

## THE NORMATIVE STRUCTURE OF TORT LAW

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This essay has two ambitions. The first is to preview many of the claims that Gabe Mendlow and I make in an upcoming book about corrective justice, tort law and the relationship, if any, between the two.<sup>1</sup> The second is to set forth some of the arguments in support of those claims. Not all of the claims and fewer of the arguments will be spelled out in full detail in this essay. The book and the essay fall into three parts. In the first part, we offer a theory of corrective justice: an account of the concept and a particular conception of it. In the second, we provide an account of the normative structure of tort law, explain and defend the claim that tort law is in large measure an institution of corrective justice. In the third part, we offer an account of the foundational justification of tort law.

### I. Corrective Justice

Some tort theorists have claimed that tort law *embodies, expresses or reflects* corrective justice. Some have argued that a legitimate or *justified* tort law *is* itself an institution of corrective justice. Others have thought that tort law *pursues* or *achieves* corrective justice; or that it *aims* or *aspires* to do so.<sup>2</sup> Some or all of these claims may be mistaken, but they are all intelligible; and understanding them requires an account of corrective justice. Before we can assess the relationship, if any, between corrective justice and tort law we need an account of corrective justice.

#### A. *The Concept and the Domain of Corrective Justice*

Though many legal philosophers have defended one or account of tort law based on corrective justice, none has offered anything like a complete or satisfying account of the concept of corrective justice itself. Each has instead offered a particular conception of principle of corrective justice and has argued that tort law is best explained by it; but in failing to provide an account of the concept itself, we have been left to wonder, among other things, whether the various principles offered in the name of corrective justice are in fact conceptions of the same concept, whether corrective justice is truly a matter of justice, and if so, what makes it so.

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<sup>1</sup> Justice and the Law of Torts

<sup>2</sup> Those who think that tort law aims at corrective justice are likely to take this to be a contingent fact about tort law, but they needn't. For it might be an essential and necessary property of tort law that it aim at corrective justice in much the same way that many philosophers take it to be essential to beliefs that they aim at truth

In this part of the paper, we take some modest steps to rectify this gaping hole in the existing literature, recognizing of course that in many ways, the suggestions we make and the account we provide raise far more questions than they answer. That is as it should be as the concept of corrective justice is rarely discussed and any account of it at this point is likely to be much contested. Like other principles, corrective justice is a norm. Norms are either standards of assessment or guides to conduct, which is to say that they ground evaluative judgments and provide reasons for action. Some, like the principle of corrective justice, are both.

As a standard of assessment, corrective justice applies to both states of affairs and to institutional arrangements. A state of affairs can constitute a *corrective injustice* and be criticized accordingly. Under certain circumstances, we can assess an official action as correctively unjust if it promotes a state of affairs that is itself correctively unjust. The action's unjustness is derivative, not fundamental. The content and nature of the critical assessment depends on substantive principle of corrective justice and by the values expressed by it or embodied within it.

Institutions can be assessed by the standard of corrective justice in two distinct ways: by the states of affairs they produce and by their internal normative structure. An institution may bring about states of affairs that are either correctively just or unjust and assessed accordingly. We will have a good deal more to say about the normative structure of an institution in section II below, but for now it is enough to note that normative structure refers to the manner in which an institution distributes relevant normative relationships (rights, duties, powers, liberties, privileges and so on) among those engaged in the practice (in the case of institutions, among those whose conduct is regulated and those whose task it is to create and enforce those regulations). The claim that an institution's normative structure is a matter of corrective justice is the claim that the manner in which it distributes normative powers reflects corrective justice and in doing so embodies or expresses the values associated with it.<sup>3</sup>

As a first approximation, we suggest that the domain of corrective justice is 'human losses owing to human agency.'<sup>4</sup> There are four elements of this claim that

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<sup>3</sup> We will eventually need to say more about how an institution's embodying or expressing a value is not ultimately explicable in terms of the institution's producing states of affairs with that value. Otherwise, the second of these modes of assessment would reduce to the first.

<sup>4</sup> No account of the *concept* should rule out any putatively plausible *conception* of corrective justice. It is worth noting in this regard that Rawls' account of the concept of distributive justice in fact rules out certain intelligible conceptions of distributive justice – in particular, strict resource egalitarianism, and we want to avoid a similar problem in providing an account of concept of corrective justice. (cite to Rawls formulation of the concept of justice in terms of distribution of rights and the basic structure)

call for further elucidation and argument. The first is our identifying the domain of corrective justice with *losses*. One consequence of doing so is that we are ruling out 'gains' as falling within the province of corrective justice. This is of course controversial. More importantly, however, the emphasis on losses is meant to rule out other ways of characterizing the possible detriments or modes of suffering or disadvantage that could arguably fall within the domain of corrective justice, including 'harms,' 'wrongs,' 'rights-infringements,' and the notion of 'disadvantage' itself.<sup>5</sup>

The second feature of our characterization of the domain or province of corrective justice is the view that only human agency can be the source of losses that fall within corrective justice. The idea is that one can suffer much in the way of misfortune and the misfortunes one suffers can have many sources – from agency to natural disasters – but only those that come at the hands of agents are matters of corrective justice. This is not to say that losses that result from natural disasters or accidents of birth (place and status for example) are not matters of justice: only that they are not matters of corrective justice. This too is a controversial claim no doubt, and it may be that the best argument we have for it has to do with our view which will come to discuss later that the claims in corrective justice are paradigmatically connected to infringements of rights or important interests, and only human agency can violate or infringe rights (or more generally fail to comply with the constraints that rights impose).

The third feature of our account is that only losses suffered by human agents fall within the domain of corrective justice. The interests of animals can be harmed and animals can suffer losses. It is a further question whether they can suffer wrongs. In claiming that only humans can suffer the kinds of losses that fall within the domain of corrective justice, we are not claiming that justice applies only to humans, but we are saying that only humans can have claims in corrective justice. Perhaps it would be better to say that only those 'agents' who can be the bearers of rights or who can stand in certain kinds of normative relations to others – of being able for example to make demands or claims – can suffer corrective injustices. Again much more needs to be said here before anyone should feel satisfied that we have specified the domain of corrective justice accurately.

The fourth feature of our characterization of the domain of corrective justice is its reliance on 'owing to' as the right kind of relationship between agency and loss to ground a claim in corrective justice. The concept of 'owing to' is obviously vague and what one must do is tighten it up a bit to explain why it is the right kind of

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<sup>5</sup> We are not settled on the idea that the domain of corrective justice is losses, but this is our starting point recognizing that much more argument is necessary than we or anyone else has offered to this point. Indeed, below we even suggest that the possibility that the domain of corrective justice may be better captured in terms of the concept of 'important or fundamental bads.'

relationship to ground claims in corrective justice without tightening it up so much as to constitute a particular substantive account of corrective justice.

In identifying the domain of corrective justice as losses owing to human agency, we are careful not to restrict the domain to *wrongful* losses. A particular substantive conception of corrective justice may restrict the claims of corrective justice to wrongful losses, but there is no reason to suppose that the concept itself does. This would remain true of the *concept* of corrective justice even if it turned out that the only defensible *conception* was one that restricts the domain of corrective justice to wrongful losses.

In saying that the domain of corrective justice is losses owing to human agency we do not mean to imply that corrective justice is concerned primarily with allocating or assigning losses. It does not follow in other words from the fact that corrective justice is concerned with losses owing to human agency that a substantive principle of corrective justice specifies the terms by which those losses are to be allocated or assigned. A principle of corrective justice might instead assign normative powers with regard to those losses – rights, powers and duties for example, as between those who have suffered losses and those whose agency occasions it. Or such a principle might allocate normative powers between those who suffer losses owing to human agency and the population as a whole or between those who suffer appropriate losses and one or more of its institutions.

To be sure, particular conceptions of corrective justice may assert that losses owing to human agency should be distributed or assigned this way or that, but the view that corrective justice is about assigning or distributing losses is itself mistaken. This is important because it implies that an institution of corrective justice need not allocate losses. Instead it can have a certain normative structure – a distribution of rights, responsibilities and powers – that responds to the concerns of corrective justice.

In a broad sense, the principle of corrective justice is an allocation principle. One should not be misled, however, into thinking that it is a principle that applies primarily to states of affairs and assigns or allocates losses in order to meet its demands. The principle might instead apply to institutions and instead of assigning or allocating losses, assign normative powers with regard to the losses that are its concern.

### *B. Skepticism About Corrective Justice*

In what sense is corrective justice a matter of justice? Is corrective justice a matter of justice in name only? Skepticism about corrective justice may be expressed in at least two different ways. The concept of distributive justice responds to the problem of conflicting claims to limited resources. Is there a comparable problem to which the concept of corrective justice responds? If there is such a problem, is it weighty enough in the right way to render the response to it a matter of justice? Just as there are conflicting claims of entitlement or ownership regarding limited

resources or 'goods,' there are conflicting claims of entitlement or ownership regarding important 'bads' or 'misfortunes' or 'losses.' These are claims of attribution. They are claims about whose burden it is to clean up the mess or bear the loss or shoulder the costs of the misfortune. The claim is that the concept of corrective justice responds to the problem of ownership of 'important' bads or losses.

Another way to express skepticism about corrective justice is to wonder about its relationship to distributive justice. Let's imagine that resources are distributed justly, but that the distribution is upset as a result of human agency. The loss (or gain) is a distortion in the distribution. If the point of corrective justice is merely to annul the distortion, then corrective justice is just another name for an aspect of distributive justice. For it is distributive justice that sets the standard of an appropriate distribution and it is compliance with the requirements of distributive justice that demands that the distortion be annulled. In that case 'corrective' justice is a requirement of justice, but corrective justice marks no independent principle of justice: it is just an aspect of distributive justice. The losses that are its domain are regulated ultimately by distributive justice, to which corrective justice is a mere adjunct.

On the other hand, if corrective justice sometimes requires annulling losses that are departures from distributions of resources that are not themselves just, then corrective justice will have the consequence of stabilizing or entrenching unjust distributions of resources. In that case, corrective justice will be independent of distributive justice, but what is the reason for thinking that it expresses a requirement of justice? Corrective justice is either not an independent principle of justice or it is independent but not a principle of justice.

There is much to be said in response to this objection. The first thing to note is that the domain of corrective justice is losses owing to human agency, not losses owing to human agency whose normative significance depends on their relationship to distributive justice. So, for example, one might think that the relevance of human agency signals that the concerns of corrective justice have something to do with the manner in which the loss comes about. More needs to be said of course, but there is no reason to reject without argument the thought that corrective justice is an aspect of transactional justice: the norms governing the ways in which resources may be legitimately transferred. After all, whatever the underlying distribution of resources, we may want to distinguish legitimate from illegitimate forms of transfer.

To be sure, if such losses are always to be annulled as a matter of corrective justice, the outcome will either conform to distributive justice or it will not depending entirely on the existing distribution of resources. If annulling the losses brings about a state of affairs that is also distributively just, that much the better. Still, the justice of annulling the gains need not depend on the outcome conforming to distributive justice. The outcome is called for and warranted by corrective justice and it is simply an added benefit that in meeting the demands of corrective justice one has also satisfied the requirements of distributive justice.

On the other hand, annulling the loss may not lead to a just distribution of resources. Nevertheless, doing so may be required by corrective justice. This is a problem for corrective justice only if it is a necessary condition of an action being correctively just that it also produces outcomes that conform to distributive justice. But why should that be the case? We might simply allow that there may be conflicts between the demands of corrective and distributive justice. If this possibility is a problem for corrective justice—and we doubt that it is—it is equally a problem for distributive justice! There is more to say on this issue, but that is all we will say about it here.<sup>6</sup>

There is one other point to notice about the skeptical argument, however, and that concerns the way in which it formulates or conceives of both distributive and corrective justice: that is, as allocation principles, narrowly conceived. Distributive justice assesses allocations of resources and corrective justice assesses allocations of losses (or perhaps allocations of normative powers that are concerned with responding to losses).

There is a distinction between, on the one hand, the domains of distributive and corrective justice and, on the other, the problems to which the concepts respectively respond. The domain of distributive justice may be basic resources and the domain of corrective justice may be losses owing to human agency. The problem of distributive justice, however, is ‘conflicting claims’ to those resources; and the problem of corrective justice, too, is ‘conflicting claims’ about whose responsibility the losses are. This means that both the principles of distributive and corrective justice may be elaborated in terms of normative powers or relationships with regard to both resources and losses respectively: norms that can be expressed in institutions and in virtue of which institutions can be assessed.<sup>7</sup>

### *C. Corrective Justice and Other Principles of Morality*

Other principles of morality – including some that are more directly allocative by nature – also bear on the domain of losses owing to human agency. So for example, one might argue that losses owing to human agency should be borne by those who

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<sup>6</sup> We prefer to take this version of the skeptical argument as an invitation to spell out what makes corrective justice a matter of justice in more detail. In effect, it is a request to explain why certain kinds of losses that individuals suffer at the hands of others would be a concern of justice. That is one of the central projects of the first part of the book.

<sup>7</sup> None of this cuts against the fact that whenever there is a loss the question of who should bear it may be appropriate. In a sense, the principle of corrective justice will always be relevant to answering that question. But it is a mistake to think that the principle of corrective justice is necessarily an answer to that question or that to understand corrective justice is to understand it as an answer to that question. Again, at the very least that is because the correct principles of corrective justice may specify normative relationships between parties in regards to losses, or normative relationships between particular persons and legal or other institutions; or it may specify the contours of institutions that ought to be put in place; and so on.

*deserve* them.<sup>8</sup> Or one might hold that losses should be shouldered by those who are *outcome responsible* for them. Arguably, someone is outcome responsible for states of affairs that he could have (or should have) foreseen and which he could have avoided.<sup>9</sup>

Either or both principles can be offered as partial (or full) specifications of the content of corrective justice – that is as substantive principles of corrective justice – or as independent moral principles that address at least in part some of the same problems that the principle of corrective justice does. Take the principle of desert, for example. If offered as an account of corrective justice, its claim is that losses owing to human agency ought to be born by those who deserve them. This would render corrective justice an allocation principle. It would also render it only partially helpful, since corrective justice would be silent with regard to losses that no one in particular deserves to bear. We would then need a principle to supplement corrective justice in the allocation of losses that no one deserves to bear.

Or the principle of desert might be an independent moral principle that could in principle supplement, conflict with or supplant corrective justice with regard to allocating losses owing to human agency. The principles would conflict for example were desert to preclude imposing losses on individuals who were not at fault—if, say, the principle demanded that losses be imposed on all and *only* those who deserve to bear them—while the principle of corrective justice allowed for strict liability. The more interesting case is the one in which the principles complement one another. So, for example, the principle of corrective justice may be realized in institutions in which the losses that are the concern of corrective justice are rectified (thus satisfying the principle of corrective justice) in a way that imposes the losses on those who deserve them.

The same remarks would apply to the principle of outcome responsibility. Tony Honore defends outcome responsibility as a basis of liability and does not invoke the principle of corrective justice in doing so.<sup>10</sup> Outcome responsibility may complement corrective justice in the institution of tort law – as in fact we are inclined to believe it does, in two ways: in both the conditions under which a primary norm of tort law is breached; and second in the grounds for imposing the victim’s loss on the injury. We have more to say about this in II below.

One final preliminary point, but a particularly important and no doubt controversial one. We need to untangle the relationship between corrective justice and corrective injustice. Let’s suppose that the principle of corrective justice asserts that wrongful losses ought to be annulled. How should we characterize a corrective

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<sup>8</sup> The principle of desert has a much broader domain than the category of losses owing to human agency of course.

<sup>9</sup> Like the desert principle, the principle of outcome responsibility has a wider scope than the principle of corrective justice, but it also addresses the problem of losses owing to human agency

<sup>10</sup> cite to honore

injustice then? Wrongful losses call for annulment as a matter of justice, but the fact of the existence of a wrongful loss is not itself a corrective injustice. A wrongful loss is just that. It is not itself an injustice even if it calls for annulment as a matter of justice. In saying that a state of affairs is a corrective injustice, we mean to be saying that wrongful loss has not been appropriately responded to. The injustice is not in the wrongfulness of the loss, but in the inadequacy or inappropriateness of the response to it. Now what counts as an appropriate response to it will depend on the substantive conception of corrective justice and not on the principle itself. Our view is that the appropriateness of the label 'justice' indicates that the right kind of response is at the least social and perhaps political: the relevant collectivity must respond in the right kind of way. We obviously think that the notion of corrective justice is primarily 'institutional' but this cannot be extracted entirely from reflecting on the concept itself. Still the fact that we are talking about corrective justice and not personal morality does at least indicate that there is a collective or social if not necessarily a political dimension to our concept. We are spelling out that dimension in terms of how we characterize corrective injustice. Thus, we would resist the idea that there is a principle of corrective justice that applies in the Nozickian Robinson/Crusoe world. This is why I, for one, have always talked about the existence of a practice of corrective justice: a way collectively of responding to losses that fall within its domain.

With these preliminary conceptual matters out of the way, we turn now to substantive conceptions of corrective justice. We begin with the annulment thesis.

#### *D. Revisiting the Annulment Thesis*

Early on, I advanced and defended a substantive account of corrective justice according to which: corrective justice requires annulling wrongful losses and wrongful gains. This view came to be referred to as the 'annulment' thesis. Several tort theorists, Stephen Perry most prominent among them, objected that so understood corrective justice would give rise to agent-neutral reasons for action, which, they claimed, would render it indistinguishable from distributive justice. Those who pressed this objection argued that among the distinctive features of corrective justice is that it creates agent-relative reasons for acting. The annulment thesis fails as an account of corrective justice because it cannot explain this feature of it and its failing to do so leaves the annulment thesis unable to distinguish corrective from distributive justice.

At the time, most commentators found this objection – in one form or another – decisive; frankly, I did as well. As a result I abandoned the annulment thesis and offered an alternative account of corrective justice according to which those who are responsible for the wrongful losses their conduct occasions have a duty to repair them. In one form or another, this latter conception of corrective justice has become the standard or conventional view. We shall return to it shortly, but for now I want to focus on the annulment view and the most important objections to it. That is because in retrospect, these objections now strike me as less persuasive than I once took them to be.

First, even if both corrective and distributive justice share a common property, it hardly follows that they are indistinguishable. So the fact, if it is one, that both distributive and corrective justice create agent-neutral reasons for acting does not imply that they are therefore indistinguishable from one another. Indeed, as we noted earlier, their domains are different and they can be elaborated differently in our institutional life. Secondly, it is plausible to suppose that by its nature, injustice is everyone's business. There is no reason to suppose that corrective justice does not give rise to agent-neutral reasons for acting.

The existence of corrective injustice is everyone's business both emotionally and practically. It is natural and appropriate for one to be concerned both about injustice itself and about the welfare of those who are victims of it. Beyond that, injustice calls each of us to action. Each of us has reason to see to it that injustices are effectively and appropriately addressed. This means that each of us has a reason to contribute to the creation of institutions for addressing those injustices. The reasons of corrective justice direct everyone, including both potential wrongdoers and victims, to the same actions. Once certain institutions are in place, particular persons may have agent-relative reasons for acting; but those reasons derive from the institution and its rules and procedures and not solely from corrective justice itself.

As noted, those who pressed this objection against me also held that the person who is responsible for those of another's losses that ought to be rectified or annulled has a reason to repair the loss that no one else has: that reason is thus agent-relative and is a matter of corrective justice. Thus, any principle of corrective justice that could not explain the agent-relative reason that 'wrongdoers' have to make good the losses their conduct has occasioned fails as an account of corrective justice.

This objection is less persuasive than it appears to be. We have to distinguish the fact that a corrective injustice has incurred from the fact that one has *suffered* or *caused* a corrective injustice. The fact that one has caused or is responsible for a corrective injustice can give rise to agent-relative reasons for action. These are reasons of responsibility or desert and not of corrective justice alone. Those reasons may be agent-relative, but they are not reasons that the fact of corrective justice itself creates. To be sure, in the absence of any institutional arrangement for addressing what is to be done about the victim's loss, it is reasonable to suppose that the 'wrongdoer' has a reason to make good the victim's loss that no one else has. But the mistake is in thinking that the reason he has is itself a matter of corrective justice as opposed to some other aspect of morality.

Were there good reasons for abandoning the annulment thesis, they were not provided by the various objections that we have considered to this point. Nevertheless, nearly everyone else including me found it persuasive at the time. The annulment thesis was abandoned and replaced by a conception of corrective justice according to which the party responsible for creating wrongful losses has a duty to repair them. In a moment, we shall return to the annulment thesis, but for

now we want to explore the view that corrective justice imposes a duty of repair on those whose failure to exercise appropriate care creates losses for which they are responsible.

### *E. Is Corrective Justice Epiphenomenal?*

John Gardner has suggested that this alternative conception of corrective justice – the conventional view – is subject to a fatal objection. Let's develop Gardner's objection by considering an example. Jane invites Sam to her home for dinner. To calm his nerves Sam drinks a bit too much and clumsily knocks over one of Jane's valuable collectible vases. It is reasonable that Sam should apologize to Jane and repair or replace the vase. It would not be inappropriate for Jane to be angry or to be upset, though the aptness of these responses depends in part on the extent of Sam's carelessness and his culpability in a way in which his duty to repair or replace the vase may not.

Invited to Jane's house for dinner, Sam has a responsibility to take appropriate care to guard against carelessly or intentionally damaging or destroying Jane's property. In drinking too much Sam has put himself at risk of negligently or carelessly damaging Jane's property; and as it happens this is precisely what happens. The resulting damage is his doing. He is responsible for it, and it is fitting that he answers for the untoward upshots of his carelessness. He is required to answer to Jane by incurring a remedial duty to her: to make amends in a suitable way. Roughly, the content of that duty is to apologize and offer to repair or replace the vase depending on the extent of the damage to it.

The duty of repair is grounded in the breach of the first order duty and its content depends on the causal consequences of the breach. Now, according to the conventional view, the principle of justice (or of morality) that connects the two duties – that explains and justifies the remedial duty – is corrective justice. This is the normative work that the principle of corrective justice does; it grounds second order duties of repair and explains the sense in which they are matters of morality or justice.

Gardner thinks otherwise. In going to Jane's home, Sam has a reason to exercise appropriate care to guard against damaging or destroying her property. The reason directs him to take certain actions and to avoid others. As it happens, Sam fails to act as the reason directs him to; he fails to take the appropriate precautions and his failure to do so leads to his damaging Jane's vase.

In failing to act on the reason (or the duty) he has, he has not thereby extinguished the reason, nor has he reduced or eliminated its normative force. The reason survives his failing to act on it. It would be odd after all were one able to extinguish reasons and the demands they place merely by ignoring them or failing to act on them. The reason survives and the question to ask is what does it now direct him to do?

Before he has damaged the vase, the reason Sam has to take due care requires of him that he guard against damaging or destroying property. Once he has damaged the vase, the reason he has to take care directs him to take proper precautions to guard against damaging other of Jane's belongings. It also directs him to apologize and to repair or replace the vase.

The explanation of why the reason now directs Sam to make amends by repairing or replacing the vase is that doing so is the nearest best alternative to taking the care necessary to avoid damaging the vase in the first place. In the event one fails to do the first best alternative to comply with the demands of reason one should undertake to perform the second best or nearest alternative. In breaking the vase, Sam makes it impossible to accomplish what the applicable reason requires of him (first best), and so he is responsible now for doing whatever he must do to come as close to complying fully with the requirements of that reason as he can.

The failure to do what one has reason or a duty to do need not create a new duty or reason to act; instead, as in this case, it grounds a change in the content of what one must do in order to comply with reasons that already apply. If there is no new reason to explain, there is no need to invoke a principle of corrective justice in order to explain it. There is no normative task for which we must turn to a principle of corrective justice.

It may be tempting to resist Gardner's conclusion that it is necessary in order to explain why Jane, for example, is entitled to demand an apology, repair or replacement from Sam. Corrective justice may not change the normative situation of the wrongdoer, but it may change the normative circumstances of the aggrieved party.

Prior to Sam's damaging her vase, the duty Sam has to take precautions to guard against damaging her property is just the flip side of Jane's having standing to demand of him that he take such precautions as are appropriate. Prior to his damaging the vase, she also has the normative power to release him from his responsibilities to exercise such care. It may well be unwise for her to do so, but there is no denying that she has the normative power to do so. The contents of what she has authority to demand of him after he has damaged the vase change but they are the consequence of the breakage and not the result of a new reason she has for acting. Again, what Jane has are new actions supported by the same reasons.

This line of argument is offered to establish that if understood as explaining or justifying a class of remedial *moral* duties, the principle of corrective justice does no normative work. When such a duty exists, its existence is fully and best explained by the underlying reason to take appropriate care in the first place. That reason directs conduct differentially – ex ante (prior to harm), and ex post (after harm). More generally, understood as a moral principle designed to explain what we might think of as the normative structure of the relationship between first order moral duties of care (and associated powers and rights) on the one hand and second

order duties of repair (and associated powers and rights) on the other the principle of corrective justice is epiphenomenal.

This is a serious objection, but it is by no means decisive. Gardner may be right about the moral duty to repair, but we may be looking to explain or justify something else: namely, a *coercively enforceable* duty of repair. So even if we do not need the principle of corrective justice to explain the existence of a moral duty of repair in cases like Sam's, it may well be necessary to justify the exercise of the coercive authority of the state to enforce such duties. It hardly follows after all from the fact that Sam has a moral responsibility to Jane to make amends that the state has any authority whatsoever to force him to do so.

One way to put this point is to say that the corrective justice is a political principle, not a moral principle. After all, not every moral duty is coercively enforceable; and thus we need an additional premise to explain why a moral duty of repair is coercively enforceable and that is the task of the principle of corrective justice.

Once we identify the potential role of the principle of corrective justice by distinguishing between grounding a moral duty to make appropriate amends and a coercively enforceable duty of repair, we are well on our way to meeting Gardner's objection. The second point to emphasize is that just as there may be moral duties to make amends that are not coercively enforceable, there may be coercively enforceable duties of repair that do not correspond to preexisting moral requirements.

That said, let us suppose for the sake of argument that the set of coercively enforceable duties of repair is coextensive with the set of moral duties of repair (an assumption quite unlikely to be true!). All and only moral duties of repair are coercively enforceable. Even so, it does not follow that the features of the conduct or the state of affairs that ground the moral duty of repair are the same as those that ground the duty of repair in corrective justice. The moral duty to make amends may be grounded in features of the situation that are not significant or which have a different significance in determining whether the duty to make repair is coercively enforceable. The fact of loss may be important to corrective justice in ways in which it is not to the moral duty to make amends or to apologize. In addition, the duties may have different contents, and in any case, discharging the coercively enforceable duty does not extinguish the moral duty of repair and vice versa. These are just two different kinds of duties. They likely point to different features of the normative situation as salient and different principles are necessary to explain them. If there is a reason to reject the accepted formulation Gardner has not provided it.

#### *F. Why Annulment*

We have identified two conceptions of the principle of corrective justice: the annulment thesis and the conventional view. The latter is widely accepted and thought to be responsive to the failure of the annulment thesis to explain the sense

in which corrective justice gives rise to agent-relative reasons for action. If Gardner is right the conventional view falls prey to a different but equally devastating objection.

In fact neither account of corrective justice is victim to the objections raised against them. As we have just seen, the conventional view is an account of the conditions under which coercively enforcing a duty of repair can sometimes be a matter of justice. In addition those features of wrongdoing that give rise to a moral duty to make amends need not coincide with those that ground repair in corrective justice. Finally, the contents of the moral and the politically-imposed duties of repair differ and so it would make sense that two different principles are at work in grounding them.

In addition, those who favor the conventional view have often found the annulment thesis lacking in comparison precisely because they take it that corrective justice creates agent-relative reasons for acting that cannot be explained by the annulment thesis. Some, moreover, claim that this fact about corrective justice is all that can distinguish it from distributive justice. Neither of these objections to the annulment thesis can be sustained.

Corrective and distributive justice can both create agent-neutral reasons for acting and yet be distinguished from one another in other ways: for example, by the domains in which they apply and by the nature of the social problems to which they respond. Secondly, corrective justice itself creates agent-neutral reasons for acting though it can *contribute* to creating agent-relative reasons for acting; the same is true of distributive justice, however. The fact that Jones causes a corrective injustice may give him a reason for acting that no one else has; but then again the fact that he has caused a distributive injustice or is responsible for one may do so as well. The fact of corrective injustice like the fact of distributive injustice grounds agent-neutral reasons for acting. The fact of causing either may ground agent-relative reasons.

So neither account is subject to the general objections thought to be decisive against them. How would we choose between them – not as accounts of tort law but as accounts of corrective justice? While we do not accept fully the annulment thesis, we think it is on the right track – at least as compared to the conventional view. Let's take a look first at why we think the annulment thesis is of the right general sort and then say a few things about where changes in it are in order.

One reason for preferring an account like the annulment thesis is parsimony. The conventional view holds that someone who is responsible for creating a wrongful loss incurs a duty to repair it. On this view, wrongful losses are corrective injustices. The principle then amounts to the claim that those who are responsible for creating corrective injustices have a duty to repair them. That may be true, but not simply because there is a corrective injustice. Rather the reason one has a duty to repair the loss is that it is a loss that ought to be repaired and because one is

responsible for having brought it about. So it is the fact of responsibility for the injustice that is the source of the duty and not the fact of injustice itself.

Now consider the annulment thesis. Again, we can assume that the domain of the principle of corrective justice is wrongful losses. The annulment thesis holds that such losses ought to be annulled as a matter of justice. It does not deny that those who are responsible for such losses have a duty to annul the losses, but it holds that this is not strictly speaking a matter of justice. It is a matter of responsibility or perhaps desert. The fact that there is a corrective injustice is a call to action for everyone.

One has to be careful to distinguish between the 'constitutive elements' of corrective injustice and the reasons for action that corrective justice creates. It is true that in order to be a corrective injustice a loss must result from human agency. That is part of what makes it an injustice of the right sort. It does not follow from the fact that in order for a loss to be an injustice it must result from human agency that the reason to which it gives rise should reflect that fact about it.

A loss is a concern of corrective justice only if it has a certain causal history in which human agency figures in a certain way. But this may be because only agents can violate or invade rights or because only persons can wrong others. Once there is a wrong or an injustice of the appropriate sort, it is another question as to what its practical significance is for all of us – including those who are not responsible for the injustice.

Those who are responsible may have reasons for acting that the rest of us do not have, the ground of such reasons being the fact of responsibility for the injustice. In addition, the conditions that one must satisfy in order to be responsible for a wrongful loss (an injustice) need not coincide with the conditions one must satisfy in order to have created a wrongful loss. The extent to which agency must be implicated in order for a loss to be wrongful and thus a concern of corrective justice may not coincide with the conditions necessary in order for a person to be responsible for the loss.

In short, the main reason for preferring the annulment view to the conventional view is that it allows us to distinguish corrective injustice from responsibility for a corrective injustice, and thus to distinguish the reasons for acting corrective justice creates from those that responsibility or desert create.

### *G. Some amendments*

The concept of 'wrongfulness' is central to the version of the annulment thesis that included within its domain not only wrongful losses but also wrongful gains. Both of these features of the annulment thesis raise concerns that we want to say just a bit about at this point. Our preliminary thinking is that losses have a moral significance – an urgency -- as such that gains do not have. If I injure you and cause you to suffer a loss, it is natural to ask what is to be done. Indeed, if you suffer a loss through no one's action, but simply as a matter of bad luck, that fact seems to engage

morality as well. On the other hand, if you secure a gain through your own doing, by luck or as the result of the intentional or unintentional action of another, our moral sensibilities are not engaged in the same way. This is not to say that gains can never be the concern of justice; wrongful gains surely are.

So the first idea is that perhaps loss engages our moral sensibilities in ways in which gains do not. (This is of course is an invitation to theorize, not the conclusion of a theory.) But the domain of corrective justice is restricted to losses owing to human agency and not to bad luck more generally. Here the idea is that only agents can wrong others or invade their rights. And so the concept of corrective justice must ultimately have something to do with losses owing to wrongs or to actions contrary to rights.

In the earlier formulation the emphasis has been on the wrongfulness of the loss, and while this may turn out to be the right way to think about corrective justice, more of an argument is needed than has been provided to this point. We are more confident that corrective justice requires that some category of losses be annulled than we are about which kinds of losses those are and why some rather than other losses are the concern of corrective justice. To put it another way, when we have an account of what it is about certain losses that makes them the concern of justice we will have a better idea of what kinds of losses corrective justice requires that we annul.

## **II. The Normative Structure of Tort Law**

One feature of my work that has remained constant over the years is the claim that a just tort law is a practice of corrective justice. Part of what this means is that tort law partially specifies the content of corrective justice. To understand a just system of tort law is in part to understand the nature of corrective justice.

On more than one occasion, I have been criticized for offering an account of tort law that may have been accurate a couple of hundred years ago when the basic tort was some form of intentional wrongdoing – trespass or battery -- and the most common harms involved just two parties. But that was before the industrial revolution, and the industrial revolution changed everything. Now the most basic tort is negligence and tort law resides on a continuum with all sorts of other practices designed to regulate and to compensate: from workmen's compensation schemes to no fault schemes to administrative regulations. Any account of tort law must reflect the fact that it is a tool capable of regulating behavior and compensating accident victims. It shares the same normative justification as do these other institutions that are genuine alternatives to it – at least in part.

No one thinks that administrative regulations or no-fault schemes or workmen's compensation schemes are designed primarily to promote corrective justice. To argue that tort law is a matter of corrective justice, then, has the effect of isolating it inappropriately. To emphasize the corrective justice aims of tort law is not only to isolate it, but to remain oblivious to the variety of laudable social and

economic goals that it is capable of achieving and which figure in its desirability and contribute to its legitimacy.

### *A. Normative Structure and Foundational Justification*

These objections simply cut no ice against the corrective justice account of tort law. In fact they are largely misguided and beside the point. They are misguided because they take me to be offering corrective justice as an account of the *justification* of tort law when I have consistently offered it as an account of the normative structure of tort law. They are criticizing me for making a claim I am not and never have made; and they are ignoring the importance of the claim I am making.<sup>11</sup>

To be sure, securing corrective justice can be and is part of the foundational justification of our system of tort law. As to its overall justification, we are in fact quite ecumenical. In a liberal society it would be very surprising indeed if the institutions we have could only be justified from one moral or political perspective.

It is one thing to say that corrective justice is an account of the normative structure of tort law and not primarily an account of its justification and another to explain what the normative structure of a practice is and to distinguish its normative structure from its foundational justification. The distinction between the normative structure and foundational justification of a practice is nicely illustrated by the practice of promising.

There are a number of good reasons for creating and sustaining a practice of promising. Promises foster commitments, friendships, deepen social and personal bonds, allow individuals to plan their futures, impose constraints on themselves and confer authority on others to control what one is free to do. All of these are valuable human assets made available by the institution of promising; all of them count as part of its justification.

Whatever reasons exist for an institution of promising and for making and keeping particular promises, the institution itself has a distinctive normative structure. The standard view is that promises create obligations on the promisor and confer power or authority on the promisee. The promisor is obligated to do what he has promised to do, but is also subject to the will of the promisee who has an authority to demand compliance of him or to relieve him of his obligations.

Other normative relationships emerge in the event of breach. In the typical case, provided compliance with the promise remains a possibility, the promisee can demand “specific performance” as well as an apology. In the event performance is no longer possible, the promisee can demand “damages” and the promisor is

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<sup>11</sup> Of all my critics, the ones who have understood best that corrective justice is primarily an account of the normative structure of tort law and not an account of its justification are Ben Zipursky and John Goldberg. (We take up their objections and their alternative below.)

obligated to provide it. Promising is governed by norms and these norms stand in relationship to one another. These are norms that govern the making and keeping of promises and the manner by which promises are enforced, and so on. To explain the normative structure of the institution of promising is to explain the relationship among these norms; it is to identify the principle, if any, that explains and grounds the relationships among the normatively salient features of the practice.

### *B. Methodology*

Let's pause to consider a methodological question: what we are doing when we offer an account of the normative structure of a practice? We can distinguish among three different approaches to understanding a practice. The first of these is behavioristic. Such an account identifies regularities of behavior in order primarily to make predictions about future behavior. The behavioristic approach is often exemplified by the law and economics approach to the law, where the key is to identify regularities in behavior and to make predictions about behavior in the light of changes in prices or sanctions or the like. The second is hermeneutic. Such an approach involves understanding the practice from the point of view of various participants in it. If the practice is a normative practice – as both law and promising are – then the understanding of the norms of the practice that counts is the participant's. Arguably, Ronald Dworkin's approach to certain jurisprudential questions represents a philosophically sophisticated example of the hermeneutic approach to an essentially normative institution. The third approach -- which we call reconstructive --[WHICH NEEDS A LABEL: RECONSTRUCTIVE?] begins by recognizing that the participants in normative practices adopt certain attitudes towards the norms that govern their behavior; or it recognizes that some do and all might. It takes this fact about the participants – that at least some of them adopt what Hart referred to as the internal point of view – as something that an adequate theory of the practice must capture. In offering an account of the normative structure of the practice it makes possible a rationalization of the actions of participants in terms of the norms of the practice and the reasons to which those norms give rise. Hart emphasizes that law is a distinctive kind of social practice: one in which all participants can take the internal point of view and one in which at least some participants must do so. To adopt the internal point of view towards a norm is to take the norm as one's reason for acting. So to understand the law is necessarily to understand how it figures in explaining, justifying and criticizing behavior. In offering an account of the normative structure of tort law we take ourselves to be engaged in the same kind of project that Hart took himself to be engaged in. Our focus is not law overall but tort law in particular. We have two projects: the first is to identify the normative structure of tort law; the second is to explain that structure – to identify the principles that that make the best sense of it.

### *C. The elements of the Normative Structure*

Like promising, tort law gives rise to distinctive kinds of reasons for acting. These are expressed in the primary norms of tort law and the mechanisms and procedures by which those norms are implemented or enforced: in particular in the system of private actions for damages (or less frequently, for injunctive relief). A full account of the normative structure of tort law would explain the content of the primary norms, the mechanisms of their implementation and enforcement and the connection between the two. It would do so by identifying a principle or consistent set of principles that rationalize the salient normative features of the practice.<sup>12</sup>

The literature on tort theory normally divides into those who endorse an economic analysis and those who think that tort law expresses some or other demand of morality or justice. In what follows we take up three accounts of the normative structure of tort law. The first is the economic analysis. The failure of the economic analysis is often taken to provide evidence for the conventional corrective justice account. And so upon completing our discussion of the economic analysis, we turn to the standard corrective justice account of tort law's normative structure. That account has been the target of powerful sustained criticism by Benjamin Zipursky and John Goldberg. In its place they offer what they call the 'recourse view.' We explore their objection and the alternative to corrective justice they provide, and find both wanting. We conclude this section by offering a defense of the view that the normative structure of tort law is best explained by the conception of corrective justice we have outlined in section I. We begin, however, with the familiar objection to the economic analysis of the structure of tort law.

#### *D. The structure of tort law*

In a typical tort suit in which B alleges that A has tortiously harmed him and for which B seeks to recover damages from A for harm caused:

1. B brings an action against A.
2. B introduces evidence against A to the effect that:
  - a. A wronged him
  - b. He (B) suffered a harm the tort law recognizes as the sort of harm for which the law provides remedies.
  - c. A's wrong is the cause of harm and thus that A is responsible for it.

If we suppose both that B is able to make out his allegations to the satisfaction of a jury and that that A is unable to mount a compelling defense to the action against him, a practical conclusion is warranted:

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<sup>12</sup> By 'rationalize' we mean it displays these normative features as supported by a consistent set of reasons that show them to be rational

3. A is liable to make good B's losses.<sup>13</sup>

According to the economic analysis, the goal of tort law is optimal deterrence. Salient features of tort law are explained in terms of their relationship to the goal of cost avoidance. The problem is that the economic analysis can plausibly explain neither B's actions nor the inference the law draws. The fact is that in the typical case the victim sues the person she alleges to be the wrongdoer, but if the aim of tort law is optimal deterrence, we should expect that the victim would sue the person who she thinks is best able to reduce accidents at the lowest cost. That may turn out to be the wrongdoer, but it need not be. In any case, having the property of being the alleged wrongdoer is not salient on the economic account; having the property of being in the best position to reduce costs is. However, in tort law having the property of being the alleged wrongdoer is the salient property. Having the property of being able efficiently to reduce costs is not.

The natural way to mitigate the force of this objection is to note that it is costly to search for the cheapest cost avoider – especially as compared to searching for the alleged wrongdoer. So the salience of being the alleged wrongdoer is to be explained as a matter of high search costs. This is implausible because it implies that as search costs decline significantly we should expect to find victims bringing actions against cheapest cost avoiders and not against those who they allege have wronged them. But we have no reason to believe this. It is also the wrong kind of explanation, for it presupposes that being the alleged wrongdoer is not the normatively significant fact in torts. Rather the normatively significant fact (according to the economic analysis) is being able to reduce accident costs efficiently, and the importance of being the alleged wrongdoer gains its place in tort law only as a result of high search costs.

Secondly, if the point of imposing liability is to allocate costs to the person in the position to reduce future costs at the lowest price, then we would expect to find the plaintiff introducing evidence that the injurer is better able than she to reduce costs. In fact, the plaintiff does no such thing, wisely preferring to introduce evidence that the defendant has wronged her and that she has suffered compensable losses as a result.

Thirdly, were economic analysis correct we would expect the practical conclusion of litigation (the inference called for by the evidence presented) to consist in that allocation of the costs appropriate to induce the right behavior on the part of both the plaintiff and the defendant. In fact, the judgment warranted if the plaintiff has made his case is that the defendant is liable to her for the costs of the harm suffered. That amount of money may fall short or exceed the amount sufficient to induce the parties to take optimal precautions. Damage awards are uniformly oblivious to the amounts necessary or sufficient to induce optimal

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<sup>13</sup> In what follows we will refine this conclusion. Is the imposition of liability the imposition of a duty of repair or the imposition of costs; and in either case – which costs, and so on. The current formulation suffices for our current purposes.

deterrence; and indeed, no evidence is typically introduced in order to determine what that amount is.

If the aim of tort law is optimal deterrence, we might *require* the victim to bring an action rather than provide her the option of doing so. Providing the victim with the option to bring an action may lead to too few lawsuits and to inefficiency.

This worry draws our attention to the general point that tort litigation centers around the victim's prerogatives and normative powers in a way that the economic analysis lacks the resources to explain. In the conventional wisdom, the fact that the loss falls to the victim of misfortune is taken to create a burden for the victim. In a sense it does. Certainly, the decision to initiate litigation is costly and initiating litigation is costlier still. On the other hand, the option of initiating litigation as a way of demanding that the defendant answer for his mischief or offer an accounting of it is one of the many normative powers tort law confers on victims; and focusing on those powers and the role they play in tort law is central to the theory of tort law we develop here.

#### *E. Recourse, not corrective justice*

These considerations suggest that the economic analysis cannot explain the normative structure of tort law.<sup>14</sup> Many commentators have found this conclusion unavoidable. Some have taken the above argument to constitute a powerful argument for a corrective justice account of tort law.

Roughly that argument proceeds as follows. In an ordinary tort action, the plaintiff/victim brings an action against the person he identifies as the individual responsible for the loss that he has suffered. In order to make good his claim, the victim seeks to establish that the party he is bringing an action against has wronged him by breaching a primary conduct norm with regard to him; he then argues that he has suffered a harm or loss and that the loss is the result of breach and that the injurer is thus responsible for it. If he is able to make good on these claims, the practical inference the law endorses is that the injurer has a duty of repair to the victim. This is precisely what the principle of corrective justice asserts. And so the normative structure of tort law is a matter of corrective justice.

In an important series of articles, Ben Zipursky and John Goldberg have raised very serious doubts about the corrective justice account of the normative structure of tort law. They emphasize two features of existing tort law that the corrective justice account gets wrong. The first is that the corrective justice account

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<sup>14</sup> Our view is that a charitable interpretation of the economic analysis is that it is not an account of the normative structure of tort law, but an account of its justification. That being so, it still owes us an explanation of the connection between the normative structure of tort law and its economic foundation. This is precisely the sort of explanation we offer in Part III, and one the economist does not.

presupposes that a judgment in torts is the imposition of a duty of repair. In fact, however, a judgment in torts is a liability to pay damages. Often those damages are compensatory in nature. The corrective justice account presupposes that the breach of the primary norm in torts gives rise to a duty of repair (or a liability to pay damages). This too is mistaken. The breach of the duty imposed by the primary norm grounds a normative power that is the plaintiff's to exercise, not a duty or a liability that is the defendant's to bear.

Of these two objections, we agree with the second: the judgment in tort imposes a liability and not a duty; and so we set that objection aside for now. Instead, we focus on the most worrisome objection, namely, that whereas the corrective justice view is committed to the idea that the breach of a primary conduct norm creates a duty (or liability), the fact is that, in torts, the breach of a primary norm gives rise to a normative power. Conferred on the victim by the breach, the normative power is the power to create and impose a liability on the defendant. This last point has the additional consequence that unless and until the plaintiff exercises his normative power to create and impose a liability on the injurer, the wrongdoer has no duty in the law to make repair. The duty or the liability is a consequence of the exercise of a power and does not exist independent of the power being successfully exercised.

It is important to note that, so formulated, the objection is that corrective justice goes awry because it does not actually capture the normative structure of tort law. Corrective justice, the objection goes, is explaining something that doesn't really exist. There is no duty of repair that it is the purpose of corrective justice to explain. There is instead a power to impose a liability that corrective justice is poorly suited to explain.

The principle of corrective justice is well suited to explain the duty of repair. The problem is that there is no such duty of repair in torts. What needs explaining is the power to create and impose a liability. The burden of solving this problem falls to Zipursky and Goldberg. Unfortunately, they have very little to say. They posit the existence of a right to recourse and offer a suggestive but very incompletely developed account of its status as a basic principle of political morality. This is an issue to which we shall return below, but for now, it is enough to note that they do see that in order to have a competitor to the corrective justice account it is not enough to identify the salient normative features of tort law; one needs as well an explanation of their normative significance.

For now we want to explore whether they are right in identifying the normative power to create and impose a liability as the normatively salient feature of tort law. We set aside for the time being what principle if any would explain that feature's normative significance.

*F. Jurisprudence all the way down*

Setting aside the issue of whether the judgment in torts imposes a liability or instead a duty of repair, the corrective justice theorist and the recourse theorist agree that there is both a duty (or liability) that falls to the defendant and a set of normative powers that are conferred on the victim/plaintiff. They disagree about the content of each and the order of explanation. The recourse theorist believes that the breach of the primary norm creates the normative power and that the successful exercise of that power creates the duty or liability. The corrective justice theorist believes that the breach of the primary norm creates the duty or liability and that the duty or liability explains the existence of the power. Whereas the recourse theorist believes that the content of the power is to create the duty or liability, the corrective justice theorist insists that duty already exists and so the plaintiff cannot have the power to create it. Instead, it is a power to insist on the duty's enforcement or to release the defendant from his duty. Finally, in the corrective justice account the power must be understood as a mechanism by which corrective justice is secured and not as the normative focal point in virtue of which other features of the normative structure of tort law are to be explained.

How do we choose between these two pictures? The recourse theorist might point to the fact that there is no enforceable duty in law until the victim/plaintiff brings an action to create one. The corrective justice theorist might respond that there is such a duty but its actual enforcement depends on the victim insisting on it. There are many reasons why the law would recognize the existence of liabilities or duties but not permit their enforcement unless and until others – in this case, victim/plaintiffs – take steps to establish the existence of the duty or to insist on its enforcement.

One way to see the force of this response is to imagine that we had some other system than the tort system for enforcing the claim against the wrongdoer. If the injurer had no duty to repair that was consequent on his breach, then it would be odd to think that an alternative way of enforcing the duty against him could make sense. But surely such an arrangement is coherent and sensible, quite apart from whether it would constitute the best way to enforce the duties that wrongdoers have. Presumably, such a scheme makes no sense on the recourse view because there are no legal duties to make repair and no liabilities to pay damages in the absence of the victim/plaintiff successfully exercising his power to create them.

This is a start, but not persuasive just yet. The recourse theorist might allow that the breach of a primary conduct norm in torts gives rise to a duty of repair but deny that it is a legal duty. They might insist that there is a moral duty of repair that is not the concern of tort law. The concern of tort law is the right to recourse that issues in the normative power to impose liability that is consequent on the breach.

At this level the dispute between the corrective justice and recourse theorists turns on matters of jurisprudence. Whether there is or is not a preexisting legal duty depends on one's view of the law and its grounds. The view that there is no duty depends on the view that the duty emerges only after a judgment against the defendant has been secured: that is, only after a particular kind of legally

authorizing action has taken place. But that is a controversial view about one's duties under the law, and one that is especially awkward in the context of the common law of torts. After all, many if not all of the primary norms regulating conduct that are enforced in torts do not depend for their existence on any official acts by relevant officials. Why would one think that what is good enough for the primary norms of tort law is not good enough for the norms governing their breach?

We are inclined to the view that jurisprudential considerations are inconclusive and that the dispute between recourse theorists and corrective justice theorists about the normative structure of tort law cannot be resolved at level of jurisprudence. The debate may implicate matters of fundamental jurisprudence but its resolution does not turn on those considerations. How then are we to make the case for one or the other of these two accounts? The answer depends on how one goes about making a case for a philosophical position more generally.

The philosopher is an artist of sorts, painting a picture of an area of our social, political, moral and legal life. Hopefully, the picture is adequately resolved and is capable of conveying an overall interpretation of that area of our life together. We assess competing philosophical views by the picture each paints and the overall account that emerges. Basically, the recourse theorist and the corrective justice theorist are offering different pictures of the normatively salient features of tort law. The recourse theorist picks out the normative power that the victim has and characterizes it as a power to create and impose a legal liability that the defendant then has a duty to discharge. Essential to that argument is the denial of the existence of a legal liability prior to the exercise of the normative power. The corrective justice theorist is committed to the existence of the legal liability and treats that as the normatively salient feature of tort actions. He then explains the normative power of the victim/plaintiff rejecting that it is a power to create and impose a liability. In what follows we offer the outlines of a general picture supporting a particular corrective justice account of tort law.

### *G. Painting a picture for corrective justice*<sup>15</sup>

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<sup>15</sup> We have to be open to the possibility that there is nothing distinctive about the normative structure of tort law. One might hold this view because one believes that there is nothing distinctive about any area of the law: tort law is nothing special in this regard. All area distinctions in the law are artificial. Even if the distinctions among various areas of the law are artificial it does not make them arbitrary. To be sure, some theorists hold that various areas of the law necessarily or conceptually map onto particular domains or aspects of morality and in claiming that the distinctions among various areas of the law are artificial all one need be doing is denying the claim that there is a natural or essential mapping of morality to particular legal domains.

One can accept that the distinctions that the law recognizes among various areas is conventional without that implying anything about the distinctions make sense or are important. Nor does it follow that the boundaries between areas of the law are impermeable. There will always be some bleeding between areas of the law and for some purposes – theoretical as well as practical – it may be of no real importance or interest to emphasize the differences. Still, none of this implies

The principle of corrective justice performs that task within the account we offer; and the right to recourse performs the same task in the view advanced by Zipursky and Goldberg.

We begin with a working formulation of our conception of corrective justice according to which corrective justice requires annulling wrongful losses (or some variant on that idea). Our account is not committed to the existence of a legal duty to make repair that exists prior to the exercise of the plaintiff/victim's normative power. Certainly it does not claim that such a duty or liability exists as a matter of corrective justice. If a preexisting liability or legal duty exists, it is not a matter of corrective justice. That means that our account is simply not subject to the Zipursky/Goldberg objection. This does not mean that the corrective justice account we offer is right, only that it is not subject to a particular kind of objection – whatever its ultimate force may be.

We turn next to the normatively salient features of tort law. As we noted earlier, a satisfying account of the normative structure of tort law would explain the content of the primary norms, the mechanisms of their enforcement and the connection between the two. Thus an account of the normative structure of tort law will point us to a principle that knits the normative elements together in a way that reveals what is distinctive of tort law – what makes it the area of the law that it is.

The norms of tort law are of basically two sorts: primary norms that impose duties to take appropriate precautions to guard against harm; and norms that govern the enforcement of those norms, specifically those that regulate private causes of actions brought by victims/plaintiffs against those they allege have wronged them. Our claim is that the principle of corrective justice outlined above provides a consistent, illuminating appreciation of normatively significant features

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that there are no differences; still less does it suggest that whatever differences there might be that they are unimportant.

Even so, it may turn out that on reflection, there is nothing normatively distinctive about tort law. Perhaps, there is something normatively distinctive about private law more generally – as Ernie Weinrib suggests – but nothing especially distinctive of tort law. Or it might be that there is something normatively distinctive of tort law in combination with property law or tort law in combination with unjust enrichment law, and so on -- but nothing normatively distinctive about tort law itself. Or it may be that there is something normatively distinctive of large parts of tort law, but not, say of other parts, including, for example, products liability. We have to be open to all of these possibilities, and we are.

On the other hand, we have to begin somewhere. So we need a working but revisable set of basic building blocks of tort law. These building blocks are all going to relate to the normative aspects of tort law, since that is the feature of tort law that is our concern. It is not an arbitrary concern. For we begin with the idea that the law regulates human affairs by norms that are reasons and to understand what, if anything, is distinctive of a particular area of the law is to understand something of its distinctive normative character.

of the primary norms, the norms governing their enforcement and the relationship between the two. In addition, we claim that the principle of corrective justice so understood embodies important political and moral values which are thereby expressed in the normative structure of tort law.<sup>16</sup>

Let's begin with the primary norms. The primary norms of tort law regulate the conduct of those who engage in various undertakings. These norms impose relational duties that those who engage in various undertakings owe to particular persons or to particular groups of persons whose security is jeopardized by those undertakings. In saying that they are duties owed to particular persons, we intend to draw a contrast with norms that impose an obligation owed to the community at large. Because these duties are relational, they confer certain powers on those to whom one owes them, powers that others, for example do not possess. So, for example, if Sam owes Jane such a duty, then Jane has the power to insist on Sam's compliance as well as the power to release him from his responsibilities to her. These are not powers that others have, even though if Sam breached his obligations to Jane, everyone and not just Jane would have grounds for indignation and anger towards him. Some of the moral sentiments travel with the notion of obligation, but some normative powers travel only with relational obligations or duties.

It is common for commentators to think of the primary duties of tort law as a subset of duties or obligations to exercise care of one sort or another. This is a mistake. The failure to exercise care is not actionable in torts. The better view is that the duties imposed by the conduct norms of tort law are duties not to harm by failing to take appropriate precautions. In some cases, the appropriate precautions are all those that are necessary to prevent harm from occurring. These are commonly thought of as cases in which one's undertaking is governed by a rule of strict liability. The classic example of such an activity is blasting.

In other cases, the appropriate precautions require one to exercise reasonable care. If one exercises reasonable care and still harms another, one has not breached one's duty because it is not true that the harm has occurred as a consequence of the failure to take appropriate precautions to guard against it. Such activities are said to be governed by a rule of fault liability, in our example by a rule of negligence. The classic example of this sort of activity is motoring.

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<sup>16</sup> Whereas the principle of corrective justice is well developed – here and elsewhere – the same cannot be said about the right to recourse. It remains the least developed part of the Zipursky and Goldberg argument and leaves one with the impression that it lacks the generality to qualify as a genuine principle of political morality. It seems tailored to the explanatory role it is being asked to play and remains unconnected to other more fundamental principles of political morality and justice. At the very least, it is hard to assess the recourse view absent a good deal more work being done on the side of the relevant political philosophy.

So rather than criticizing the recourse view, we prefer to make the case for the corrective justice account of the normative structure of tort law.

Another way to put the difference between these two kinds of duties is to note that one can satisfy one's duty under fault liability in either of two ways: by not harming others or by not being at fault in doing so. In contrast, in the case of activities governed by strict liability, one can meet one's duties to those one puts at risk in only one way: by not harming them.

The key point for our current purposes is that a breach of either sort of norm constitutes a *wronging* –in some sense—of the individual whose security is threatened by one's undertaking. The import of the primary norms being relational is that one's duties to take appropriate care to guard against harm are owed to particular persons who consequently have a certain standing to demand compliance. The failure to comply is thus action contrary to a right. Most such actions are wrongs, but there are justifiable actions contrary to rights and it is odd to refer to these as wrongs. That is why we characterize them all as wrongings: actions contrary to the constraints that rights impose.

This is important because it means that the losses that result are losses that are the consequence of wrongings. As a result of conduct that is an invasion of a right or a wronging, they are wrongful losses in the sense that brings them within the ambit of corrective justice as we have characterized it. The fact that the breach of the primary norms is a wronging is a normatively salient feature of those norms (a consequence of the norm's being relational) and one that is important from the point of view of corrective justice.

We turn now to a speculative claim about the primary norms of tort law. Not every interest is protected by tort law. The primary norms of tort law protect one's interest in one's property, one's body, one's control over one's body, one's capacity to earn a living, one's reputation, and aspects of one's emotional well being. To the extent that these are the paradigmatic interests protected by tort law, they are matters of corrective justice as well, since as we suggested in the first section corrective justice is concerned primarily with a category of important or significant bads or losses. One needs an argument (that we have not provided yet) but the thought would be that tort law in the main protects precisely those interests harms against which are the substantial or important bads that are the basic concern of corrective justice. (At this point this is a speculative hypothesis at best.)

We turn now to the norms governing the enforcement of the primary or conduct norms. No one denies that victim/plaintiffs possess normative powers. In the recourse view, the victim has the power to create and impose on the defendant a liability to pay damages to her. In the corrective justice account, she has no power to create or impose a liability (or a duty of repair). Instead, the normative powers she has are instruments by which the wrongful losses she has suffered in virtue of the breach are to be rectified.

Recall the point we made in the first section of the paper, that the demands of corrective justice may be satisfied by creating an institution that allocates normative powers with regard to wrongful losses. Our claim is that tort law is, in this sense,

an institution of corrective justice. The breach of the primary norms creates wrongful losses that are the appropriate concern of corrective justice. Tort law provides a mechanism for addressing those losses. It does so by conferring powers on victim/plaintiffs to initiate litigation and, upon successfully bringing an action, to impose a liability on the defendant. That liability rectifies or annuls the relevant wrongful losses. The wrongful loss is the result of the breach and the concern of corrective justice. The enforcement norms distribute normative powers as a mode or mechanism for rectifying that loss, not as a way of creating a liability.

The key point is that, in the corrective justice account of tort law, the normative power is a mode of rectification. This mode of rectification is not required by corrective justice, but it is a way of elaborating its requirements. To say that this mode of rectification is not required by corrective justice is not to say that there are no good reasons for it. There are a variety of good reasons for empowering the victim to insist on the imposition of the liability. First of all it is a way not only of imposing liability on the wrongdoer but of compensating the victim; and doing so through one institutional arrangement. Second, as economists have pointed out, it provides an incentive for the victims to act as private prosecutors. Third, it makes the defendant accountable to the victim by conferring an authority on the victim in the form of a power to create and impose a liability. And that is a power that can be waived or insisted upon; and for those reasons, makes the defendant answerable to the victim. And so on.

We would like to elaborate just a bit on this last point, and in doing so consider an objection to the account on offer. Suppose that Jones has suffered a wrongful loss. This means that corrective justice requires its annulment and that the relevant collectivity ought to respond to his loss in a suitable way to insure that his loss is annulled. So far so good. Now imagine that Jones' loss is annulled by having a designated person reimburse him for it. If we suppose that this counts as an appropriate response (and we have no reason to rule it out without begging the question), then Jones has no complaint as a matter of justice. Isn't that the end of it as far as corrective justice goes? The 'normative structure' of this institution looks nothing like tort law's; yet it accomplishes corrective justice. We don't want to say that this institution has the normative structure of tort law; on the other hand, what is it that we are saying when we refer to the structure of tort law embodying or expressing corrective justice?

The idea is this. Take a look at how Jones' claim in justice is vindicated in the tort system. Jones makes a claim against the wrongdoer. He establishes that he was wronged and that he suffered a loss as a consequence. He establishes that his loss is of the sort that the law is concerned to guard one against and so on. The mechanism by which his claim is vindicated in other words reflects all the elements of the claim in corrective justice and does so as well by reflecting the relational aspects of the underlying norm of conduct, the breach of which gives rise to the claim in justice. And it is in that sense that the normative structure reflects corrective justice: it reflects the elements of a claim in corrective justice and the normative relationships

that are essential to it. And in doing so it reflects the values that are captured in the underlying conduct norms and the modes of private actions in order to enforce them.

So the claim that tort law is an institution of corrective justice is a claim both about the character of the claims it vindicates and the mode by which those claims are vindicated. The argument for tort law depends on both and the relationship between them.

The final piece of the argument is, as we have noted, the defense of the principle of corrective justice, which is the burden of the first part and which we will not repeat here. So this is the general picture on offer designed to defend the view that the normative structure of tort law is best explained by corrective justice.

We close this section with four suggestive remarks. First, we agree with Zipursky and Goldberg that a judgment against the wrongdoer is a *liability* to pay damages and not a *duty*. A liability is a debt and consistent with justice and morality more generally one can have one's debts discharged by others on one's behalf. Of course, one often has a duty to discharge one's debts, but that is a duty to see to it that one's debts are discharged.

Second, in the event that the tort system is legitimate or justified, the debt that is one's liability in torts is legitimately or justifiably incurred. A legitimately incurred debt is a debt that one has a *moral* duty to discharge. And so in a legitimate tort system the reason the law creates is an ordinary moral reason for acting that takes the form of a moral duty to discharge a legitimately incurred debt. Once the liable party has discharged her debt in a morally permissible way, there is nothing else she owes as a matter of law. And so one of the important roles that the corrective justice account of tort law performs is helping us to understand the conditions under which the responsibility the law imposes on defendants in tort law to discharge their liabilities is a moral requirement and thus a moral reason for acting and not merely a pragmatic one.

Third, we come now to the connection between the normative structure of tort law and its foundational justification. While it is important to distinguish between the normative structure of tort law and its foundational justification, there are likely to be extremely important interactions between the two. Let's identify a few of these. Tort law serves many legitimate ends and covers many areas of life. These facts exert a kind of pressure on the normative structure of the law. There will be changes in the nature of the underlying or primary obligations and there are likely to be changes in the normative machinery by which these norms are enforced. Some areas of the law will be so removed in both regards that it may be more helpful ultimately to think of them as adjunct tort and not part of tort law at all; but this is the extreme. The general point is that foundational justifications for tort law – the reasons for having it – can well exert pressure on its normative structure. This is one very good reason for thinking that it is unlikely that there is one overarching principle that explains the normative structure of tort law.

Fourth, and most important, we suggest that the fact that tort law has the normative structure that it does may be among the important reasons why it is able successfully to secure many of the aims and goals that make it legitimate or that justify it. We have argued that the normative structure of tort law is best explained by a set of moral principles including importantly the principle of corrective justice. Our claim is that this feature of it, the fact that the law adjudicates claims in a way that embodies or expresses a range of important values and ideals, is part of the reason why it can be effective at pursuing a range of important social goals.