I lunch at the local Korean produce market. My eating the salad the owners serve is justified provided I pay them what they (fairly) charge me for it. If I ate the salad but refused to pay, I would have done something wrong. Some might call it theft. In any event, it would constitute a taking of something to which I had no right. So my rendering the market its due by paying the tariff is a condition of my legitimately eating the market's food. This is an example of the third sort of case, in which the doing is justifiable only if compensation is paid and not otherwise.

There are numerous more traditional tort-like examples of cases of the third sort. An example might be blasting. No matter how reasonable one is about doing it, blasting may nevertheless put people and property at substantial risk. One option, therefore, is to ban it altogether. Another is to permit it provided individuals compensate the victims of blasting whenever the blasting is negligently or otherwise faultily done. In effect, that option

places blasting in the first category, like motoring. Another option, though, is to permit people to blast but require them to compensate their victims in all cases, whether or not the blasting is faultily performed. Blasting is not permissible unless victims of it are compensated.

In all cases of the third sort, compensation is a condition of the justifiability of one's act and, in that way, helps to right what in its absence would be a wrong. It is a necessary, but not a sufficient, condition of a conduct's justifiability. We can distinguish between two ways in which compensation ex post might justify harmful conduct. In some of these cases, compensation ex post serves to justify in the same way that consent ex ante would. In these cases, high ex ante transaction costs prevent individuals from reaching an accord and settling upon an allocation of risk that they would otherwise be authorized to do. Compensation ex post helps to justify transfers of resources in these cases by replicating as closely as is feasible the terms to which the parties would have agreed. In these cases, we believe that a voluntary allocation of risk would have been preferable and that by replicating as closely as possible that outcome tort liability provides a second best alternative in an imperfect world.

In other cases, however, compensation is not a surrogate for consent. In a blasting case, for example, even if the potential victims and injurers could have gotten together at low cost, we might not authorize them to allocate risk by contract or voluntary exchange. Permitting free exchange in these cases presumes that either blasters or victims are entitled to blast as they see fit or to prohibit blasting, respectively, and we may mean to authorize no such liberty right in either case. Therefore, compensation ex post is not designed to substitute for agreement ex ante. Though compensation ex post helps to justify the injurer's conduct in both kinds of cases, the content of the underlying entitlement differs and, therefore, so does the explanation of why compensation justifies.

The overall point I want to emphasize in distinguishing among these three categories of cases is this: The absence of wrongfulness is a bar to recovery in some cases, so that the right to compensation depends on wrongdoing or fault; in other cases, an injurer can owe his victim compensation though his conduct is and remains justifiable whether or not he compensates his victim. Compensation is owed because a victim's rights have been invaded, not because the injurer has been negligent or otherwise at fault. In still other cases, compensation helps make right conduct that in its absence would have been wrong.

The theory of strict liability goes astray in thinking that all cases of justified recovery and liability are of the second sort—rights invasions. The economic analysis of torts, which views tort law as arising from high transaction costs and as designed, therefore, to move resources from lower

to more highly valued uses,[7] goes astray by viewing tort law as a system of private takings, instances of the third sort. Different versions of the theory will emphasize either the hypothetical contract or the private-takings dimension. The theory I advance encompasses all three categories. It claims that recovery in cases one and two can be explained, in part, as matters of corrective justice. It denies that cases of the third sort are best viewed as expressing the ideal of corrective justice; it argues instead that these cases are best analyzed in some other way. My theory is that tort law is a mixture of markets—economic efficiency—and morals—corrective justice.

5. CORRECTIVE JUSTICE

In the preceding sections, I have drawn numerous distinctions and have made several claims based upon them. The most important of these claims is that at least some of the cases that come up in torts are best viewed as articulating or expressing an ideal of justice. In what follows, I present a particular conception of corrective justice.[8]

Corrective justice demands that wrongful (or unjust) gains and losses be rectified, eliminated, or annulled. Not every loss, however wrongfully created, is the concern of corrective justice. For example, suppose that losses are wrongful only if they are the result of negligent or wrongful interference with a person's legitimate interests. Only when a person has suffered a wrongful loss in this sense will he have the makings of a claim in corrective justice to repair. Still, there are many losses that an individual suffers at the hands of others that, although they may fall within the ambit of morality, are nevertheless outside the scope of justice. So what we will need, then, is a theory about which interests of the person fall within the scope of corrective justice. That theory will not itself be part of corrective justice but will instead set the boundaries of it.

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7. This view is expressed in A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1989) and Posner, *supra* note 4.

8. Like any conception, this one will be controversial and contestable. One of the central questions the reader will no doubt want answered is by what criteria are competing conceptions of corrective justice to be evaluated. This is an especially important question, since even among tort theorists who advance the view that to some extent at least tort law is a matter of corrective justice, there is virtually no agreement about just what corrective justice requires. I will try to say something useful in defense of my version of corrective justice and something about how various conceptions are to be evaluated. Ultimately, no defense of a conception of corrective justice will be satisfactory in the absence of foundation for it. Of course, there will be different views about what counts as an appropriate foundation for a principle of justice. There will even be differences of opinion about whether foundational arguments are possible. On these matters, I am partial to the wisdom of my teacher, Joel Feinberg, that progress can be made on the penultimate questions in philosophy even as the ultimate ones remain unresolved.

Fundamentally, corrective justice is concerned with the gains and losses that one person causes another. I suppose it is possible to wrong oneself and therefore to impose wrongful losses upon oneself. Similarly, it may be possible to secure wrongful gains at no one's expense, but these gains and losses are not primarily the concern of corrective justice. Moreover, the analysis of corrective justice offered here focuses primarily on wrongful *losses* and the institutions made available for rectifying them. Rectifying wrongful losses is at the heart of tort law in a way in which rectifying wrongful gains is not.[9]

To make use of a distinction introduced earlier, corrective justice specifies *grounds* of recovery and liability; it does not specify a particular *mode* of rectification. It does, however, constrain the set of possible modes of rectification. Wrongful gains and losses cannot be annulled so as to impose or *create* wrongful gains or losses. Any mode of rectification that does not create wrongful gains and losses is compatible with corrective justice.

Understood in this way, corrective justice prohibits creating a wrongful loss, even if doing so would have the effect of rectifying substantial injustice. Can this be correct? Greater injustices are worse than trivial ones. Were there no way of rectifying a wrongful loss of substantial magnitude other than by creating some small injustice, then it would be odd to claim that nothing could be done about the greater injustice; more precisely, anything done which rectifies the greater injustice by creating a lesser one would violate corrective justice.

Suppose *A* injures *B* in a way that creates a wrongful loss. Let's imagine for the sake of the argument that the only way to eliminate *B*'s wrongful loss is to impose it upon *C*. We might say, then, that since *C* had nothing to do with the injury—he didn't cause it nor could he have prevented it—imposing the loss on him creates a wrongful loss. Let's suppose that the loss imposed upon *C* is considerably less than that imposed originally upon *B*. (How we are to determine the relative injustices of various losses is a further question.) We might hold that *B*'s loss be imposed on *C*; it is the lesser injustice and it is the only way we can make good *B*'s loss. What about *C*? It can hardly matter to her that her loss is not as bad as the loss *B* would otherwise have had to bear. *Ex hypothesi*, her loss is a wrongful one which, as a matter of justice, requires annulment. To hold otherwise is to treat *C* as an instrument of some public policy designed to minimize the overall corrective injustices in the world. It is to act as if one had no right to have one's wrongful losses annulled, only the right to have the inefficient level of wrongful losses eliminated in the population as a whole.

9. It is a further question, but not one strictly speaking of moral or legal philosophy, as to why tort law is not a particularly good institution for rectifying wrongful gains.

Put this way, the general principle of corrective justice has an efficiency dimension. Indeed, one might argue that once one allows the imposition of corrective injustices as a way of eliminating more extensive injustices, corrective justice is reducible to a version of efficiency. Understood in this way, efficiency is the goal of tort law, but the minimand is "corrective injustices," not costs in the economic sense.

We appear to be driven to either of two unacceptable alternatives. Either we are barred from correcting injustices in ways that create other wrongful losses, or we are free to create wrongful losses when doing so is necessary to rectify greater ones. In the first case, we run the risk of leaving individuals without relief for substantial unjust losses. In the second case, we run the risk of trivializing the concept of corrective justice. Instead of claiming that wrongful gains and losses ought to be annulled, the principle of rectification is really the requirement that we minimize the sum of the costs of corrective injustices and the costs of correcting for them, which, as the reader may know, is simply an instance of the Calabresian formulation of the economic goal of tort law.[10] Is there a way out of this problem?

It can never be permissible to create a wrongful loss in order to rectify another wrongful loss if rectification without doing so is possible. On the other hand, the imposition of a wrongful loss is permissible only if the disparity between the wrongful loss created and the loss annulled is substantial. By way of example, assume a wrongful loss of $1000 that can be rectified in one case by imposing another loss of $10 and, in another case, only by imposing a loss of $999. The principle of efficiency would require that the larger loss be rectified in both cases. The "substantiality" constraint on the principle of corrective justice we are considering suggests that the large loss be rectified when the costs of doing so are $10 but not when they are $999. Some cases that fall in between these two extremes will be controversial and difficult to resolve, but that should not trouble us, certainly not at this juncture.

Thus, in order for the imposition of a wrongful loss to be justified, there must be no way of rectifying the existing loss without imposing another wrongful loss. Moreover, the difference between the loss annulled and the loss created must be substantial. The difference between this proposal and the efficiency account is that all that is required in the latter case is a marginal difference between the loss created and the loss annulled. The proposal under consideration requires a substantial difference between the two.

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10. Dean Calabresi discusses the goals of tort law in Calabresi, *Optimal Deterrence and Accidents,* 84 YALE L.J. 656 (1975), and in G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 26 (1970) ("[T]he principle function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents.").

One way of objecting to this proposal is to question whether it makes sense to impose the "substantial difference" requirement. After all, if we are going to allow the imposition of some corrective injustice in order to reduce the total amount of corrective injustice in the world, why not reduce at the margin as well? If we want to be efficiency theorists about the costs of corrective injustice, there is no good reason for requiring that the difference between losses annulled and those imposed be substantial. The point of the proposal, however, is to save the independence of the principle of corrective justice while at the same time acknowledging the desirability and plausibility of reducing the extent of corrective injustice in the population as a whole—even when doing so creates some injustice. The substantial difference requirement gives expression to the commitment to corrective justice, not efficiency. At the same time, it provides room for the possibility of reducing corrective injustice as a whole—within some constraints.

This is an intuitively plausible solution to our problem of choosing between trivializing the notion of corrective justice by reducing it to a dimension of efficiency and being barred from reducing the extent of corrective injustice as a whole. Plausible though it may be, the solution may strike the skeptical as being more convenient than defensible. For all we have said so far, the proposal we are considering appears arbitrary and motivated entirely by the need to escape an untoward consequence of the theory.

The suggestion can be made somewhat more plausible by connecting it to ways we think about rights in other contexts. Let's assume that the principle of corrective justice gives individuals a right to repair for wrongful losses. To claim that someone has a *right* is to say that it cannot be overridden by only marginal increments in utility, welfare, or efficiency.[11] On the other hand, even if considerations of utility can override the claims of rights under certain conditions, it does not follow that the overridden right lacks normative force or consequence. For example, a person whose claims of right are overridden may nevertheless be entitled to compensation. That is, if I have a right that you not take my property without first securing my consent, we can imagine situations in which it is true both that you justifiably take my property without my consent—an example would be to save many lives, including, but not only, your own—and that I am owed compensation for the loss in value of the property or for its use.

Now let's consider the significance of this discussion of rights for corrective justice. Individuals have a right not to have wrongful losses imposed upon them. This seems reasonable enough. On the other hand, like other

11. The claim that only substantial gains in utility can override the claims of rights is a feature of the *meaning* of rights. It is part of what we mean by a right that it functions in political and moral arguments in a certain way; it sets a threshold above which gains in utility must rise in order for those gains to override the claims of rights.

rights, that right can be overridden *if* the gains of the appropriate sort are substantial. So, under corrective justice, both the person who may bear the loss at a wrongful cost of $10 and the person who may do so at a wrongful cost of $999 may have the right that the loss not be imposed upon them. In the former case, one can plausibly argue that the threshold of net gain sufficient to override the right is met. In the latter, even though there is a net gain in the sense that the total amount of corrective injustice in the world is reduced, it is implausible to argue that the threshold sufficient to override the right has been satisfied while maintaining anything like the claim that there is a right at work.

Of course, there will be borderline cases, and any such analysis will put a lot of pressure on how we determine the relative wrongfulness of losses. After all, isn't it plausible to argue that any loss imposed on an innocent person by the state—through its tort system—is worse morally and politically than a loss a private person wrongfully imposes on another? Or is it? How would we weigh these and other factors?

At this point my intuitive idea has been given a partial theoretical foundation. With that foundation, we can adopt the relatively modest claim that corrective justice imposes the following constraint on the various means of rectifying wrongful losses: no mechanism of rectification that creates new wrongful losses is permissible unless those losses are necessary to rectify the original wrongful loss and modest in comparison with it.

6. Corrective Justice and the Right to Repair

Tort law has at least two basic aspects or functions: *validating* and *compensating* functions. In its validating, or epistemic, role, tort law determines, albeit imperfectly, which claims to repair are legitimate. Does this victim have a legitimate claim to repair, a claim the law recognizes as valid? Its compensating, or normative, role is to provide an institutional means—also an imperfect one—through which legitimate claims to repair are satisfied.

Corrective justice plays a role with respect to both aspects of tort law. First, it partially specifies criteria for determining legitimate claims to repair. Many, but not all, of the valid claims to repair in torts are valid as matters of corrective justice. That is, the victim's claim is based on the fact that his loss is a wrongful one. To be justified as an institution for satisfying legitimate claims to repair, tort law cannot normally create wrongful gains and losses. Thus, corrective justice imposes a constraint on the kind of institution tort law can be. It thereby constrains tort law in both its epistemic and normative dimensions.[12]

12. Though corrective justice constrains tort law, it cannot fully explain or justify tort law

The first order of business is to explain the sense in which tort law implicates the principle of corrective justice. The principle of corrective justice requires that wrongful or unjust gains and losses be annulled or rectified. But there are alternative formulations or conceptions of this principle, differing in any number of dimensions. Let's identify two.

First, formulations can differ with respect to which gains and losses ought to be annulled. Here, some alternatives may deny that wrongfulness is the appropriate criterion. One might hold that *all* losses caused by the *voluntary* conduct of an individual ought to be compensated as a matter of justice yet not mean that such losses are wrongful. Or one might hold that all losses that are not self-inflicted or the result of an act of God require rectification as a matter of justice.

In each case, the person who adopts the alternative view means to deny that the domain of corrective justice is set by the criterion of wrongfulness. On the other hand, we can imagine individuals who accept that corrective justice is concerned with wrongful gains and losses but who adopt a different criterion of wrongfulness. In one such view, a loss or gain is wrongful only if it is the result of a rights invasion. Losses in which no rights are involved are not wrongful, however unhappy they may be. In another conception of wrongfulness, losses are wrongful only if they result from an injurer's *morally* culpable conduct. In yet another conception, losses are wrongful only if they result from morally culpable conduct that invades the rights of others. So we can distinguish between those conceptions of corrective justice that require wrongfulness as a condition of compensation and those that do not. Among those that require wrongfulness, we can distinguish different accounts of what makes a loss wrongful.

The second dimension in which alternative conceptions of corrective justice vary concerns what I have called the mode of rectification or liability. While my version of the principle does not impose a particular mode of rectification, others may do so. In one view, corrective justice holds that those who create unjust or wrongful losses have a duty to annul them and that, in order to be just, compensation must flow from particular injurers to their particular victims. Such a principle makes a particular mode of rectification part of the concept of corrective justice.

These two dimensions of corrective justice can interact in ways that allow for a variety of conceptions of corrective justice. For example, one can advance the view that all losses that are the result of human conduct—

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in either its validating or compensating dimensions. As I will argue, not all of the claims valid in torts are claims in corrective justice, and while the principle of corrective justice restricts the range of possible institutions for rectifying wrongful losses, it does not identify tort law as uniquely suitable for that purpose. My view is that what cannot be explained in our tort practice as a matter of corrective justice can be understood as a matter of economics instead. Hence I view tort law as a mixture of markets and morals—efficiency and corrective justice.

faulty or otherwise—require annulment and that the best way of making good the claims of the injured is through a general tax of some sort. Or one can hold the view that only losses that result from morally culpable conduct are rectifiable as a matter of justice and that such losses should be made good through the tax coffers. Or one can hold that all losses that are the concern of corrective justice must be annulled by those individuals who have occasioned them. And so on. Before we can determine the extent to which our existing practice is a matter of corrective justice, we are going to have to figure out just what it is corrective justice stands for.

One problem is to figure out what we are looking for in a conception of corrective justice. Are we looking for that conception that is most defensible within the theory of justice, or that conception that provides the best, whether partial or complete, interpretation of our legal practice? The best conception of corrective justice, in the sense of being the one for which the best moral foundation can be provided, may not in fact be the conception of corrective justice operative in the law. An obvious example is provided by the conception of corrective justice according to which all and only those losses that result from morally culpable conduct ought to be annulled as a matter of justice. If this turns out to be the correct conception of corrective justice, then it will not be the one operative in the law of torts—especially in negligence law.

Framing the problem in this way—in terms of a distinction between the correct principle of corrective justice and the one operative in the law—is exceedingly misleading. For if there is only one correct principle of corrective justice, that is, only one conception of it that is uniquely defensible, then either it is implicated in our current practice or it is not. If it is not, then no principle of corrective justice is. That is, it cannot be the case that the law of torts articulates one principle that injurers must make good the losses their fault occasions while at the same time moral theory commits us to another principle of corrective justice—for example, the principle that only the losses occasioned by culpable mischief are rectifiable as a matter of justice and that any way of rectifying those losses is permissible provided it creates no further injustices. Or, to use a particularly stark example, if claims in corrective justice are defensible only if they call for returning a person to a preexisting state that is itself just, then since this is no feature of our current tort practice, tort law has virtually nothing to do with corrective justice. This would be so even if it has a great deal to do with compensation. Either the principle of corrective justice is expressed in our current practices or it is not, and determining whether it is depends first on our identifying the principle in question.

I want to distinguish this claim from the possibility that the law of torts is attempting to articulate the correct principle of corrective justice, but that it continues to get it wrong. I also want to distinguish this claim from the possibility that our current practices reflect an imperfect approximation

of the demands of corrective justice. It may well be that corrective justice demands that wrongful losses be annulled. Such an account requires an analysis of wrongfulness. At various times in the history of our practices, different conduct has been thought to be wrongful, depending in part on prevailing norms of conduct, technology, and levels of relevant and available information. Hence, we may want to say that the best explanation of our practice is one that sees it as striving to do justice. On the other hand, if our practice is one in which victims recover for all losses other than those they bring upon themselves, *if* corrective justice requires that only wrongful losses be annulled, the view that such a practice is an effort to articulate the demands of corrective justice is simply mistaken. The practice is better viewed as articulating some ideal of charity or beneficence, not justice or efficiency.

Similar problems do not arise for an efficiency theorist, at least insofar as there is only one operative conception of efficiency.[13] There are many conceptions of corrective justice, and how are we to choose among them? In this essay, I cannot provide a full defense of the conception of corrective justice that all and only wrongful losses ought to be annulled. This conception relies on the distinction between the grounds and modes of rectification. It also holds that wrongfulness is a condition of a compensable loss. Thus, I will limit the defense of this conception of corrective justice to these central elements of it. In other words, I will argue that the principle of corrective justice does not require that the person who occasions the loss is responsible for making it good and that wrongfulness, but not moral blame or a notion very much like it, is essential to the concept of corrective justice. In that way, I want to distinguish claims to repair in corrective justice from other claims to repair which may be matters of justice of another sort but which do not rely on wrongdoing. In addition, I present an analysis of wrongfulness implicated in the principle of corrective justice, and I will defend that account against certain kinds of objections to it.[14]

My first goal is to show that corrective justice distinguishes between grounds for and modes of recovery in the important sense that corrective justice does not require a particular mode of rectification. If that is so, then there will be a feature of our current legal practice, the fact that injurers pay their victims, that is not required by corrective justice, though it may be compatible with it. Other measures for making good those losses are presumably also compatible with corrective justice. Why do we rectify

13. For a different view, see J. COLEMAN, MARKETS, MORALS AND THE LAW (1988).

14. What I will *not* do is present an argument that demonstrates that a particular substantive theory of wrongfulness is the correct one. To that extent, my argument will be incomplete. Different theories of wrongfulness will pick out different gains and losses as demanding rectification as a matter of justice. I do not as yet have a satisfactory, fully developed account of wrongfulness, only an account of its constitutive elements.

losses the way the tort system does? My answer is that doing so is a matter of economic efficiency.

Next, I want to argue that losses that are not wrongful in my sense are not the concern of corrective justice. Corrective justice requires wrongfulness. Other conceptions of corrective justice that focus, for example, on voluntariness and causation to the exclusion of wrongfulness are therefore incorrect conceptions of corrective justice. The law of torts permits recovery of losses that are not wrongful in my sense, although they involve volition and causation. Recovery for these losses is not ruled out by corrective justice but is not required by it. Why are these losses rectified by our tort practice? Again, my answer is that the theory of rational bargaining and economic efficiency suggests that such losses be annulled.

7. Defending the Annulment Conception

In the end, I defend the view that tort law is a mixture of markets and morals. In this essay, I develop the sense in which it is a matter of morals primarily. The relevant moral principle is the principle of corrective justice. In the previous section I have identified the conception of corrective justice: Corrective justice requires annulling wrongful gains and losses. In this and the next section, I defend this conception, what I call the annulment conception of corrective justice. This conception relies heavily on two independent theses, both of which I defend here: first, that corrective justice does not require the victim to be paid by his injurer; second, that victims have a right in justice to repair only for wrongful losses they suffer. This section defends the first of these claims.

Let me begin by contrasting the annulment thesis with a variety of alternatives to it. In one alternative, it is not enough to hold that wrongful gains and losses be annulled. In this view, the victim has a *moral right* to repair in justice. That right imposes a corresponding moral duty to make repair, but corrective justice itself is silent on the question of which party has the corresponding duty to repair. A slightly different version might hold not only that the victim of a wrongful loss has a moral right to repair, but also that his *injurer,* whether or not he has gained at the victim's expense, has the corresponding moral duty to repair. Finally, we can imagine the view that a victim has a right in justice to repair whenever someone else invades a right of his. In this view, part of what it means to have a right is that violation of that right triggers a second-order right to repair. The same right imposes a corresponding duty not to cause it. Failure to discharge that duty gives rise to a second-order duty to make amends.

All of these alternatives differ from the annulment view in claiming that the victim of wrongdoing has a *moral right* to recover. In contrast, the annulment view holds only that the victim's losses ought to be annulled. If they are not annulled an injustice occurs, but no right of a particular victim

need be violated. The injustice of failing to compensate the victim is not equivalent to the victim's having a right invaded or inadequately respected. This does not amount to much for those who identify injustice with rights violations but is otherwise significant. The more important distinction, however, is between the annulment thesis and the last two alternatives. In each of these, someone has a moral duty to make repair and that duty is part of corrective justice. Although these alternatives differ from one another in the extent to which the person on whom the duty falls is specified, they share with one another the view that a mode of rectification is part of the concept of corrective justice itself. In that way, they differ from the annulment conception, which is based upon the distinction between grounds and modes of rectification in the sense that it claims that corrective justice applies only to the former.

On what grounds can we choose among these competing conceptions of the demands of justice? We might begin with the following observation. Not only is the distinction between the grounds and modes of recovery analytically sound, but also analogous distinctions are recognized as central to every other principle of justice. For example, the principle of retributive justice is usually formulated to state that wrongdoing deserves its comeuppance. Such a principle leaves open both the sanctions that are appropriate and the institutional forms that are best suited to provide legitimate means for satisfying the demands of retributive justice.

Similarly, the principle of distributive justice in one formulation requires that all resources be allocated so as to maximize total welfare. It is a further question upon whom the duty to maximize wealth falls and which institutional forms are appropriate to the task. Should wealth be maximized by redistributive taxes, incentives, liability rules in torts, or some other means?

In general, we distinguish between the duties and rights that a principle of justice imposes and confers and the variety of institutional forms, both public and private, that are best suited to discharge the duties and to vindicate the rights. This, after all, is just the distinction between the grounds of a claim and the mode or institutional vehicle through which the claims are to be realized. It would be odd if the distinctions between the grounds of claims in justice to actions, policies, and resources and the institutional forms suitable for realizing or satisfying those claims—distinctions endorsed and recognized in every discussion of distributive and retributive justice—were inappropriate to corrective justice. So the principle of corrective justice no more specifies a particular mode of rectification than does the principle of distributive justice.

Frankly, this has always struck me as a good, even compelling argument, but that is not to say that there is no argument on the other side. A defender of the alternative conception of corrective justice might object to my argument on the grounds that what I have attempted to do is to transpose distinctions from other principles of justice to corrective justice,

when, in fact, doing so is illegitimate. Corrective justice, she will argue, is different from retributive and distributive justice in precisely those ways that make my argument untenable. Distributive and retributive justice are, in this view, principles of *public* justice; they regulate the relationships of citizens or members of a community to the state or to the relevant collective body. Claims in distributive justice are claims against the state, or against the collective, to shares of the pool of resources or wealth. Claims in retributive justice are claims made on behalf of the state against particular citizens, or they are claims made on behalf of a community against a member who has wronged the community by violating one of its norms. In contrast, corrective justice is a dimension of *private* justice; it is an aspect of justice between the parties. For that reason, distinctions that may apply to public justice are inappropriate to corrective justice. While we can think of many ways of satisfying the demands of distributive justice, many institutional forms that might be suitable means of giving each person her due, there is only one way of meeting the demands of corrective justice and that is by having the person who created the injustice or wrong rectify it.

This is not a fully satisfying argument—just yet. After all, the public/private distinction is not nearly so rigid as this response makes it out to be. Tort law is itself sometimes used as a private scheme by which public norms are enforced; regulation is often a public measure for reducing the incidence of private wrongs. However, the argument can be strengthened.

We might embed the concept of corrective justice in a particular account of what it is to have a right. Suppose we analyze rights in the following general way: To say that you have a *right* that I not harm you is to say, among other things, that I have a *duty* not to harm you. These are correlative rights and duties that are *primary* or fundamental to the content of the right in question. However, part of what it means for you to have such a right is that you have a variety of *secondary* rights as well. These are, or can include, metarights—rights about your primary rights. One is the right you have that I compensate you in the event that I violate your first-order right that I not harm you. Similarly, we might say that I have a series of second-order duties correlative of your second-order rights and among these, presumably, is the right that I compensate you in the event that I fail to discharge my first-order duty to you. Thus, when I harm you in a certain way that violates your right, you have a right against me to repair resulting damage, and I have a corresponding duty to provide it. Justice requires not only that your wrongs be rectified, but also that they be rectified by that person who has wronged you, namely, me.

There are several things I want to say in response to this argument. Let me begin with the weakest, but in some ways the most telling, response. Suppose that everything in the argument is correct. All it would show would be that whenever a victim has a claim to repair in corrective justice the

person who wronged her would have the moral duty to rectify the loss. It would not establish that justice requires one and only one institutional mechanism for having that duty discharged and that right satisfied. It does not answer whether the duty at issue is one that can be discharged, consistent with the demands of justice, by individuals other than the wrongdoer. After all, the duty to make good another's loss is a debt of repayment, and there are many debts of repayment that can be discharged by individuals other than the indebted party with no affront to justice. So, if sound, the argument brings us only to the point of the injurer or wrongdoer having the duty to repair the victim's loss; it does not take us that needed extra step of requiring only one measure for discharging that duty—imposing the loss, not just the duty to compensate, on the injurer or wrongdoer.

This brings me to the second point. The proposed argument makes no mention of corrective justice. Instead, it seeks to derive particular constraints on the kinds of institutions we can make available for rectifying wrongful gains and losses from a particular theory of rights. So it begins by connecting compensation and liability to a theory of rights and then draws its conclusions from the theory so conceived. But, one might ask, exactly what sort of theory of rights is at work here? Is it an analytic theory about the meaning of rights, or is it a normative theory or conception of rights?

I will have occasion to spell out my own analytic theory of rights shortly, but it does seem plain enough that the relationship between secondary and primary claims or rights relies on normative, not analytic, considerations. Even if we accept the view—which I do not—that correlative of every right is some specifiable set of duties and that rights are to be analyzed in terms of the relationships between or among them, it hardly follows that the existence of certain primary rights entails, in any sense, the particular list of secondary rights or claims that includes the claim to repair. After all, the right not to be harmed can be protected in any number of ways, each of which may give rise to very different secondary claims and some of which may give rise to no secondary claims at all. Surely, how we should secure or protect the important interests marked by rights is not a matter of logic, but a matter of substantive moral argument.

If the duty to compensate and the right to compensation do not follow as a matter of *logic* from the nature of what it means to have a right, but follow instead from a suitable normative principle, the question becomes: which principle? The obvious choice is corrective justice. In other words, the duty to compensate and the right to compensation for the invasion of rights derives from the principle of corrective justice. To put the matter somewhat differently: The second-order right to repair and the corresponding duty to compensate are ways in which the principle of corrective justice protects first-order rights and enforces duties. Surely this argument is deeply circular. For it is precisely this principle of corrective justice that the

argument we are considering is designed to support or defend, and it will do that argument no good to show that *it* presupposes the very principle it is designed to defend. If I am right, the principle of corrective justice, by itself, does not specify any particular mode of rectification even if it constrains the set of possible rectificatory forms.

I have made good on my promise to defend my conception of corrective justice, at least with respect to the importance it places on the distinction between the grounds and modes of recovery. I also claimed that only *wrongful* losses fall within the ambit of corrective justice.

8. Characterizing Wrongfulness

Let's draw a distinction among interests, legitimate interests, and rights. A thief who has stolen a television may develop an interest in the TV, but because he has obtained it illegitimately, his interest is illegitimate. If the television is destroyed, the thief suffers loss but is not *harmed.* Harm is a moral category that requires that an interest be legitimate. Setbacks to legitimate interests are harms. It does not follow that someone who is harmed has a claim to repair in justice. I have a legitimate interest in my work being favorably received. A negative review harms this interest. The same is true of business competitors and suitors for the affections of others. As long as an actor complies with the relevant norms of conduct, his harming of another creates no grounds in justice to recovery or liability. Only when an injurer *wrongfully or impermissibly* harms another's interest does the victim have a claim in justice to repair. *Wrongful harming* gives rise to a claim in justice to repair in a way in which mere harming does not. What makes a harming wrongful, moreover, is the impermissibility or wrongfulness of the injurer's conduct.

While not all legitimate interests are secured by rights, some are. Injurers can act contrary to the constraints rights impose in two ways, justifiably or not. An unjustifiable invasion of a right is a *violation* of it. A justifiable or permissible invasion is an *infringement.* If rights secure legitimate interests, then a violation is also a wrongful harming. An infringement is a harming, but not a wrongful one. Part of what it means to have a right, however, is that invasion of the right gives rise to a claim to repair whether or not the injurer acts wrongfully. That is the special protection afforded by rights to legitimate interests. Conduct contrary to a right is a *wrong,* and it is a wrong whether or not the injurer acts wrongfully, that is, impermissibly.

Losses are wrongful if they result from either wrongful harming—wrongdoing—or rights invasions—wrongs. Let's focus first on aspects of the injurer's conduct that contribute to its being wrongful. Very little of tort law is taken up with cases involving intentional torts. In contrast, most of the cases involve accidents, and of those, the bulk are adjudicated under

the negligence rule. Negligence in torts is the failure to take reasonable care; the standard of reasonable care is objective or external to the actor. An actor is negligent for failing to take the care of a reasonable person of ordinary prudence, whether or not he or she is capable of exercising that care. How can the injurer's conduct be wrongful when measured against an external or objective standard of negligence? In what sense can an injurer who does the best he can, but fails nevertheless to act as a reasonable person would have, be said to have acted wrongfully?

The answer lies in the distinction between act and actor, the distinction between fault in the doing and fault in the doer. It is illustrated by the distinction between the roles justifications and excuses play in defeating ascriptions of fault. An actor is *morally* at fault when his conduct falls below a moral standard of behavior and he is to blame for it. An actor is *genuinely* at fault when his conduct falls below a standard of behavior that is not moral and he is to blame for it. An individual is at fault in torts when his conduct falls below the standard of reasonable care—which may or may not be a moral standard of conduct—whether or not he is to blame for his conduct. In cases of the latter sort, the conduct is wrongful whether or not the actor is to blame for the shortcoming in his conduct. The wrongfulness that matters is the shortcoming in the doing, not in the doer.

One might object that I am passing off conclusions as arguments. Why is it that the sort of wrongdoing required by corrective justice is shortcoming in the doing, rather than shortcoming in the doer? Is this just a transparent effort to have my theory coincide with practice, where shortcomings in the doer are not required? In other words, why is it that corrective justice, to the extent it relies on the wrongfulness of the injurer, requires only that the conduct be wrongful, not that the agent be to blame or otherwise culpable for it? Why is not moral culpability the standard of wrongfulness required by corrective justice?

The central concern of the principle of corrective justice is the *consequences* of various sorts of doings, not the character or culpability of the doers. Corrective justice specifies certain gains and losses as requiring annulment; it does not specify the conditions under which the individuals who are responsible for creating those gains and losses ought to be blamed or punished. Its concern is consequences, not character. The fact that duties under corrective justice can often be discharged by insurance contracts further illustrates the centrality of consequences, not character, to the demands of corrective justice. Indeed, the fact that losses resulting from reckless or intentional mischief are not insurable only emphasizes the general point that for negligently created losses the concerns of justice are satisfied by the failure of conduct to comply with an objective standard.

The principle of retributive justice is that wrongdoing deserves its comeuppance, that those who are responsible for producing it deserve to be punished or otherwise sanctioned. Culpable agency is the very heart of

retributive justice. Punishment as retribution expresses disapprobation or some similar sentiment against those who have behaved in a way that exemplifies defective character or motivation. Punishment is an appropriate form of retribution when imposed upon those deserving of it, those who have no excuse for their shortcomings. The institution of punishment, as well as the moral and political theories that are thought to justify it, then, suggests the necessity of culpable agency as a condition of justified punishment. And retribution is deserved only if it is against a person who is to blame for his wrongdoing. Undeserved retribution is not retribution at all.

The concept of wrongdoing implicated in the principle of corrective justice is that of fault-in-the-doing, not fault-in-the-doer. Moral culpability of the agent is not a condition of the victim's claim to repair as a matter of corrective justice. Therefore, while excuses that are aimed at defeating blame are not relevant to the claims of corrective justice, excuses aimed at defeating ascriptions of *agency* are. The reason is that a loss is wrongful only if it is the result either of a faulty *doing* or a rights invasion. Excuses that defeat agency establish the absence of wrongdoing and wrong by defeating ascriptions of agency and, to that extent, undermine all claims to repair in corrective justice. Thus, the concept of wrongful loss in the principle of corrective justice presupposes the idea of agency, even as it rejects the idea of *culpable* agency.

Corrective justice requires wrongfulness. Wrongfulness can be satisfied either by wrongdoing or wrong. Wrongdoing in turn presupposes fault but not blame. The relevant fault is in the doing, not the doer, and excuses that defeat blame are irrelevant. Thus, an objective standard of negligence is perfectly compatible with corrective justice. On the other hand, both wrongdoing and wrong implicate human agency. Excuses that defeat agency bear on the demands of corrective justice. These excuses matter to corrective justice simply because human agency does, but why must claims in justice rely on human agency?

In fact, not every claim in justice to compensation requires human agency. Some claims can be based on simple misfortune. I would not want to deny this. Nevertheless, I think it is important that we distinguish among the various grounds people might have for recovery. Corrective justice marks one set of such grounds, but it is not the only set. Considerations of benevolence and charity, as well as those of utility and distributive justice, may also provide a basis for repair. But it is important to distinguish among the kinds of considerations that are relevant to grounding compensation in all cases. If compensation is desirable on grounds of utility or charity, then there is no reason to think that the loss for which compensation is offered must have been the result of human agency. By the same token, compensation schemes designed to offset genetic disadvantages may be matters of distributive agency, but here, too, no need to associate the loss with human agency arises. But that is just the way in which claims to repair in corrective

justice differ essentially from all others. They are claims to repair in virtue of something someone else has done to the party who seeks redress. As such, they require human agency.

9. Rights and Wrongful Losses

Losses can also be wrongful if they result from conduct contrary to the constraints imposed by rights. This section provides an account of the notion of rights invasion and of wrong implicated by the principle of corrective justice. If corrective justice requires that losses resulting from wrongs, as well as those resulting from wrongdoing, be annulled, then we need an account of wrongs analogous to the account of wrongdoing presented in the previous sections. Wrongs are rights invasions. Rights invasions can be innocent or culpable, permissible or unjustified. In either case we need an account of rights.

The most well-known account of rights in the legal theory literature is given by Calabresi and Melamed.[15] Calabresi and Melamed distinguish among property rules, liability rules, and inalienability rules as ways of protecting or securing entitlements once conferred. Property rules protect rights by conferring on rights-holders the power to exclude and to alienate. Consent ex ante is a condition of legitimate transfer. Liability rules protect rights by conferring upon rights-holders a right to compensation in the event that someone takes that to which the right-holder is entitled. Here, compensation ex post is a sufficient condition of legitimate transfer. Inalienability rules protect entitlements by prohibiting rights-holders from transferring that to which they are entitled either by consent ex ante or compensation ex post.

Conventional legal theory wrongly assumes the Calabresi-Melamed framework. In classical liberal theory, to have a right is to have a protected sphere of autonomy or control. To say that I have a right to something is to say that I, not you or anybody else, has control over its use. That right is not protected when you and others have the power to decide the uses to which the things to which I am entitled are put, even if you must compensate me for whatever damages, if any, the uses to which you put my holdings impose upon me. A liability rule in this sense gives you options or control with respect to the resources to which I am entitled. The notion of a liability rule is thus incompatible with the idea of what it means to have a right within the classical liberal tradition. Liability rules in the Calabresi-Melamed sense cannot protect rights in the classical liberal tradition.

This leaves us with two possible options. One is to reject the classical liberal conception of rights in favor of a theory compatible with the idea

15. Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972).

of liability rules as ways of protecting rights. The other is to reject the view that liability rules protect rights. I suggest that we reject both the classical liberal theory as an account of the *meaning* or *syntax* of rights as well as the view that liability rules protect rights.

Since wrongs are invasions of rights, I want now to provide an analysis of rights. This analysis will explain the structure of rights in a way that makes sense of the Calabresi-Melamed framework but that avoids the problems associated with it that I have just illustrated. This account begins by drawing a distinction between the *meaning* and *content* of rights, what I have elsewhere called the distinction between the syntax and semantics of rights.[16] The syntax of rights specifies what is true of rights analytically or necessarily, what, in other words, is part of the very meaning of rights. So, for example, Dworkin's claim that rights act as trumps in political and moral arguments is, in his view, part of the meaning of rights.[17] If true, such a claim would be true of all rights or all rights of a certain kind, for example, political rights, as such. Someone else, such as Feinberg, would argue that all rights are *valid claims* of one sort or another.[18]

To say that rights are necessarily valid claims does not tell us a priori the *content* of those claims. All rights may be claims, but different rights can give rise to different claims. The content of claims associated with rights ownership is given by the *semantics* of rights. The semantics of rights is not given a priori and is not true of rights as such.

If the content of particular rights is not given a priori by a theory of the meaning of rights as such, what can be their source or foundation? The answer is that the content of rights is specified by the *norms* governing the particular domains constituting rights ownership. The norms that specify the content of rights derive from the underlying *normative* foundation or theory of rights. Let me make this clear by example.

In my view, the Calabresi-Melamed framework does not specify ways of protecting or securing rights. Rather, it constitutes a possible set of norms specifying the terms or conditions of legitimate transfer; it constitutes the transactional domain of rights and in doing so helps to determine the *content* of particular rights. Liability rules, then, do not protect rights. They help to specify a right's content within the transactional domain and they do that as follows: With respect to the transfer of resources to which someone is entitled, that person has a valid claim to compensation ex post as a condition of legitimate transfer and no power to exclude another's

16. Coleman & Kraus, *supra* note 1.

17. Professor Dworkin's argument appears in R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

18. Feinberg claims that *all* rights are a set of valid claims. For him, that is what it *means* for something to be a right; something could not be a right if it did not entail some set of valid claims. *See* Feinberg, *The Nature and Value of Rights,* 4 J. VALUE INQUIRY 243 (1970).

taking without her consent. Property rules give rights a different content. Under property rules, a rights-holder has the power to demand consent ex ante as a condition of transfer. That is what his right requires; that is its *content.* If the transactional content of a right is given by the disjunction of liability and property rules, an entitled party may be able to demand *either* consent ex ante or compensation ex post as a condition of transfer.

The underlying normative theory of rights tells us what the appropriate transaction rule should be in various empirical circumstances. The transaction rule in turn specifies the conditions of legitimate transfer and, in doing so, gives content to the particular entitlements. Only then can we determine whether compensation is owed and, if it is, whether it is owed because a right has been *invaded* or because rendering compensation is part of what one has to do in order to *respect* the constraints rights impose. For example, if the content of a right is specified by a liability rule only, then compensation is required in order to satisfy the constraints rights ownership imposes. If the content of a right is specified by the *conjunction* of property and liability rules in which the former provides the conditions of legitimate transfer, then compensation may be owed when the conditions of legitimate transfer have not been adequately respected. Thus, we cannot determine from the fact that compensation is paid whether it serves to legitimate a transfer consistent with the demands imposed by the victim's rights or whether instead it is owed because a wrong has been done.

Compensation can be owed both as a way of respecting rights and as a way of redressing a wrong. We cannot know which role compensation plays in a particular case until we know what the content of the relevant right is. That depends on the transaction rule and that, in turn, depends on the underlying normative theory.

10. Efficiency and the Content of Rights

In economic analysis, the underlying normative theory is efficiency. The transactional content of rights will then be given by that norm that is likely to promote efficiency under various circumstances. Typically, when transaction costs are low, resources can be moved to their efficient use when entitlements to them are defined by property rules. For similar reasons, when transaction costs are high, resources move to their efficient uses when entitlements to them are defined by liability rules. Thus, compensation under liability rules satisfies the conditions of legitimate transfer; it gives the entitled person exactly what she is entitled to. Under these conditions, compensation is rendered *not* to rectify a wrong, but to make conduct permissible which, in the absence of compensation, would have been wrong. Compensation is not owed because a right has been invaded; rather liability is rendered as a way of respecting the content of the victim's rights, of

satisfying the demands the rights impose upon the injurer. Thus, in the economic analysis, we begin to see torts as *private takings.*

Such an account presupposes a particular conception of what it is that rights or entitlements confer. If liability rules can fully specify their content, entitlements cannot secure domains of autonomy. Instead, entitlements secure particular levels of welfare or utility, and, because they do, liability rules can fully specify their content. The reason is simple. If entitlements secure a level of welfare or utility, then full compensation provides the entitled party with the guaranteed level of welfare the right protects. Anything less would not be full compensation.

We have drawn two implications of economic analysis. The first is that because the *content* of rights derives from the underlying efficiency theory, that to which a rights-holder is entitled will depend on what transfer rules are efficient under a variety of empirical conditions. Liability rules will often specify the content of rights under conditions of high transaction costs. This means that compensation ex post is often all that a rights-holder is entitled to and that providing such compensation is a way of respecting a right, of giving a rights-holder his *due.* Second, compensation cannot satisfy the demands rights impose if rights are thought of as domains of secured autonomy. Compensation gives one one's due only if rights secure welfare or utility; to have a right then is to be guaranteed a particular level of welfare. Compensation respects rights under liability rules not because it respects autonomy associated with classical liberal rights, but because it provides the level of welfare to which one is entitled.[19]

Compensation under liability rules can serve to respect rights and the conditions of legitimate transfer imposed by them. But compensation can have another function, depending on the content of rights, to redress for wrong done, for conduct that fails to comply with the constraints of rights ownership. This is the central insight of the theory of strict liability.

II. Strict Liability and the Content of Rights

The theory of strict liability is designed to show that liability can be both just and strict. Liability, in this account, serves not to legitimate forced transfers under the auspices of rights, but serves instead to rectify wrongs done to rights. It is a debt *owed* because the conditions of legitimate transfer under rights have been violated or disregarded. Torts invade rights because torts invade the autonomy of victims.

The proponent of strict liability also has a theory of rights, but his is opposite that of the economist. For the advocate of strict liability,

19. To accept economic analysis as a foundational theory is to reject the classical liberal conception of rights. For that reason it is puzzling that so many advocates of economic analysis think of themselves as classical liberals.

compensation under liability rules does not legitimate forced transfers; it is imposed to annul losses that result when injurers fail to comply with the terms of legitimate transfer specified by property rules. Compensation ex post is not the moral equivalent of consent ex ante. Rather, it is owed precisely because the injurer has taken without securing consent and, in doing so, has failed to respect the demands imposed by rights ownership.

Both the economist and the strict liability theorist accept forms of strict liability but radically different versions of it. For the economist, compensation respects the conditions of legitimate transfer imposed by rights understood in terms of welfare or utility levels. For the defender of strict liability, compensation is owed for rights invasions because the injurer has taken without the consent of the entitled party. The economist sees rights in terms of utility levels, the defender of strict liability in terms of protected spheres of autonomy. Both also see tort law as involving compensation and rights of victims but in radically different ways. Strict liability for the economist is to be understood on the model of private takings, in which compensation ex post legitimates involuntary transfers and in doing so respects the rights of victims. For its advocates, strict liability is understood as the result of conduct contrary to the demands of rights ownership in which compensation ex post redresses the wrong of failing to secure consent ex ante. The two theories may agree in their *extension* but not in their *intention*.[20]

In economic analysis, an efficient taking is justified provided compensation is paid; compensation justifies the taking. In the theory of strict liability, taking without consent is wrong and compensation is owed for wrong done. Taking without consent is wrong in every case, however, only if a rights-holder is empowered by her rights to exclude another's use. That power is given by property rules; that is, only if all relevant rights are property rights in the classical sense. This is, in fact, Epstein's view.[21] For him, the concept of property entails the theory of strict liability.

How does this argument go? Let's say that to own property is to possess a bundle of rights with respect to it. To have rights is to have valid claims and powers of certain sorts. To say that the theory of strict liability falls

20. Richard Epstein, who nowadays argues for the merger of economic with classical liberal legal theory, makes exactly this mistake. *See* Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y 713 (1989). He is overly impressed by the fact that both economics and classical liberal theory are endorsing principles of strict liability, and he is losing sight of the very different sorts of reasons the theories have for their endorsements. There is all the difference in the world, after all, in advancing the view that compensation should be paid whenever a loss is imposed because doing so legitimates the transfer—the private-takings model—and the view that compensation should be paid in order to redress for wrong done—the theory of strict liability. Both may downplay the relevance of fault but for very different reasons.

21. *See* Epstein, *supra* note 2.

out of the very concept of property must mean that among the rights one has when one has property is the right to compensation whenever someone transgresses or invades one of those rights.

This argument can be interpreted in either of two ways: one as articulating an analytic truth about the concept of property and the other as advancing a particular normative conception of property. As an analytic claim about the syntax of property, the view that strict liability is part of our understanding of the concept of property is clearly mistaken. Ownership entails the existence of various claims and powers, but the content of those claims and powers is not given a priori; it depends on the relevant norms of ownership. Those norms specify various conceptions of property. Different conceptions of property, that is, different theories about the nature of property and of the rights involved in its ownership, may give rise to different sets of claims. But these are varying conceptions of property, not the concept of property itself, and are contestable conceptions of it, conceptions that are essentially normative and that require substantive normative argument on their behalf. Nothing normative, including the right to compensation for all invasions, follows *logically* from the concept of property.

Instead, we need a particular conception of property and of the rights property ownership entails. There may well be such a conception that includes the right to recover for all losses caused by conduct contrary to the demands property ownership imposes, but that conception is not itself the concept of property. It is a normative theory, based not on conceptual analysis but on normative premises instead. Those premises need to be articulated and defended.

It is obvious that the view of property that gives rise to the theory of strict liability holds that the rights constituting ownership are property rights in the Calabresi-Melamed sense. To have property is to have control over it, to be in a position to specify fully the terms of transfer ex ante, and to demand consent as a condition of legitimate taking or transfer. If all of the rights one has in property are property rights, then any action contrary to the will or autonomy of the rights-holder is a rights invasion calling for compensation as a matter of justice. Thus, strict liability falls out of this normative conception of property. Thus, the theory of strict liability, like the economic analysis of law, presupposes a particular *normative* theory of rights.

The principle of corrective justice claims that losses and gains can be wrongful if they result either from wrongful harming or the invasion of a right. The theory of strict liability sees all cases of corrective justice as involving conduct invasive of a right. Thus, it does not directly countenance cases of the first or third sort. That should not be surprising since cases of the first sort involve wrongful harming or faulty conduct and the point of strict liability is to show how compensation and liability can be just in the absence of fault. The theory of strict liability is correct to point out that

liability and recovery can sometimes be matters of justice in the absence of fault—as in infringement cases—but wrong to miss entirely the centrality of fault to corrective justice.

The problem with the economic analysis is that not all cases that involve rights are private-takings cases. Sometimes compensation is owed as a matter of right not to legitimate transfer ex post, but to rectify for the failure to secure consent ex ante. Compensation is sometimes a matter of right because it rectifies a wrong; it does not right the wrong. Thus, the problem with the economic analysis is that even when it countenances rights as central to a victim's claim to repair it comprehends those rights in terms of liability rules. In doing so, it fails to understand the extent to which the claims to repair and liability can be rooted in corrective justice, not economic analysis. But if compensation is owed to rectify a wrong, then rights are not always guarantees to particular levels of welfare or utility. For liability insures that the appropriate or guaranteed level of utility is provided, and, were the content of rights given by such guarantees, compensation would always provide what rights require. A person who took without the rights-holder's consent would, provided he paid compensation, give the rights-holder precisely what she was due. Compensation, if full, would always legitimate and never rectify.

The correct theory is one that captures the insights and avoids the pitfalls of economic analysis and the theory of strict liability. This is the theory of corrective justice as I have articulated it. Unlike strict liability, the theory of corrective justice argues that claims to repair in corrective justice need not depend on a right having been invaded, wrongfully or otherwise. The wrongful invasion of a legitimate interest—a wrongful harming—can occasion wrongful losses. To the extent rights are involved, the strict liability theorist is correct that the claims to repair, *when they are matters of justice,* depend on the invasion of the right, not on the injurer's wrongdoing. However, not every claim to repair that depends on the existence of a right is grounded in the right having been invaded. Some claims to repair arise as a way of respecting the victim's right. This is the great insight of economic analysis, and it is an insight the strict liability theorist misses entirely. Broadly speaking, such claims to repair are matters of economics, not corrective justice.

CONCLUSION

If we return for a moment to the distinction among the three ways in which compensation and justification are connected in our ordinary morality—justification as a bar to recovery, justification and recovery, and justification only if recovery—we can put the previous discussion in a larger perspective. When the economist looks at tort law, she sees all of the cases as being of the third sort, private-takings cases. When the strict liability

theorist looks at tort law, she sees all of the cases as being of the second sort. When I look at tort law, I see all three sorts of cases as equally important. Cases of the first and second sort involve the principle of corrective justice; cases of the third sort do not. Anyone who thinks, therefore, that the principle of corrective justice can provide a full explanation of tort practice is, in my view, simply mistaken. On the other hand, anyone who thinks that tort law does not fundamentally implicate the notion of corrective justice is equally mistaken.