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## Is the Role of Tort to Repair Wrongful Losses?

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# 13

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### I. INTRODUCTION

OVER THE PAST 30 years, philosophers of tort law have performed invaluable work in restoring the concept of a ‘wrong’ to prominence in tort scholarship, and in building a persuasive case that no adequate account of tort can replace the idea of a ‘wrong’ with the idea of a ‘cost’. The backward-looking, bilateral structure of ordinary tort adjudication—which pits an injured victim against the party allegedly responsible for injuring that victim—is powerfully explained and justified by the thesis that the plaintiff has a claim for redress against the defendant when and *because* the defendant has wronged the plaintiff. The competing thesis that tort is a regulatory mechanism designed to minimise the combined costs of accidents and their prevention, by contrast, offers a forced and implausible account of the formal structure of a normal tort lawsuit.

Economic analysis explains tort’s preoccupation with the past as an oblique way of shaping the future. Past wrongdoers and the sunk costs for which they are responsible are false targets for cheapest cost-avoiders and avoidable future costs. Rational actors recognise that the past is beyond their control. They ignore sunk costs and focus on minimising expected costs—costs which have yet to materialise and which might still be avoided.<sup>1</sup> The only reason to hold people responsible for past harm

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<sup>1</sup> [C]ost to an economist is a forward-looking concept. “Sunk” (incurred) costs do not

is to induce people to avoid future harm, insofar as it is worth avoiding. And the right people to hold responsible are not those who have done past harm wrongly, but those who are in the best position to avoid future harm efficiently. Wrongdoers are false target defendants, and they are false targets for cheapest cost-avoiders. Properly understood, then, tort adjudication is not about responsibility for past harm, wrongly inflicted. Tort adjudication is about providing proper incentives to minimise the combined costs of paying for and preventing *future* accidents.<sup>2</sup>

In the same vein, the only reason to recognise *plaintiffs'* claims to redress for past harm wrongly inflicted is to enlist plaintiffs' participation in minimising the combined costs of harm and its avoidance going forward. Tort plaintiffs should prevail not when they show that defendants are responsible for having done them wrongful harm, but when they show that honouring their claims will promote the social interest in minimising the combined costs of accidents and their prevention, going forward. Properly understood, then, plaintiffs are private Attorneys-General. They sue to vindicate the general good, not their own individual rights.

Philosophers of tort have been quite right to criticise this account of tort adjudication as strained and unconvincing. They have been far less persuasive, however, when they have elaborated their general claim that tort is a law of wrongs through the more particular thesis that tort is about the *rectification* of wrongs. Influential legal philosophers have argued, for example, that 'tort law is best explained by corrective justice' because 'at its core tort law seeks to repair wrongful losses'.<sup>3</sup> Corrective justice theory, robustly conceived, insists that the obligation to repair wrongful loss is the paramount or sovereign principle of tort, the cornerstone on which the institution is constructed. Tort law's primary norms—its articulation of those wrongs whose commission gives rise to responsibilities of repair—must fit a mould imposed by its remedial norms. Because tort is an institution of corrective justice—an institution for the repair of wrongful losses—tort wrongs must be the kinds of things that issue

affect a rational actor's decisions ... Rational people base their decisions on expectations of the future rather than on regrets about the past. They treat by-gones as by-gones': RA Posner, *Economic Analysis of Law*, 7th edn (New York, Aspen Publishers, 2007) 7.

<sup>2</sup> 'I take it as axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents': G Calabresi, *The Costs of Accidents* (New Haven, Yale University Press, 1970) 26.

<sup>3</sup> J Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford, Oxford University Press, 2001) 9, 36. The first passage continues: 'The central concepts of tort law—harm, cause, repair, fault, and the like—hang together in a set of inferential relations that reflect a principle of corrective justice.' The principle of corrective justice 'states that individuals who are responsible for the wrongful losses of others have a duty to repair th[os]e losses': at 15 (emphasis altered). Ernest Weinrib has done as much as Jules Coleman to place the concept of corrective justice at the centre of tort scholarship. For Weinrib, tort is about 'wrongs' and although these usually result in wrongful losses, tort is not about wrongful losses. See the text accompanying n 4 below.

in wrongful loss. This requires, in turn, that tort be a realm of conduct-based wrongs.<sup>4</sup>

This account of tort law as an institution concerned at bottom with repairing wrongful losses is unconvincing. It suffers from two deep flaws. First, it puts the cart before the horse: primary tort obligations not to inflict wrongful harm are antecedent to and grounding of tort law's remedial responsibilities of repair. Those primary norms are not obligations to avoid committing corrective injustices. Primary tort norms articulate obligations to avoid harming people in various ways, and to respect their authority over their persons and their property in various ways. These wrongs are grounded not in a norm of corrective justice, but in rights people have as persons, such as the right to physical and psychological integrity.

Secondly, corrective justice theory itself offers an implausible account of the structure of tort law. Primary obligations in tort are neither all conduct-based nor all bilateral in their structure, and their violation does not always result in wrongful losses. Primary obligations are typically omnilateral—owed by everyone to everyone else. Some primary obligations protect rights whose violation need not result in harm, and other primary obligations are not conduct-based. Strict liabilities in tort characteristically criticise not the primary conduct responsible for harm, but secondary failures to repair harm justifiably inflicted. Strict liabilities are usually 'conditional wrongs'.

My argument will proceed in three parts. The first part explicates the robust conception of corrective justice summarised above, with particular attention to its powerful critique of the economic analysis of tort law. The second part develops the distinction between substantive or primary rights and responsibilities in tort and remedial or secondary ones. The third part explains why tort's obligation of reparation is essential to tort law, but not the master principle of tort.

Corrective justice theory, in short, faces problems both with fitting and with justifying basic features of tort. The overarching argument of this chapter, linking its various parts, is that tortfeasors are called to account for and because of their failures to discharge primary obligations, obligations either to avoid inflicting certain harms or to avoid harmlessly violating certain rights. Remedial responsibilities in tort are subordinate, not fundamental. They are conditioned on and arise out of failures to discharge antecedent primary obligations. Those primary obligations are the ground of tortfeasors' secondary responsibilities to repair the harms wrought by their torts. Repairing harm wrongly done is a next- or sec-

<sup>4</sup> The claim that tort is a law of 'conduct-based wrongful losses' is distinctive to Coleman, but related ideas such as the idea that tort is a realm of conduct-based wrongs have widespread currency: see, eg, JCP Goldberg and BC Zipursky, 'Rights and Responsibility in the Law of Torts' ch 9 of this book.

ond-best way of discharging an obligation not to do harm wrongly in the first place. Rights and remedies form a unity: the role of remedies is to enforce and restore rights. Corrective justice theories reverse this relation by putting remedy before right.

## II. TORT LAW AS CORRECTIVE JUSTICE

### A. Conceptions of Corrective Justice

Corrective justice is an ancient concept, and it has spawned a family of distinct modern conceptions. At its most general, corrective justice is defined in contradistinction to distributive justice and in terms of a relationship between the parties. Distributive justice, in the pertinent sense, has to do with the justice of holdings, with the distribution of wealth, income and property for example. Persons who participate in the same institutions of distributive justice have their claims against one another mediated by those institutions. Claims in distributive justice are not direct claims on other persons. We may have a claim in distributive justice to a certain share of society's wealth and income, but we do not have a claim in distributive justice against another person for that share.

Corrective justice, by contrast, involves the relationship between the parties to a claim. It requires a 'wrong' or a 'rights violation'. That wrong or rights violation must relate the parties directly to one another, and it must give rise to an obligation of reparation on the part of the defendant. Corrective justice has to do with claims that one person has against another, to repair a loss to the former for which the latter is accountable. 'Corrective justice', Ernest Weinrib tells us, 'treats the wrong, and the transfer of resources that undoes it, as a single nexus of activity and passivity where actor and victim are defined in relation to each other'.<sup>5</sup> Corrective justice 'joins the parties directly, through the harm that one of them inflicts on the other'.<sup>6</sup> It involves 'the correlativity of doing and suffering harm'.<sup>7</sup>

<sup>5</sup> EJ Weinrib, *The Idea of Private Law* (Cambridge MA, Harvard University Press, 1995) 56.

<sup>6</sup> *ibid.*, at 71.

<sup>7</sup> *ibid.*, at 77, 142. See also Weinrib's statement that '[c]orrective justice represents the integrated unity of doer and sufferer': at 213. Martin Stone places 'the unity of doing and suffering' at the heart of Weinrib's corrective justice theory: M Stone, 'The Significance of Doing and Suffering' in GJ Postema (ed), *Philosophy and the Law of Torts* (Cambridge, Cambridge University Press, 2001) 131, 131 ('Modern tort law looks out on a situation which is ubiquitous in human affairs and inherent, as a possibility, in the fact of human action: a situation where the actions of one person are connected to the misfortunes of another'). See also M Stone, 'On the Idea of Private Law' (1996) 9 *Canadian Journal of Law and Jurisprudence* 235. The font of this is Aristotle, *Nicomachean Ethics* (M Ostwald tr, Indianapolis, Bobbs-Merrill, 1962) paras 1132a2-1132a6:

By the time we reach Weinrib's emphasis on the 'unity of doing and suffering'<sup>8</sup>—with the 'doing' being the infliction of the suffering by violating the 'abstract equality of free purposive beings under the Kantian conception of right'<sup>9</sup>—we have left the common ground of corrective justice theories. Richard Epstein's theory of tort flies under the banner of corrective justice, but it applies the concept to an essentially causal form of liability. The concept of a wrong that is so central to Weinrib's account is attenuated in Epstein's.<sup>10</sup> George Fletcher, for his part, applies the term to a theory of liability for non-reciprocal risk imposition.<sup>11</sup> Jules Coleman asserts that the principle of corrective justice 'states that individuals who are responsible for the wrongful losses of others have a duty to repair th[os]e losses.'<sup>12</sup> Other conceptions can also be found in the literature.<sup>13</sup>

These diverse conceptions vary in a number of different ways. For our purposes, however, the important division among theories is the division between those that take corrective justice to be a subordinate principle or aspect of tort law and those that take it to be the paramount or sovereign principle of tort law. Endorsements of corrective justice as a subordinate principle of tort law are widespread. On a subordinate account, corrective justice is an aspect of tort—perhaps even a necessary and defining feature of the institution—but it does not play a fundamental role in explaining or justifying tort law. Instead, the justifications for tort law—inducing optimal accident prevention, say—call for corrective justice as an aspect of tort law.<sup>14</sup> Accounts which treat corrective justice as the sovereign principle of tort—a principle which grounds and explains the law of torts—work the other way around. Rather than being required by other, more basic, justifications for tort, corrective justice justifies tort law as an institution and governs its design.

Whether a worthy person has taken something from an unworthy person or vice versa, makes no difference ... the law looks to the difference in harm alone, and it treats them as equals, if the one commits and the other suffers injustice and if the one has inflicted and the other has suffered harm.

<sup>8</sup> Weinrib, *The Idea of Private Law*, above n 5, at 145.

<sup>9</sup> *ibid.*, at 58.

<sup>10</sup> RA Epstein, 'A Theory of Strict Liability' (1973) 2 *Journal of Legal Studies* 151.

<sup>11</sup> GP Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 *Harvard Law Review* 537.

<sup>12</sup> Coleman, *The Practice of Principle*, above n 3, at 15. See also above n 3 and accompanying text. For Coleman, 'wrongful losses' need not always arise from 'wrongs': J Coleman, *Risks and Wrongs* (Oxford, Oxford University Press, 2002) ch 17.

<sup>13</sup> See generally SR Perry, 'The Moral Foundations of Tort Law' (1992) 77 *Iowa Law Review* 449, 506–507 (taking the task of corrective justice theory to specify when the law may legitimately shift losses from one citizen to another); P Benson, 'The Basis of Corrective Justice and its Relation to Distributive Justice' (1992) 77 *Iowa Law Review* 515; RW Wright, 'Substantive Corrective Justice' (1992) 77 *Iowa Law Review* 625; A Ripstein, *Equality, Responsibility, and the Law* (Cambridge, Cambridge University Press, 1999) (taking the principle of corrective justice to specify when the state may justifiably force the transfer of one person's loss to another by means of compensatory payment).

<sup>14</sup> See the text accompanying nn 17–19 below for an argument of this kind.

If corrective justice is the fundamental principle on which tort law rests and if it asserts that justice requires repairing wrongful losses, then tort law must be concerned with the repair of *losses*, and those losses must be *wrongful*. More particularly, corrective justice theorists of the sovereign stripe insist that tort liability must attach to losses generated by *wrongful conduct*. On this account, corrective justice is an *independent* principle to which the law of torts answers. The proposition that wrongful losses should be repaired by those responsible for them is a free-standing principle of political morality, and it governs and justifies the law of torts. Corrective justice is also an *important* principle because it places a significant constraint on the character of tort's primary norms. For tort to be an institution of corrective justice, the primary norms of tort law must consist of conduct-based wrongs whose commission results in the infliction of loss. Wrongful losses are losses that issue from wrongful conduct.

## B. Corrective Justice as the Sovereign Principle of Tort Justice

Theorists like Coleman and Weinrib take corrective justice to be the paramount principle of tort law. Recall Coleman's claim that 'tort law is best explained by corrective justice' because 'at its core tort law seeks to repair wrongful losses'.<sup>15</sup> For this claim to be credible, 'wrongful losses' must be a concept which does some work and which has some constraining content. It must identify a class of phenomena to which a duty of repair properly attaches. Coleman's robust conception of corrective justice thus holds that it involves responsibility for *wrongful losses, harms or rights violations*, meaning losses that result from *wrongful conduct*.<sup>16</sup> Such conduct disrupts the pre-existing distribution of entitlements—it violates rights, inflicts injury, or does harm—but it gives rise to liability in *corrective justice* because it is *wrongful*, not just because it is disruptive of a pre-existing pattern of entitlement. Innocent disruptions—disruptions which are not wrongful—do not give rise to claims of corrective justice. Corrective justice is thus distinguished from distributive justice, and the criteria of wrongfulness that corrective justice places at the centre of tort law do the work of determining when liability in tort is justified.

<sup>15</sup> Coleman, *The Practice of Principle*, above n 3, at 9, 36. See also Weinrib, *The Idea of Private Law*, above n 5, at 133–34 (arguing that corrective justice is 'immanent' not just in tort, but in contract and restitution as well). Corrective justice is thus characteristic of private law in general, not of tort law in particular.

<sup>16</sup> See, eg, JL Coleman, 'The Practice of Corrective Justice' in DG Owen (ed), *Philosophical Foundations of Tort Law* (Oxford, Oxford University Press, 1995) 53, 56–57 (explaining that corrective justice imposes a duty on an injurer to repair the loss of a victim when the injurer is responsible for having brought the loss about by virtue of the injurer's wrongful conduct). Wrongdoing understood as wrongful conduct is also essential to Weinrib's theory of corrective justice in tort. For Weinrib, however, while liability for restitution is a species of corrective justice, it is a species of corrective justice which does not require wrongful conduct: see *The Idea of Private Law*, above n 5, at 140–42, 197–98.

The proposition that corrective justice involves both the infliction of harm or the violation of a right *and conduct that is in some way wrongful* establishes the *independence* of corrective justice from distributive justice, but it does not establish the *importance* of corrective justice, or show that it explains the law of torts. Richard Posner drove these points home in an important paper. Posner distinguished between what I have called subordinate and sovereign conceptions of corrective justice in tort, and went on to argue that '[o]nce the concept of corrective justice is given its correct Aristotelean meaning, it becomes possible to show that it is not only compatible with, but required by, the economic theory of law'.<sup>17</sup> Starting from the premise that corrective justice in its robust sense requires wrongful conduct, Posner argued first that economics could supply the requisite standard of conduct, and second that an economic conception of tort *required* corrective justice:

[For an economic theory,] law is a means of bringing about an efficient (in the sense of wealth-maximizing) allocation of resources by correcting externalities and other distortions in the market's allocation of resources. The idea of rectification in the Aristotelian sense is implicit in this theory. If A fails to take precautions that would cost less than their expected benefits in accident avoidance, thus causing an accident in which B is injured, and nothing is done to rectify this wrong, the concept of efficiency as justice will be violated. ... Since A does not bear the cost (or the full cost) of his careless behavior, he will have no incentive to take precautions in the future, and there will be more accidents than is optimal. Since B receives no compensation for his injury, he may be induced to adopt in the future precautions which by hypothesis ... are more costly than the precautions that A failed to take.<sup>18</sup>

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

When corrective justice is conceived of as compatible with economics in this way, however, it is neither sovereign nor justificatory. Corrective justice is a feature of tort law—a constitutive element of the legal subject. As such, it is not a justification but an aspect of the institution, which *requires* justification. For Posner, economics supplies the justification. When tort law is a society's principal mechanism for addressing accidents—and is otherwise efficient<sup>19</sup>—corrective justice is necessary to ensure

<sup>17</sup> RA Posner, 'The Concept of Corrective Justice in Recent Theories of Tort Law' (1981) 10 *Journal of Legal Studies* 187, 201.

<sup>18</sup> *ibid.*

<sup>19</sup> Posner's argument isolates reparation for harm wrongly done and assumes that tort law is otherwise efficient, in order to determine whether reparation for harm wrongly done is efficient. Without the assumption that tort law is otherwise efficient the argument does not go through. See J Gardner, 'Backward and Forward with Tort Law' in JK Campbell, M O'Rourke and D Shier (eds), *Law and Social Justice* (Cambridge MA, MIT Press, 2005) 255, 269–70.



that the law of torts as a whole induces efficient precaution. Corrective justice, in other words, is an instrument of wealth-maximisation.

Posner's account makes corrective justice a subordinate principle of tort liability even though it incorporates the idea that corrective justice involves liability for wrongful conduct. The reasons that we have for doing corrective justice are simply the reasons that we have for deploying tort law in the first place and, for Posner, those are reasons of efficiency. Tort law exists to induce efficient precaution, and corrective justice serves this end. Wrongful losses—meaning losses inflicted by inefficient and therefore wrongful conduct—must be shifted back onto the parties responsible for them, or else neither injurers nor victims will have the right incentives. Posner's theory pours the substance of efficiency into the form of corrective justice.

This union of efficiency and corrective justice is surprising. Corrective justice and the economic theory of tort appear to be rival conceptions. The economic conception of tort law is forward-looking, and it takes as its touchstone the attainment of a state of the world where value of a certain sort (wealth and, indirectly, welfare) is maximised.<sup>20</sup> The rights and duties of plaintiffs and defendants with respect to one another matter only insofar as they may be deployed as instruments towards the realisation of this end. Corrective justice theory, by contrast, is backward-looking. It aims to repair past wrongs. Corrective justice theory focuses on who has done what to whom, and on the immediate normative implications of that doing and suffering. It places the rights and wrongs of plaintiffs and defendants at the very centre of its account. Tort is about the obligations of wrongdoers to repair the wrongful losses that they have inflicted on their victims. The total amount of value in various states of the world is utterly beside the point.<sup>21</sup>

### C. Corrective Justice as a Practice of Principle

The leading proponents of corrective justice theory in our time—Coleman and Weinrib—reject Posner's conclusion that corrective justice is merely a feature of tort law to be explained, or even a subordinate principle of tort law. For Coleman and Weinrib, corrective justice is tort law's sovereign principle. 'Corrective justice', Coleman writes, 'expresses the principle that

<sup>20</sup> The standard criterion is the one stated by Guido Calabresi as quoted in above n 2. This simple formulation is usually refined to incorporate administrative costs as well: see R Cooter and T Ulen, *Law and Economics*, 5th edn (Upper Saddle River NJ, Prentice Hall, 2007) 359.

<sup>21</sup> To invoke a distinction made famous by Robert Nozick, the economic theory of tort is an 'end-state' theory whereas corrective justice is a 'historical' theory of tort justice: R Nozick, *Anarchy, State, and Utopia* (New York, Basic Books, 1974) 153–60.

holds together and makes sense of tort law'.<sup>22</sup> The principle that wrongful losses should be repaired is a *morally* authoritative norm in its own right—it is sovereign, not subordinate. Tort, in a word, is a body of law grounded on the principle that wrongful losses should be repaired.

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

Coleman and Weinrib's own theories spring, in turn, from their critiques of economics. Tort adjudication, they argue, must be understood to be the instantiation of a *principle* of corrective justice. For Weinrib, tort adjudication appears to be an entirely autonomous institution. Its principles are given by the *form* of tort law—especially the form of tort adjudication—and they neither need nor have any further justification.<sup>23</sup> For Coleman, the principle of corrective justice and the practice it sustains can be explained and justified by reference to more abstract and fundamental principles, such as the principle that the costs of life's misfortunes should be allocated fairly.<sup>24</sup> Tort adjudication cannot, however, be conceived of as a means to an independently valuable end. Instead, it must be understood to enforce claims that persons have the standing to

<sup>22</sup> Coleman, *The Practice of Principle*, above n 3, at 62. Coleman appears to have been more sympathetic to the idea that tort law might effect the union of efficiency and corrective justice earlier in his career. Compare JL Coleman, 'Mental Abnormality, Personal Responsibility, and Tort Liability' in BA Brody and HT Engelhardt Jr (eds), *Mental Illness: Law and Public Policy* (Boston, Springer, 1980) 107, 123 (stating 'that a duty of corrective justice is compatible with a substantive concept of unjust conduct based on economics or utilitarianism') with JL Coleman, 'The Structure of Tort Law' (1988) 97 *Yale Law Journal* 1233 (arguing that economics cannot account for the normative structure of tort law).

<sup>23</sup> This is epitomised by Weinrib's oft-cited remark that 'private law is just like love': Weinrib, *The Idea of Private Law*, above n 5, at 6. Weinrib writes (at 6):

Explaining love in terms of extrinsic ends is necessarily a mistake, because love does not shine in our lives with the borrowed light of an extrinsic end. Love is its own end. My contention is that, in this respect, private law is just like love.

Cf Weinrib's discussion of formalism, immanence and the autonomy of private law at 22–24, 206–08.

<sup>24</sup> See, eg, Coleman, *The Practice of Principle*, above n 3, at xiii, 4, 5, 8, 9–10, 43, 55, 58. Coleman writes (at 28 n 8): 'Anglo-American tort law *expresses, embodies, or articulates* corrective justice. Tort law is an institutional realization of principle, not an instrument in the pursuit of an external and hidden goal' (emphasis in original).

assert against one another in their own names and not, say, on behalf of an independently valuable end.

The divergence between Coleman and Weinrib over the autonomy of tort law signals a divergence between their views. To get a well-defined conception on the table, I shall therefore take Coleman's writings as my canonical example of a theory which takes corrective justice to be the sovereign principle of tort. On Coleman's account, because corrective justice rests on a genuine moral *principle*—the principle that wrongful losses should be repaired—corrective justice is not the goal of tort law. It is instead a justification for holding someone accountable for harm wrongly done. As a legal practice, corrective justice is not an instrument for the realisation of an end, but the instantiation and further specification of a morally authoritative principle of responsibility. It is *fair* to hold people responsible for repairing the wrongful losses that they inflict on others. This gives corrective justice a dual relation to tort practice. On the one hand, the principle of corrective justice grounds the practice. On the other hand, the practice puts flesh on the bare bones of the principle.<sup>25</sup>

*Wrongful human agency, correlativity, and repair* lie at the core of both tort law and corrective justice.<sup>26</sup> That tort law is about *agency* is evident enough to the pre-theoretic eye, but obscured by the theoretical apparatus of economics with its emphasis on achieving states of the world where value is maximised. The thesis that losses are more easily borne when they are widely dispersed, for example, gives us reason to be as concerned with concentrated losses caused by natural disasters as with concentrated losses caused by human malfeasance. Yet tort law denies this equivalence: it is about malfeasance, not misfortune.<sup>27</sup> In this respect, the law of tort taps into deep moral sentiments, sentiments constitutive of the sense of justice itself. We have reason to resent mistreatment by others, but it is anthropomorphic nonsense to complain of mistreatment by Mother Nature.<sup>28</sup>

<sup>25</sup> *ibid.*, at 62.

<sup>26</sup> *ibid.*, at 58: 'corrective justice requires that the costs of misfortune owing to human agency be imposed on the person (if any) whose wrongful conduct is responsible for those costs. The losses are made his by imposing on him an enforceable duty of repair.' See also Coleman, 'The Practice of Corrective Justice', above n 16, at 56–57, 66–67.

<sup>27</sup> 'There is a basic pretheoretical distinction between misfortunes owing to human agency and those that are attributable to no one's agency. The traditional philosophical distinction between corrective and distributive justice reflects, among other things, this pretheoretical distinction among kinds of misfortune': Coleman, *The Practice of Principle*, above n 3, at 44 (footnote omitted).

<sup>28</sup> In *Two Concepts of Liberty*, Isaiah Berlin quotes Jean-Jacques Rousseau's remark that '[t]he nature of things does not madden us, only ill-will does': I Berlin, *Two Concepts of Liberty* (Oxford, Clarendon Press, 1958) 2, reprinted in I Berlin, *Four Essays on Liberty* (Oxford, Oxford University Press, 1969). The remark is not attributed and appears to be Berlin's own translation of a passage in Rousseau's *Émile*: see J Rousseau, *Oeuvres complètes*, vol 4 (B Gagnebin and M Raymond eds, Paris, Éditions Gallimard, 1959) 320. John Rawls follows Rousseau's lead here in explicating what he calls 'the sense of justice':

That the pertinent agency must be and is *wrongful* is a proposition that looks to be at once self-evident and over-determined. Wrongfulness explains why the distinction between malfeasance and misfortune is intuitively basic. By themselves, natural events are just facts. Moral appraisal applies only to our *response* to natural facts. Human agency, by contrast, is immediately and directly subject to moral appraisal, and to negative moral appraisal if it is wrong. Wrongfulness gives us a reason to hold people responsible for the losses that they inflict on others. Last, but surely not least, wrongful conduct figures very prominently in the law of torts itself. Both intentional and negligent torts involve wrongful conduct. Perhaps for these reasons, robust conceptions of corrective justice take wrongfulness to be an indispensable element of tort liability.<sup>29</sup>

*Correlativity* is central to tort because

[t]he claims of corrective justice are limited ... to parties who bear some normatively important relationship to one another. A person does not ... have a claim in corrective justice to repair in the air, against no one in particular. It is a claim against someone in particular.<sup>30</sup>

Correlativity thus refers to the bilateral (or bipolar) structure of tort adjudication, which itself mirrors the underlying interaction of a tortious wrong. Weinrib explains that '[c]orrective justice joins the parties directly, through the harm that one of them inflicts on the other.'<sup>31</sup> It involves 'the correlativity of doing and suffering harm'.<sup>32</sup> '[T]he direct connection between the particular plaintiff and the particular defendant' is 'the master feature characterizing private law'.<sup>33</sup> Coleman concurs, saying that '[t]ort law's core is represented by case-by-case adjudication in which particular

see J Rawls, *Collected Papers* (S Freeman ed, Cambridge MA, Harvard University Press, 1999) ch 5, which begins with a reference to Rousseau and *Émile* (at 96) and goes on to observe (at 111) that '[r]esentment and indignation are moral feelings. Resentment is our reaction to the injuries and harms which the wrongs of others inflict upon us, and indignation is our reaction to the injuries which the wrongs of others inflict on others.' See also PF Strawson, 'Freedom and Resentment' in PF Strawson (ed), *Studies in the Philosophy of Thought and Action* (Oxford, Oxford University Press, 1968) 71 (showing that 'reactive attitudes' such as resentment are fundamental to our sensibilities and cannot be accounted for by instrumentalism).

<sup>29</sup> Coleman speaks of duties as specifying norms of *conduct*: 'the duties articulated in the law of torts purport to express genuine reasons for acting, or standards with which one ought to comply' (*The Practice of Principle*, above n 3, at 35 n 19). In contrast, 'economic analysis eliminates the concept of duty in tort law—that is, it eliminates the concept of something that can be defended as a *standard of conduct* and not merely as a condition of liability': at 35 n 19 (emphasis added). Recall, too, that the principle of corrective justice 'states that individuals who are responsible for the wrongful losses of others have a duty to repair the losses': at 15 (emphasis altered).

<sup>30</sup> Coleman, 'The Practice of Corrective Justice', above n 16, at 66–67.

<sup>31</sup> Weinrib, *The Idea of Private Law*, above n 5, at 71.

<sup>32</sup> *ibid.*, at 73, 78. See also above n 7, including the quotes from Stone and Aristotle in that footnote.

<sup>33</sup> Weinrib, *The Idea of Private Law*, above n 5, at 10.

victims seek redress for certain losses from those whom they claim are responsible'.<sup>34</sup>

The structure of tort adjudication coheres smoothly with the basic principle of corrective justice. Having a wronged plaintiff seek reparation from the wrongdoer who has injured him or her is the most natural way to give institutional expression to the principle that persons who are responsible for wrongly injuring others ought to repair the harm they have done.<sup>35</sup> Economic analysis, moreover, cannot offer an equally elegant and persuasive explanation of tort's adjudicative structure. On its face, tort law is a backward-looking practice concerned with repairing harm wrongly done, but economics takes it to be a forward-looking regulatory mechanism, designed to minimise the combined costs of accidents and their prevention. Generally speaking, this requires pinning accident costs on the 'cheapest cost-avoider'—on the party in the best position to minimise the combined costs of accidents and their prevention going forward.

Because it is only contingently the case that the particular injurers responsible for particular injuries are the cheapest cost-avoiders with respect to the general classes into which those injuries fall, economic theory is hard-pressed to explain why plaintiffs always have rights against and only against those who have wronged them.<sup>36</sup> To induce efficient precaution going forward, we ought to pin liability on cheapest cost-avoiders going forward. The economic theory of tort can explain tort law's backward-looking focus on past wrongdoers only by saying that we have good reason to think that past wrongdoers probably are the cheapest cost-avoiders going forward.

This argument fits tort practice poorly and justifies it only very weakly. Tort law's penchant for holding wrongdoers responsible for the wrongs that they commit is deep-seated. You might, indeed, reasonably regard this feature as one of tort law's constitutive characteristics. Yet the logic of the economic theory of tort holds that wrongdoers are merely false targets for cheapest cost-avoiders. The theory's logic requires pinning lia-

<sup>34</sup> Coleman, *The Practice of Principle*, above n 3, at 16.

<sup>35</sup> For Weinrib, this relationship expresses the 'unity of doing and suffering', the intrinsic moral salience of the doer of harm as someone specially responsible for the harm that he or she has wrongly done. '[T]he private law relationship forms a normative unit that integrates the doing and suffering of harm and that dovetails with the bipolar litigation between plaintiff and defendant. ... Correlativity locks the plaintiff and defendant into a reciprocal normative embrace': Weinrib, *The Idea of Private Law*, above n 5, at 142. Weinrib's view appears more metaphysical than Coleman's in that it appears to take the structure of tort law to reflect an essential and eternal form of human interaction. Recall Stone, 'The Significance of Doing and Suffering', above n 7, at 131: 'Modern tort law looks out on a situation which is ubiquitous in human affairs and inherent, as a possibility, in the fact of human action: a situation where the actions of one person are connected to the misfortunes of another.'

<sup>36</sup> Hard-pressed, but not without resources. It may be, as Coleman recognises, that administrative costs (eg, search costs) make tort litigation as it now exists a far more competitive institutional mechanism for inducing optimal accident precaution than it appears to be at first glance. See, eg, Coleman, *The Practice of Principle*, above n 3, at 18–20.

bility on cheapest cost-avoiders—and not wrongdoers—whenever the two diverge and whenever we can find the cheapest cost-avoiders. Tort law shows no such tendency.

The justificatory force of the economic theory is weak because it makes tort's practice of holding wrongdoers accountable a mere rule of thumb whose rationale is epistemic. It does not capture the *normative* force of tort practice. Tort practice looks backward towards breach of pre-existing obligations and asks tortfeasors to make right the harms they have wrongly done by breaching those obligations. The proposition that society would be better off in the future if some party were held accountable for the costs of accidents which they are in the best position to minimise going forward is a reason which can contingently call for holding that party liable for harm done in the past, but it does not capture the obligatory character of defendants' duties of repair.<sup>37</sup>

The implausibility of the economic account of tort adjudication is thus entangled with and compounded by the weakness of its explanation of the central substantive concepts of tort law—concepts such as duty, 'harm, cause, repair, fault and the like'.<sup>38</sup> The failure is a failure to do justice

<sup>37</sup> *ibid.*, at 14–21, especially at 21. Weinrib likewise argues that extrinsic goals cannot make sense of the bipolar relationship between plaintiff and defendant, and that the relationship must be understood in terms of an immanent juridical relationship: EJ Weinrib, 'Understanding Tort Law' (1989) 23 *Valparaiso University Law Review* 485; Weinrib, *The Idea of Private Law*, above n 5, at 37–38, 142, 212–13. Weinrib's argument has a more metaphysical aspect: the bipolar structure of tort adjudication is indispensable to tort law because it corresponds to the underlying structure of the interaction between persons that characterises all torts. See, eg, Weinrib, *The Idea of Private Law*, above n 5, at 215:

The formalism of corrective justice therefore lies not in its existing somewhere apart from the social world, but in its representing the unifying structure of the doer-sufferer relationship. Because it renders the interaction of doer and sufferer intelligible from within, corrective justice takes the doing and suffering of harm—as well as the conditions under which such interaction occurs—for granted. Accordingly, corrective justice both draws on a social and empirical reality and impresses that reality with the stamp of its regulating form.

Cf Stone, above n 7 (describing the unity of doing and suffering as a possibility inherent in human action). Coleman's position is simply that the practice embodies and is grounded by a principle of corrective justice that cannot be explained instrumentally.

<sup>38</sup> Coleman, *The Practice of Principle*, above n 3, at 9–10. See also Coleman, 'The Structure of Tort Law', above n 22. In conjunction with the basic structural features of tort adjudication, these concepts form what Coleman calls the pre-theoretic core of tort law: Coleman, *The Practice of Principle*, above n 3, at 15 n 2. As a pragmatic conceptualist, Coleman believes that tort theory must explain how the central concepts of tort law hang together. Coleman is concerned with whether views can explain the conceptual structure that forms the heart of tort law. Weinrib similarly believes that economic instrumentalism cannot explain the structure of tort law, but as a committed legal formalist, he believes that private law must be understood on its own terms and that 'an immanent moral rationality' is latent in the form of tort law: Weinrib, *The Idea of Private Law*, above n 5, at 24–25. Legal theory elicits that logic and makes it explicit. For Weinrib, corrective justice is a distinctively juridical concept: at 210–14. Coleman and Weinrib agree that tort law is an institutional expression of corrective justice, but Weinrib thinks that concept arises within tort law itself, whereas Coleman does not. Moreover, for Coleman, corrective justice is distinctive to tort law, whereas Weinrib believes that it is characteristic of private law in general.

to the way that these concepts operate as *reasons* for the imposition of liability in tort. For the law of negligence, breach of duty is a *reason* for the imposition of liability. Duty specifies an obligatory standard of conduct. In conjunction with the other elements of a negligence claim, failure to conform to that standard is *the* reason why tort holds a defendant responsible for harm done to a victim by the breach of that duty. Tort law looks backward at the past interactions of the parties in order to determine if the defendant should be held responsible for the plaintiff's injury. Defendants are liable to plaintiffs *because* they breach duties they owe to the plaintiffs and because those breaches are the actual and proximate causes of the harms that the plaintiffs suffer.

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

[S]tandard economic account[s] ... do not use efficiency to discover an independent class of duties that are analytically prior to our liability practices. ... What counts as a 'duty' or a 'wrong' in a standard economic account depends on an assessment of what the consequences are of imposing liability in a given case.<sup>39</sup>

Economic analysis looks forward to the reduction of future accident costs. Legal decisions must therefore be justified by good future consequences. They cannot be vindicated (at least not directly) by the correction of past injustices. Past accident costs are sunk; rationality requires that we disregard them and assign liability to whoever is in the best position to prevent *future* accidents at the lowest cost.

For orthodox economic analysis, liability does not follow from breach of duty when breach of duty is the actual and proximate cause of harm done. Liability follows from and because of a conclusion that the imposition of liability for past harm will induce optimal prevention of accidental harm going forward. On this view, the central concepts of tort law—duty, breach, actual and proximate cause, and harm—do no real work.<sup>40</sup> Judges say that they are imposing liability in negligence because duty, breach, actual and proximate cause, and injury are present, but standard economic analysis takes them to be justified in what they are doing only if they are engaged in a transaction cost minimising search for cheapest cost-avoiders. On the standard economic analysis view, duty, breach,

<sup>39</sup> Coleman, *The Practice of Principle*, above n 3, at 35. Coleman casts this argument as the incarnation of a general critique of policy argument in legal reasoning, understanding policy to be concerned with achieving consequences which are desirable overall. Even sharper objections to the use of policy arguments in tort appear in Weinrib's work: see, eg, *The Idea of Private Law*, above n 5, at 210–14, 218–22 (arguing that policy arguments are impermissible because they introduce ends extrinsic to the interaction between the parties to a tortious wrong, violate the equality of the parties and are therefore incompatible with doing justice between them, and let loose objectives which must cover every case within their purview, thereby consuming the law).

<sup>40</sup> Coleman, *The Practice of Principle*, above n 3, at 34–36.



actual and proximate cause, and injury are not *reasons for* the imposition of liability. They are evidentiary markers which do a respectable job of identifying cheapest cost-avoiders going forward.

The separate weaknesses of the economic theory of tort compound into a larger whole because the structural and substantive elements of tort law themselves form a unified whole. ‘The relations among the central concepts of tort law—wrong, duty, responsibility, and repair—are best understood as expressing the fundamental normative significance of the victim-injurer relationship as it is expressed in the principle of corrective justice.’<sup>41</sup> Because economic analysis fails to explain both the structural and the substantive cores of tort, it cannot do justice to the larger whole that they form.

The success of corrective justice as a theory of tort is the flip side of the failure of economic analysis. The basic structural features and main concepts of tort law embody the principle of corrective justice. The bilateral form of the lawsuit tracks the substantive responsibility of a wrongdoer for the wrongful losses that he or she has inflicted. The retrospective character of tort adjudication reflects the fact that tort law is corrective—the fact that its sovereign principle requires wrongdoers to repair the wrongful losses that they have inflicted. Duty and breach articulate criteria of *wrongfulness* and thereby ensure that the law of tort honours the principle of corrective justice in its robust form. If tort regularly enjoined repair of losses that stemmed from *innocent* conduct, it could not be said that the law of tort institutes the principle ‘that individuals who are responsible for the *wrongful* losses of others have a duty to repair them.’<sup>42</sup> Causation connects the wrongdoer to the loss wrongfully suffered by the victim and so plays an essential role in establishing the special responsibility of the wrongdoer for that loss.

Corrective justice thus gives each of the elements of a typical tort suit an unforced, intuitive interpretation and justification. The institutional practice of tort law instantiates and fleshes out the abstract moral principle of corrective justice.

### III. RIGHTS AND RESPONSIBILITIES IN TORT

In thinking about the law of torts, it is natural to distinguish between primary (or substantive) responsibilities and secondary (or remedial) ones. Primary responsibilities in tort are responsibilities to avoid harming others in various ways, to avoid violating certain of their rights even when no harm is thereby done, or to avoid unreasonably failing to repair harm

<sup>41</sup> *ibid*, at 23.

<sup>42</sup> See, eg, *ibid* at 15, 36 (emphasis added).



reasonably inflicted.<sup>43</sup> Remedial responsibilities are responsibilities of repair, responsibilities triggered by the breach of various primary obligations.

When the distinction between these two kinds of responsibilities is noted, it is natural to think that primary responsibilities are, well, primary—that is, antecedent to and more important than secondary ones. Primary responsibilities in tort are omnilateral and standing.<sup>44</sup> We are all obligated, for example, not to defame or defraud one another. Omnilateral obligations, moreover, are not the same as indefinitely extensible bilateral ones. When obligations are omnilateral, what we owe to one person may be affected by what we owe to other people. The incorporation of the traffic code rule ‘speed limit 25 [in the vicinity of primary and secondary schools] when children are present’ into Californian tort law is a mundane case in point.<sup>45</sup> That norm makes the care owed to any one child depend in part on whether that child is in the company of other children. Whereas primary responsibilities in tort are omnilateral and standing, tort’s remedial responsibilities are bilateral and conditional. If I defame or defraud you, you may require me to repair the harm that I have done. That obligation, however, is particular to me, owed to you, and conditioned on my breach of my primary obligation of harm avoid-

<sup>43</sup> The second clause of this sentence refers to circumstances where tort law protects autonomy rights. Some batteries, trespasses, and conversions are cases in point: see text accompanying n 93 below. The last clause of the sentence describes the general character of strict liability in tort. The duty here has the structure of eminent domain doctrine, transposed to the realm of private law. Just as eminent domain makes the payment of just compensation a condition for the legitimate taking of private property for a public purpose, so too strict liability doctrines in tort make reparation for harm done a condition for the legitimate infliction of certain reasonable risks (eg, the risks of blasting) or harms (eg, the harm reasonably inflicted on the plaintiff’s dock when you lash your ship to the dock in a hurricane to avoid the ship’s destruction). I shall have more to say about strict liability in part IV(D)(ii) below.

The distinction between primary or substantive obligations and remedial ones in tort is a familiar one: see, eg, TC Grey, ‘Accidental Torts’ (2001) 54 *Vanderbilt Law Review* 1225, 1242–44. The distinction is naturally salient when corrective justice conceptions of tort are under consideration: see, eg, KW Simons, ‘Jules Coleman and Corrective Justice in Tort Law: A Critique and Reformulation’ (1992) 15 *Harvard Journal of Law and Public Policy* 849, 867–68; H Sheinman, ‘Tort Law and Corrective Justice’ (2003) 22 *Law and Philosophy* 21, 32–34. For the sake of convenience, I will refer to primary duties as ‘duties of harm avoidance’, even though duties of harm avoidance are only the most common kind of primary duty in tort.

<sup>44</sup> There are exceptions to this rule, but they all appear to involve affirmative obligations. These exceptional obligations are bilateral, affirmative, and have a quasi-contractual quality in that they arise out of assumptions of responsibility on the part of one person toward another: see R Stevens, *Torts and Rights* (Oxford, Oxford University Press, 2007) 9–14, 114–24; A Beaver, *Rediscovering the Law of Negligence* (Oxford, Hart Publishing, 2007) ch 8.

<sup>45</sup> Cal Veh Code § 22352(a)(2). Not all tort duties are sensitive to the numbers. While greater precautions may be necessary to make a skyscraper safe, the fact that skyscrapers house more people than single family homes do is not a reason to make the homes less safe.

ance. Secondary, remedial responsibilities thus come into play only when primary, substantive responsibilities are not discharged.

The fact that primary obligations are omnilateral, not bilateral is of immense importance. Primary obligations in tort are owed by everyone, and primary rights in tort are good against everyone. This fact must play a decisive role in determining the character and content of tort obligations. To put the matter in a Kantian idiom, primary responsibilities must be articulated by asking if they could be willed generally—as binding law for a plurality of persons, with distinct ends and aspirations, concerned to interact with each other on mutually acceptable terms—not whether they could be willed bilaterally, between one particular plaintiff and one particular defendant.<sup>46</sup> The facts that tort rights and obligations attach to persons simply *as* persons residing within some jurisdiction, and run from every person in the jurisdiction to every other person, need to be front and centre in our thinking about the character and content of primary obligations. It is therefore unhelpful simply to relax, or broaden, our conception of corrective justice so that it encompasses primary obligations as well as secondary ones. Importing the bilateral logic of remedial rights into our understanding of primary rights only serves to distort our understanding of primary rights and responsibilities.<sup>47</sup>

The priority of primary responsibilities is in part a logical or conceptual one. Remedial responsibilities arise out of the breach of antecedent primary duties.<sup>48</sup> But the priority of primary responsibilities is not just conceptual, it is also normative.<sup>49</sup> Remedial responsibilities are second-best ways of complying with obligations that are best honoured by discharging primary responsibilities. Remedial responsibilities draw their obligatory force from the persisting normative pull of the primary obligation that has not been discharged. Suppose, for example, that Arthur punches Jules in the nose without provocation, excuse, or justification. Arthur has battered Jules, breaching his obligation not to do so and violating Jules' right

<sup>46</sup> Here, I think that I am in substantial agreement with a sentiment expressed by Stevens, above n 44, at 328 ('the scope of our rights is not solely determined by considerations of what is fair as between claimant and defendant, ignoring all others').

<sup>47</sup> For an example of such an approach see Wright, above n 13. The substantive basis of corrective justice is distinct from corrective justice itself.

<sup>48</sup> See, eg, Coleman, *The Practice of Principle*, above n 3, at 32 ('Someone does not incur a second-order duty of repair unless he has failed to discharge some first-order duty'); Sheinman, above n 43, at 30–31 (explaining the conceptual or functional priority of primary obligations in tort law).

<sup>49</sup> For observations along these lines, see N MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Oxford, Oxford University Press, 1982) ch 11; J Raz, 'Personal Practical Conflicts' in P Baumann and M Betzler (eds), *Practical Conflicts: New Philosophical Essays* (Cambridge, Cambridge University Press, 2004) 172, 182. This line of argument is developed powerfully by John Gardner and is dubbed 'the continuity thesis': J Gardner, *What Is Tort Law For? Part I: The Place of Corrective Justice* (Oxford Legal Studies Research Paper No 1/2010, University of Oxford, 18 January 2010) at ssrn.com/abstract=1538342, accessed on 28 January 2011.

that he not do so. By battering Jules, Arthur has neither discharged his obligation *not* to batter Jules nor relieved himself of the responsibility to comply with that obligation. Arthur is still bound by the obligation that he has breached, but he has placed himself in a position where he cannot comply fully with its commands. Now, the best that Arthur can do is to repair the harm that he has wrongly done. His duty to repair that harm arises out of his failure to discharge his duty not to harm Jules wrongly in the first place.

What this example shows is that primary responsibilities ground remedial ones. The first-best way of complying with tort obligations is not to harm anyone, or violate their rights in ways that tort law proscribes. Repairing the harm you have done by violating someone's right is the next-best way of respecting that right. It would have been better not to violate their right in the first instance. The flip side of this coin is that primary rights—to reasonable care, not to be battered, and so on—are more important than remedial ones. My right to reasonable care is best respected when others take care not to injure me, not when they repair the harm that they have done by carelessly injuring me. Given the choice between a law of torts which effects perfect compliance with its obligations of repair and one that effects perfect compliance with primary responsibilities of harm avoidance, we should not hesitate a moment before choosing perfect compliance with primary responsibilities of harm avoidance. When the primary norms of the law of torts are perfectly complied with, there is no work left for its remedial norms.

The general point here is that in tort law, as elsewhere, remedies exist to enforce and to restore rights.<sup>50</sup> The *prospect* of a remedy helps to assure a right-holder that they can enforce their right if necessary and by so doing, gives others reason to respect their right. The *enforcement* of a remedy when a right has been violated serves to restore the right. To be sure, rights and remedies are reciprocal: we look to a right to determine what a remedy should be, and we look to a remedy to determine what a right is. The two go hand in hand and must be understood in relation to one another. Even so—and even though remedies are partially

<sup>50</sup> See, eg, *Smothers v Gresham Transfer Inc* 23 P 3d 333 (Or 1999) 348, 356 (Leeson J). HM Hart Jr and AM Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (WN Eskridge Jr and PP Frickey eds, New York, Foundation Press, 1994) 122 (emphases in original) give a classic formulation of this point:

Every general directive arrangement contemplates something which it expects or hopes to happen when the arrangement works successfully. This is the primary purpose of the arrangement, and the provisions which describe what this purpose is are the *primary provisions*.

Every arrangement, however, must contemplate also the possibility that on occasion its directions will not be complied with. ... The provisions of an arrangement which tell what happens in the event of noncompliance or other deviation may be called the *remedial provisions*.

constitutive of rights—remedies are also properly the servants of rights. Remedies are governed by and subordinate to rights because the content and the contours of a remedy ought to be fixed by determining what the enforcement or the restoration of the right requires.

In tort, the remedy fixed upon by corrective justice theorists—the duty to repair a loss—is pre-eminent because tort is preoccupied with harm in general and physical harm in particular. Harms—broken arms or legs, for example—leave their victims with injuries to be repaired (if the underlying right not to be harmed is to be restored). When this is not the case—when the underlying right is, say, to exclusive control or dominion over real property and the violation of that right does not inflict an injury to be repaired—the appropriate remedy is different, and it is quite wrong to say that the tort instantiates the corrective justice principle that wrongful losses should be repaired. For example, injunctive relief is available as a matter of right in trespass cases because injunctive relief normally restores the right to control who or what enters one's real property.<sup>51</sup> Remedying harmless trespasses by requiring merely that the wrongdoer repair the harm that he or she has wrongly done would not vindicate the right. The violation of the right need not result in harm. Making reparation for harm done the standard remedy for trespass would, indeed, enable those whose trespasses inflict no injury to continue trespassing as long as they were prepared to pay nominal damages.<sup>52</sup> In both the trespass case and the wrongful physical injury case, the remedy is governed by the right. The duty to repair wrongful loss figures prominently in tort only because most torts involve harms, and harms leave their victims worse off—in need of repair.

The lesson of these examples is that remedies are prominent in tort, but their prominence is not the consequence of tort law's adherence to a free-standing principle of corrective justice. Remedies are prominent in tort because rights are fundamental to tort and there is a unity of right

<sup>51</sup> 'Generally an injunction will lie to restrain repeated trespasses': *Planned Parenthood of Mid-Iowa v Maki* 478 NW 2d 637 (Iowa 1991) 639 (Larson, Carter, Lavorato and Snell JJ). See generally DB Dobbs, *Dobbs' Law of Remedies: Damages, Equity, Restitution*, 2nd edn (St Paul MN, West Publishing, 1993). The point here is not that injunctive relief is the appropriate remedy for harmless torts and only for harmless torts, but that right determines remedy in the sense that the proper remedy is the remedy that enforces, restores, or vindicates the right. Trespass is an instance of an important category of torts which protect 'autonomy rights'—powers of control or zones of discretionary choice. Following Arthur Ripstein I call torts of this kind 'sovereignty-based' torts: see below n 65 and accompanying text.

<sup>52</sup> In *Jacque v Steenberg Homes Inc* 563 NW 2d 154 (Wis 1997), punitive damages were awarded against a defendant who had dragged a trailer home across the plaintiff's snow-covered property without the plaintiff's permission. Because its trespass did no harm, the defendant was otherwise liable only for nominal damages. The award of punitive damages both punished a deliberate, harmless trespass and enforced the plaintiff's right to exclusive control by stripping that one-shot trespass of the economic advantage that made its commission rational.

and remedy. You do not have a legal right unless you have some remedy for its violation.<sup>53</sup> When Arthur punches Jules in the nose, he violates Jules' right to the physical integrity of his person. If Jules has no legal remedy for that violation of his right, his right is legally meaningless. Absent some special institutional arrangement, Jules' claim for redress is naturally directed against Arthur. After all, Arthur is the person who has violated Jules' right. By so doing, he has opened himself up to responsibility for restoring Jules' right. He stands in a special and unique relation of responsibility to Jules.

Putting remedial responsibility at the centre of tort distorts our understanding of the subject in subtler ways as well. By mistakenly identifying tort and tort alone with responsibilities of repair, remedial theories misconceive tort law's relation to the rest of private law. Rightly, remedial theories recognise that tort law enforces and restores rights in a particular way, namely, by enabling the victims of tortious wrongdoing to obtain redress for the wrongs done to them from those who have done them wrong. This, however, is a distinctive feature of private law in general, not a distinctive feature of the law of torts in particular. Contract, property, and restitution also enforce rights by empowering those whose rights have been violated to seek redress from those who have done the violating. If a duty of *repair* is more characteristic of tort than it is of contract or restitution, that is because primary tort rights differ from primary contract or restitutionary rights, and those differences are reflected in the corresponding remedies. We lose sight of the fact that private law in general has a distinctive relation to rights when we identify responsibility to restore a right wrongly violated with tort and tort alone. And we fail entirely to see that tort is distinguished from other private law subjects by the character of the primary rights and obligations it enforces.

Putting responsibilities of repair at the centre of tort law also obscures tort law's relation to administrative alternatives to tort, such as workers' compensation. When we take the common law of tort to be defined by duties of repair owed to named victims by named tortfeasors, we must regard workers' compensation and similar administrative schemes as radically discontinuous with the law of torts. After all, these schemes abolish private law duties of repair and private law mechanisms for the enforcement of rights and replace them with public law systems and mechanisms.

<sup>53</sup> *Marbury v Madison* 5 US 137 (1803) 163 famously holds that 'the very essence of civil liberty ... consists in the right of every individual to claim the protection of the laws, whenever he receives an injury'. That holding invoked William Blackstone's claims that 'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded' and that 'every right, when withheld, must have a remedy, and every injury its proper redress': at 163, quoting 3 Bl Comm 23, 109. Blackstone himself was following Coke: see, eg, 1 Bl Comm 55-56; 2 Co Inst 55-56, citing Magna Carta cls 39-40. The remedies clauses found in many American State Constitutions are a direct expression of the maxim that 'for every right there must be a remedy'.

While it is surely correct to say that workers' compensation is 'public law' and tort is 'private law', it is misleading to insist that the two legal regimes are radically discontinuous. Workers' compensation and the common law of torts are both continuous and discontinuous, connected and competitive.<sup>54</sup> They are continuous because they are both legal regimes which aim to institute the right to the physical integrity of one's person.<sup>55</sup> They are competitive because they are alternative legal mechanisms for instituting the same right with respect to various kinds of accidental injuries,<sup>56</sup> and they battle for dominion over various legal domains. Workers' compensation schemes, for example, displace the common law of negligence from the domain of workplace injuries. Administrative schemes for nuclear accidents, or health injuries incident to mining coal, displace tort from other domains.<sup>57</sup>

The proposition that administrative schemes such as workers' compensation and the common law of torts are alternative ways of instituting the right to the physical integrity of one's person seems obvious, but it bears on our understanding of tort only if we recognise that within the law of torts itself, remedial rights and responsibilities are derivative of primary—or substantive—ones. Only then can we conceive of these regimes as both competitive and continuous. If we identify tort with bilateral duties to repair wrongful losses, the two regimes will be radically discontinuous. One of the costs of taking them to be discontinuous is that we will forgo a first principle by reference to which we might choose intelligently between them. The question 'which legal regime gives better institutional expression to the right to physical safety?' will have been swept out of sight. Our law, however, regards tort and its administrative alternatives

<sup>54</sup> See, eg, J Smith, 'Sequel to Workmen's Compensation Acts' (1914) 27 *Harvard Law Review* 235, 344 (arguing that the workmen's compensation acts were organised on a principle of strict liability which could not be reconciled with the fault liability of the common law of torts and prophesying that the common law of torts would be reconstructed to be more compatible with the normative logic of workers' compensation). For further discussion see GC Keating, 'The Theory of Enterprise Liability and Common Law Strict Liability' (2001) 54 *Vanderbilt Law Review* 1285.

<sup>55</sup> Historically, the law of torts has been preoccupied with physical harm, and thus with the right to physical security. Over time, however, the law of torts has come to grant more protection against psychological harm. Thus, the right that the text is referring to has been transformed from a right to physical integrity into a right to physical and psychological integrity. For simplicity, I will generally speak of this right as a right to physical or bodily integrity or security.

<sup>56</sup> Or even all accidental injuries, as with the New Zealand Accident Compensation Scheme.

<sup>57</sup> In addition to workers' compensation, these schemes include automobile no-fault plans; the Black Lung Benefits Act of 1972, 30 USC §§ 901–945; the Price-Anderson Act, 42 USC § 2210 governing nuclear accidents; the National Childhood Vaccine Injury Act of 1986, 42 USC §§ 300aa-1 to 300aa-34; and the Accident Compensation Act 2001 (NZ). This last scheme, of course, takes all accidental injuries away from tort.

as members of the same family of institutions. And it should: these institutional arrangements are alternative ways of instituting the same right.<sup>58</sup>

This view of the matter should not be surprising. To see why, bear in mind, first, that it is a feature of rights that they justify ‘successive waves of duty’.<sup>59</sup> The right to reasonable care for protection against physical harm is backed by ancillary procedural and remedial rights. The same right to the physical security of one’s person which justifies imposing the primary duty of reasonable care to avoid causing foreseeable physical harm to others also justifies the duty to repair harm negligently inflicted, and for that remedial right to be effective, the state must be under a duty to provide some avenue of ‘civil recourse’ through which rights or repair can be enforced.<sup>60</sup> Next, observe that the right to the physical and psychological security of one’s person not only generates waves of duty, it also generates diverse primary duties. Within the law of tort itself, for example, that right justifies duties of reasonable care in negligence law, duties not to assault or batter other people, and duties to conduct abnormally dangerous activities only on condition that one repair the unavoidable harm that one does. The extension of the point that the right to the security of one’s person—an abstract and protean right if ever there was one—justifies diverse primary obligations within tort is that this right may also justify displacing tort and adopting an administrative scheme, on the straightforward supposition that the administrative scheme does a

<sup>58</sup> This is most evident in litigation under State ‘remedy clauses’, but it is also evident in litigation under other legal doctrines over such matters as the adequacy of workers’ compensation schemes or the nuclear power accident scheme. For remedy clause adjudication, see *Smother v Gresham Transfer Inc* 23 P 3d 333 (Or 1999) 348, 356 (Leeson J); JH Bauman, ‘Remedies Provisions in State Constitutions and the Proper Role of the State Courts’ (1991) 26 *Wake Forest Law Review* 237; D Schuman, ‘The Right to a Remedy’ (1992) 65 *Temple Law Review* 1197. For other doctrines, see RE Keeton, LD Sargentich and GC Keating, *Tort and Accident Law*, 4th edn (St Paul MN, West Publishing, 2004) ch 22.

<sup>59</sup> J Waldron, *Liberal Rights: Collected Papers 1981–1991* (Cambridge, Cambridge University Press, 1993) 212:

Even a particular duty, thought of as associated with a right, itself generates waves of duties that back it up and root it in the complex, messy reality of political life. The right not to be tortured, for example, clearly generates the duty not to torture. But, in various circumstances, that simple duty will be backed up by others: a duty to instruct people about the wrongness of torture; a duty to be vigilant about the danger of, and temptation to, torture; a duty to ameliorate situations in which torture might be thought likely to occur; and so on. Once it is discovered that people have been tortured, the right generates remedial duties such as the duty to rescue people from torture, the duty on governments to find out who is doing and authorizing the torture, remove them from office, and bring them to justice, the duty to set up safeguards to prevent recurrence of the abuses, and so on.

<sup>60</sup> This last point is emphasised by the ‘civil recourse theory’ of John Goldberg and Ben Zipursky: see Goldberg and Zipursky, above n 4. On the view of ‘civil recourse’ presented in the text it is essentially complementary to, not competitive with, corrective justice. Both involve secondary responsibilities necessary to institute effectively the primary duties of tort law.



better job of securing the right. When a common law remedy is set aside and replaced by an administrative scheme, the question that courts most commonly ask is whether the administrative scheme provides an adequate alternative remedy for the underlying right.<sup>61</sup> Workers' compensation and tort, for instance, are understood and assessed as alternative ways of instituting the same right to the safety of one's person.

From the vantage point of a view which takes primary rights and responsibilities to form the heart of the law of torts, these decisions ask the right question. Taking our cue from the remark in the *Second Restatement of Torts* that the interest in bodily security is 'protected against not only intentional invasion but [also] against negligent invasion or invasion by the mischances inseparable from an abnormally dangerous activity',<sup>62</sup> we might frame the choice between tort and various administrative alternatives as a matter of which institutional arrangement gives more satisfactory expression to the right that they share in common. The private law of tort is *the natural default* legal institution for the enforcement of the right to the physical integrity of one's person because when one person violates another person's right to the physical integrity of his or her person, responsibility to repair the harm wrongly done naturally falls on the wrongdoer. But it is *only* the natural default. The private law of tort can be displaced by administrative alternatives so long as those alternatives are defensible ways of instituting the underlying right to the security of one's person.

#### IV. THE STRUCTURE AND CONTENT OF PRIMARY NORMS

Corrective justice theory is right to place wrongs at the centre of tort, but wrong to call the repair of wrongful losses the 'overarching ambition or purpose' of tort law.<sup>63</sup> Torts are indeed wrongs—violations of rights which protect interests important enough to be made coercively enforceable by law—but it is better for wrongs not to be done in the first place than it is to erase their untoward effects once they have been committed. The corrective justice principle that wrongful losses should be repaired is indeed prominent in the law of torts, but it is not prominent because it is the fundamental principle on which the law of torts is built. It is prominent because most—though not *all*—tortious wrongs involve harms and therefore leave their victims in conditions requiring repair. Or so I have argued.<sup>64</sup>

<sup>61</sup> See above n 58 and accompanying text.

<sup>62</sup> *Restatement of the Law, Second: Torts* (St Paul MN, American Law Institute, 1965) (*Second Restatement*) § 1 comment d. The right to bodily security thus grounds diverse tort obligations. I am grateful to Mark Geistfeld for calling my attention to this comment.

<sup>63</sup> Coleman, *Risks and Wrongs*, above n 12, at 395.

<sup>64</sup> This statement may need to be qualified in the case of strict liability. Because we believe harm may be done justifiably in cases of strict liability and because the basic reason



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

The argument that the prominent place of corrective justice in tort is accounted for by the character of tortious wrongs warrants further discussion. Most torts protect against harm in one of its manifestations. An important minority of intentional torts, however, guard aspects of our ‘sovereignty’.<sup>65</sup> Sovereignty-based torts proscribe various interferences with zones of control or powers of discretion—control, for example, over one’s physical person or one’s real property. These torts protect important boundaries against unauthorised crossings. Sovereignty-based torts can be committed without doing harm, and indeed, while benefiting their victims. If I operate on your ear without your permission and succeed in curing your earache, I have not harmed you. You are better off, not worse off. Nonetheless, I have violated your rights and committed the tort of battery because I have operated on you without your consent.<sup>66</sup> In the same vein, I may not enter your real property without your permission, even if I thereby improve that property.<sup>67</sup>

For our purposes, the first lesson taught by these torts is that when primary rights do not protect against harms, the proper remedy for their violation is not repair of wrongful loss. These torts are thus clear counter-examples to the thesis that tort law instantiates the corrective justice principle that wrongful losses should be repaired. The tort of trespass pro-

for imposing such liability is to prevent the defendant from loading the cost of its justified conduct off on the plaintiff who does not benefit proportionately from that conduct, there is a question whether damages serve a corrective or commutative role. They serve a corrective role if they rectify a wrong; a commutative one if they align burden and benefit. We cannot pursue this question here.

<sup>65</sup> I borrow the term ‘sovereignty-based’ from A Ripstein, ‘Beyond the Harm Principle’ (2006) 34 *Philosophy and Public Affairs* 215. He is not responsible for my usage. ‘Sovereignty-based’ torts protect the exercise of powers whereas ‘harm-based’ torts ground duties whose protections are enjoyed. This distinction is drawn nicely in L Wenar, ‘The Nature of Rights’ (2005) 33 *Philosophy and Public Affairs* 223, 233. The shorthand distinction between ‘harm-based’ and ‘sovereignty-based’ torts is not meant to imply that the former do not involve rights whereas the latter do. The point, rather, is that some tort rights are grounded in harm whereas others are grounded in autonomy. More clumsily, we might call these torts ‘autonomy rights-based torts’ and distinguish them from ‘harm rights-based torts’.

<sup>66</sup> See, eg, *Mohr v Williams* 104 NW 12 (Minn 1905); *Kennedy v Parrott* 90 SE 2d 754 (NC 1956). This prohibition against invasive medical procedures conducted without consent reveals a face of battery different from its usual preoccupation with physical harm. This aspect of battery protects persons’ *authority* over their physical bodies. A medical procedure conducted without the consent of the subject is an affront to the subject’s authority over his or her person, but does not *impair* the subject’s bodily integrity in the way that physical harm does. It is one thing to impair agency and another to deny it.

<sup>67</sup> See, eg, *Longenecker v Zimmerman* 267 P 2d 543 (Kan 1954). Believing that cedar trees near the boundary of her property were on her side of the line, the defendant had them topped, trimmed, and cleaned of bagworms. In fact, they were on plaintiff’s property. The defendant had trespassed and was liable for nominal damages, despite the plaintiff having benefited from her acts.

protects the interest in dominion over real property and the right to exclusive control that interest grounds. Put differently, the tort of trespass protects the exercise of a power, namely, the power to determine who and what will enter your property. When that right is violated and that power is denied the proper remedy is one that restores the power. That restoration is normally accomplished by injunctive relief.<sup>68</sup> Remedies are the servants of rights. The repair of wrongful losses—corrective justice as Coleman conceives it—is only appropriate when that is what is required to restore the relevant right. In tort, it is often but not always the case that restoration of the right requires reparation. The connection of tort to corrective justice is thus a consequence of the fact that most torts involve harms.

## **B. The Principle of Corrective Justice is Formal, and Not Confined to Tort**

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

The wrongs that we find, moreover, depend on the content that we supply. The domain of corrective justice is heavily shaped by how broadly or narrowly we state the principle of corrective justice. When we interpret corrective justice as having to do with the repair of wrongful *loss*, restitution does not do corrective justice because it undoes wrongful *gain*. On a broader interpretation of corrective justice, the undoing of wrongful gain might be as much a matter of corrective justice as the repair of wrongful loss.<sup>69</sup> And if we adopt a conception which does not insist on

<sup>68</sup> See above n 51 and accompanying text.

<sup>69</sup> Weinrib takes this broader view of the matter, because he thinks of correlativity of right and duty as the essence of corrective justice: *The Idea of Private Law*, above n 5, at 122–26. Restitution does corrective justice even though it involves wrongful gain not wrongful loss because it involves a breach of duty correlative to the plaintiff's right: at 140–41, 197–98. Weinrib's broad conception of corrective justice also encompasses contract damages: at 136–40.

bilaterality, we are likely to find some wrongful losses in various pockets of public law.<sup>70</sup>

Similar issues arise with respect to contract law. If contract is really about reliance—as Lon Fuller thought—then breach of contract results in wrongful loss and contract damages do corrective justice, even on a narrow interpretation of the principle. If, however, contract is about expectation then contract damages are about being put in the position that one would have occupied had the contract been performed.<sup>71</sup> That counts as corrective justice only if corrective justice is broadly construed.<sup>72</sup> When corrective justice is construed that broadly, however, it can no longer be presented as the paramount principle of liability in tort. It is now at least a principle of private law in general, and it may well be a general principle of law.

Just how broadly to state the principle of corrective justice is not, however, our concern. For our purposes, the point is that wrongful loss is neither unique to tort nor characteristic of all torts. Corrective justice is therefore not distinctive to tort. It is common for tort law to do corrective justice, but only because most torts involve harms and therefore result in wrongful losses. For example, unlike the tort of battery, the general duty of due care does not protect a boundary against an impermissible crossing. That duty guards the right to ‘bodily security’<sup>73</sup> by requiring everyone to take appropriate precautions to avoid physically harming others. Breaches of the duty which violate a correlative right to ‘bodily security’ leave their victims in conditions where repair is required. Because most torts are like negligence in that they protect against harms, most torts bring to bear the corrective justice principle that wrongful losses should be repaired. They do so, however, not because corrective justice is the paramount principle of tort, but because this remedy restores the primary right.<sup>74</sup>

### C. Justice and Rights in Tort

The corrective justice theory of tort goes wrong in the way that retributivism goes wrong as a theory of criminal law. Just as we do not have the criminal law in order to punish the wicked, so too we do not have

<sup>70</sup> See generally L Smith, ‘Corrective Justice and Public Law’ (Paper presented at the Obligations V Conference: Rights and Private Law, University of Oxford, 14–16 July 2010).

<sup>71</sup> See, eg, LL Fuller and WR Perdue Jr, ‘The Reliance Interest in Contract Damages I’ (1936) 46 *Yale Law Journal* 52, and compare D Friedmann, ‘The Performance Interest in Contract Damages’ (1995) 111 *Law Quarterly Review* 628 with Sheinman, above n 43, at 61–62.

<sup>72</sup> See above n 69.

<sup>73</sup> See above n 62 and accompanying text.

<sup>74</sup> This statement may need to be qualified in the case of strict liability. See above n 64.

the law of torts in order to repair wrongful losses.<sup>75</sup> The ‘overarching aim or purpose’ of the law of torts is not to repair harm wrongly done, but to articulate certain obligations to others, obligations grounded in interests of persons urgent enough to count as rights and ground duties. The wrongs that tort law recognises spell out an important part of what we owe to each other in the way of coercively enforceable responsibilities, by virtue of our essential interests as persons.<sup>76</sup> The rights that those responsibilities respect have to do, for the most part, with liberty and security, broadly construed. Primary obligations in tort are obligations not to harm other people in various ways, and to respect powers which confer on them authority over their persons and possessions. To be sure, tort guards these rights with remedial responsibilities of repair, but repair is a second-best form of protection. Tort obligations are discharged most fully when harm is not done and rights are respected in the first instance, not when harm wrongly done is repaired after the fact.

Because tort law is fundamentally concerned with the question of what we may reasonably demand from each other as a matter of right with respect to the liberty and security of our persons and property, tort is basically concerned with *justice*, but the justice that lies at the base of tort law is *not corrective*. Analytically, corrective justice is parasitic on primary obligations and those primary obligations are not obligations of corrective justice. Coleman himself observes:

[C]orrective justice is an account of the second-order duty of repair. Someone does not incur a second-order duty of repair unless he has failed to discharge some first-order duty. However, the relevant first-order duties are not themselves duties of corrective justice.<sup>77</sup>

Corrective justice does not come into play until an antecedent wrong exists. With the possible exception of strict liability wrongs—where the primary duty is not to harm without repairing and where the primary wrong thus consists in harming without repairing<sup>78</sup>—tortious wrongs themselves are

<sup>75</sup> Coleman anticipates this criticism and argues that retributivism is a defensible explanatory and justificatory theory of punishment: *The Practice of Principle*, above n 3, at 32–33. He is quite right about this, but the observation is beside the point. Coleman claims not that corrective justice is a defensible theory of *tort remedies*, but that ‘tort law is best explained by corrective justice’ because ‘at its core tort law seeks to repair wrongful losses’: at 9, 36. See also above n 3 and accompanying text. Just as retributivism is only plausible as a theory of criminal punishment, so too corrective justice is only plausible as a theory of tort remedies. Cf Sheinman, above n 43, at 46–47.

<sup>76</sup> The exact content of what we owe to each other in the way of tort obligations depends on the jurisdiction in which we find ourselves, but the basis of our varying obligations is the same, namely, our equal personhood.

<sup>77</sup> Coleman, *The Practice of Principle*, above n 3, at 32 (emphasis altered).

<sup>78</sup> Under the ‘private eminent domain’ model of strict liability, it is permissible to undertake certain actions and activities only when two conditions are met. First, the acts and activities must be conducted reasonably. Secondly, those who undertake those acts and activities must repair any physical harm done by their conduct. Whereas negligence liabil-

not corrective injustices. It is wrong to punch someone else in the face absent justification or excuse, but it is not a corrective injustice.

Committing battery is wrong not because it fails to correct a prior wrongful interaction, but because it violates a primary obligation to avoid either (a) physically harming another person or (b) making contact with them in a way which is offensive because it denies their sovereignty over their own person. That primary obligation is, in turn, grounded in the victim's right to the integrity of his or her person.<sup>79</sup> More generally, torts—fraud, battery, intentional infliction of emotional distress, negligent infliction of physical injury, and the like—are wrongs which presuppose rights, not antecedent corrective injustices.<sup>80</sup> People have rights, for example, not to be defrauded. Deception destroys freedom every bit as much as coercion does. Autonomy is the power to set and act on one's own ends and reasons, on one's own plans and purposes. Deception manipulates people's minds and thereby robs them of their autonomous agency. Fraud's victims are no longer the authors of their own actions; they are the unwitting instruments of the wills of those who have deceived them. We have compelling reasons to object to such treatment, and even more so when our cooperation is unwittingly enlisted in economic transactions that are injurious to us.

Primary obligations in tort are thus grounded in people's rights. It is wrong to batter someone because it violates their right to physical integrity; it is wrong to imprison someone falsely because it violates their right to liberty; it is wrong to injure someone negligently because it violates their right to reasonable security; and so on. The question of what rights people have is not a question of corrective justice. If anything, it is a question of distributive justice.<sup>81</sup> Taxonomy aside, the substantive

ity is predicated on *primary* criticism of conduct, strict liability is predicated on *secondary* criticism of conduct. Negligence faults the doing of harm in the first instance; strict liability faults the failure to make reparation for harm reasonably done. Negligence liability is liability for harm done by *unreasonable* conduct whereas strict liability is liability for harm done by *reasonable* conduct. Its fundamental justification is that the costs of necessary or justified harms should be borne by those who benefit from their infliction. See, eg, Grey, above n 43, at 1275–81; FH Bohlen, 'Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality' (1926) 39 *Harvard Law Review* 307; RE Keeton, 'Conditional Fault in the Law of Torts' (1959) 72 *Harvard Law Review* 401.

<sup>79</sup> As the *Second Restatement* recognises: see above n 62.

<sup>80</sup> Weinrib appears to deny this. He writes, 'Corrective justice serves a normative function: a transaction is required, on pain of rectification, to conform to its contours': *The Idea of Private Law*, above n 5, at 76. Corrective justice is thus about the righting of corrective injustices (actions which, say, disturb 'the equality between the parties': at 76). This is, as Gardner says, a 'non-starter': see Gardner, above n 49, at 28. See also Sheinman, above n 43, at 34–36. With the possible exception of strict liability wrongs, where the wrong consists in harming without repairing, torts are wrongs—not corrective injustices.

<sup>81</sup> Theorists are split on this point. Stephen Perry, for one, thinks that rights to the liberty and integrity of our person precede questions of distributive justice: see SR Perry, 'On the Relationship Between Corrective Justice and Distributive Justice' in J Horder (ed) *Oxford Essays in Jurisprudence: Fourth Series* (Oxford, Oxford University Press, 2000) 237, 239:

point is this: tort law is not fundamentally about corrective justice, it is fundamentally about wrongs, and wrongs are grounded in rights. Corrective justice broadly construed is *an* essential aspect of tort because rights require remedies, and remedies require making right one's wrongs.<sup>82</sup> This truth does not, however, make the obligation to repair wrongful losses the sovereign principle of tort.

#### D. The Structure of Tort Law

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

If corrective justice theory misconceives the content of tort law by insisting that it must involve wrongful loss, it also misconceives the structure of tort law in three distinct ways. First, by emphasising the bilateral struc-

At least within non-consequentialist moral theory, it makes sense to think of this [security] interest as morally fundamental, and hence as falling outside the purview of distributive justice; our physical persons belong to us from the outset, and are accordingly not subject to a social distribution of any kind.

On this conception, the question of what rights people have is a question of justice, but not a question of distributive justice. Other usages of the term distributive justice appear to include within its domain the question of what rights people have on the ground that this is one kind of question about the distribution of entitlements. HLA Hart's references to rights as concerned with the distribution of freedom in HLA Hart, 'Are There Any Natural Rights?' (1955) 64 *Philosophical Review* 175, 178 fits this description, as does Rawls' usage. See, eg, J Rawls, *A Theory of Justice*, rev edn (Cambridge MA, Harvard University Press, 1999) 54 (emphasis added): 'the basic structure of society distributes certain primary goods ... the chief primary goods *at the disposition of society* are rights, liberties, and opportunities, and income and wealth.' For an example of distributive justice being used in this broader sense in connection with private law, see P Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 *Oxford Journal of Legal Studies* 471, 481.

<sup>82</sup> This broad conception of corrective justice is similar to the view taken by Tony Honoré, but it may be even broader. See T Honoré, *Responsibility and Fault* (Oxford, Hart Publishing, 1999) 73: 'On a wide view, [corrective justice] requires those who have without justification harmed others by their conduct to put the matter right.'

ture of tort lawsuits, corrective justice theory gets the formal character of primary tort norms wrong, and gives them a curiously personal cast. For the most part, primary obligations in tort are omnilateral not bilateral; they are owed by everyone and to everyone else.<sup>83</sup> And characteristically modern tortious wrongs have an abstract and general quality, not a personal, particular one. The negligent infliction of accidental physical harm, for example, is usually an abstract and general wrong: a failure to exercise care in order to protect an indefinite plurality of potential victims whose persons and property we might otherwise unreasonably endanger. Because primary tort norms are articulated through private lawsuits, the structure of the typical tort lawsuit conceals this truth instead of making it manifest. The bilateral and personal form of the lawsuit does not mirror the omnilateral obligations and impersonal norms that tort adjudication generates.

Secondly, not all primary obligations are properly expressed as standards of conduct and not all tort liability attaches to wrongful conduct. If corrective justice requires wrongful losses issuing from wrongful conduct, then significant chunks of tort law are not compatible with corrective justice. Strict liability in tort exists, and it attaches to conduct that is justified or innocent, not wrongful. When strict liability is the prevailing liability rule, the primary obligation is to make reparation for harm fairly attributed to one's *justified or faultless* conduct. Strict liability wrongs are wrongs, but they are not conduct-based wrongs. The wrong lies in not repairing harm faultlessly inflicted, but rightly attributed to the tortfeasor's agency, in circumstance where it is reasonable to inflict harm, but unreasonable to ask that the victim of that harm bear its financial cost.

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

#### *(i) The Properties of Primary Obligations*

Tort law, to be sure, is not regulation. Tort is a common law legal institution, and it develops law through adjudication. But it does apply and articulate *law*, not just settle disputes. Legal decisions are decisions in accordance with pre-existing norms, and tort rulings do not bind only the parties to the case at hand. Nor do common law legal decisions bind only retrospectively. Common law legal decisions have precedential force. Rulings in individual cases bind prospectively all who fall within their

<sup>83</sup> See above n 44.



scope. In their prospective aspect, tort rulings bind very generally. They govern indefinite classes of potential wrongdoers going forward indefinitely, and they protect indefinite classes of potential victims going forward indefinitely.<sup>84</sup>

In the general law of negligence, for example, duties are owed by classes of prospective injurers and to classes of potential victims. There are, indeed, few legal duties as general and few legal norms as abstract as the general obligation of reasonable care. That obligation is both owed by everyone and to everyone else and presumptively applies to all actions that create significant risks of physical harm. When corrective justice theories insist that duty and right in tort have a bilateral, one-on-one structure, they simply overlook this basic feature of the structure of rights and duties in tort. The result of this oversight is an oddly—and mistakenly—personal conception of tortious wrongs. Torts are presented as wrongs done to one named person by another.

Corrective justice gets its peculiarly personal conception of tortious wrongs from its preoccupation with the remedial dimension of tort. Tort law's remedial responsibilities *are* correlative to in personam rights. Duties of reparation in tort *are* owed to named plaintiffs and are owed by named defendants. Remedial rights are held by and against particular persons. Corrective justice theory is quite right about all of this, quite right to insist on the bilaterality of remedial rights and duties and on 'the unity of doing and suffering'.<sup>85</sup> Primary rights and obligations, however, are not personal in this way. Primary rights and obligations are omnilateral. Unlike contractual obligations, tort obligations do not arise between named persons. They are grounded in fundamental interests of persons *qua* persons and are owed by each of us to everyone else.

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

<sup>84</sup> cf Sheinman, above n 43, at 50–51 (discussing the doctrine of precedent in tort).

<sup>85</sup> As described by Weinrib, *The Idea of Private Law*, above n 5, at 145.



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

(ii) *Strict Liability Wrongs*

Corrective justice theory's insistence on wrongful *conduct* as essential to tort law prevents it from giving an adequate account of strict liability in tort.<sup>86</sup> Negligence liability is predicated on wrongful conduct—on conduct that is unreasonable or unjustified. The competing principle of strict liability predicates responsibility not on unreasonable *conduct* in the natural and primary sense of that term, but on an unreasonable failure to repair harm reasonably inflicted. In *Vincent v Lake Erie Transportation Co*,<sup>87</sup> for instance, it is right and reasonable for the owner of the ship to lash the ship to the dock during the storm, even though he does not have permission to do so, but it is unreasonable and wrong for the shipowner to foist the cost of saving his ship off onto the owner of the dock. When docking results in harming, a duty to make reparation arises. That duty is breached when the dock owner doesn't volunteer, in a timely fashion, to pay for the harm he has inflicted. The lawsuit is brought to repair the wrong of failing to comply with that duty. That wrongful conduct is *secondary*, not *primary*.<sup>88</sup> The primary conduct—lashing the ship to the dock and damaging the dock—is not wrongful. The wrong lies in failing to step forward and repair the damage, even though that damage is justifiably done. Strict liability thus involves a wrong, but that wrong is not conduct-based in Coleman's sense of the term. Liability is not predicated on the assertion that the defendant should have behaved differently and not harmed the plaintiff.<sup>89</sup>

To be sure, strict liability is the exception and negligence the general rule. Strict liability is common enough, however, that we can reasonably insist that an adequate theory of tort be able to explain and justify its

<sup>86</sup> This is ironic because strict liability 'duties' are the only primary duties that might be plausibly described as corrective; they involve obligations not to harm without repairing.

<sup>87</sup> *Vincent v Lake Erie Transportation Co* 124 NW 221 (Minn 1910) (*Vincent*).

<sup>88</sup> See above n 78.

<sup>89</sup> The identification of tort with conduct-based wrongs is not particular to Coleman. Weinrib holds the same kind of view, a fact vividly illustrated by his criticisms of strict liability as a norm of conduct which condemns 'any penetration of the plaintiff's space': *The Idea of Private Law*, above n 5, at 177. For their part, Goldberg and Zipursky write that '[a]lthough by convention, strict liability for abnormally dangerous activities clearly is part of what lawyers define as "tort law", strictly speaking it does not belong in this department': JCP Goldberg and BC Zipursky, *The Oxford Introductions to US Law: Torts* (New York, Oxford University Press, 2010) 267. Any account of tort law which specifies the constitutive features of tortious wrongs in such a way that the account cannot acknowledge, or properly characterise, the existence of strict liability in tort is, for that reason alone, seriously defective and in need of revision.

existence as an alternative to negligence. Corrective justice theory flunks this test. In Coleman's case, corrective justice theory flunks the test in part because it conceives of much of strict liability as lying outside the core of tort that it succeeds in explaining,<sup>90</sup> and in part because it models strict liability on negligence. Whereas negligence liability imposes a duty to exercise reasonable care to avoid inflicting physical harm on others, strict liability, Coleman claims, imposes a duty not to harm others, full stop.

This misconceives strict liability. Structurally speaking, most strict liability in tort resembles the public law of eminent domain, not fault liability in tort. Indeed, strict liability *competes* with fault liability because it imposes liability on *reasonable* conduct. Eminent domain law holds that it is permissible for the government to take property for public use only if the government pays just compensation to those whose property it takes. This is a two part criterion. First, the taking must be justified; that is, it must be for a public use. Secondly, compensation must be paid for the property taken. In parallel fashion, strict liability in tort holds that it is permissible to undertake certain actions and activities only when two conditions are met. First, the acts and activities must be conducted reasonably. Secondly, those who undertake the acts and activities must repair any physical harm done by their conduct.<sup>91</sup> Whereas negligence liability criticises primary conduct, strict liability criticises a secondary failure to make reparation for harm done. Negligence liability is liability for harm done by *unreasonable* conduct whereas strict liability is liability for harm done by *reasonable* conduct. Its fundamental justification is that the costs of necessary or justified harms should be borne by those who benefit from their infliction.

This form of strict liability is embodied by a diverse set of doctrines: by private necessity cases such as *Vincent*;<sup>92</sup> by liability for abnormally dangerous activities; by some liability for intentional nuisance; by liability for manufacturing defects in product liability law; and by the liability

<sup>90</sup> Coleman notes in *The Practice of Principle*, above n 3, at 36 that corrective justice theory 'does not explain' various features of tort law, 'for example, vicarious liability or perhaps product liability'. In Coleman, *Risks and Wrongs*, above n 12, at 417–29 he excludes product liability from the core of tort and tentatively suggests that it should be understood not in terms of corrective justice but in terms of rational bargaining. The issues here are too complicated to be discussed adequately in this chapter. For now we must settle for noting two points. First, a theory of tort which can explain its domains of strict liability is interpretively superior to a theory which cannot. Secondly, the emergence of product liability law is the most important development in twentieth century tort law. An adequate theory of tort ought to be able to account for it.

<sup>91</sup> This 'private eminent domain' conception of strict liability may make its first appearance in American tort theory in the writings (some famous and some obscure) of Oliver Wendell Holmes. These writings are cited and discussed in Grey, above n 43, at 1275–81 and at greater length in TC Grey, *Holmes on Torts* (unpublished). Two other classic statements are Bohlen, above n 78 and Keeton, above n 78. See also Stevens, above n 44, at 104–05 (endorsing an account of *Vincent* along these lines).

<sup>92</sup> *Vincent* 124 NW 221 (Minn 1910).

of masters for the torts of their servants committed within the scope of their employment. The obligation imposed by these doctrines is an obligation to undertake an action (eg, saving your ship from destruction at the hands of a hurricane by bashing the dock to which it is moored) or conduct an activity (eg, operating a business firm) *only on the condition* that you will repair any physical harm for which your action or activity is responsible. The reciprocal right is a right to have any physical harm done to you undone by the party responsible for its doing.

There is also a second, less common form of strict liability epitomised in the torts of conversion and trespass and in some batteries.<sup>93</sup> Here the wrong is the violation of a right which assigns a power of control over some physical object or, in the case of battery, control over some subject. The law's specification of various powers of control over one's person and physical objects gives rise to a form of strict liability predicated on the voluntary but impermissible crossing of a boundary. If you enter my land, or appropriate my pen, without my permission, you have violated my right of exclusive control over these objects, even if your entry or appropriation is entirely reasonable and justified. The wrong consists in the failure to respect the right. Fault is simply irrelevant. Put otherwise, liability for violation of a right of exclusive control is strict for the simple reason that the right itself would be fatally compromised by tolerating all reasonable (or justified) boundary crossings, without regard to whether consent was given to those crossings. Rights of control are a species of autonomy rights. Those who hold such rights are entitled to forbid even reasonable boundary crossings, and they are presumptively wronged whenever their boundaries are crossed without permission. Their rights thus give rise to stringent 'duties to succeed' on the part of others.<sup>94</sup> In this class of cases, the strictness of liability in tort is a consequence of the right being protected.

The wrong committed in a sovereignty-based tort is conduct-based *in only the most attenuated sense of the term*. In negligence—the canonical example of a conduct-based wrong—liability is predicated on the wrongfulness of the defendant's *conduct*; it is that wrongfulness which does the work and triggers liability. In 'sovereignty torts' it is the violation of the plaintiff's right which does the work and triggers the liability. The duty is a duty not to violate the right, and conduct that violates the right is wrongful only because it violates the right. Viewed in isolation from the right, the conduct may be innocent and even justified. The defendant doctor in *Mohr v Williams*, for example, benefited the plaintiff by

<sup>93</sup> See above n 65 and accompanying text (discussing sovereignty-based torts).

<sup>94</sup> The concept of 'duties to succeed' is developed in J Gardner, 'Obligations and Outcomes in the Law of Torts' in P Cane and J Gardner (eds), *Relating to Responsibility: Essays in Honour of Tony Honoré on His 80th Birthday* (Oxford, Hart Publishing, 2001) 111.

curing her disease.<sup>95</sup> Moreover, sovereignty-based torts are clear counter-examples to the thesis that tort is a law of wrongful losses. These may be committed without inflicting wrongful loss because the rights at issue are powers of control not protections against harm. The essential, distinguishing features of strict liability are thus obscured and distorted by calling strict liability torts ‘conduct-based wrongs’. Strict liability wrongs are based not on wrongful conduct in the normal sense of that term, but on violations of autonomy rights or on secondary failings of conduct—on conditional, not primary fault.<sup>96</sup>

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

Strict and fault liability are different ways of articulating the content of one’s duty to others. ...

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

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

If my duty to you is a duty-not-to-harm-you-faultily ... then I can discharge that duty either by not harming you or by not being at fault—whether or not I harm you.<sup>97</sup>

When strict liability is conceived of as a ‘duty-not-to-harm’, it conforms to the demands of corrective justice theory because, so conceived, strict liability is a conduct-based wrong.

<sup>95</sup> *Mohr v Williams* 104 NW 12 (Minn 1905). See the discussion in above n 66.

<sup>96</sup> This is Robert Keeton’s vocabulary: see Keeton, above n 78.

<sup>97</sup> JL Coleman, ‘Facts, Fictions, and the Grounds of Law’ in JK Campbell, M O’Rourke and D Shier (eds), *Law and Social Justice* (Cambridge MA, MIT Press, 2005) 327, 329. See also Coleman, *The Practice of Principle*, above n 3, at 35:

The concept of a duty in tort law is central both to strict and fault liability. In strict liability, the generic form of the duty is a ‘duty not to harm someone’, while in fault, the generic form of a duty is a ‘duty not to harm someone negligently or carelessly’.

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

In *Vincent*<sup>98</sup> and under the doctrine of private necessity the ship owner's plight justifies their use of the dock and trumps the dock owner's right to exclude. But that trumping extends only as far as its rationale requires. It is reasonable for the owner of the ship to inflict the harm, but it is unreasonable for the ship owner not to repair the harm that it inflicts. The exigencies of the situation justify overriding the dock owner's right to exclude, but they do not justify shifting the cost of the ship owner's salvation onto the dock owner. That would both be unfair and disregard the dock owner's rights unjustifiably. The dock owner's right to exclude the ship is overridden because lashing the ship to the dock is necessary to save the ship. But it is neither necessary nor fair to shift the cost of the ship's salvation onto the dock owner's shoulders.<sup>99</sup> It is therefore unreasonable for the ship owner to refuse to repair the harm that he or she does in the course of saving his or her ship. The ship owner's wrong consists *not* in breaching a primary duty not to harm the dock, but in breaching a secondary duty to make reparation for harm reasonably done.<sup>100</sup>

<sup>98</sup> *Vincent* 124 NW 221 (Minn 1910).

<sup>99</sup> 'It might be said, and it has been held, when it is a question of paying damages, that a man cannot shift his misfortunes to his neighbor's shoulders': *Spade v Lynn* 52 NE 747 (Mass 1899) 747 (Holmes J for the Court). Holmes is speaking here of *Gilbert v Stone* (1647) Sty 72, 82 ER 539; he thought that the principle applied more broadly. See also the cases cited in GC Keating, 'Property Right and Tortious Wrong in *Vincent v Lake Erie*' in J Gordley (ed), *Issues in Legal Scholarship—Symposium: Vincent v Lake Erie Transportation Co and the Doctrine of Necessity* (Berkeley Electronic Press, 2005) n 53.

<sup>100</sup> Weinrib treats *Vincent* as an unjust enrichment case: *The Idea of Private Law*, above n 5, at 196–203. Because *Vincent* is a clear case of strict liability, moving it out of tort law furthers Weinrib's identification of tort with fault liability. The argument is unconvincing, however. The liability in *Vincent* is for harm done, and the measure of damages is injury inflicted, not benefit received. The benefit received by the defendant—saving its ship from near certain destruction—vastly exceeds the harm inflicted on the plaintiff's dock. That is why it is both rational and reasonable to authorise the trespass and the ensuing damage to the dock, after all. Liability for benefit unjustly received requires a different damage measure and much greater damages. Moreover, because the privilege authorises the trespass, the saving of the ship is an enrichment but not an unjust one. What would be unjust is for the defendant to shift the cost of its plight onto the shoulders of the plaintiff by failing to make reparation for harm done. In short: *Vincent* is not an unjust enrichment case, but unjust enrichment ideas play a role in justifying the imposition of strict liability in tort.

When we turn to cases where reasonable harm is inflicted accidentally (as it is in the blasting cases to which Coleman alludes<sup>101</sup>), positing a duty not to harm is equally unpersuasive. Negligence duties always back-stop strict liabilities in tort, negligence liability is always available as an alternative to strict liability, and the stringency of negligence obligations of care increase with and are calibrated to the seriousness of the risk at issue. Courts often decline to impose strict liability precisely because they perceive the law's default norm of negligence liability as an adequate alternative.<sup>102</sup> The standing availability of negligence liability, and its capacity for calibration to the seriousness of the harm threatened, makes an *independent strict duty not to harm* superfluous. The ground of strict liability is simply different from the ground of fault liability. Strict liability asserts that when harm is done, even though all reasonable precautions have been taken, it is unfair to leave the cost of that harm on the plaintiff. The injurer ought to take the bitter with the sweet.

*(iii) The Forward-Looking Role of Remedial Responsibility*

Last, but surely not least, corrective justice theory takes reparation to be tort's fundamental purpose, but tort puts the *prospect* of reparation to use to *enforce* primary rights and responsibilities, not just to restore them. Tort damages perform, in part, a forward-looking role. Primary tort duties enjoin respect for the rights of others, thereby constraining our freedom and checking the pursuit of our self-interest. It is natural to chafe at these obligations and tempting to disregard them. We may, moreover, justifiably be wary of discharging our obligations to others if we are not assured that they will discharge their reciprocal responsibilities to us. The prospect of liability in tort serves as a counterweight to our self-interest, as an incentive to discharge our obligations, and as an assurance that others will comply as well. The remedial powers that tort law places in the hands of injured plaintiffs, and the correlative duties that it imposes on defendants, put teeth in its primary obligations. Damages may do their most important and effective work when they diminish the number of occasions on which they must be awarded. Insofar as reparation is a second- or next-best way of honouring primary rights and responsibilities, this forward-looking, rights-enforcing aspect of damages should not be dismissed lightly.<sup>103</sup>

<sup>101</sup> Coleman, 'Facts, Fictions, and the Grounds of Law', above n 97, at 329.

<sup>102</sup> See, eg. *Foster v City of Keyser* 501 SE 2d 165 (W Va 1997). In *Foster*, the West Virginia Supreme Court of Appeals reversed the Circuit Court's imposition of strict liability on a natural gas company for an explosion caused by the escape of gas from one of its transmission lines because 'other principles of law—a high standard of care and *res ipsa loquitur*—can sufficiently address the concerns that argue for strict liability in gas transmission line leak/explosion cases': at 175 (Starcher J for the Court).

<sup>103</sup> Doctrinally, this concern manifests itself most vividly in damages and proximate cause.

## V. CONCLUSION

To summarise: corrective justice theory is right on two fundamental matters. First, that the economic theory of tort cannot adequately justify the normative structure of tort adjudication. Secondly, that the obligation of reparation is central to tort law. Tort obligations are owed by persons and to persons. When they are breached, responsibility for repairing their untoward effects and restoring the relationship between the breaching and injured parties naturally falls on the breaching party. But corrective justice overstates its case when it insists that the essence of tort law lies in this salient duty to repair wrongful losses. That duty is neither constitutive of—nor distinctive to—tort law. It is a contingent remedy, applicable to harm wrongly inflicted and common in tort only because most of tort law's primary norms impose duties of harm avoidance. Duties to repair are parasitic on primary duties not to harm. The principle of corrective justice, moreover, is purely formal: it cannot be brought to bear without specifying what counts, substantively, as a wrong. A theory of tort that has no account of tort wrongs is radically incomplete.

By focusing so intently on obligations of repair, corrective justice theory also misunderstands the logical structure and normative order of tort norms. Tort consists both of primary obligations of harm avoidance and secondary, remedial responsibilities of repair. Tort's primary norms are anterior to and grounding of its remedial responsibilities. Remedial responsibilities of repair arise out of breaches of primary obligations to respect certain rights and avoid certain harms and are next-best ways of discharging those obligations. Lastly, tort's primary norms of harm avoidance do not have the properties that corrective justice theory thinks are essential to tort. Tort's primary norms are omnilateral, not bilateral, they do not proscribe only conduct-based wrongs, and their commission does not always result in wrongful loss.

To both incorporate the insights of corrective justice theory and overcome its blind spots, we need to recover a deeper insight of corrective justice theory, namely, the insight that tort is a law of wrongs. To grasp that insight correctly, however, we need to place wrongs and the rights that ground them—not reparation—at the centre of our understanding of tort. Tort is a body of law concerned with the rights that persons have against each other qua persons—with rights not to be physically harmed,

Punitive damages are sometimes imposed in order to deprive certain kinds of tortious acts of their economic advantage, thereby attempting to ensure that the relevant rights will be respected and not priced out by economically rational tortfeasors: see above n 52 and accompanying text. Proximate cause cases fixing the outer perimeter of responsibility for harm tortiously done often take explicit account of whether the scope of liability is sufficient to enforce the rights at stake. This is especially evident in negligence cases involving pure economic loss and pure emotional harm: see, eg, *Barber Lines A/S v M/V Donau Maru* 764 F 2d 50 (1st Cir 1985); *Thing v La Chusa* 771 P 2d 814 (Cal 1989).

denied our authority over our persons and our property, deceived as we go about our economic lives, and so on. Tort obligations are grounded in the fundamental interests of persons as persons. They are owed by each of us to everyone else, and they are not fundamentally obligations of reparation. Fundamentally, tort obligations are obligations to avoid harming others in various ways, and to respect certain rights which safeguard and institute their autonomy.



