

Draft: not for quotation

Liability and Assignability

Jules L. Coleman
Professor of Philosophy
NYU –AD and NYU- NY

1. The concept of liability figures in a number of distinct locutions. We talk about individuals (or groups) bearing ‘a liability,’ ‘being liable,’ and ‘being held liable.’ In its broadest sense a liability is a kind of vulnerability, and the idea of vulnerability may well be what ties the locutions together conceptually.¹ We distinguish between *liability for* and *liability to*; and both involve different forms of vulnerability. To be liable *for* something is to be subject to bearing a burden, cost, disability or detriment of some sort. To be liable *to* another is to be vulnerable to the exercise of another’s power. The powers to which one might be vulnerable vary from the emotional and psychological to the physical and normative.

Though it is natural to characterize being liable to another as a burdensome and thus unwanted state, making oneself vulnerable to another is essential to developing trust, friendship and interpersonal love. When we become aware that others we care about are unwilling to expose themselves to the risks essential to developing trust, we are often rightly concerned that they may be closing themselves off from access to potentially valuable relationships.

There is no shortage of potential liabilities – individual and collective, private and public. We talk about being liable for our misdeeds, our misfortunes, the pain and suffering of others, for how our lives and those of others go. We talk of our liability to fines, punishments, taxes, regulations as well as to duties of repair and recourse: of being liable to the indignation and resentment of others as well as to familiar forms of self-recrimination, especially guilt.

¹ Not every vulnerability is a liability. Liabilities are a distinctive kind of vulnerability about which we will have more to say below.

2. In some cases, ascribing liability to someone for something is just another way of ascribing responsibility to him for it. Often though the fact that someone is responsible for an action or consequence is a reason bearing on the appropriateness, fairness or justice of subjecting him to liability for it. Arguably, we are liable to sanctions, fines, and duties of repair as well as to the reactive attitudes of others in part *because* we are responsible for our misdeeds and their consequences. In many cases, these responses would be inappropriate, unfair or unjust were we not responsible or at fault for what has gone wrong.

Though being responsible (for an act, outcome, state of affairs, etc.) bears on the justification of liability, it is neither necessary nor sufficient for liability to be justly imposed. Sometimes, though deserved, liability serves no purpose or may be counterproductive. Other times, it may simply be inapt as too much time has passed to render the imposition of liability fitting or fair.²

Liability may be justifiably imposed on grounds other than responsibility. Insurers are liable for the costs they insure and promisors are liable to perform the actions they promise to undertake. The innocent threat can be justifiably vulnerable to defensive actions taken against him in self-defense. On yet other occasions liability is imposed simply to offset benefits – as a matter of fairness: e.g. those who benefit from various activities should shoulder its costs (or at least some of them). And on still other occasions, considerations of ‘fair play’ are offered to justify liability to sanction when a sufficient number of participants in a group activity incur opportunity costs for the good of the collective. Finally, in a loose but nevertheless important sense merely being in the world subjects one to bad luck and its unhappy consequences. No basis beyond participating in life is required to justify liability to bad luck. Thus, while responsibility is often the basis of liability, it is by no means the only grounds adequate to do so.

We now have three important distinctions in place: (1) that between liability for and liability to; (2) that among the various forms of liability for and liability to; and (3) that among various *grounds* of liability – both liability for and liability to. To this group, we can add (4) that among the various *modes* of liability – both liability for and liability to. By a mode of liability, I mean the mechanism by which liability is imposed, extracted and enforced. As an example, we could impose or allocate the costs of accidents through first party private or public insurance, the tort system, a system of workman’s compensation or the like.

² In another essay, I argue at length that among the least appreciated of these reasons is the passage of time. That is, as time passes and events unfold, it may no longer be fair or appropriate to impose liabilities on someone for the wrongs he has done in the past. Indeed it may be unjust to him to do so; and there may even be occasions on which it would be wrong for someone to do so. Indeed, in some cases one may have a duty not to. See, Jules Coleman and Alex Sarch, “Blameworthiness and Time.”

3. Virtually everyone who has watched a police show on television is aware of the institution of plea-bargaining, notable not only for its pervasiveness but for the fact that it gives defendants the power to negotiate the extent of the liability to which their putative wrongdoing subjects them. At first blush, one might object to such a practice on the grounds that it disaggregates inappropriately the grounds and the modes of liability. Presumably the basis of liability to criminal sanction in these cases is wrongdoing; yet the mode of extracting or imposing liability is some or other version of contract.

If criminal wrongdoing calls for punishment or otherwise justifies the state (acting as the agent of the people), then it is odd (at the least) that the scope of the punishment called for should be a matter of negotiation, all the more so when the wrongdoer participates in setting its parameters. In a sense, the problem with plea-bargaining runs deeper still. In many cases, the defendant pleads guilty to an offense other than the one he is accused of – often a crime he did not commit – and in doing so accepts a sanction that while appropriate to that offense is likely inappropriate to the crime he is alleged to have committed. To be sure, an alleged wrongdoing and the threat of punishment places the defendant in the circumstances in which he negotiates, but it is the negotiation that is the ground of the liability, not the wrongdoing.

Negotiated liability is justified, if it is, in virtue of the context in which it occurs. In such negotiations, the prosecution can threaten bringing the case to trial and to insist (to the extent possible) that a conviction will lead to a long sentence; whereas the defendant can threaten to impose costs on the prosecution by forcing the case to trial – costs that the prosecution may well believe are best spent elsewhere. In effect, the fairness of negotiated liability derives from the fact the negotiating parties pose comparable threats. The underlying wrongdoing is alleged not proven and is not the basis of liability.

All this is relatively familiar stuff. That said, to the extent that philosophers have theorized institutions that emerge as a consequence of the primary institutions of liability such as criminal sanction and tort liability, they have tended to see them instrumentally, as what I like to think of as philosophically ‘thin.’ Plea-bargaining and settlement conserve resources for more demanding cases where the resources would be better spent. They occur in the shadow of the primary institutions of liability. The primary institutions of liability are the sites where ‘all the normative work gets done’ and the place where the principles of liability are fixed and identified. Once those principles are in place, we have all the normative resources we need in order to determine the normative contours within which secondary institutions for assigning powers to impose liability and for discharging liabilities can permissibly exist.

So it is in the nature of criminal punishment and liability to it that it is justifiably imposed only if deserved, and for that reason, insurance against criminal

liability is unacceptable. In contrast, it is because tort liability consists in bearing a cost of an activity that insurance against it is permissible.

In short, there is a distinction between the primary institutions of liability and the secondary institutions that grow up around the primary institutions of liability. The secondary institutions are those that arise in order to discharge liabilities or assign or delegate the powers to impose them. There is, as well, a standard picture of the relationship between these two kinds of institutions. The philosophically interesting questions pertain almost entirely to the norms governing the primary institutions of liability, and for several reasons. Most importantly, these institutions impose liabilities that are coercively enforceable by the exercise of state power and to that extent require a justification. Once that justification is in place, the considerations that ground the practice of creating liability set constraints on the kinds of institutions that can arise as modes of liability – that is, as mechanisms for discharging the particular liabilities. There is little, if anything, of deep philosophical interest or importance in these secondary institutions. Whatever issues arise with respect to them – whether insurance is permissible, whether private prisons are, and so on – are all to be addressed from the point of view of the principles that underlie the primary institutions of liability and their place in the normative landscape.

The remainder of this paper sets up a challenge to the standard picture. The challenge itself is owed to my student, Jed Lewinsohn, who deserves full credit for it. The argument of the paper thus proceeds as follows. First, I distinguish between two views of the nature of liability in torts: what I call liability as allocation and liability as accountability. I focus first on liability as allocation and make the very best case I can for the view that liability in torts is a mode of allocation. It's not hard for me to do so in part because for much of my life as a tort theorist this is the view of liability in torts that I adopted (if only implicitly). I then demonstrate that this view of liability in torts is mistaken; that liability in torts is a kind of *liability to*, and that the better interpretation of tort liability is as a mode of accountability. This is certainly the view with which I have come to be associated in my more recent work. The view that liability in torts is a mode of accountability is also at the core of the work of other tort theorists – notably Ben Zipursky and John Goldberg, who hold that tort law identifies a class of wrongs and provides a mode of redress for wrong done. If anything, their view is more deeply committed to liability as a mode of accountability than is the corrective justice account of tort law that I have advanced.

Once I have persuaded you that liability in torts is a matter of accountability not allocation, I turn to what I call the 'transactional domain' in which liabilities and the powers to impose them are exchanged, gifted and assigned. I suggest that the practices that have grown up around the powers to impose liability in torts raise doubts about the view that liability in torts is a form of accountability. This is Lewinsohn's challenge, and I am not confident that it can be met.

In addition to raising doubts about the view that liability is a matter of accountability, the challenge draws attention to several more general concerns about the ways in which law and morality are connected: in particular, about the ways in which legal practice contributes to determining the content of moral concepts and to the ways in which law contributes to what we have moral reason to do. The essay closes by outlining these concerns and offering tentative and speculative hypotheses about the relationship of legal practice to moral content, and thus to what we have moral reason to do.

4. In tort law, losses fall either of plaintiffs or defendants. Thus liability judgments are allocative judgments. They are judgments about which party should bear the costs of the kinds of misfortunes that fall within its domain. On the standard view, these are largely accidents, and so liability in torts is *liability for* the costs of accidents. Liability as allocation is a kind of *liability for* and *liability for* in turn is a two-place relationship between an individual (or group or any other kind of entity capable of being liable) and a detriment (a risk, cost or other kind of burden). This is the dominant conception of liability in torts.

Though one needn't adopt an economic analysis of law in general or of tort law in particular to be drawn to an allocative conception of liability, such a conception of liability is most closely associated with the economic analysis. It may be helpful to characterize the economic analysis of torts in general and in doing so locate the place of the allocative conception of liability within it.

- (1) Tort law (like law more generally) is designed to solve particular social problems.
- (2) The paradigmatic tort is an accident.
- (3) The main problem with accidents is that they create costs.
- (4) The social problem tort law addresses is how to allocate those costs.
- (5) The mechanism for allocating those costs is tort liability;
- (6) The goal of tort law is optimally to allocate those costs. The conventional formulation is that the goal of tort law is to allocate the costs of accidents so as to minimize the sum of the costs of accidents and the costs of avoiding them.
- (7) Part of the process through which this goal is pursued is the tort suit in which a judgment against the defendant results in the imposition of liability against him; and (importantly), a judgment in the defendant's favor leaves the costs the victim's to bear and thus (in the relevant sense) liable for.
- (8) Liability judgments and decisions promote efficiency because those upon liability is imposed are rational agents who respond to costs.
- (9) The theory of human psychology and motivation is thus rationalistic in a distinctive sense of the term. To be rational is not to act on the basis of the

reasons that apply to an agent, but is instead to act so as to maximize the satisfaction of one's preferences.³

5. Let's see how the pieces of the framework come together and thereby give content to the economic conception of torts. In doing so we will be able to locate the place of liability as allocation within it.

Holmes famously held that a loss should lie where it falls unless some good reason exists for shifting its incidence, and Calabresi taught us why Holmes' was right. The costs that have befallen the unlucky or unfortunate will not evaporate or vanish into thin air. They are forever with us. Necessarily they are someone's to bear. They can be borne by those upon whom they initially have fallen or they can be shifted to someone else, to some group of others, or to all of us. But shifting the costs is itself costly; and one needs a reason to incur those costs, to pile costs on costs. What are the good reasons for incurring costs in order to shift costs?

For economists the natural answer is that incurring the additional costs associated with shifting costs is justified only if doing so reduces costs (overall or over time). It would be problematic to reduce the costs of misfortunes by taking on too many costs associated with shifting them – costs both in determining whether the costs of the misfortune will ultimately be reduced by shifting it to someone else and the costs of actually doing so. Thus, one should aim for the optimal reduction in all the costs associated with misfortunes. These include: the private and personal costs letting the misfortune lie where it has fallen; the costs of determining whether there are benefits in terms of future cost avoidance available by shifting those costs; the costs of shifting the costs; and the costs of determining whether the costs of shifting are worth their costs which will include but not be limited to the costs of being mistaken about any of these determinations. In a nutshell, the framework for thinking about whether losses in a particular case or in general should be shifted from those upon they have initially fallen to someone else or to some group of others is provided by the standard that one should reduce the sum of the costs (of accidents) and the costs of avoiding them.

This is how one gets from the general problem of accident costs to the standard for determining a solution to it. The next question is how we get from here to tort law.

³ Some of these commitments are distinctive of the economic approach to law, whereas others derive from the fact that the economic analysis of tort law is an instance of economic of law more generally; whereas others derive from the fact that economic analysis of any sort is embedded within rational choice theory more generally. So, for example, the claim that the problem to which tort law is addressed is minimizing the sum of the costs of accidents and the costs of their avoidance is, for obvious reasons, distinctive of tort law – and arguably unique to it. On the other hand, the claim that tort law is responsive to a distinctive social problem derives the general view in law and economics that law itself primarily responds to market failures. In contrast, the view of human psychology and motivation as rationalistic in the sense I described derives from the fact that economic analysis of any sort is an instance of rational choice theory more generally. The latter of course makes the tools of game and decision theory applicable to legal problems and underwrites some of the more recent fixation on modeling and the derivation of equilibrium results

Costs can either be shouldered by those upon whom they have initially fallen, by someone else or some well-defined group, or by all of us taken as a whole. I have often described this as the problem of determining who should bear the costs of life's misfortunes? Some might think that the key to determining who should bear the costs of life's misfortunes should depend on the particular causal structure of the misfortune: its relevant history so to speak. So if I gamble away my fortune on bad investments or bad choices at the gaming tables in Las Vegas, I would be hard pressed to defend my giving someone else the bill. I made the mess so it is mine to clean up. In general, no one else is responsible to clean up the messes we bring upon ourselves.

Such a view identifies the messes that are ours with our agential connection to them: wherever there is the right kind of causal structure, the loss follows it. So if you cause my loss, it is yours to bear. If I cause my own loss it is mine to bear. With this basic principle in place, we then turn to cases in which the right kind of agential based causal structure is lacking, as in cases of pure bad luck – say defects of birth. We can then distinguish between those who would hold that in such cases the losses should be born by the unfortunate and those who believe the losses should be borne collectively. Roughly, this distinction in attitude tracks the difference between modern liberalism and classic liberalism – or what is now called libertarianism.

6. We needn't begin with the idea that costs should track their causal structure. Instead, we could look to the impact of losses on life prospects, to who is in the best position to bear costs or who is in the best position to reduce them. And so on.

However we think it appropriate to divvy costs or distinguish among misfortunes, we will realize that some institutions are better able than others to implement the relevant distinctions, to ask and answer the questions that need to be asked and answer, and better suited as well to execute the judgments reached and answers given. This is how one comes to locate the place of tort law. It reflects both a particular view about how to divvy up misfortunes and a view about what the point of doing so is. In addition, it is better suited to those misfortunes than to others and to executing the judgments once reached. So to fill out the picture a bit, we wouldn't be drawn to tort law on this view if we thought that the costs of life's misfortunes are morally significant because of their overall impact on the life prospects of those upon whom misfortune falls. Nor would we choose tort law if we thought that we should impose misfortune's costs on those best able to bear them.

We choose tort law because in part we believe that the causal structure of some losses bears on the question of how best to deal with the costs; and if economists are right, we choose tort law because we believe that within the framework defined by the relevant causal structure, we should be concerned with optimally reducing costs. That is, we believe that tort law is well suited to reducing costs, but not the costs of all misfortunes -- primarily those instead that are tied to human agency in a particular way that is reflected in certain kinds of causal structures and not others.

The economic analysis therefore takes a hybrid approach to tort law, a fact about it that often goes unnoticed. A certain kind of causal structure must play a role in characterizing the kinds of misfortunes that tort law is best suited to address. Within that framework, however, the concerns that tort law is best suited to address are economic: namely, reducing the sum of the costs of accidents and the costs of avoiding them. Causation plays a domain-setting role only; and then within that domain causation is relevant only to the extent that the causal structure of a particular misfortune provides evidence that bears on which of the parties is in the best position optimally to reduce risk.

7. The point of the lawsuit is to determine who should bear the (relevant) costs of this particular accident (or misfortune): who in other words should be liable. The causal structure figures in determining the set of persons who are eligible to bear the costs. The burden is on the plaintiff to establish that the defendant should bear his costs. In the event he is successful, liability is imposed upon the defendant; the victim's costs are assigned to him. In the event the plaintiff is unsuccessful, he is liable for his own costs. The conclusion of the lawsuit is the imposition of costs on someone – either the defendant or the plaintiff.

Consider the two basic cases: in one the plaintiff succeeds against the defendant; in the other he does not. In the first case, liability is imposed on the defendant and, provided he is rational, adjusts his behavior accordingly. The activity in which he has engaged is now more costly to him than it had previously been; and given the usual assumptions an increase in costs leads to a reduction in the activity. This is a bit crude. Actually his calculation is much more sophisticated than that, for he asks whether it is worth it to invest in precautions that would reduce the likelihood of his harming others. In other words he seeks the optimal level of engagement in the activity in the face of the fact that he will be liable for the social costs his activity imposes on those it puts at risk.

Now consider the case in which the plaintiff is unable to make out his case and his costs are his to bear and not his injurer's. His activity is more costly than he had previously taken it to be; and, again provided he is rational, he too will adjust his behavior accordingly. In fact, he will think about his activity in precisely the same way the defendant who loses the suit in our first example does. That is, he seeks to discover the optimal level of engagement in the relevant activity in the light of the costs he will have to bear and the various options open to him of reducing those costs.

It should be clear that because the relevant parties respond to the costs they bear as a result of the liability judgment, it is natural for those who think about tort law in this way to identify liability entirely in terms of the allocation of costs; and therefore to see the question in every tort suit as amounting to no more than determining which party should be liable for the costs at stake. There is no point in reserving the term liability for the cases in which the defendant is made to pay,

since the judgment in every case is 'who pays' or 'who has the burden of taking care of the costs.' There is no other content to the notion of liability, and thus no reason not to treat a judgment against the plaintiff as equivalent to his being liable for his costs. Indeed, the fact that the law will take steps to keep him from imposing those costs on others only strengthens the view that he is liable for those costs in every sense the law cares about. This is the essence of liability-as-allocation.

8. There is one more piece to the economic picture. In the economic analysis the conclusion of the lawsuit is the imposition of a liability. In other words, the entire point of the suit is to determine who should bear the costs and the conclusion is an executable judgment as to who that party is. That party bears the costs and that party is thus liable. The conclusion of the suit is the imposition of the costs: the liability.

The problem is that the conclusion of a lawsuit is not the imposition of a liability. As has Ben Zipursky, I have long argued that the structure of a tort suit is best understood as a scheme of practical reasoning or inference, the conclusion of which is a call to action. If the premises support the conclusion, then the action is called for or justified. If the economic analysis were correct, the conclusion would be of a tort suit would be: the court should impose the costs on D (or P).

But this is not in fact the conclusion of the lawsuit. If the plaintiff's suit succeeds, the actual conclusion is that *the court is obligated (ceteris paribus) to confer upon P the power to impose a liability upon D*. If the plaintiff's suit fails, the actual conclusion is that the court is not permitted to confer upon P the power to impose a liability on D. The successful lawsuit warrants the conferral of a normative power. A power is an option that the victim/plaintiff is at liberty to exercise or not. An unsuccessful lawsuit simply establishes that the relevant action is not warranted. It does not entail that costs should be imposed on the plaintiff. It entails only that there are insufficient grounds for conferring on the plaintiff a power (to impose his costs on the defendant).

It is impossible to overstate the importance of this point; and a good place to begin appreciating its significance is by taking a look at the general scheme of practical inference in tort law. The loss falls to the victim who then has to establish the prima facie case against the defendant. If the plaintiff is able to establish the prima facie case, then the defendant has an opportunity to offer his case including presenting a positive defense if he has one.

For ease of exposition, let's set aside these niceties and go directly from the prima facie case to the judgment and in doing so all we are doing in effect is assuming a case in which the defendant has nothing persuasive to offer in the face of the prima facie case presented against him. What case does the plaintiff victim present? What does she have to establish? If she succeeds, what practical inference is warranted? We can put this in the form of a series of questions and answers.

Question: Does the defendant owe a duty of care to the plaintiff?
Answer: Yes, the defendant owes such a duty.⁴

Question: Did the defendant breach the duty to the plaintiff?
Answer: Yes, the defendant breached the relevant duty.

Question: Was the plaintiff harmed in a way the law seeks to protect?
Answer: Yes, the plaintiff suffered a harm of the appropriate sort.

Question: Was the harm the result of the breach?
Answer: Yes, the harm was the result of the breach

Question: What ought to be done given these answers?
Conclusion: The plaintiff has a power to impose a liability on the defendant.

If economic analysis is right these questions are appropriate insofar as they allow us to identify which of the parties to the accident is in the best position to reduce the costs of the accident at the lowest cost. If economic analysis is right then the practical conclusion that the plaintiff has the power to impose a liability on the defendant must turn out to be equivalent to imposing liability on the defendant. (It is obviously not co-intensive.). If economic analysis is correct then the two schemes of practical inference (the economic one characterized in the previous section and the one in tort law) must amount to the same thing; or the economic analysis must be a plausible (if not the best) interpretation of the actual scheme of practical inference in tort law.

9. The problem is that none of these three claims can be sustained. The economic analysis misconstrues the place of the premises in the argument; it misunderstands the argument's conclusion; and it mistakes the relationship between the premises and the conclusion.

Let's consider the claim that the premises in the scheme of practical inference in tort is in fact a good way of ascertaining which party is in the best position to reduce costs. If the point of the tort suit is to allocate costs to the person who is in the best position to reduce accident costs, there is no point in restricting potential candidates to those who happen to have a duty of care to the victim (and the victim). More importantly, it makes no sense to adopt an artificial constraint imposed by emphasizing the causal structure of the harm on the category of persons who are eligible candidates for bearing the loss. Second, the evidence one would seek would be about the relative capacity of the injurer and the victim to reduce costs, and not, in the first instance, information about whether the injurer acted towards the victim in a way that constitutes a wrong to him; and certainly not whether the harm the victim suffered was connected in the right way causally to the wrong. More generally, as I have noted time and again, whereas tort law asks and answers questions about the relationship between the parties to one another, the economic analysis would ask questions about each of the parties in relationship to

⁴ I am only considering the case in which the answer is in the affirmative. If it is not, then the inference is unsound; the premises do not ground the conclusion (the remedy).

the goal of optimal cost avoidance separately or individually. How good is the plaintiff at reducing costs optimally? How good is the injurer? Who is better? Should their behavior be coordinated optimally to reduce costs, and so on. None of this would seem to hinge on matters of duty, responsibility and causal structure.

Now what about the conclusion? If the point of the liability judgment is to allocate costs then the conclusion of the suit would be an imposition of costs, but in fact it is not. The suit begins by characterizing a normative relationship between parties and its conclusion is itself the creation of a normative relationship between the parties – not the allocation of costs.

It is important to distinguish between the deontic and nondeontic areas of the normative landscape. Sometimes we assess behavior as careless, inattentive; but we recognize that even careless and inattentive behavior may provide benefits—and not merely to those who benefit by saving the costs of greater attentiveness or care. Other times, we characterize our conduct in terms of duties and rights, powers and liberties: claims we have against others, authority we have over them, and demands that we can stand or call upon. Roughly, the latter is part of the deontic area of the normative landscape; the former is not, or at least need not be. The benefits my wrongdoing confers on others may appropriately figure in an overall assessment of what I have done—whether and to what extent I should be punished for my mischief, for example. But those benefits do not figure in what I owe you as a matter of the duty of care, and thus what I owe you in the event that I have failed to provide you with the care I owe.

At bottom, the problem with law and economics is that it fails to appreciate the complexity of the normative landscape, and in particular ignores those features of it that have a fundamental deontic structure. Law and economics scholars focus on behavior as such—as good or bad according to a standard of efficiency—and see the law as responsive to defective behavior. In these scholars' view, the law responds by providing incentives to induce better behavior insofar as doing so is feasible and desirable. It is no surprise, therefore, that economists of law in general see taxes, fines, subsidies, punishments, tort and contractual liabilities as fungible instruments: different ways of inducing desirable behavior.

The fundamental notion in torts is that of duty. Tort law tracks or is continuous with the deontic domain of our normative landscape. The deontic character of tort law is reflected in its basic norms: standards of behavior that specify particular duties to regard appropriately the interests of others. This deontic character is also reflected in the remedy: the conferral of a power on the plaintiff to impose a liability on the defendant and in the pattern of practical reasoning that I have identified.

It does not follow from the fact that tort law has an essential deontic structure that the only explanation of it can be provided by deontic norms, e.g norms of justice or right. There is no reason in principle why the deontic structure of tort law cannot be explained in non-deontic terms. In principle, different theories of tort law—from efficiency to corrective justice to recourse theory to what have you—can be offered to explain the

pattern of reasoning that embodies the deontic normative structure of tort law. But one cannot hope to explain tort law without appreciating that it has a distinctive normative structure and that this structure tracks the distinctive place that tort law occupies in our normative landscape.

10. Most commentators correctly associate me with the corrective justice view of tort law. The key point is that in my view corrective justice is offered as a way of explaining why tort law has the deontic structure that it does. It is not in the first instance a theory of norms of behavior tort law enforces nor is it a theory of the aims (if any) that tort law has. In my view, the best way to understand Recourse Theory is also as an account of tort law's deontic structure, and not as a theory of the point of tort law – though I suspect that those who endorse Recourse Theory take it to be a compelling account of both tort law's structure and its point – or at least as a significant part of its point. Importantly, there is no reason why those defending economic analysis of tort law should not offer it as the best explanation of why tort law has the deontic structure that it does. Economic analysis goes wrong when it seeks to reduce the elements of that structure to economic concepts. It would be better served taken the structure at its face value and then showing that the best account of tort law having the structure it does is 'economic' in character.

Though one could in principle offer an economic account of tort law's deontic structure, the fact is that to this point such accounts have appealed primarily to deontic concepts: e.g. corrective justice and the right to redress. Those defending such views have not only sought to understand the deontic structure of tort law in more basic deontic terms. They have adopted a framework for conceptualizing tort law overall that is essentially moralized and quite different from the framework we typically associate with economic analysis. It might be helpful if we spell out that framework in some detail and in doing so locate the place of liability as accountability within it.

- (1) The paradigmatic tort is a wrong;
- (2) What makes a tort a wrong is that it involves the breach of a duty not to harm as a result of the failure to comply with the relevant duty of care;
- (3) Not all cases governed in torts are wrongs, but they paradigmatically are and they are paradigmatically wrongs for the reason given above;
- (4) The wrongs governed by tort law are relational; that is, they are not wrongs in the sense of breaches of obligations or duties to act in a particular way to which everyone in the relevant moral community would have equal standing to complain and equal standing to complain in the same way. They are instead wrongs to particular persons or groups of persons.
- (5) Most wrongs that are the concern of torts are the concern of torts in part as a result of the fact that they result in harms to those to whom one is under the relevant duty of care;
- (6) The normatively significant features of torts are not that they impose costs but that they involve three other concepts: wrong, harm and responsibility.

(7) The aim of the tort suit (using 'aim' loosely) is to see if these elements are present, and if they are connected to one another in the instant case in the right way.

(8) If the plaintiff/victim is able to establish that they are present in the case at hand and in the right way, then an appropriate practical action is called for and that action is the conferral of a power on the victim to impose a liability upon the defendant.

If the key concepts in the economic analysis of tort are: accident, costs and allocation of them, the key concepts in this framework, are wrong, harm, responsibility and the power to call one's injurer to account. Roughly the idea is that the victim claims to have suffered harm (in the usual case) that is the result of wronging for which the defendant injurer is responsible. He seeks to make out his case that this is so. In the event he is able to do so, he is authorized by the court to hold the defendant to account for the harm suffered and the wrong done. My view is that the manner in which the victim comes to hold the defendant accountable is partially but importantly determined by convention.

The conventional way in which plaintiff's get to hold their injurer's to account is by imposing liability upon them. The liability must be appropriate and responsive to the underlying wrong done. There are a variety of good reasons that explain why the liability usually takes the form of monetary damages that we tend to think of as compensatory. The nature of the evil one is entitled to impose depends on a range of factors that are connected ultimately to what we take the underlying wrong of torts to be. Without going into very much detail here, my view is something like this. Someone who commits a tort against me robs me of the control I have over some of the resources otherwise at my disposal. If you negligently destroy my car or my house, then you have deprived me of those resources. Those resources figure in my projects and plans. Decisions about what to do with those resources are mine (subject to constraints), not yours. When you negligently injure me, you interfere with my autonomy in the sense of the control I have over resources at my disposal. The remedy I am due should respect this fact by returning to me my lost resources, or their monetary equivalent. I am entitled to demand that you replace what I have lost in a way that respects my control over those resources. The damage remedy provides me with the resources to reconfigure my plans, projects, and life in the light of a new set of resources.

In tort law, liability is not a matter of cost allocation. If the plaintiff is unable to make his case, that does not mean he is held liable in torts for his own costs. Not at all. It does mean that it is up to him to shoulder those costs; they are his to bear. But he owes no one an accounting of them. He is not accountable to anyone for them. Contrast that with the case in which the plaintiff is able to make out his case against the defendant. In making out his case in torts he has: (1) established that the defendant owed him a level or regard for his interests in person and property; (2) that the defendant has failed to discharge that duty and in doing so has wronged him; (3) that he suffered harm; and (4) that the harm he suffered is the result of the wrong the defendant committed for which he is responsible. And because he has shown all that, the law empowers him to demand an accounting of his suffering by the defendant. The defendant's responsibility for what has

transpired to the plaintiff renders him accountable to him. The plaintiff's inability to establish the defendant's responsibility for what has happened to the plaintiff does not render the plaintiff accountable to the defendant. Indeed it does not render him accountable to anyone. It only renders his costs and his sufferings his to shoulder.

Tort law is not about costs, but about normative relationships between persons: what we owe one another with regard to taking one another's interests adequately into account and what we owe them when our failure to do so has deleterious consequences. This is the view a sensible person would come to as a way of understanding liability in torts upon reflecting on the basic structure of tort law. The question is: is the view of tort liability we would come to if we looked at it through the lens of the secondary institutions that have grown up around tort law. I am not sure that it is.

11. I have argued that liability in torts is not liability for: in particular, that it is not the particular version of liability for that I have called 'liability-as-allocation.' I have argued instead that liability in torts is a form of liability to: in particular, I have argued that it is a form of what I have called 'liability-as-accountability'.

This has been my view, and I think such a view is even more closely tied to other theories of tort law, especially those that emphasize the place of a so-called right to redress or to recourse of the sort that has been so richly by Ben Zipursky and John Goldberg. In fact, Zipursky and Goldberg deserve the credit for drawing attention to the fact that liability in torts takes the form of power to impose a liability and not the imposition of a liability.⁵

12. The arguments that follow are drawn almost entirely from conversations I have had with Jed Lewinsohn. It is his insight that I am exploiting in what follows – though he bears no responsibility for what I make of it.

Suppose P succeeds in a torts lawsuit against D. I take it that the normal (but not the exclusive) form of liability is monetary damages, and I have argued at length elsewhere as to why monetary damages are appropriate. The key point is that P can *insist* that D provide appropriate monetary relief to him. No one else has standing to do so. Take C (a representative of the moral community). C can possess every attitude toward D that is fitting or appropriate. He can also take various actions. He and everyone else can shun D and take steps otherwise to ostracize him. But one thing he cannot do is insist that D pay P. D is not accountable to him in this regard. If C insists that D pay P, D can

⁵ They have exploited this feature of tort liability in a particular way and have drawn inferences from it that I do not find persuasive, in particular, that there are no duties in torts to provide repair prior to the exercise of the power to impose it. I disagree. One might well argue that it is because the plaintiff has established that there is a duty to render him repair that courts confer upon him a power to impose a liability to satisfy the duty. And more. My point here, however, is not to highlight differences between our views. Rather, it is to point out the extent to which both of our views are drawn to seeing liability as a form of accountability and thus to point out the extent to which both views are vulnerable to the kind of argument I want to press in what follows. If anything, Zipursky and Goldberg's view is even more vulnerable than mine is to the challenge presented in what follows.

simply respond that C has no right to insist on any such thing. It's a groundless and misplaced demand at best. And the reason is that D is accountable to P for the wrong he has done P and to no one else.

Now suppose that P presses his claim against D and gives the money he receives to C. No problem. Or suppose that C gives P money in advance of the suit to keep him afloat while the case goes on and that afterwards P repays C by giving him a share of or all of the compensation D must pay him. No problem. Now suppose that instead of C loaning P money to keep him afloat while the case drags on, C offers P a deal by which he, C, will give P in advance 80% of what he, P, is suing D for in return for which, P will give C all his winnings should he prevail. In the latter case C is gambling on its success and is willing to give P some payment in advance in anticipation of a reward *ex post*. Why should that be a problem? If so, what is the nature of the objection to it? Would it matter if instead of C coming to P with this deal, P advertises the existence of his claim against D and seeks to create a market to sell stakes in the claim to others and that C wins the bidding?

What is it that C has purchased? One thought is that he has purchased what P wins in the event his suit is successful and that is the power to impose the liability upon D. Another view is that he cannot purchase that power. The source of that power is D's wronging P; and only that fact, if it is one, can ground the power to impose the liability. C can purchase P's winnings, that is the compensation P is owed, but he cannot purchase the power to impose the liability. He can purchase a power to demand that P exercise his power against D, but he cannot himself purchase the power to impose liability against D.

The question is why not? That is, why would it be impermissible or objectionable for C to have purchased the power to impose the liability upon D? One thought is that P has a power to impose liability upon D only because D wronged him. D did not wrong C, so how is that C could have a power to impose a liability upon D? He cannot obtain such a power to impose a liability upon D by contracting with P? Certainly, if D has wronged P, he owes P an apology, and there is no reason to think that he owes C one. On the theory that liability in torts is a form of accountability and that to be accountable to someone is to owe that person an answer for what one has done, it seems unreasonable to suppose that C could secure the power to impose liability on D as a result of an exchange of any sort between P and him.

That's a perfectly plausible argument but it presupposes that liability in torts is a mode of accountability. So let's reconsider for a moment the reason we have so far for thinking that it is a mode of accountability. In the first place, liability is a form of liability to and not liability for. We can agree on that; but why would we think that it follows that it is a form of accountability? The thought is that the plaintiff in a successful suit secures the normative power to demand liability from the defendant and in doing so demands that the wrongdoer answer to him for the wrong he has done him.

Why would we think that the power to impose the liability should be understood as a way of demanding that the defendant answer to the plaintiff for his having wronged

him? To be sure, if we already thought of torts as a mode or redress for wrongs done this would be a natural interpretation. But there is nothing in torts that forces this interpretation on us. So why not adopt the following alternative view instead. If one wrongs another in a way that tort law recognizes and in doing so creates thereby a vulnerability for one's wrongdoing, then one is vulnerable to the power of the plaintiff to impose the liability or vulnerable to a similar power exercised by anyone the plaintiff gifts or assigns that power to. Why should the wrongdoer's vulnerability be restricted to the party wronged? To be sure, he is vulnerable to the party he has wronged, but why doesn't his wrongdoing make him vulnerable to the discretion of the plaintiff to assign that power or authority to others? I am not yet arguing that it does or that it should. I am only suggesting that we have no compelling reason yet for precluding that possibility.

Let's develop the concern a bit further. Suppose P creates a market for his claim against D and sells shares to C, D, E and F, and in doing so secures as much from them collectively as he could possibly secure against D in a successful litigation. Suppose now that as the case drags on C, D, E and F all have investments they would like to make – perhaps in other even more potentially profitable claims. As a result, they would like to settle the suit with D. Can P hold up their efforts? Should he be allowed to do so? Should C, D, E and F who now have a stake in the outcome be permitted to negotiate directly with D and force their settlement on P who should by all accounts be willing to go along having sold his claim? What should we make of it if he says something like 'But I won't get my apology if the case settles?' To be sure, if C, D, E and F can settle with D and force the settlement on P, he won't get his apology from D, but why should that matter. If the apology was so important to him, he should not have sold the stakes in the first place, or he should have sold them at a price that reflects the value of the apology to him.⁶

It is worth noting as well that if P never sells stakes in his claim against D, it is unclear that D's insurance company paying him the judgment constitutes much if anything by the way of an apology from D to him.⁷

⁶ Suppose we created a market in unrealized tort claims. Everyone in the market would know that the price they pay would reflect the likelihood of success. Prices would be discounted by uncertainty. There is no reason why prices wouldn't also reflect the value to those with the claims of having an official judgment in their favor. For the sake of the argument, let's suppose that everyone who puts their claim up in the market appreciates what they are giving up and chooses voluntarily to do so. Does it make sense to object to such a market simply because the accountability function of tort liability has been compromised or lost? It may well be compromised, but what are we to make of that objection. Is it an objection at all? If it is, shouldn't it be just as compelling an objection to the practice of settlements?

⁷ P imposes a liability on D, then there are a variety of ways in which D can discharge his liability that would leave P without grounds for further complaint. So D's insurance company, I, can pay P under a contractual arrangement it made in advance with D. Or D's uncle Lenny could pay P on D's behalf leaving P without an additional claim to press. If P were to demand an apology from the insurance company or from Uncle Lenny, both could legitimately tell P to bugger off. There is nothing that either owes P beyond the monetary damages that D owes P. If there is an apology forthcoming it is D's to make and no one else's. Yet, P is in no position to reject the insurance company's or uncle Lenny's payment on the grounds that he wants an apology first.

The claim is not that such practices face no objections. There may well be reasons for restricting what individuals may do with the powers they have to press claims and to impose liabilities, and there are likely constraints on the ways in which individuals may discharge their liabilities to others. But we cannot begin simply by assuming that tort liability is a mode of redress or accountability and derive those constraints accordingly. Rather, we have to determine what tort liability is by looking at the range of practices in which it is embedded and see what principles make the best sense of it and derive constraints accordingly.

13. Arguably, we can proceed in either of two ways. We can accept that tort liability is a mode of accountability and resist the assignments of the powers to impose those liabilities on the grounds that such assignments erode the connection between liability and accountability. Or we explore the actual and possible practices in which the power to impose liability figure in tort law and figure out thereby what liability in torts amounts to. We may be led to the view that even though liability in torts is liability to it is not an instance in which liability to is a form of accountability. Or we might be led to conclude that the distinctive form of liability we have in torts reveals what accountability in various contexts amounts to. How should we proceed? Where might we look for guidance in choosing which path to follow?

The suggestion that Lewinsohn makes with which I agree is that at bottom we do not have a deep or richly developed conception of the morality of repair or compensation. Our conception of corrective justice (I am inclined to think) is extremely thin; and its content is to be filled in by the practices in which it figures. This is a view I have advanced in a variety of different ways in a variety of different contexts. When I have argued in the past that tort law is an institution of corrective justice, part of what I have had in mind is that the institution of tort law helps to give content to the principle of corrective justice. The principle is partially specified by the practice of tort law.⁸

Actually, my view is much more complicated and nuanced than this. I draw a distinction between the morality of repair and the political morality of repair. I believe that ordinary or common sense morality is pretty clear about what follows when wrongdoing imposes losses. In those cases, one incurs a duty of repair, but even in ordinary morality the content of the duty of repair is determined by an enormously diverse variety of factors including aesthetic criterion (what is fitting) to moral ones (what is fair)? When it comes to the political morality of repair, we are concerned with the domain of justifiable political action: namely, what the state may permissibly do through coercion. Here the practices of repair are governed by norms of justice primarily. In my view, the practices of permissible repair are governed first and foremost by principles of corrective justice. In my view, the norm of corrective justice is particularly thin: corrective justice calls for annulling wrongful losses – or so I have argued. The content of the demands it imposes is to be filled in by the practices in which it figures.

⁸ While I have always held this view I did not appreciate the way in which it fit in with the arguments of this paper until I had many conversations with Jed Lewinsohn.

Let's consider the practice of promising. We have a fully developed conception of the morality of promising. So, for example, if I promise to paint your house on Monday, but fail to do so, then you don't owe me or anyone else a special explanation as to why you have a right to demand to paint it on Wednesday (*ceteris paribus*). Certainly you don't need to provide an explanation for why you are insisting on specific performance rather than, say, expectation damages!

Suppose I promise to mow your lawn. You know have the normative power to insist on my doing so. As in the torts case, others (including C) can express their disdain or anger in the event I fail to do so. But no one other than you can insist or demand that I mow your lawn. So your neighbor cannot demand that I mow your lawn any more than he can demand that I mow his. This is so even if he is a beneficiary of your having a nicely mowed lawn. So far so good. Now suppose you assign your right to have your lawn mowed to your neighbor or imagine that you try to do so. Can your neighbor demand that I mow his lawn? Were he to insist that I mow his lawn it would be perfectly plausible for me to respond that he has no power to insist on any such thing.

I promise to mow your lawn or to pay you 100 if I don't.⁹ Can you assign that disjunctive right or power to your neighbor? First we need to disaggregate in order to identify exactly what you would be attempted to assign. One possibility is that you assign both to your neighbor such that he can now demand of me that I either mow his lawn or pay him 100. If your neighbor now insists that I perform or pay, it seems perfectly plausible that I inform him that he has no such power over me. It is in the nature of promising, I inform him, that (with few exceptions) it is up to me to determine who has that power over me. Another possibility is that you assign to your neighbor the 100 compensation in the event I fail to mow your lawn. The same response is appropriate. You can if you like give your neighbor the 100 in the event I fail to mow your lawn, but he cannot insist on my giving it to him.

Another way to see the force of the response is this. Suppose I promise to mow your lawn or pay you 100 if I don't. You worry that I may choose the latter option given my wealth and laziness, but nothing would make you happier than to have me mow your lawn. You also know I despise your neighbor and therefore threaten me: 'Coleman, if you don't mow my lawn, I am going to assign the right to demand 100 payment to my neighbor, N.' The threat is morally speaking pointless. I do not have to answer to the demands of your neighbor. That simply does not change and you cannot make it change by assigning your claims to him.

I do not mean to claim that there are no circumstances under which assignment in the case of the powers to demand performance derived from promises are possible or morally permissible. I mean only to contrast the case of promissory liability with that of tort liability. Both arise from wrongs. Both arise from relational wrongs. It isn't the case either that breaches of promises are invariably morally worse than are tortious

⁹ This example is Lewinsohn's as is the development of it.

wrongs. It isn't just that tort liability is 'legal' and promissory obligations are moral. Intentional property torts can be significant moral wrongs and much worse from a moral point of view than many promissory breaches.

We might add for contrast the wrongs that give rise to criminal liability. The extent to which the power to impose liability for those wrongs is extremely limited; and there is a very lively and important debate about the extent to which punishment can and should be privatized. And in the case of private prisons, it is important to realize that we are not talking about assigning the right to punish private parties. After all, we are not leaving it up to the private prison organizations to determine the scope of punishment or when it should end. They are acting under the state's authority to execute its and not their judgments and powers. Even so, there are deep worries about the permissibility of them.

And if we switch attention to the wrongdoer's side of the ledger, the limitations on ways in which he is free to discharge his liability are narrower still. His uncle Lenny can pay his debts including those he incurs in torts, but his uncle Lenny cannot serve his time. Indeed, in the case in which his wrong creates both a potential tort and criminal liability, he cannot obtain insurance against his criminal liability though he might be able to obtain insurance against his tort liability.

Let's close this section by considering the relationship between contract and promise. There is no doubt that many contracts are mutual promises. In many ways, the most important question in contract theory is what to make of that fact. For while it is true that perhaps the vast majority of contracts are mutual promises, it does not follow that they are contracts and binding as such in virtue of that fact about them. Indeed, even if nothing could be a contract unless it was a set of mutual promises, it would not follow that what makes contracts binding in law and the source of obligation would be that fact about them.

Those, like Charles Fried, who see contracts as promises advance the view that the paradigm cases of contracts involve mutual promises and it is that fact about them that explains why they are binding and the source of obligations on the parties. Others like Seana Shiffrin focus on the extent to which there is an overlap between contracts and promises: most contracts are mutual promises. I take it that the most illuminating way to read her argument is suggested by the considerations to which I have been drawing attention. In other words, we have a very well developed (if not complete) sense of the morality of the institution of promising. To the extent to which the institution of contracting departs from that understanding – especially in the grounds it identifies as the sources of potential obligations and the liabilities it imposes for their breach – it creates a tension in persons whose behavior is presumably governed by both practices. This tension is both psychological and moral, and under certain conditions poses a threat to law's legitimacy.

At the other extreme are economists of law who are inclined not to be moved by the fact, if it is one, that many contracts are mutual promises. They take the view of

contracting that they take of torts. The fact that contracts are formed by promises is no more important to the institution of contracting than is the fact that torts are 'formed' by actions that have a distinctive kind of causal structure appropriate to assignments of responsibility has to do with the norms governing tort law and liability for torts.

It is this contrast that is at the heart of the debate in the theory of contracts – or so I am inclined to believe.

14. All this brings me back to Lewinsohn's speculative hypothesis with which I am inclined to agree. The differences we see in the transactional practices involving liabilities and the powers to impose them appropriate to different institutions -- torts, contracts, promises, crimes and property -- is not a function of the fact that some involve wrongs and others do not; in each case liability is grounded in a wrong. Nor is it that the source of the obligations in some is agreement, promise or consent and imposition of risk in others; nor is it that in some cases the liability is liability for and in other cases it is liability to. Rather, the better explanation has something to do with the way in law and morality are connected to one another.

It is not that we don't have a rich or fully developed notion of wrong. We do – at least for certain kinds of wrongs. But we don't have a fully developed or rich notion of an 'objective wrong' -- a way in which you could wrong another doing the best you can, or blamelessly wronging another. Much of tort law concerns such wrongs. Moreover, while we have a pretty good sense of the kinds of responses that are appropriate (morally speaking) to certain wrongs, we are less confident about what should be done about 'objective wrongs' and strict liability wrongs. And we do not have a firmly developed sense of what is to be done about the consequences of wrongs – beyond, I have argued, the deep moral conviction that the consequences should be annulled insofar as that is possible. The rest of the morality of these aspects of our lives together is spelled out by our institutions, especially the law.

So what are we to conclude about the nature of liability in torts? I am not sure. I have two suggestions. The first is that it does not follow from the fact (if it is one) that liability in torts is not a matter of accountability that it is therefore a matter of allocation. Second, perhaps the right inference to draw is that liability to does not mean liability as accountability: that in other words, accountability is a distinctive kind of liability to and not the one embodied in tort law. Or perhaps the right conclusion is that we have uncovered what accountability in tort law amounts to.